

**Trans Mountain Expansion Project
NEB Hearing Order OH-001-2014**

Government of Canada Intervenor Information Request (IIR) 50 to:

Tsawout First Nation

To:

Brenda Gaertner
Lawyer
Tsawout First Nation
422-1080 Mainland Street
Vancouver, BC V6B 2T4

cc:

All other intervenors and Trans Mountain Pipeline ULC

Preamble:

As you are aware, NRCan's Major Projects Management Office (MPMO), is serving as the Crown Consultation Coordinator for the Trans Mountain Expansion Project (the Project). As Crown Consultation Coordinator, MPMO is using the "Intervenor Information Request (IR) to other Intervenorors" round to submit a summary of the concerns and issues that the Tsawout First Nation has raised to date in the regulatory review of the Project.

Using Issues Tracking Tables (ITTs), **we are seeking feedback from you on the completeness and accuracy of the concerns and issues you have raised, and your views on concerns and issues that may have not yet been addressed by proposed mitigation measures or proponent commitments to this point in the process.** The Crown intends to use your feedback to further refine its current understanding of the potential adverse impacts of the Project on your community's interests, including any adverse impacts the Project may have on your potential or established Aboriginal and treaty rights.

In your review of the draft ITT (attached), please note that the Crown has attempted to document procedural concerns and the substantive issues raised by Aboriginal group Intervenorors. However, the ITT is not intended to be an exhaustive list of all issues currently submitted to the NEB for its consideration as part of the regulatory review of the Project, rather, it is intended to summarize and reflect the Crown's current understanding. Nor does the

ITT provide a comprehensive listing of all proponent commitments or proposed mitigation filed with the NEB to date.

The Crown will continue to rely on the NEB process, to the extent possible, to identify whether your concerns or issues have been addressed, partially addressed or not addressed. ITTs will be an integral component of post-hearing (Phase III) consultation with Aboriginal groups, as the information they contain will provide the basis for discussions to determine what outstanding concerns or issues remain. The ITTs will also be used in the drafting of the Crown Consultation Report which will help to inform Governor in Council decision making for the Project.

The NEB has also requested comments on its draft standard Terms and Conditions for the Project, and will be seeking comments on additional draft conditions to be released on July 29, 2015. The Crown looks forward to reviewing your comments to the NEB on these draft conditions, to build upon its current understanding of potentially outstanding issues and concerns and potential mitigation measures.

Questions:

The Crown invites your review of the enclosed draft ITT and for convenience, welcomes responses to be provided within the ITT columns or additional rows as follows:

50.1. Aboriginal group response to ITT column #1: Key Issue (specific concern or potential impact to Aboriginal rights and interests)

Please briefly indicate in the adjacent column, whether the key issue or concern expressed in ITT column #1 generally reflects the views of the Tsawout First Nation and if not, please suggest revised language; alternatively, additional rows may be added to the ITT to reflect an issue or concern not adequately described in the ITT.

50.2. Aboriginal group response to ITT column #3: Mitigation: Proponent Commitments and/or Response

Please briefly indicate in the adjacent column, whether the proposed mitigation measure or proponent commitment and/or response (as applicable) is considered by the Tsawout First Nation to be an effective means of addressing the key issue or concern raised. If not, please suggest any additional mitigation or commitments that would more fully or appropriately address or accommodate the concern. (Please note that Proponent mitigation measures/commitments continue to evolve and consequently the list provided below is draft only and may not be comprehensive.)

Tsawout's Response:

Given time and capacity restraints, Tsawout has responded to the Crown's Issue Tracking Table (ITT) to the extent feasible at this time. In doing so, Tsawout must emphasize the following:

1. Canada's ITT, together with Tsawout's response, is not complete and cannot be relied upon as a comprehensive summary or listing of TMEP impacts, effects, infringements, concerns, issues or possible mitigations or accommodations identified by the proponent, Tsawout or otherwise;
2. Canada's ITT failed to accurately present a listing of impacts and effects which was consistent with the concerns raised to date by Tsawout, including those outlined in Tsawout's Current List of TMEP Impacts (May 2015). While in some circumstances Canada's ITT referenced certain impacts found in Tsawout's Current List of TMEP Impacts, in other circumstances it did not. It is unclear on what basis Canada chose to include or exclude in its ITT the issues of concern found in Tsawout's Current List of TMEP Impacts. Except for procedural issues, Canada should have used Tsawout's Current List of TMEP issues when completing the ITT.
3. Given limited time and capacity, Tsawout's response to Canada's ITT in this Information Request does not comprehensively include all concerns, issues, potential mitigation, etc. Rather, to the extent feasible, Tsawout has responded to those issues and concerns that Canada has listed in its ITT. There are more and other issues and concerns which Tsawout has identified in its evidence before the NEB, and which may be identified during Tsawout's ongoing assessment of TMEP, including reviewing the Draft Conditions, Final Argument before the NEB and upcoming Crown consultation.
4. Canada's ITT and Tsawout's response does not present the listing of issues and concerns in any ranking of importance.
5. Although mitigation options have been identified in the ITT, the ideas presented by Tsawout are preliminary in nature and do not reflect Tsawout's view on the sufficiency or adequacy of the mitigation to address or accommodate the potential impacts, effects, infringements, risks, etc.
6. Completing an ITT within the consultation process between Tsawout and Canada is better served outside the NEB's IR process. This would have allowed an iterative, collaborative approach to creating and developing the ITT without the restrictions associated with the NEB's process, including the short time frames for response.

7. For all of the reasons set out herein, in order to achieve a reliable ITT that could provide a basis for consultation, Tsawout and Canada must return to this ITT as part of the upcoming consultations between Tsawout and Canada. It will be more effective and efficient to collaboratively finalize the ITT during the upcoming consultation process between Tsawout and Canada. Tsawout seeks Canada's commitment to do so.

8. Tsawout's review and assessment of potential impacts and effects of TMEP is ongoing. Tsawout will continue to identify whether there are further potential measures, conditions or commitments, including after review of the NEB's Draft Conditions, in its final arguments to the NEB, and in the upcoming Phase III consultations with the Crown.

Draft Issues Tracking Table for TMX: Tsawout First Nation

Key Issue: specific concern or potential impact to Aboriginal rights and interests (as raised by Aboriginal group)	Aboriginal Group Response: does the key issue as expressed here accurately reflect the issue?	Mitigation: Proponent Commitments and/or Response (draft /as noted by the Proponent)	Aboriginal Group Response: do proposed mitigation or proponent commitments adequately address the issue? If not, please suggest any additional mitigation or commitments that would more fully or appropriately address or accommodate the issue or concern.
Cultural and Social Impacts			
Concern about disturbance to burial sites, as well as other spiritual and cultural sites. ¹	<p>Tsawout is concerned with burial sites, as well as spiritual and cultural sites. However, the key issue as captured here needs to more accurately include disturbance to all W̱SÁNEĆ marine spaces including such things as: harvesting locations and traditional reef net locations, multiple-use sites, gathering places, landscapes, place name sites, registered archaeological sites, places with traditional or historic significance and other places of significance.</p> <p>There are also other cultural and social impacts which Tsawout has identified. Please see Tsawout’s Current List of TMEP Impacts (Tsawout First Nation Written Evidence - Exhibit “D” to the Affidavit of Harvey Underwood, sworn May 27, 2015: A4Q1D9), and as described below.</p>	<p>An environmental education program will be developed and implemented to ensure that all personnel working on the construction of the Project are informed of the location of known sacred sites and burial sites. All sensitive resources identified on the Environmental Alignments Sheets (Volume 6E) and environmental tables within the immediate vicinity or the right-of-way will be clearly marked before the start of clearing.</p> <p>In the event that previously unidentified archaeological, paleontological or historical/sacred sites are discovered during clearing or construction, the proponent will implement measures outlined in the Traditional Land Use Sites Discovery Contingency Plan, and/or the Heritage Resources Discovery Contingency Plan (Appendix B of Volume 6B) and no work at that particular location shall continue until permission is granted by the appropriate regulatory authority. Trans Mountain will also follow any conditions or recommendations identified in the permits for the HRIA for Alberta and AIA for BC. ^{2 3 4}</p> <p>See also mitigation for Marine Impacts and Accidents and Malfunctions</p>	<p>Trans Mountain’s response as noted in the Mitigation column is not adequate.</p> <p>The response does not relate to Tsawout’s concerns about the likely effects of the Project on archaeological and heritage sites in the marine area. Rather, it relates to the terrestrial portion of the pipeline.</p> <p>The likely effects of the Project—through regular operations and in the event of malfunctions and accidents—on coastal archaeological and heritage sites have not been adequately assessed by Trans Mountain.</p> <p>Working under the direction and guidance of Tsawout, Trans Mountain needs to complete a full baseline study of existing W̱SÁNEĆ Coastal archaeological and heritage sites, including completing a proper effects assessment for such sites. Tsawout knowledge holders and Coastal Archaeologists will need to be directly involved. This baseline will be necessary when working with</p>

¹ Tsawout Written Intervenor Evidence (C. Joseph Affidavit) [par. 9-12] ([A4Q1F3](#))

² Application **Volume 5B** [Section 7.2]

³ Application **Volume 6A** (A3S2S1)

⁴ Application **Volume 6B** (A3S2S3), **Volume 6C** (A3S2S6), and **Volume 6E** (A56013)

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	<p>Examples of more specific key issues as described in Tsawout’s Evidence include (but are not limited to) the following:</p> <p>Concern about Heritage Sites: Tsawout is concerned that the Project will disturb archaeological and heritage sites, including burial sites, spiritual, and cultural sites, and other special places, noting “The Project is likely to affect archaeological, heritage, and sacred sites through shoreline erosion due to vessel wake associated with increased marine traffic; oil contamination from accidents and malfunctions, either small or large; and impacts associated with cleanup measures following a spill.” (TMUS 18-19) <u>These effects have not been assessed or mitigated by Trans Mountain.</u></p>		<p>Tsawout to identify and determine whether avoidance, enhancement, mitigation, long term monitoring and other measures would be possible.</p> <p>The Crown and Trans Mountain must respond to Tsawout’s identified concerns regarding important marine spaces and sites described in detail in the TMUS and in Tsawout’s evidence before the NEB, and collaboratively work with Tsawout to identify and develop appropriate avoidance and other accommodation measures</p>
	<p>Access to Special Places in Marine Territory:</p> <p>This concern was identified in #6 of Tsawout’s List of TMEP Impacts</p>		<p>The Crown and Trans Mountain must support the development of a community engagement process, whereby Tsawout knowledge holders, harvesters and others could help identify and develop measures to avoid, minimize, mitigate and otherwise reduce the</p>

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	<p>(Tsawout First Nation Written Evidence - Exhibit “D” to the Affidavit of Harvey Underwood, sworn May 27, 2015: <u>A4Q1D9</u>) as the following:</p> <p>Disruption to use of historic, modern and future marine travel ways and marine access throughout the Territory, including areas now considered within the United States.</p> <p>The Project cuts through the middle of Tsawout’s traditional territory, rendering access to cultural sites, heritage sites, and harvesting locations throughout the territory - including important past and future reefnet fishery sites - inaccessible. It reduces access to at least half of Tsawout’s territory. (TMUS 23)</p>		<p>environmental, socio-cultural, economic and health effects of the Project on use, occupation and access to their marine Territory.</p> <p>Tsawout’s review and assessment of potential impacts and effects of TMEP is ongoing. Tsawout will continue to identify whether there are further potential measures, conditions or commitments, including after review of the NEB’s Draft Conditions, in its final arguments to the NEB, and in the upcoming Phase III consultations with the Crown.</p>
	<p>Disturbance to Special Places and the Reefnet Fishery: Seventeen of the 19 known past, current, and future reefnet sites identified in the MUS are contiguous with, within, or on the other side of the LSA, and are likely to be affected by the Project. The Project will disrupt the ability of Tsawout</p>		<p>The Crown and Trans Mountain must support the development of a community engagement process, whereby Tsawout knowledge holders, harvesters and others could help identify and develop measures to avoid, minimize, mitigate and otherwise reduce the impacts and effects of the Project on special places, including the reefnet fishery.</p>

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	members to access reefnet fishery locations, and may disrupt their ability to use those locations due to wave action and other effects. (TMUS 19)		Tsawout’s review and assessment of potential impacts and effects of TMEP is ongoing. Tsawout will continue to identify whether there are further potential measures, conditions or commitments, including after review of the NEB’s Draft Conditions, in its final arguments to the NEB, and in the upcoming Phase III consultations with the Crown.
	<p>Cultural and Social Effects: Tsawout is concerned that the possible social, cultural, and economic effects of the Project on Tsawout members, households, and community have not been assessed or mitigated. If the Project adversely affects Tsawout members’ ability to access traditional foods and exercise their Douglas Treaty rights, possible social/cultural effects include the following:</p> <ul style="list-style-type: none">• Loss of traditional knowledge resulting from reduced opportunities to harvest;• Diminishment of community culture and cohesion from reduced opportunities;• Diminishment of inter-regional relations with other Salish communities on both sides of		<p>The Crown and Trans Mountain must support the development of a community engagement process, whereby Tsawout knowledge holders, harvesters and others could help identify and develop measures to avoid, minimize, mitigate and otherwise reduce the environmental, socio-cultural, economic and health effects of the Project.</p> <p>Tsawout’s review and assessment of potential impacts and effects of TMEP is ongoing. Tsawout will continue to identify whether there are further potential measures, conditions or commitments, including after review of the NEB’s Draft Conditions, in its final arguments to the NEB, and in the upcoming Phase III consultations with the Crown.</p>

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	<p>the border, which rely on food reciprocity;</p> <ul style="list-style-type: none">• Inter-generational alienation resulting from reduced opportunities;• Loss of the medicinal value of traditional foods, with resulting physical and psychological outcomes;• Loss of confidence in the health of traditional foods, with resulting physical and psychological outcomes;• Loss of the nutritional value of traditional foods, with resulting physical outcomes.		
Methodology, Process and Consultation			
<p>Tsawout do not believe the NEB's List of Issues is comprehensive enough, in not considering the environmental and socio-economic effects of increased GHG's and climate change given long-term impact on fisheries and marine resources.</p> <p>Tsawout also concerned that the NEB is too distant and remote to understand issues affecting marine and coastal</p>	<p>For clarity Tsawout has distinguished the various issues listed in this part of the table.</p> <p>a. Yes, except that GSG and climate change are not the only issues not included in the NEB's list.</p> <p>b. Yes. Because Canada has not filed the MPMP Meeting Summary Notes</p>	N/A	<p>a. There are various issues which were not included in the List of Issues. For example, in order to assess the potential impacts and effects of this Project, GHG's and climate change impacts on the coastal marine ecosystems of Tsawout's Territory must be assessed and considered with respect to this Project. These issues have potential impacts on Tsawout's s. 35 rights. Given that the NEB has failed to include this in its List of Issues, these issues must be considered and addressed in the upcoming Crown Consultation Phase</p>

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impacts; also concerned about the role of the NEB given it has no jurisdiction over shipping. ^{5 6}	referenced here as part of their written evidence, Tsawout is not confirming the content or accuracy of those notes.		III. b. Prior to making any decision that would approve TMEP, the Crown must deeply consult with Tsawout. This obligation remains outstanding and cannot be met by the NEB, including gathering all necessary information to support such consultation. Tsawout’s review and assessment of potential impacts and effects of TMEP is ongoing. Tsawout will continue to identify whether there are further potential measures, conditions or commitments, including after review of the NEB’s Draft Conditions, in its final arguments to the NEB, and in the upcoming Phase III consultations with the Crown.
Tsawout do not accept that the NEB process is an appropriate means for Canada to discharge its duty to consult. ^{7 8}	Yes.	N/A	This is a conclusion of fact and law and therefore is not appropriate for an IR exchange pursuant to the NEB process.

⁵ Tsawout Letter (May 26, 2014) ([A60602](#))
⁶ MPMO Meeting Summary Notes (June 24, 2014)
⁷ Tsawout Oral Traditional Evidence [paragraph 11369] ([A4F4K9](#))
⁸ Open Letter to Minister Rickford (November 28, 2014)

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Tsawout believe that their consent to the Project is required under international law ⁹	No. Tsawout’s consent to the Project is required under W̱SÁNEĆ law, domestic law and international law.	N/A	This is a conclusion of fact and law arising from the location and potential impacts, risks and effects of the Project on Tsawout and therefore is not appropriate for an IR exchange pursuant to the NEB process.
Tsawout TMRU study highlights several issues with how Trans Mountain scoped and assessed effects as part of their ESA. The TMRU also includes recommended mitigation measures (on PDF p. 146). ¹⁰	<p>The key issues described here are overly generalized. Specific methodological issues raised by Tsawout in its TMUS related to traditional marine use include (but are not limited to) the following:</p> <ul style="list-style-type: none">• Use of Indicators: The use of indicator species as part of the scoping process, and the way that process was undertaken, is not compatible with how Tsawout views the ecology of the Salish Sea as intricately interconnected; moreover, Tsawout’s preferred species for harvesting have not all been assessed as part of the assessment, as either indicators or valued components. (TMUS p. 12)	N/A	<p>The inadequate scoping of the assessment in the ESA, and the other shortcomings, are shortcomings of Trans Mountain’s own work and its Application. Trans Mountain needs to address the specific methodological issues raised by Tsawout, complete adequate assessments and revise their conclusions regarding Project Effects. Tsawout’s evidence has demonstrated that the Project is likely to have a significant adverse effect on its traditional marine Territory, including their ongoing use and occupation of the Territory and the exercise of Douglas Treaty and Aboriginal title and rights.</p> <p>As discussed in detail below, failure to adequately identify and assess cumulative impacts and effects in Tsawout’s Territory, as described in the TMUS, is a significant gap in the Application. The Crown and Trans Mountain must substantively assess and address the concerns regarding cumulative effects described in the TMUS and in Tsawout’s evidence. Next steps must include working with Tsawout to scope the appropriate cumulative effects assessment which must be</p>

⁹ Tsawout Oral Traditional Evidence [paragraph 11370] ([A4F4K9](#))

¹⁰ Tsawout Written Intervenor Evidence (Review of Trans Mountain's Project Effects Assessment) [pdf pp. 36-57] ([A4Q1F9](#))

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11

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	<ul style="list-style-type: none">Spatial Scope: Trans Mountain’s use of LSA and RSA is not consistent with normative EA practice. Trans Mountain predicts direct Project effects throughout the RSA but has not quantified those effects or defined their significance. For example, there are a series of direct effects on the ability of Tsawout members to exercise their Douglas Treaty rights that will occur throughout the RSA—including such things as decreased access or other impacts to important fishing sites and increased competition with non-aboriginal harvesters displaced from the LSA—that have not been analyzed.Mitigation Measures: The mitigation measures noted on p. 146 -147 of the TMUS are initial ideas that arose incidentally in the interview process. To date, neither the Crown nor Trans Mountain has responded to these initial mitigation measures		<p>conducted.</p> <p>Tsawout’s review and assessment of potential impacts and effects of TMEP is ongoing. Tsawout will continue to identify whether there are further potential measures, conditions or commitments, including after review of the NEB’s Draft Conditions, in its final arguments to the NEB, and in the upcoming Phase III consultations with the Crown.</p>

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	<p>nor supported the required formal process of mitigation identification and development.</p> <ul style="list-style-type: none">• Effects out of Scope: Trans Mountain has not considered effects that were scoped out of the assessment that had been identified in the literature review phase and through engagement with Aboriginal communities, including possible effects of increased Project-related marine vessel traffic on: 1) coastal habitation sites, and 2) inland fisheries. Tsawout has aboriginal title lands and several reserves in the Gulf Islands. The effects of the Project on these lands have not been assessed by Trans Mountain. (TMUS 160)• Characterization of Effects and Determinations of Significance: Across most of its TMRU-related valued components and indicators, Trans Mountain proposes that the residual effects of the Project will be “not		

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	<p>significant” to traditional marine resource use. Trans Mountain’s effects assessment was not completed with the prerequisite information at a Tsawout specific level. Such an assessment required the completion of Tsawout’s MUS. A specific assessment of Tsawout’s TMRU should lead Trans Mountain to very different conclusions as to the significance of the Project on Tsawout’s TMRU and exercise of rights.</p> <ul style="list-style-type: none">• Cumulative Effects: The cumulative effects discussion contained in the Application (Section 8.0 of Volumes 5A and 5B) is narrowly scoped, spatially and temporally. It does not account for the significant effects Tsawout has experienced over time to its marine Territory, including their continued use and occupation of the Territory, their way of life, and the exercise of Douglas treaty rights and Aboriginal title and rights		

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	throughout its Territory. It does not include the full range of relevant factors impacting Tsawout’s Territory, and it does not consider all the reasonably foreseeable projects that will come on-stream, which are either already in application stage or are predicted to occur in the near future.		
Tsawout (and other parties) submitted a "Public Interest Evaluation of the Trans Mountain Expansion Project" which argues: "a) the TMEP application fails to show that the TMEP meets the need and public interest criteria required for NEB approval; and b) the TMEP will result in a significant net cost to Canada if the project is built, the TMEP is not needed and is not in Canada’s public interest." ¹¹	Yes, except that the report was an expert third party report that concluded and not argued (a) and (b).	N/A	No, the proposed mitigation measures and proponent commitments do not address the issues raised in this concern. There are a number of major costs that will be incurred that are not mitigated (see table 16, pp. 61-2). For example, the TMEP will result in higher electricity rates from BC Hydro due to the \$257 million subsidy on electricity sold to the TMEP. Second, there will be an increase in environmental damages resulting from the GHG emissions (\$289 to \$916 million) and other air pollution damages (\$9-\$427 million) from the TMEP that are not mitigated. Third, there will be damages from potential oil spills of between \$2.3 and \$18.6 billion that will only be

¹¹ Tsawout Written Intervenor Evidence [Public Interest Evaluation Report] ([A4Q1G6](#))
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			<p>partially mitigated by existing oil spill compensation funds. Fourth, there are approximately 162 additional negative impacts from the project that are not mitigated.</p> <p>Given TMEP’s potential significant infringements to the exercise of Tsawout’s Douglas Treaty Rights, the Crown must justify these infringements before any decision approving the Project. Since the Crown has not put that information before the NEB, it must provide such information to Tsawout as part of Phase III Consultations.</p>
Cumulative Effects			
Concern about continued and cumulative effects throughout the traditional territory ¹²	<p>The key issues captured need to include those listed in Tsawout’s Current List of Issues as follows:</p> <ul style="list-style-type: none">#10 - Continued and increasing cumulative effects throughout the Territory, including contributing to climate change impacts,	An evaluation of the significance of the Project’s contribution to cumulative effects was conducted for each indicator determined to have a likely combined residual effect associated with the Project, as identified in Section 7.11 of Volume 5A for biophysical elements, and Section 7.10 of Volume 5B for socio-economic elements. Furthermore, an evaluation of the significance of the Project’s contribution to cumulative effects was also conducted for each element where more than one likely cumulative effect may act in combination.	Trans Mountain’s assessment of cumulative impacts in the marine is not adequate. Trans Mountain must complete a fulsome cumulative impact assessment of Project impacts and effects. This will include the development of community-based research on cumulative impacts to Tsawout’s traditional marine territory and the exercise of s. 35 rights. Such a cumulative impact assessment is a necessary component of the assessment of the Project. Tsawout knowledge holders, harvesters and others must help

¹² Trans Mountain Response to Tsawout Oral Traditional Evidence ([A4H1X1](#))
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	<p>ecosystem effects, and carbon emissions; and</p> <ul style="list-style-type: none">• #11 - Infringements of s. 35 Rights, including Tsawout’s Treaty right to carry on our fisheries as formerly.• #6 - Disruption to use of historic, modern and future marine travel ways and marine access throughout the Territory, including areas now considered within the United States. <p>The key issues related to cumulative effects listed in the ITT need to be properly scoped and should not be generalized.</p> <p>For example, specific cumulative effects concerns identified to date and raised by Tsawout in its TMUS include (but are not limited to) the following:</p> <p>Cumulative Disruption to Use of Travelways: Trans Mountain claims</p>	<p>The cumulative effects of the proposed Project are discussed in Section 8.0 of Volumes 5A and 5B. ¹³</p>	<p>identify and develop measures to avoid, minimize, mitigate and otherwise reduce the cumulative effects of the Project and other reasonably foreseeable future projects on marine use and the exercise of Douglas Treaty rights. The Crown and Trans Mountain must commit to support development of community-based and scientific regional cumulative effects that would inform the identification of measures to address cumulative impacts and effects. The Crown and Trans Mountain must respond to the concerns regarding cumulative effects described in the TMUS.</p> <p>Tsawout’s review and assessment of potential impacts and effects of TMEP is ongoing. Tsawout will continue to identify whether there are further potential measures, conditions or commitments, including after review of the NEB’s Draft Conditions, in its final arguments to the NEB, and in the upcoming Phase III consultations with the Crown.</p>

¹³ Trans Mountain Response to Tsawout Oral Traditional Evidence ([A4H1X1](#))
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Key Issue: specific concern or potential impact to Aboriginal rights and interests (as raised by Aboriginal group)	Aboriginal Group Response: does the key issue as expressed here accurately reflect the issue?	Mitigation: Proponent Commitments and/or Response (draft /as noted by the Proponent)	Aboriginal Group Response: do proposed mitigation or proponent commitments adequately address the issue? If not, please suggest any additional mitigation or commitments that would more fully or appropriately address or accommodate the issue or concern.
	<p>that transits of tankers will increase from “once a week to approximately once a day,”; however this does not include the cumulative effects of existing or other proposed projects that will use the shipping lanes, projects that may be induced by the Trans Mountain project, or disruption of Tsawout’s use of travelways by recreational boaters displaced from the LSA. (TMUS 22)</p> <p>Cumulative Effects on Marine Resources: Tsawout members consistently report on the insufficient amount of marine resources that they are currently able to access, due to the cumulative effects of past and ongoing projects, and believe that the Project, and the other known or reasonably anticipated future projects, will have a significant adverse effect on their traditional marine use, and on their ability to exercise Douglas Treaty Rights;</p> <p>Cumulative Impact to Marine Ecology Affecting Marine Foods: Members are concerned the Project, in</p>		

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	combination with other projects, will affect key marine resources well beyond thresholds where traditional marine use and Douglas Treaty rights can be exercised in any meaningful way. (TMUS 12)		
Environmental Impacts			
Concern about decreased water quality. ¹⁴	<p>Yes. Tsawout has concerns with decreased water quality. However, this is not the only Environmental Impact of concern to Tsawout resulting from TMEP.</p> <p>Tsawout’s environmental concerns related to the Project were captured in their Current List of TMEP Impacts (Tsawout First Nation Written Evidence - Exhibit “D” to the Affidavit of Harvey Underwood, sworn May 27, 2015: A4Q1D9), including the following:</p> <ul style="list-style-type: none">• #2 Disturbance to food gathering locations and multiple use sites;• #3 Disturbance to	<p>Trans Mountain agrees that the protection of Tsawout First Nation's sensitive aquatic environments is critical. In order to manage potential effects from air, greenhouse gas (GHG), noise (including underwater noise) and bilge discharge related pollution, Trans Mountain has implemented the following mitigation measures:</p> <ul style="list-style-type: none">• All Project-related marine vessels will be fitted with exhaust silencers similar to those already in use through industry standards.• Trans Mountain would be interested in supporting and participating in a joint industry-government advisory group that would be charged with determining and/or developing effective mitigation measures to reduce potential effects of underwater noise on marine mammals in the region.• Trans Mountain will provide reception facilities at the Westridge Marine Terminal as necessary to service the needs of the Project-related marine vessels.	<p>Trans Mountain’s mitigation response does not address cumulative impacts to water quality in the marine environment.</p> <p>Examples of potential mitigation include, but are not limited to, protocols and procedures for ship traffic management, including vessel speed and timing, identification and coordination of Canadian and US government and private sector roles and responsibilities, and other criteria for avoiding, mitigating or otherwise reducing Project impacts and effects.</p> <p>Canada and Trans Mountain must commit to collaboratively review with Tsawout possible conditions available through protocols and procedures for the vetting of tankers and for in port inspections.</p>

¹⁴ Trans Mountain Response to Tsawout Oral Traditional Evidence ([A4H1X1](#))
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	<p>distribution, health, abundance and long term sustainability of fish and aquatic resources, birds, mammals, vegetation, benthic communities, threatened and endangered species such as whales, and other resources;</p> <ul style="list-style-type: none">• #4 Disruption to marine ecosystems from increased wake, noise, air emissions and lights;• #7 Decreased water quality and increased pollution from ballast water, including introduction of non-native invasive species;• #10 Continued and increasing cumulative effects throughout the Territory, including contributing to climate change impacts, ecosystem effects and carbon emissions. <p>Examples of some of these impacts include, but are not limited to the following:</p>	<ul style="list-style-type: none">• Trans Mountain will screen the tankers nominated to call on the Westridge Marine Terminal to check that they do not have any malfunctions to pollution prevention equipment or history of non-adherence to provisions of the Canada Shipping Act, 2001 and the International Convention for the Prevention of Pollution from Ships (MARPOL).• Trans Mountain will require all tankers to process and empty their bilges prior to arrival and to have the discharge valve of the bilge water locked while in Canadian waters. ¹⁵	<p>The effect of climate change on tanker traffic including the likelihood of more extreme marine weather conditions is important to evaluate in order to determine operational limits under varying conditions.</p> <p>Tsawout’s review and assessment of potential impacts and effects of TMEP is ongoing. Tsawout will continue to identify whether there are further potential measures, conditions or commitments, including after review of the NEB’s Draft Conditions, in its final arguments to the NEB, and in the upcoming Phase III consultations with the Crown.</p>

¹⁵ Trans Mountain Response to Tsawout Oral Traditional Evidence ([A4H1X1](#))
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	<p>Increased tanker traffic can have negative impacts on marine organisms and populations and/or their use of habitats. This could affect availability, sustainability and health of marine resources and habitat;</p> <p>Striking of marine mammals and whales;</p> <p>Noise from tankers and tugs can affect fish and marine mammals through temporary or permanent damage to hearing as well as through adoption of avoidance behaviors which impair fitness and reproductive potential;</p> <p>Increased tanker traffic increases the potential for introducing non-native invasive aquatic species;</p> <p>Cumulative effects of increased traffic from other shipping operations combined with Project tanker traffic has not been adequately accounted for.</p>		

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Impacts to Aboriginal Rights (asserted or established)			
Tsawout assert Aboriginal title and rights, and Douglas treaty rights, throughout its territory, stating that their rights include the right to carry on their fisheries as formerly, and incidental rights such as the right to travel to and from their fisheries. ^{16 17 18}	<p>The key issues related to Aboriginal and Treaty rights described here are overly generalized. Tsawout has established Douglas Treaty rights that will be impacted and infringed by the Project. Some of the specific concerns raised by Tsawout include (but are not limited to) the following:</p> <p>Disruption of Travelways: The fishing, gathering, and hunting locales identified in Tsawout’s MUS are all accessed as part of the seasonal round of Tsawout hunters and fishers. All of the contemporary marine travel routes used by Tsawout harvesters intersect with the LSA at some point and will be disrupted. (TMUS 22)</p> <p>Disruption of Reefnet Fishery: Tsawout members have been working to revive the traditional reefnet fishery. The reefnet fishery is</p>	The existing shipping lanes are used by marine vessel traffic for recreational, commercial, tourism and passenger transit on a daily basis. The expected increased Project related marine vessel traffic is not anticipated to pose a capacity problem for the internationally regulated shipping lanes. Every month, Port Metro Vancouver (PMV) currently handles 250 vessels of all types. At present, the Westridge Marine Terminal handles approximately eight vessels per month (five of which are tankers) — representing less than three per cent of the total traffic in PMV. Should the proposed expansion be approved, the number of vessels, including tankers and barges, being loaded at the Westridge Marine Terminal could increase to approximately 37 per month (34 of which could be tankers) in 2017, or about 14% of today’s total PMV vessel traffic. ¹⁹	<p>Trans Mountain’s response is not adequate.</p> <p>Without adequately assessing the current and cumulative impacts and effects on Tsawout’s Territory and the exercise of s. 35 rights, including impacts of existing and foreseeable traffic and other marine use, it is not possible to assess the potential impacts of a 14% increase in PMV vessel traffic. Trans Mountain and Canada must commit to properly assess current conditions and cumulative impacts and effects of the Project on Tsawout.</p> <p>The subject matter of Trans Mountain’s response does not relate to Tsawout’s concerns about the likely effects of the Project on Tsawout’s use and occupation of its Territory, including access and travel.</p> <p>The Crown and Trans Mountain must complete a substantive cumulative impact assessment, including the development of a community engagement process, whereby Tsawout knowledge holders, harvesters and others could help identify and develop potential measures to avoid, minimize, mitigate and</p>

¹⁶ Application to Participate ([A56822](#))
¹⁷ Tsawout Motion to Compel (July 4, 2014) ([A3Y8H4](#))
¹⁸ Tsawout Written Intervenor Evidence [paragraphs 11-19] ([A4Q1D4](#))
¹⁹ Trans Mountain Response to Tsawout Oral Traditional Evidence ([A4H1X1](#))

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	<p>foundational to Tsawout culture and an important aspect of carrying on “their fisheries as formerly.”</p> <p>Seventeen of 19 known reefnet sites are contiguous with, within, or on the other side of the LSA. (TMUS 20)</p>		<p>otherwise reduce the effects of the Project on travelways.</p> <p>Some measures could include changes to vessel scheduling, routing, development of communications methods, community loan programs, and other measures that may arise from engagement.</p> <p>Trans Mountain and the Crown must find ways to enhance and support the efforts of the W̱SÁNEĆ to develop their reefnet fishery, and engage in a process to develop ways to avoid, minimize, or mitigate the potential effects of the Project on it.</p> <p>Tsawout’s review and assessment of potential impacts and effects of TMEP is ongoing. Tsawout will continue to identify whether there are further potential measures, conditions or commitments, including after review of the NEB’s Draft Conditions, in its final arguments to the NEB, and in the upcoming Phase III consultations with the Crown.</p>
	<p>Effects to Multiple Use Locations:</p> <p>There are a number of locations that are associated with multiple fishing, hunting, gathering, habitation, and other cultural uses. These areas are highly valued as preferred locations by Tsawout members for harvesting</p>		<p>Tsawout requests that Trans Mountain support the development of a community engagement process, whereby Tsawout harvesters and others could help develop measures to avoid, minimize, mitigate the social and cultural effects of the Project on high-value, multiple use locations which are deemed essential to the maintenance of Tsawout’s way of life and the</p>

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	and the exercise of Aboriginal and Douglas Treaty rights. At these locations, uses are heavily layered, and often coincide with place names and reefnet sites that further testify as to their importance in culture. (TMUS 22)		protection and enhancement of Douglas Treaty rights. Tsawout’s review and assessment of potential impacts and effects of TMEP is ongoing. Tsawout will continue to identify whether there are further potential measures, conditions or commitments, including after review of the NEB’s Draft Conditions, in its final arguments to the NEB, and in the upcoming Phase III consultations with the Crown.
	Effects to Commercial Fishery: Tsawout members are active in the commercial fishing industry both as individuals and as a nation through Salish Sea Foods. The Project will adversely affect Tsawout individuals and the future planned fishing and aquaculture activities of Salish Sea Foods, but these effects are not assessed within the application as aspects of the Project’s likely effects on the exercise of Douglas Treaty rights. Increased risk of accidents and malfunctions, including inabilities to adequately clean up diluted bitumen in Tsawout’s Territory.		Trans Mountain must support research and analysis on the likely effects of the Project on commercial fishing by Tsawout members, and seek ways to avoid, minimize, mitigate or otherwise reduce those effects. Tsawout’s review and assessment of potential impacts and effects of TMEP is ongoing. Tsawout will continue to identify whether there are further potential measures, conditions or commitments, including after review of the NEB’s Draft Conditions, in its final arguments to the NEB, and in the upcoming Phase III consultations with the Crown.

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Marine Impacts			
<p>Concern about potential impacts to traditional use activities as well as to commercial and tourism interests, due to the increase in marine shipping.</p> <p>Specific concerns identified regarding increased marine shipping, accidents, and malfunctions, include:</p> <ul style="list-style-type: none">• disturbance of food gathering locations, fishing, harvesting aquatic resources, plant gathering and hunting;• disturbance to long term sustainability of fishery and aquatic resources, birds, mammals, vegetation;• disruption of marine ecosystems from wake, noise, air emissions, and lights;• decreased water quality and increased pollution;• capacity to contain and clean up diluted bitumen in marine environment; and• climate change^{20 21 22 23 24 25}	<p>The key issues related to marine impacts described here are generalized, and mix biophysical effects with effects on the users of those resources.</p> <p>The marine impacts of TMEP were generally described in Tsawout’s List of TMEP Impacts (Tsawout First Nation Written Evidence - Exhibit “D” to the Affidavit of Harvey Underwood, sworn May 27, 2015: A4Q1D9) as follows:</p> <ul style="list-style-type: none">• #1 - Disruption to Tsawout’s way of life, including increased alienation from and interruption with Tsawout’s sacred relationship and reliance on the waters and lands of our Territory, increased health effects and effects on physical, mental, emotional and spiritual wellbeing;	<p>Trans Mountain would be interested in supporting and participating in a joint industry-government advisory group that would be charged with determining and/or developing effective mitigation measures to reduce potential effects of underwater noise on marine mammals in the region.</p> <p>Trans Mountain will provide reception facilities at the Westridge Marine Terminal as necessary to service the needs of the Project-related marine vessels.</p> <p>Trans Mountain will screen the tankers nominated to call on the Westridge Marine Terminal to check that they do not have any malfunctions to pollution prevention equipment or history of non-adherence to provisions of the Canada Shipping Act, 2001 and the International Convention for the Prevention of Pollution from Ships (MARPOL).</p> <p>Trans Mountain will require all tankers to process and empty their bilges prior to arrival and to have the discharge valve of the bilge water locked while in Canadian waters.</p> <p>Trans Mountain will ensure an untethered tug accompanies the Project-related tankers through the Strait of Georgia and between Race Rocks and the 12 nautical mile limit in addition to tug requirements to assist with navigation. The</p>	<p>Trans Mountain’s response to the initial key issues is not adequate. The subject matter of Trans Mountain’s response does not relate to Tsawout’s concerns about the likely effects of the Project. Many of Trans Mountain’s responses deal with the Westridge Terminal and not with the Marine Shipping Lane. The Crown and Trans Mountain must support the development of a community engagement process to help develop measures to avoid, minimize, mitigate and otherwise reduce both: (a) the biophysical effects of the Project; and (b) the effects of the Project on the abilities of Tsawout members to access and use their Territory, including marine spaces and marine resources.</p> <p>Tsawout’s review and assessment of potential impacts and effects of TMEP is ongoing. Tsawout will continue to identify whether there are further potential measures, conditions or commitments, including after review of the NEB’s Draft Conditions, in its final arguments to the NEB, and in the upcoming Phase III consultations with the Crown.</p>

²⁰ Application to Participate ([A56822](#))
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	<ul style="list-style-type: none">• #2 - Disturbance to food gathering locations, multiple use sites, and disruption to harvesting of marine resources, fishing, gathering of food and medicinal plants, hunting, and cultural and spiritual practices;• #3 - Disturbance to distribution, health, abundance and long term sustainability of fish and aquatic resources, birds, mammals, vegetation, benthic communities, threatened and endangered species such as whales, and other resources;• #4 - Disruption to marine ecosystems from increased wake, noise, air emissions, and lights. <p>Specific concerns identified regarding</p>	tug can be tethered for extra navigational assistance if needed. ²⁶	

²¹ Tsawout Motion to Compel (July 4, 2014) ([A3Y8H4](#))

²² MPMO Meeting Summary Notes (June 24, 2014)

²³ Tsawout Oral Traditional Evidence Presentation, Slide 21 ([A64566](#))

²⁴ TSWA Oral Traditional Evidence [paragraphs 11398, 11606, 11671-11682] ([A4F4K9](#))

²⁵ Tsawout Written Intervenor Evidence [paragraphs 23-30] ([A4Q1D4](#))

²⁶ Trans Mountain Response to Oral Traditional Evidence ([A4H1X1](#))

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	<p>increased marine shipping, accidents, and malfunctions, include (but are not limited to) the following:</p> <ul style="list-style-type: none">• disturbance to immediate and long term sustainability of fishery and aquatic resources, birds, mammals, eel grass and other vegetation;• disruption of marine ecosystems from wake, noise, air emissions, and lights;• decreased water quality and increased pollution;• increased risk of accidents and malfunctions;• lack of knowledge and capacity to contain and clean up diluted bitumen in marine environment;• failure to adequately consider the impacts of climate change;• displacement from subsistence food gathering locations, fishing, harvesting aquatic resources, plant gathering and hunting by Project vessels in the LSA;• displacement from subsistence food gathering locations, fishing, harvesting aquatic resources,		

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	<p>plant gathering and hunting throughout their territory by other user vessels displaced from the LSA by Project vessels. This effect has not been analyzed in the Project Application;</p> <ul style="list-style-type: none">• alienation from subsistence food gathering locations, fishing, harvesting aquatic resources, plant gathering and hunting on the eastern side of the shipping lanes by Project vessels;• displacement and alienation of Tsawout members from important marine spaces and places within their Traditional Territory;• disruption of traditional marine users’ harvesting from wake, noise, air emissions, and lights, and degradation of the enjoyment of traditional marine use.		
Accidents and Malfunctions (marine/terrestrial)			
Tsawout is concerned about the potential effects of accidents or malfunctions, and interested in navigation and navigation safety for the project (including anchorage, pilotage,	Tsawout is more than interested in navigation and navigation safety and contingency planning. Rather, marine shipping, including accidents and malfunctions and marine operations,	<p>The potential effects of credible worst case and smaller marine spills on marine users are discussed in Section 5.0 of Volume 8A of the Application (A3S4Y3) and (A3S4Z1).</p> <p>Trans Mountain will continue to provide information about</p>	<p>Trans Mountain’s response is not adequate. Trans Mountain’s response does address Tsawout’s concerns about the likely effects of the Project.</p> <p>The failure to properly identify and assess impacts,</p>

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tugboat escort, ballasting, and types of fuel used), as well as contingency planning for accidents or malfunctions. <small>27 28 29 30</small>	<p>will significantly impact Tsawout’s Douglas Treaty Rights and their Aboriginal title and rights.</p> <p>Tsawout has identified this as a significant concern with the Crown and throughout the NEB Process and has filed third party expert reports (An Assessment of Spill Risk for the TMEP by Gunton and Broadbent and Oil Spill Response Analysis by Nuka Research and Planning) which describe in details the risks of an Oil Spill and the significant challenges and gaps in emergency response along the Project’s marine tanker route.</p> <p>Furthermore, as set out in Tsawout’s written evidence, Tsawout sought to be part of the TERMPOL Review Committee in order to be part of the</p>	<p>Project-related shipping to marine users, specifically:</p> <ul style="list-style-type: none">• provide regular updated information on project-related marine vessel traffic to fishing industry organizations, Aboriginal communities and other affected stakeholders, where possible through the COSBC;• initiate a public outreach program prior to Project operations phase; and• communicate any applicable information on project-related timing and scheduling with Aboriginal communities. <p>Trans Mountain is facilitating \$100 million investment in to new equipment by Western Canada Marine Response Corp (WCMRC) with new spill-response bases to be located at ports in Delta, Nanaimo, Sidney, Sooke and Ucluelet. <small>31 32 33</small></p>	<p>effects and risks of marine accidents and malfunctions undermines the sufficiency and effectiveness of any mitigation or avoidance measures. For example Spill response effectiveness in the Application is based on the unsubstantiated assumption that most oil will float.</p> <p>Trans Mountain and the Crown must acknowledge and address the significant knowledge gaps and uncertainty regarding the fate and behavior of bitumen spilled along the TMEP marine tanker route.</p> <p>Failure to adequately assess the risks and address the knowledge gaps places Tsawout’s Territory and Tsawout at significant risk to accidents and malfunctions which would cause permanent impacts and infringements.</p> <p>In order to adequately assess the environmental effects of a project, the significance of those effects and the appropriate mitigation measures required to</p>

27 Application to Participate ([A56822](#))

28 Tsawout Motion to Compel (July 4, 2014) ([A3Y8H4](#))

29 MPMO Meeting Summary Notes (6/24/2014)

30 Tsawout Written Intervenor Evidence [paragraphs 23-25] ([A4Q1D4](#))

31 Trans Mountain Supplemental Marine Resource Use Report ([A4F5D2](#))

32 Trans Mountain Response to Oral Traditional Evidence ([A4H1X1](#))

33 Globe & Mail (June 4, 2015) 'Kinder Morgan Pledges to Protect against Oil Spills' <http://www.theglobeandmail.com/news/british-columbia/kinder-morgan-says-100-million-investment-will-protect-against-oil-spills/article24815664/>

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	<p>work on recommendations to enhance safety and navigation of the marine shipping for the Project. This request was denied by the Crown.</p> <p>There are many concerns with Trans Mountain’s Application related to accidents and malfunctions.</p> <p>For example, Trans Mountain did not put forth a credible worst case scenario and has not adequately assessed the likelihood and nature of the risks of an oil spill of diluted bitumen.</p> <p>Release of oil from tankers can occur as a result of many different types of accidents (e.g., collision, groundings, tanker engine fires or other malfunctions). Weather and sea conditions will directly affect both the potential for such events to occur and the capacity to respond to a spill.</p> <p>Effectiveness of current technologies to contain and recover diluted bitumen from the marine is limited.</p>		<p>eliminate, reduce or control those effects requires reliable and sufficient information, which is currently lacking in the Application. The presumption that conventional containment and recovery techniques and technologies will be effective in the event of a spill of diluted bitumen is not supported by evidence or experience.</p> <p>Providing information and outreach programs as a mitigation measure to address the various environmental, social and cultural impacts that increased tanker traffic carrying diluted bitumen will have on the exercise of Tsawout’s Treaty and Aboriginal rights is not sufficient.</p> <p>Proposed mitigation measures by Trans Mountain do not address the issue. A new risk assessment should be completed that addresses the deficiencies in the proponent's risk assessment. In addition, the project proponent must sign a comprehensive compensation agreement that provides full payment for all damages due to accidental spills, specifies the damages that will be covered, the mechanism for determining the value of compensation and for resolving disputes over compensation, and funding for the parties incurring damages to assess and resolve all damage claims. This agreement should be subject to Tsawout approval</p> <p>Tsawout’s review and assessment of potential impacts</p>

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	<p>The time it takes to deploy equipment and personnel is critical to reducing damage from a spill. The weather and sea conditions at the time of a spill will significantly affect the ability to deploy equipment and personnel, as well as the effectiveness of oil containment and recovery after a spill occurs.</p> <p>In many spill scenarios, extensive oiling of shorelines and marine habitat (e.g., eel grass) throughout Tsawout Territory could occur.</p> <p>The extent and degree of biological effects from an oil spill will depend on time of year, species prevalent at the time and how long and hard critical habitats are impacted.</p> <p>The marine tanker route includes significant marine resources, including salmon. Current knowledge on the immediate and long term toxic effects of spilled diluted bitumen on fish and aquatic resources, birds, marine mammals etc. is not sufficiently developed and filled with much</p>		<p>and effects of TMEP is ongoing. Tsawout will continue to identify whether there are further potential measures, conditions or commitments, including after review of the NEB’s Draft Conditions, in its final arguments to the NEB, and in the upcoming Phase III consultations with the Crown.</p>

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	<p>uncertainty.</p> <p>The potential for health effects from a spill, including volatile compounds from the diluent escaping into the atmosphere and the consumption of contaminated food can also cause health effects.</p> <p>Limited knowledge about the behavior of diluted bitumen in the marine environment is a critical information gap for designing effective spill containment and evaluating the extent and degree of effects.</p> <p>There are many concerns with Trans Mountain’s Application related to accidents and malfunctions.</p> <p>For example, Trans Mountain did not put forth a credible worst case scenario and has not adequately assessed the likelihood and nature of the risks of an oil spill of diluted bitumen.</p>		