

Annex 4.C.1

Joint Federal / Provincial Consultation and
Accommodation Report for the Trans Mountain
Project including Relevant Annexes

Joint Federal/Provincial Consultation
and Accommodation Report for the

Trans Mountain Expansion Project

November 2016

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Appendix A: Alberta Aboriginal Groups

TREATY SIX

Nakhóda Peoples [Assiniboine or Stoney]:

- A.1 Alexis Nakota Sioux Nation (with Alexis Trappers Association)
- A.2 Paul First Nation

Nehiyawak Peoples [Cree]:

- A.3 Alexander First Nation (Kipohtakaw)
- A.4 Enoch Cree Nation
- A.5 Ermineskin Cree Nation
- A.6 Louis Bull Tribe
- A.7 Montana First Nation
- A.8 Samson Cree First Nation
- A.9 Sunchild First Nation

Nakawē Peoples [Western Saulteaux]:

- A.10 O'Chiese First Nation

TREATY SEVEN

Nakhóda Peoples [Assiniboine or Stoney]:

- A.11 Stoney Nakoda First Nation (Iyarhe Nakoda)

TREATY EIGHT

Dane-zaa Peoples [Athabaskan Beaver]:

- A.12 Horse Lake First Nation

Nehiyawak Peoples [Cree]:

- A.13 Sturgeon Lake Cree Nation
- A.14 Sucker Creek First Nation
- A.15 Whitefish (Goodfish) Lake First Nation / Saddle Lake Cree Nation

Appendix B: BC Interior Aboriginal Groups

Dalkelh [Carrier] Peoples:

- B.1 Lheidli T'enneh First Nation
- B.2 Lhtako Dene Nation

Nlaka’pamuxw Peoples:

- B.3 Ashcroft Indian Band
- B.4 Boston Bar Band
- B.5 Cook’s Ferry Indian Band
- B.6 Kanaka Bar Indian Band
- B.7 Nicomen Indian Band
- B.8 Siska Indian Band
- B.9 Nlaka’pamuxw Nation Tribal Council:
 - Boothroyd Band
 - Lytton First Nation
 - Oregon Jack Creek Band
 - Skuppah First Nation
 - Spuzzum First Nation

Nlaka’pamuxw Peoples [Scw’exmx People Sub-Group]:

- B.10 Coldwater Indian Band (C’eletkwmx or Ntsla’tko)
- B.11 Lower Nicola Indian Band (Shulus)
- B.12 Nooaitch Indian Band (Nooaitch)
- B.13 Shackan Indian Band (Shackan)

Okanagan (Syilx) Peoples:

- B.14 Okanagan (Syilx) Nation:
 - Upper Nicola Band
 - Lower Similkameen Indian Band (Smelqmix)
 - Okanagan Indian Band
 - Osoyoos Indian Band
 - Penticton Indian Band
 - Upper Similkameen Indian Band
 - Westbank First Nation

Secwepemc Peoples:

- B.15 Adams Lake Indian Band (Sexqeltqín)
- B.16 Bonaparte Indian Band (St’uxwtews)
- B.17 Canim Lake Band (Tsq’escen’)
- B.18 Little Shuswap Lake Indian Band (Skwlax)
- B.19 High Bar First Nation (Llenlney’ten)
- B.20 Neskonlith Indian Band
- B.21 Shuswap Indian Band (Kenpésq’t)
- B.22 Simpcw First Nation
- B.23 Splatsin First Nation (Splatsín)
- B.24 Stk’emlupsemc te Secwépemc Nation:
 - Skeetchestn Indian Band (Skítsesten)
 - Tk’emlúps te Secwépemc

- B.25 Stswecem'c / Xgat'tem (Canoe Creek / Dog Creek Indian Band)
- B.26 Ts'kw'aylaxw First Nation (Pavilion Indian Band)
- B.27 Whispering Pines / Clinton Indian Band (Stil'qw / Pelltiq't)
- B.28 Williams Lake Indian Band (T'exelc)
- B.29 Xat'sūll First Nation (Soda Creek Indian Band)

Tsilhqot'in Peoples:

- B.30 Toosey Indian Band (Ti'esqox)

Appendix C: BC Lower Fraser River & Adjacent Waters Aboriginal Groups

Downriver Halkomelem & Squamish Peoples:

- C.1 Kwikwetlem First Nation
- C.2 Musqueam Indian Band (X^wməθk^wəyəm)
- C.4 Squamish Nation – (Skwxwú7mesh)
- C.5 Tsawwassen First Nation
- C.6 Tseil-Waututh Nation

Upriver Halkomelem Peoples:

- C.7 Chawathil First Nation
- C.8 Cheam First Nation
- C.9 Katzie First Nation
- C.10 Kwantlen First Nation
- C.11 Matsqui First Nation
- C.12 Peters First Nation
- C.13 Popkum First Nation
- C.14 Seabird Island Indian Band (Sq'éwqel)
- C.15 Shxw'ōwhámel First Nation
- C.16 Sts'ailes Nation
- C.17 Union Bar First Nation
- C.18 Yale First Nation
- C.19 Stó:lō Collective:
 - Aitchelitz Band (Athelets)
 - Kwaw-Kwaw-Apilt First Nation (QweQwe'opelhp)
 - Leq'a:mel First Nation
 - Scowlitz (Sq'éwlets)
 - Shxwhá:y Village
 - Skowkale First Nation (Sq'ewqéyl)
 - Skwah First Nation
 - Skawahlook First Nation (Sq'ewá:lxw)

Soowahlie First Nation (Th'ewá:li)
Squiala First Nation (Sxwoyehálá)
Sumas First Nation (Sema:th)
Tzeachten First Nation (Ch'iyaqtel)
Yakwekwioose First Nation (Yeqwyeqwi:ws)

Appendix D: BC Vancouver Island & Adjacent Places Aboriginal Groups

Island Halkomelem Peoples:

- D.1 Cowichan Tribes
- D.2 Halalt First Nation
- D.3 Hwlitsum
- D.4 Lake Cowichan First Nation
- D.5 Lyackson First Nation
- D.6 Penelakut Tribe
- D.7 Snaw-naw-as (Nanoose) First Nation
- D.8 Snuneymuxw (Nanaimo) First Nation
- D.9 Stz'uminus (Chemainus) First Nation

Straits Salish Peoples:

- D.10 Esquimalt Nation
- D.11 Malahat Nation
- D.12 Pauquachin First Nation
- D.13 Scia'new (Beecher Bay) Indian Band
- D.14 Semiahmoo First Nation
- D.15 Songhees (Lekwungen) Nation
- D.16 Tsartlip First Nation
- D.17 Tsawout First Nation
- D.18 Tseycum First Nation
- D.19 T'Sou-ke First Nation

Southern Wakashan Peoples / Nuu-chan-luth:

- D.20 Ditidaht First Nation
- D.21 Pacheedaht First Nation
- D.22 Maa-nulth Treaty Society:
 - Huu-ay-aht First Nations
 - Ka:'yu:'k't'h'/Che:k'tles7et'h First Nations
 - Toquaht Nation
 - Uchucklesaht Tribe
 - Ucluelet First Nation

Appendix E: Métis Groups

Métis Peoples (Alberta):

- E.1 Métis Nation of Alberta
- E.2 Métis Nation of Alberta – Métis Regional Council Zone 4
- E.3 Métis Nation of Alberta – Gunn Métis – Local Council #55 (Lac Ste. Anne)
- E.4 Mountain Métis Nation Association

Métis Peoples (BC):

- E.5 BC Métis Federation
- E.6 Kelly Lake Métis Settlement Society
- E.7 Métis Nation of British Columbia

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Acronyms, Abbreviations and Definitions used in this Report

AB	Alberta
ACO	Aboriginal Consultation Office
ANFO	ammonium nitrate fuel oil
BC	British Columbia
BC OGC	British Columbia Oil and Gas Commission
BCSC	British Columbia Supreme Court
bpd	barrels per day
CEAA	Canadian Environmental Assessment Agency
CEAA 2012	<i>Canadian Environmental Assessment Act, 2012</i>
CFIA	Canadian Food Inspection Agency
CO₂	carbon dioxide
CO₂e	carbon dioxide equivalent
CPCN	Certificate of Public Convenience and Necessity
DFO	Fisheries and Oceans Canada
EA	environmental assessment
EAC	environmental assessment certificate
EAO	British Columbia Environmental Assessment Office
ECCC	Environment and Climate Change Canada
EMP	Emergency Management Program
FLNRO	BC Ministry of Forests, Lands and Natural Resource Operations
FSA	Footprint Study Area
GHG	greenhouse gas
GiC	Governor in Council
INAC	Indigenous and Northern Affairs Canada
IR	Indian Reserve

km	kilometre
LSA	Local Study Area
m	metre
MBA	mutual benefits agreement
MOTI	BC Ministry of Transportation and Infrastructure
MPMO	Major Projects Management Office
NEB	National Energy Board
NO₂	nitrogen dioxide
NRCan	Natural Resources Canada
OTE	oral traditional evidence
PM_{2.5}	particulate matter 2.5 micrometres or smaller in diameter
PF	Participant Funding Program
RoW	right-of-way
RSA	Regional Study Area
SARA	<i>Species at Risk Act</i>
SCC	Supreme Court of Canada
TERMPOL	Technical Review Process of Marine Terminal Systems and Transshipment Sites
TLRU	traditional land and resource use
TMRU	traditional marine resource use
TMEP, TMX or Project	Trans Mountain Expansion Project
TMPL	Trans Mountain oil products pipeline
TRC	TERMPOL Review Committee
US	United States
VC	Valued Component
VFPA	Vancouver Fraser Port Authority
WMT	Westridge Marine Terminal

1. INTRODUCTION

The Crown has a constitutional duty to consult Aboriginal groups, and where appropriate accommodate, when it contemplates conduct that might adversely affect asserted or established Aboriginal or Treaty rights. The Crown also consults with Aboriginal groups for many reasons, including statutory, contractual, policy and good governance, and overall to build effective relationships and understanding of Aboriginal groups. The Crown's consultation objectives are to meet the legal duty, uphold the honour of the Crown and build long-term relationships based on shared reconciliation objectives. Through the consultation process, governments seek to reconcile asserted or established Aboriginal rights, including title and treaty rights (referred to collectively in this report as "Aboriginal Interests") with the interests of the Crown and broader societal interests.

1.1 Purpose of the Report

The Major Projects Management Office (MPMO) of Natural Resources Canada (NRCan) and British Columbia's Environmental Assessment Office (EAO), collectively representing "the Crown", have prepared this Consultation and Accommodation Report to document the Aboriginal consultation conducted to date for the Government of Canada's and responsible British Columbia ministers' respective decisions on the proposed Trans Mountain Expansion Project's (Project) environmental assessment (EA) and regulatory review.

This Consultation and Accommodation Report summarizes the procedural and substantive aspects of Crown-Aboriginal consultation in respect of the Project. This report describes:

1. Aboriginal consultation undertaken in respect of the Project;
2. Views of Aboriginal groups on how the Project may impact Aboriginal Interests and other interests;
3. Measures proposed to address potential impacts on Aboriginal Interests and other interests raised by Aboriginal groups;
4. The Crown's conclusions regarding the potential impacts of the Project on Aboriginal Interests and other interests; and
5. Conclusions regarding the adequacy of consultation.

This report was developed based on consideration of all information brought forward to the Crown by Aboriginal groups through direct consultation; submissions made by Aboriginal groups and the proponent as part of the National Energy Board (NEB) Review; as well as other information cited below.

In the development of this report, the Crown considered and integrated comments received by Aboriginal groups through consultation meetings, and during the written comment periods on the initial and revised draft versions of this report. The intention was to use this report to improve the Crown's understanding of the perspectives of Aboriginal groups, potential impacts on Aboriginal Interests, and options to accommodate these potential impacts.

1.2 Project Description

On December 16, 2013, Trans Mountain Pipeline ULC (the proponent or Trans Mountain), a wholly owned subsidiary of Kinder Morgan Canada, filed a Project Application with the NEB to build and operate the Project consisting of approximately 987 kilometres (km) of new 36-inch and 42-inch pipeline and reactivation of 193 km of existing pipeline between Edmonton, Alberta (AB) and Burnaby, British Columbia (BC).

The Project is designated under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) and would require a Certificate of Public Convenience and Necessity (CPCN) and other necessary relief under the *National Energy Board Act* (NEB Act) to proceed. For the province of British Columbia (BC), the Project is reviewable under the Reviewable Projects Regulation of BC's *Environmental Assessment Act*, and would require an EA certificate from the province.

The Project would result in twinning the existing Trans Mountain Pipeline (TMPL) that runs 1147 km from Edmonton, AB to the Westridge Marine Terminal (WMT) in Burnaby, BC. The existing pipeline was constructed between February 4, 1952 and October 17, 1953, and consists of 1155 km of a 61-centimetre (cm) main line between Edmonton and Burnaby, and a distribution line from the Burnaby terminus tank farm to Burrard Inlet, and another to Washington State. Along its mainline, the pipeline has two major crossings – the Fraser and Thompson Rivers – and 49 smaller river crossings. The system consists of two tank farms, a receiving tank farm in Edmonton, a delivery tank farm on Burnaby Mountain, a marine loading dock at Westridge on Burrard Inlet, and four pump stations (Edmonton, Edson, Black Pool, and Kamloops).

The federal Board of Transport Commissioners approved the existing Trans Mountain pipeline on December 13, 1951 after receiving submissions from the proponent, federal government departments and the two provincial governments. The approval was based on economic and strategic considerations. The existing pipeline did not undergo an environmental assessment, and the approval process did not include public or Indigenous consultations.

The proposed Project would increase the overall Trans Mountain pipeline system capacity from 300,000 barrels per day (bpd) to 890,000 bpd.

The Project as proposed also includes the following components and activities:

- Two 30-inch delivery lines from the Burnaby Terminal to the Westridge Marine Terminal (Westridge delivery pipelines);¹
- Twelve new pump stations (10 at existing pump station sites and two at a new common pump station site at Black Pines), with seven in BC and five in Alberta;
- Thirty four new pump units at the new pump stations;
- One new pump unit at Sumas Pump Station to support additional deliveries to the Puget Sound Pipeline;
- Reactivating an existing pump station at Niton, Alberta;
- Re-connecting Jasper Pump Station to Line 1 and adding drag-reducing agent injection capability;
- Twenty new storage tanks: five at the Edmonton Terminal, one at the Sumas Terminal and 14 at the Burnaby Terminal, preceded by the demolition of two existing tanks, one each at Edmonton and Burnaby, for a total of 18 additional tanks;
- Twenty five new sending or receiving traps;
- Deactivation and decommissioning of several components of existing facilities;
- Construction of one new dock complex at the WMT involving expansion of the foreshore area to enable three Aframax-capable berth faces and a utility dock; and
- Ancillary components and appurtenances, including mainline block valves, scraper traps, pressure reduction or relief stations, containment, power lines, and access roads, and temporary infrastructure to support construction activities.

As a result of the Project, the number of marine tanker transits in Burrard Inlet (laden and empty) would increase from 10 Aframax class vessel transits per month (five vessels) to up to 68 vessel transits per month (34 vessels), or approximately 696 new transits per year (348 vessels).

The proponent indicated in supplemental information submitted to EAO in July 2016² that the loading of tankers at the Westridge Marine Terminal would fluctuate based on market conditions. Currently five tankers and three barges are handled each month (i.e., two barges outbound with crude oil shipments and one inbound with jet fuel). Crude oil and jet fuel barge traffic is not expected to increase as a result of the Project. Jet fuel receipts would not change as a result of the Project. Vessels bound for the Westridge Marine Terminal currently account for approximately 3%³ of the total traffic under the jurisdiction of Vancouver Fraser Port Authority (VFPA). Project-related tanker traffic would represent an increase of 9.5% over 2012 vessel traffic in Burrard Inlet, and a 3.7% increase over 2012 vessel traffic in the Juan de Fuca Strait.

¹ Lengths are approximately 2.6 km for the tunnel option and 3.6 km for the street option.

² Available at: http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_project_home_459.html

³ Excluding barges

The proponent has developed an interactive map that shows both the existing and proposed pipeline corridors along with other Project components at <https://www.transmountain.com/map>.

The figures below show the location of the Project, including the proposed pipeline route, Westridge Marine Terminal and existing marine shipping lanes designated for use by vessels transiting through the Strait of Juan de Fuca, Salish Sea and the Port of Vancouver. A historic representation of the existing Trans Mountain Pipeline system is also included.

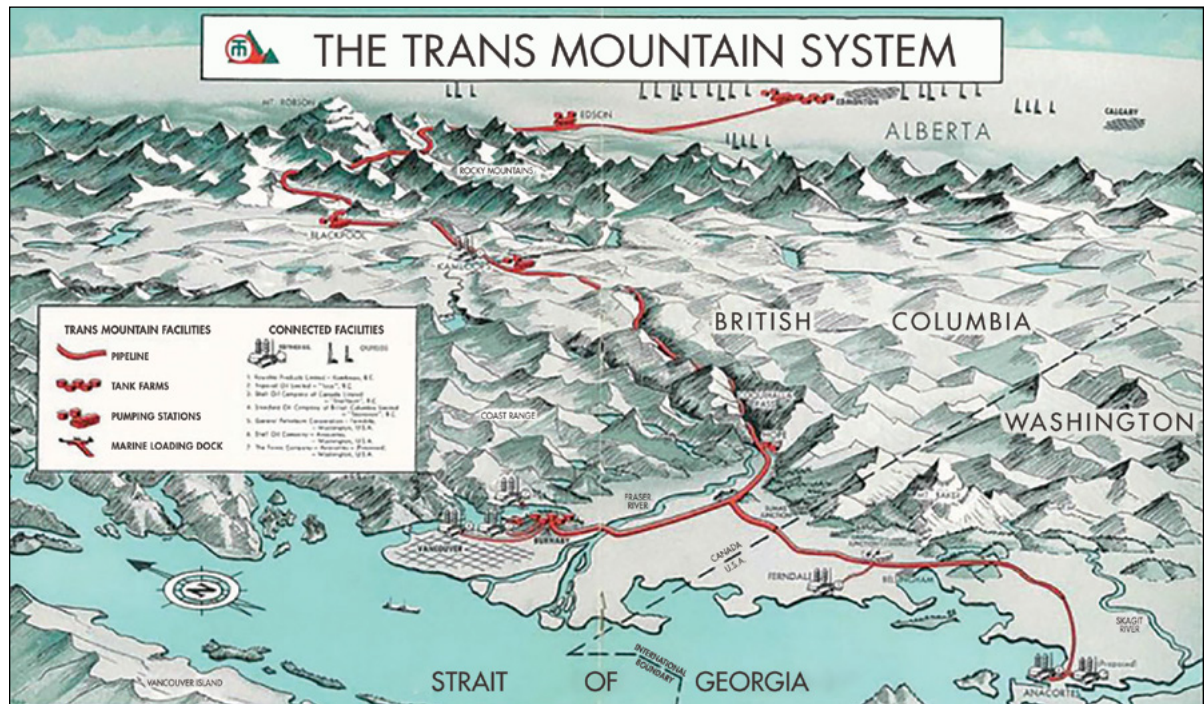
Figure 1 – Location of the Proposed Project



Figure 2 – Location of Proposed Westridge Marine Terminal Expansion and Project-related Marine Shipping



Figure 3 – Schematic of Existing Trans Mountain Pipeline System



The proponent has applied for a 150 m-wide corridor, for what would become in most cases a temporary 45 meter-wide pipeline corridor during construction and a permanent 18 meter-wide easement during operations (although this would be reduced to 10 meters-wide in some places due to existing constraints). Over 89% of the proposed pipeline route would parallel existing linear disturbances, including the right of way (RoW) for the existing Trans Mountain pipeline, thereby reducing the impacts from construction and right of way clearing. In two areas, the Project involves reactivating existing pipeline segments.

Since 1953, there have been various changes and modifications to the existing Trans Mountain pipeline. Between 2006 – 2008, 13 new pump stations were added, existing stations were modified, and the Anchor Loop project added 160 km of new pipe through Jasper National Park and Mount Robson Provincial Park between Hinton, Alberta and Hargreaves, BC.

Other infrastructure required for the Project includes temporary facility spaces, access roads and transmission lines. A comprehensive description of the Project is provided in Volume 2 of the Project Application filed with the NEB pursuant to regulatory hearing order OH-001-2014.

All documents associated with the regulatory hearing including the Project Application are available at <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2392873&objAction=browse&viewType=1>. Supplementary information on the Project provided by the proponent as part of the EAO process is available at: http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_project_doc_index_459.html.

1.3 Regulatory Review including the Environmental Assessment Process

1.3.1 NEB REGULATORY REVIEW AND ENVIRONMENTAL ASSESSMENT PROCESS

The NEB completed a comprehensive environmental assessment of the Project in accordance with its authority under the NEB Act and the CEAA 2012 which included a Public Hearing as part of the NEB regulatory process (together, termed the “NEB Review”).

Preliminary Project Planning and Engagement

Preliminary scoping of Crown consultation for the Project began in early 2012, in advance of the proponent submitting its detailed project description to the NEB. As part of the proponent’s pre-application engagement, it consulted with federal and provincial governments to identify which Aboriginal groups may be potentially affected by the Project.

On May 23, 2013, the NEB received the formal project description and undertook to determine whether and by what form, the NEB Review would be conducted. As the regulatory authority for interprovincial pipelines, the NEB is responsible for assessing an application for a CPCN for the Project and providing a report under Section 52 of the NEB Act, which would also include recommendations from an environmental assessment conducted under sub-section 29(1) of CEAA 2012.

Consistent with implementation of a 2007 Cabinet Directive and relevant policies and guidance⁴, federal departments developed a plan for Aboriginal consultation for the Project. A Project Agreement⁵ was entered into by eight federal deputy ministers and Chief Executive Officers including for the NEB in September 2014 that described the roles and responsibilities of federal authorities and the NEB during the NEB Review, as well as the Crown consultation process. As part of this agreement, the MPMO was identified as the Crown Consultation Coordinator for the Project.

In August 2013, the federal government shared an updated list of Aboriginal groups whose Aboriginal Interests and other interests may potentially be impacted by the Project with the proponent. This list was reviewed and updated over the course of the Project review. The process for identifying consultation requirements for Aboriginal groups is described in detail in Section 2 of this report.

⁴ See the *Cabinet Directive on Improving the Performance of the Regulatory System for Major Resource Project* (<http://mpmo.gc.ca/reports-publications/77>), its associated memorandum of understanding and the document *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (Aboriginal Affairs and Northern Development Canada, March 2011).

⁵ <http://mpmo.gc.ca/projects/226>

Start of the NEB Hearing

The NEB's Filing Manual and the *Filing Requirements Related to the Potential Environmental and Socio-Economic Effects of Increased Marine Shipping Activities: Trans Mountain Expansion Project* set out requirements for the proponent to engage Aboriginal groups potentially affected by the Project. As part of the Project Application, the proponent was required to identify measures to avoid, mitigate or otherwise accommodate potential adverse impacts on Aboriginal Interests. On December 16, 2013, the proponent submitted a Project Application to the NEB for a CPCN.

In January 2014, the NEB invited interested Aboriginal groups and organizations to apply for participant status in the NEB Review as well as participant funding. Applications submitted by Aboriginal groups often included preliminary information on potential Project impacts on Aboriginal Interests and other interests.

On April 2, 2014, the NEB Panel assigned to oversee the review of the Project announced it had sufficient information to proceed with the public hearings. The NEB set out the factors and scope of the factors for the environmental assessment to be conducted pursuant to CEAA 2012.

In accordance with the *National Energy Board Act*, the hearing was subjected to a legislated time limit of 15 months. On July 15, 2014, a seven-month exclusion period was announced and a second four months exclusion period was announced on September 24, 2015 pursuant to sub-section 52(5) of the NEB Act which resulted in the hearing continuing until February 17, 2016.

The NEB issued draft conditions for the Project on April 16, 2014, August 12 and December 11, 2015 and sought comments from intervenors on the 2015 version of the draft conditions by January 12, 2016.

The NEB Report is required to recommend whether issuing a CPCN would be in the public interest, any terms and conditions that should be attached to the CPCN if issued by the NEB, and any recommendations based on the environmental assessment conducted under CEAA 2012. The NEB submitted its report to the Minister of Natural Resources on May 19, 2016.

1.3.2 BRITISH COLUMBIA'S ENVIRONMENTAL ASSESSMENT PROCESS

On June 21, 2010, the EAO and the NEB entered into an equivalency agreement (NEB-EAO Agreement) for environment assessments of projects that triggered both a provincial and NEB review. The NEB-EAO agreement states that BC would accept the NEB's environmental assessment of a project that would otherwise have to be reviewed under BC's *Environmental Assessment Act* as an equivalent assessment, and that the proposed project may proceed without a provincial EA certificate.

In January 2016, the BC Supreme Court, in *Coastal First Nations v. British Columbia* (BCSC Decision⁶), held that a portion of the NEB-EAO Agreement⁷ was invalid. Specifically, the Court ruled that BC's *Environmental Assessment Act* applies to projects subject to a NEB review, to the extent that they require a provincial EA certificate. Although effectively amended by virtue of the BC Supreme Court Decision, the remainder of the NEB-EAO Agreement remained valid. Therefore, for this Project, the NEB Review is being substituted for the EA process under BC's *Environmental Assessment Act*. EAO is accepting the *NEB Recommendation Report* for the Trans Mountain Expansion Project as the assessment report for the Project.

As a result of the BC Supreme Court Decision, an order was issued under Section 10(1)(c) of the BC *Environmental Assessment Act* on April 8, 2016 requiring the Ministers of Environment and Natural Gas Development to make a decision on the issuance of a provincial EA certificate. Following consultation on a draft procedural order with Aboriginal groups and the proponent, an order was issued under Section 11 of BC's *Environmental Assessment Act* on June 17, 2016, to establish the procedures for the remaining provincial EA process for the Project, including procedures for Aboriginal consultation. Among other procedural aspects, this order identified the Aboriginal groups to be consulted by EAO, Aboriginal consultation opportunities to be provided by EAO and the proponent's consultation requirements.

EAO has been coordinating Aboriginal consultation activities with the federal Crown. As part of this approach to Crown consultation, EAO has made use of the federal consultation record that preceded the Province's regulatory involvement in the EA process. While EAO has undertaken a joint approach to Aboriginal consultation with the federal government for Aboriginal groups in BC, the provincial Crown's obligations to consult and accommodate pertain to areas of provincial jurisdiction as circumscribed by the Constitution.

1.4 *NEB Recommendation Report*

The NEB completed its review in accordance with its authority under the NEB Act and the CEEA 2012. The NEB found that with the implementation of the proponent's environmental protection procedures and mitigation, and the NEB's recommended conditions, the Project is not likely to cause significant environmental effects. However, pursuant to its authority under the NEB Act, the NEB found that the operation of Project-related marine vessels is likely to result in significant adverse effects to the Southern Resident Killer Whale, and to Aboriginal cultural uses associated with Southern Resident Killer Whale. The NEB also found that greenhouse gas emissions (GHG) from Project-related marine vessels would be significant.

⁶ <http://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc34/2016bcsc34.pdf>

⁷ http://www.eao.gov.bc.ca/EAO_NEB.html

The NEB concluded that the consultation by the proponent with Aboriginal groups was acceptable. The NEB found that the proponent offered Aboriginal groups adequate opportunities to provide information about their concerns and interests in the Project area and within their traditional territories; considered the information that was provided; and that it made a number of changes to the design and planned operation of the Project as a result of this information.

The NEB found the proponent's approach to assessing the potential effects of the Project on Aboriginal interests⁸ was acceptable, and noted that there would be impacts experienced by some Aboriginal groups if the Project was to proceed. The NEB acknowledged that Aboriginal groups would sustain modest burdens⁹ to their ability to use the lands, waters and resources for traditional purposes; would be temporarily impacted by construction and routine maintenance activities; and, that some opportunities for certain activities such as harvesting or accessing sites or areas of traditional use would be temporarily interrupted. For activities directly affected by the Westridge Marine Terminal, the NEB found that these effects would persist for the operational life of the Project, as traditional activities would not occur within the expanded water lease boundaries. The NEB found that while the effects would be long term, they would be reversible and would be confined to the water lease boundary for the Westridge Marine Terminal. The NEB did not name specific Aboriginal groups in these findings.

The NEB stated that in the event of a credible worst-case spill, environmental effects to the lands, waters or resources used for traditional purposes by Aboriginal groups would be adverse and significant. The NEB found, however, that the probability of a spill is very low, provided the Project is designed, constructed and operated in accordance with its certificate conditions and the proponent's commitments. The NEB considered the potential consequences of a spill as it weighed the overall benefits and burdens of the Project, and found the level of risk acceptable.

The NEB concluded that the overall benefits of the Project outweigh the burdens; that the Project is in Canada's public interest; and recommended approval by the Governor in Council (GiC). The NEB concluded that there would be considerable benefits as a result of the direct jobs created, local and regional spending on pipeline materials, and in providing Canadian shippers greater access to international markets. The NEB noted there would be modest benefits to local communities and the environment from the establishment of a Community Benefit Program and as a result of the enhanced marine spill response planning associated with the Project. On page 264 of its report, the NEB also found that the Project would likely result in positive economic effects, including revenues to various levels of government.

⁸ In this instance, "Aboriginal interests" pertains to the NEB's list of issues to be assessed pursuant to the requirements of the NEB Act and CEAA 2012

⁹ The NEB Report (p.14) states "Definitions for the terms considerable and modest are not provided. Rather, the terms are meant to illustrate weight the Board attributed to the benefits and burdens relative to each other."

With respect to the potential impacts of the Project on Aboriginal interests, the NEB stated the following (at page 52) in the NEB Report:

Having considered all the evidence submitted in this proceeding, the consultation undertaken with Aboriginal groups, the impacts on Aboriginal interests, the proposed mitigation measures, including conditions, to minimize adverse impacts on Aboriginal interests and the commitments to and Board imposed requirements for ongoing consultation, the Board is satisfied that the Board's recommendation and decisions with respect to the Project are consistent with section 35(1) of the Constitution Act, 1982. The Board is of the view that this assessment is consistent with what is required for the purposes of the Board's report.

In accordance with the NEB's interpretation of its legislated mandate, the NEB did not make any determinations regarding the nature and scope of asserted or established Aboriginal rights, including title, or treaty rights. As the consultation duty rests with the Crown, the NEB did not arrive at any conclusions regarding the scope of the Crown's duty to consult or whether the Crown has met this duty. These topics are the subject of this report.

The NEB Review supports the Crown in helping meet its constitutional obligations to consult, and as appropriate, accommodate for potential adverse impacts of Crown decision making on Aboriginal Interests. Many of the conditions recommended by the NEB are relevant to addressing impacts on Aboriginal Interests. See Section 4 of this report for a discussion of the relevant NEB recommendations, and Appendix H for a full list of recommended NEB conditions for the Project.

2. APPROACH TO CONSULTING ABORIGINAL GROUPS

2.1 Identification of Aboriginal Groups

Direction was provided to the proponent, through the NEB's Filing Manual, to engage and consult Aboriginal groups potentially affected by the Project. In early 2012, prior to filing its Project Description with the NEB, the proponent sought the advice of federal and provincial officials with respect to the Aboriginal groups whose interests may be potentially affected by the Project.

As part of the proponent's pre-Application planning, the Alberta government advised the proponent to include Aboriginal group communities within 100 km of each side of the proposed expansion line. The BC government advised the proponent to include groups within 10 km on each side. At that time, Aboriginal Affairs and Northern Development Canada (now Indigenous and Northern Affairs Canada) provided advice to the proponent on the traditional territories of Aboriginal groups to inform its scope of engagement. In August 2012, the MPMO provided further advice to the proponent on behalf of the federal government on the Aboriginal groups for which Crown consultation may be required. The Crown's approach to consultation also took into account a preliminary assessment of the strength of any asserted Aboriginal rights, and established Aboriginal rights or treaty rights, and of the seriousness of potential adverse impacts of the Project on Aboriginal Interests.

On May 23, 2013, following receipt of a project description from the proponent, the Crown developed a preliminary list of potentially affected Aboriginal groups. Approximately 130 Aboriginal groups were initially identified. The Crown considered whether lands or marine areas currently or traditionally used by Aboriginal groups potentially overlap or interact with the Project footprint. In addition, a 50 km buffer from the Project footprint and marine shipping corridor was used to identify additional Aboriginal groups for which the indirect effects of the Project have the potential to impact Aboriginal Interests.

In August 2013, the federal Crown's initial list of potentially affected Aboriginal groups was shared with the proponent and the NEB, following review by implicated federal authorities, including Fisheries and Oceans Canada (DFO), Environment and Climate Change Canada (ECCC), Parks Canada and Transport Canada. In August 2013, the federal Crown sent letters to Aboriginal groups introducing the Project and the NEB review process.

Refining the Scope of Aboriginal Consultation

The Project footprint and spatial assessment areas defined by the proponent informed its scope of Aboriginal engagement. Appendix 9 of the NEB Report provides a complete list of Aboriginal groups and organizations engaged by the proponent. Appendix 11 provides the study area boundaries defined by the proponent and adopted by the NEB for the environmental and socio-economic assessment of the Project.

Following the proponent's submission of the Project Application to the NEB in December 2013, the Crown reviewed available traditional use information for the identified Aboriginal groups, and the potential interactions between the effects of the Project and traditional land and marine uses. The Project Application defined the spatial boundaries selected to assess the effects of the Project to the environment or socio-economic conditions including to traditional land and marine uses. The Crown subsequently refined the scope to include any Aboriginal group with Aboriginal Interests that could be adversely affected by the Project. The Crown further refined the scope of consultations based on its understanding of the basis for which an Aboriginal group may represent the interests of a collective rights bearing entity under Section 35 of the *Constitution Act, 1982*, including whether a group was considered a Band under the *Indian Act*.

In April 2016, following the *Coastal First Nations (2016)* decision the EAO initiated the BC provincial EA process and identified 96 Aboriginal groups in BC to be consulted. Based on the strength of claims and potential to impact Aboriginal Interests, EAO identified 81 Aboriginal groups to be consulted at a deeper end of the consultation spectrum, and 15 Aboriginal groups to be consulted at a lower end of the consultation spectrum. Some of the 81 Aboriginal groups at the deeper end organized into collectives, resulting in approximately 60 Aboriginal groups being directly consulted at the deeper end. The Aboriginal groups are identified in the order issued by the EAO under Section 11 of BC's *Environmental Assessment Act*.¹⁰ The Aboriginal groups identified by EAO are consistent with those identified by the federal Crown.

¹⁰ http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_document_459_40634.html

Aboriginal Groups Consulted

The following tables identify the individual Aboriginal groups in BC and Alberta for which a duty to consult was identified as of June 2016. Eighty-three of the individual Aboriginal groups within the Crown’s scope of consultation participated in the NEB Review, either on their own or as part of a collective.

Table 1 – Alberta Aboriginal Groups

Treaty Six	Treaty Seven
<p>Nakhóda Peoples:</p> <ul style="list-style-type: none"> • Alexis Nakota Sioux Nation (with Alexis Trappers Association)* • Paul First Nation² <p>Nehiyawak Peoples:</p> <ul style="list-style-type: none"> • Alexander First Nation* • Enoch Cree Nation* • Ermineskin Cree Nation* • Louis Bull Tribe • Montana First Nation* • Samson Cree First Nation* • Sunchild First Nation* <p>Nakawē Peoples:</p> <ul style="list-style-type: none"> • O’Chiese First Nation* 	<p>Nakhóda Peoples:</p> <ul style="list-style-type: none"> • Stoney Nakoda First Nation <p>Treaty Eight</p> <p>Dane-zaa Peoples:</p> <ul style="list-style-type: none"> • Horse Lake First Nation*^C <p>Nehiyawak Peoples:</p> <ul style="list-style-type: none"> • Sturgeon Lake Cree Nation • Sucker Creek First Nation* • Whitefish (Goodfish) Lake First Nation/ Saddle Lake Cree Nation*
<p>* Indicates that the Aboriginal group participated in the NEB hearings as an intervenor ² Indicates that the Aboriginal group participated in the NEB hearings as a commentator ^C Indicates that the Aboriginal group is on Schedule C of the EAO Section 11 order</p>	

Table 2 – BC Interior Aboriginal Groups

<p>Dalkelh [Carrier] Peoples:</p> <ul style="list-style-type: none"> • Lheidli T'enneh First Nation^{*B} • Lhtako Dene Nation^B <p>Nlaka'pamuxw Peoples:</p> <ul style="list-style-type: none"> • Ashcroft Indian Band^{*B} • Cook's Ferry Indian Band^B • Kanaka Bar Indian Band^C • Nicomen Indian Band^C • Siska Indian Band^B <p>Nlaka'pamuxw Nation Tribal Council:</p> <ul style="list-style-type: none"> • Boothroyd Band^B • Boston Bar Band^B • Lytton First Nation^B • Oregon Jack Creek Band^B • Skuppah First Nation^B • Spuzzum First Nation^B <p>Nlaka'pamuxw Peoples [Scw'exmx People Sub-Group]:</p> <ul style="list-style-type: none"> • Coldwater Indian Band^{*B} • Lower Nicola Indian Band^{*B} • Nooaitch Indian Band^{*B} • Shackan Indian Band^{*C} 	<p>Okanagan Peoples:</p> <ul style="list-style-type: none"> • Lower Similkameen Indian Band^{*B} • Okanagan Indian Band^{*B} • Osoyoos Indian Band[*] • Penticton Indian Band^{*B} • Upper Nicola Band^{*B} • Upper Similkameen Indian Band^{*B} • Westbank First Nation^{*B} <p>Secwepemc Peoples:</p> <ul style="list-style-type: none"> • Adams Lake Indian Band^{*B} • Bonaparte Indian Band^C • Canim Lake Band^{B2} • Little Shuswap Lake Indian Band^B • High Bar First Nation (Llenlleny'ten)^C • Neskonlith Indian Band^{*B} • Shuswap Indian Band^C • Simpcw First Nation^{*B} • Skeetchestn Indian Band^{*B} • Splantsin First Nation^C • Stswecem'c / Xgat'tem' [Canoe Creek Band]^C • Tk'emlúps te Secwépemc^{*B} • Ts'kw'aylaxw First Nation [Pavillion Indian Band]^C • Whispering Pines / Clinton Indian Band^{*B} • Williams Lake Indian Band^{*C} • Xatšúll First Nation [Soda Creek Indian Band]^C <p>Tsilhqot'in Peoples</p> <ul style="list-style-type: none"> • Toosey Indian Band^C
<p>* Indicates that the Aboriginal group participated in the NEB hearings as an intervenor ^B Indicates that the Aboriginal group is on Schedule B of the EAO Section 11 order ^C Indicates that the Aboriginal group is on Schedule C of the EAO Section 11 order ² Indicates that the Aboriginal group participated in the NEB hearings as a commentator</p>	

Table 3 – Lower Fraser River Aboriginal Groups

<p>Downriver Halkomelem & Squamish Peoples:</p> <ul style="list-style-type: none"> • Kwikwetlem First Nation ^{*B} • Musqueam Indian Band ^{*B} • Squamish Nation ^{*B} • Tsawwassen First Nation ^{*B} • Tsleil-Waututh Nation ^{*B} <p>Upriver Halkomelem Peoples:</p> <ul style="list-style-type: none"> • Chawathil First Nation ^{*B} • Cheam First Nation ^{*B} • Katzie First Nation ^{*B} • Kwantlen First Nation ^{*B} • Matsqui First Nation ^{*B} • Peters First Nation ^{*B} • Popkum First Nation ^{*B} • Seabird Island Indian Band ^B • Shxw'ōwhámel First Nation ^B • Sts'ailes Nation ^C • Union Bar First Nation ^B • Yale First Nation ^B 	<p>Upriver Halkomelem Peoples (cont'd):</p> <p>Stó:lō Collective: ^{*B}</p> <ul style="list-style-type: none"> • Aitchelitz Band ^B • Kwaw-Kwaw-Apilt First Nation ^B • Leq'a:mel First Nation ^B • Scowlitz ^B • Shxwhá:y Village ^B • Skowkale First Nation ^B • Skwah First Nation ^B • Skawahlook First Nation ^B • Soowahlie First Nation ^B • Squiala First Nation ^B • Sumas First Nation ^B • Tzeachten First Nation ^B • Yakweakwoose First Nation ^B
<p>* Indicates that the Aboriginal group participated in the NEB hearings as an intervenor ^B Indicates that the Aboriginal group is on Schedule B of the EAO Section 11 order ^C Indicates that the Aboriginal group is on Schedule C of the EAO Section 11 order</p>	

Table 4 – Vancouver Island and Adjacent Area/Affiliated Aboriginal Groups

<p>Island Halkomelem Peoples:</p> <ul style="list-style-type: none"> • Cowichan Tribes^{*B} • Halalt First Nation^B • Hwlitsum^{B3} • Lake Cowichan First Nation^{*B} • Lyackson First Nation^{*B} • Penelakut Tribe^{*B} • Snaw-naw-as (Nanoose) First Nation^B • Snuneymuxw (Nanaimo) First Nation^{*C} • Stz'uminus (Chemainus) First Nation^{*B} <p>Straits Salish Peoples:</p> <ul style="list-style-type: none"> • Esquimalt Nation^{*B} • Malahat Nation^{B2} • Pauquachin First Nation^{*B} • Scia'new (Beecher Bay) Indian Band^{*B} • Semiahmoo First Nation^B • Songhees (Lekwungen) Nation^B • Tsartlip First Nation^{*B} • Tsawout First Nation^{*B} • Tseycum First Nation^{*B} • T'Sou-ke First Nation^{*B} 	<p>Southern Wakashan Peoples / Nuu-chah-nulth:</p> <ul style="list-style-type: none"> • Ditidaht First Nation^{*B} • Pacheedaht First Nation^{*B} • Maa-nulth First Nation:^{*B} <ul style="list-style-type: none"> – Huu-ay-aht First Nations^B – Ka:'yu:'k't'h'/Che:k'tles7et'h First Nations^B – Toquaht Nation^B – Uchucklesaht Tribe^B – Ucluelet First Nation^B
<p>* Indicates that the Aboriginal group participated in the NEB hearings as an intervenor ^B Indicates that the Aboriginal group is on Schedule B of the EAO Section 11 order ^C Indicates that the Aboriginal group is on Schedule C of the EAO Section 11 order ² Indicates that the Aboriginal group participated in the NEB hearings as a commentator ³ Hwlitsum are not recognized as a "Band" under the <i>Indian Act</i></p>	

Table 5 – Métis Groups

<p>Métis Peoples (Alberta):</p> <ul style="list-style-type: none"> • Métis Nation of Alberta • Métis Nation of Alberta – Métis Regional Council Zone^{4*} • Métis Nation of Alberta – Gunn Métis – Local Council #55 (Lac Ste. Anne)[*] • Mountain Métis Nation Association 	<p>Métis Peoples (BC):</p> <ul style="list-style-type: none"> • BC Métis Federation[*] • Kelly Lake Métis Settlement Society⁴ • Métis Nation of British Columbia[*]
<p>* Indicates that the Aboriginal group participated in the NEB hearings as an intervenor ⁴ Applied for late intervenor status in the NEB hearings but was denied by the NEB</p>	

Spatial Study Areas

Spatial study areas in environmental and socio-economic impact assessment specify the geographic area where the effects of the Project area are assessed, and in turn, informs how the Crown understands the scope and seriousness of potential effects of the Project on Aboriginal Interests.

In Volume 5A of its Application, the proponent defined spatial areas for the assessment of each valued environmental or socio-economic component (VC) identified in the NEB Hearing Order. The Local Study Area (LSA) was defined as the area within which the potential adverse effects of the Project would be assessed for each valued component. The local study area varied depending on the valued component and reflects the area where Project construction and operations are most likely to affect the valued component. The local study area is also referred to by the proponent as the “zone of influence.”

The proponent defined the Regional Study Area (RSA) for each valued component as the area where potential effects might overlap with the direct and indirect effects of other activities on that valued component, potentially causing cumulative effects.

The proponent also defined the Project’s Footprint Study Area as the area that would be directly disturbed by Project facilities and associated physical works and activities. It includes a 45-m-wide construction RoW, permanent and temporary access roads, camp and stockpile sites, valves and power lines, pump stations, tanks, and the Westridge Marine Terminal.

Key valued components for understanding potential interactions between the Project and Aboriginal Interests include traditional land and resource use (TLRU) and traditional marine resource use (TMRU). The local study area for TLRU encompassed and extended beyond the Project footprint to include the zones of influence of water quality and quantity, air emissions, acoustic environment, fish and fish habitat, wetlands, vegetation, wildlife and wildlife habitat and heritage resources as TLRU and TMRU are dependent on these resources. The TLRU LSA area included the area where there is a reasonable potential for localized Project-related effects to affect existing uses of the land for traditional purposes (e.g., trapping, hunting, fishing and gathering areas). The potential effects of the Project were assessed by the proponent in its Application, and subsequently by the NEB, within the Footprint and the TLRU LSA.

The RSA for TLRU VC includes the area where potential direct and indirect effects of other land uses and activities could overlap with Project-related effects and cause cumulative effects to TLRU indicators including subsistence activities and sites (e.g. hunting, trapping, fishing, plant gathering, trails and travel ways, and habitation sites); and cultural sites (e.g. gathering places and sacred areas).

The TLRU RSA includes the RSA boundaries defined for the water quality and quantity, air emissions, acoustic environment, fish and fish habitat, wetland loss or alteration, vegetation, wildlife and wildlife habitat and heritage resources VCs. As explained in Appendix 11 of the

NEB Report, in some cases, the focus of TLRU was on lands within a few hundred metres of the footprint, while in other cases broader territorial uses were identified extending several kilometres from the footprint. The proponent and subsequently the NEB assessed potential effects of the Project on TLRU within the RSA.

The proponent used a similar approach to define the area of assessment of Project effects to land and marine uses in the vicinity of the Westridge Marine Terminal. The spatial boundary encompassed and extended beyond the footprint of the Westridge Marine Terminal to include the zones of influence of air emissions, acoustic environment, marine fish and fish habitat, marine mammals and marine birds VCs. The land-based LSA includes the area where there is a reasonable potential for localized Project-related effects to impact lands and resources used for traditional purposes. The assessment of effects to TMRU within the LSA involved studying changes in marine access and use, sensory disturbances and alteration of subsistence resources within 500 m from the proposed water lease expansion. The RSA is defined as an area east of the First Narrows, including Indian Arm and Port Moody Arm of Burrard Inlet.

The effects to TMRU from Project-related marine shipping were assessed within the LSAs defined for assessing effects to marine fish and fish habitat, marine mammals and birds as TMRU is dependent on these resources. The RSA for TMRU encompassed a large portion of the Salish Sea.

2.2 Information Sources

This report draws on the NEB Report, the Project Application, and information provided by Aboriginal groups filed on the NEB Hearing record and during Crown consultations. Ethnohistoric information included: tribal council/association affiliations; language, governance, population, and socio-economic information; proximity of communities and traditional territories to Project-related activities; status of treaty negotiations in BC; history of land occupation; and traditional and contemporary resource use information of Aboriginal groups. Within BC, the Crown accessed BC government ethnohistoric research reports and consulted with regional consultation experts and other relevant provincial (BC) land and resource management staff. Sources are referenced in the appendices for each Aboriginal group, and any research reports have been shared with Aboriginal groups upon request.

The nature, extent and importance of traditional and cultural activities practiced in the Project vicinity are identified in the Project Application and by information provided by Aboriginal groups and filed on the NEB hearing record. These traditional and cultural activities rely on the availability, quality and access to ecosystems and natural resources, such as the land, rivers, fish and wildlife, and vegetation. This information, along with consultation with Aboriginal groups, have helped the Crown understand traditional and contemporary land, marine and resource uses and associated Aboriginal Interests related to the Project.

2.3 Consultation with Aboriginal Groups

The federal government's approach to consultation with Indigenous groups is to involve officials from all relevant federal departments and agencies. This approach arose from a 2007 Cabinet Directive and supporting Memorandum of Understanding established by the Major Project Deputy Ministers' Committee¹¹.

Pursuant to sub-section 4(1)(d) of CEAA 2012, one purpose of this Act is to promote communication and cooperation between the federal government and Aboriginal peoples. The CEAA 2012 also ensures that projects are considered in a careful and precautionary manner before federal authorities take a decision. The definition of environmental effects under Paragraph 5 of CEAA 2012 includes the effect to Aboriginal peoples of any change that the Project may cause on the environment to:

- Health and socio-economic conditions;
- Physical and cultural heritage;
- The current use of lands and resources for traditional purposes; or
- Any structure, site or thing that is of historical, archaeological, paleontological, or architectural significance.

In addition, CEAA 2012 enables the consideration of community knowledge and Aboriginal traditional knowledge into the EA process.

If approved, the Project would require federal (Table 6) and provincial permits and authorizations (Table 7).

With respect to potential authorizations under the *Indian Act*, as of July 2016, the proponent has commercial agreements or was negotiating with Bands to construct the Project across the following reserve lands: Lower Nicola Indian Band [Zoht #4; Zoht #5; Joeyaska Indian Reserve (IR) #2], Shxw'ōwhámél (Ohamil #1), Peters (IR #1; IR #1a), Popkum (IR #1; IR #2), Tzeachten (IR #13), and Matsqui (Main #2). The proponent would be seeking section 35 *Indian Act* tenures for the new pipeline from Lower Nicola, Peters and Popkum (amendments to the existing 1955 indenture to permit a second pipeline) whereas the following three Bands are operational under the *First Nations Land Management Act* (FNLMA) and have their own Land Codes in place: Shxw'ōwhámél, Tzeachten, and Matsqui. It is expected that Lower Nicola Indian Band will be operational under the FNLMA by December 2016. In addition, there are four temporary stockpile sites proposed on reserves, most likely requiring section 28 *Indian Act* tenures for the following Bands: Tk'emlúps te Secwépemc, Popkum, Lower Nicola and Enoch Cree.

¹¹ See the Federal Action Plan, and Interim Guidelines, 2007 including the [Cabinet Directive on Improving the Performance of the Regulatory System for Major Resource Projects](#) (the directive that established the MPMO Initiative, launched on October 1, 2007) and supporting Memorandum of Understanding

If approved, the following BC provincial agencies may be required to make permitting decisions (Table 7): BC Oil and Gas Commission (BC OGC), Ministry of Environment (BC Parks), Ministry of Transportation and Infrastructure (MOTI) and Ministry of Forests, Lands and Natural Resource Operations (FLNRO). Provincial agencies will seek to coordinate consultation on permit applications for the Project to the extent practicable, if the Project is approved.

Table 6 – Potential Federal Authorizations

Responsible Agency or Department	Permit	Legislation
Indigenous and Northern Affairs Canada ¹²	Permit under section 28	<i>Indian Act</i>
	Section 35 OIC Authorization	<i>Indian Act</i>
	Easement Agreement	<i>Federal Real Property and Federal Immovables Act</i>
Environment and Climate Change Canada	Section 127: Disposal at Sea Permit	Part 7 Division 3 of <i>Canadian Environmental Protection Act 1999</i> (CEPA 1999)
	Section 73 Permit	<i>Species at Risk Act</i>
	Authorization to work within Migratory Bird Sanctuary	Migratory Birds Sanctuary Regulations
Fisheries and Oceans Canada	Section 35(2): Serious Harm to Fish Authorization	<i>Fisheries Act</i>
	Section 73 (SARA): Listed Fish Species Permit	<i>Fisheries Act</i>
Industry Canada	Radio License	<i>Radio Communication Act</i>
National Energy Board	Request for Work Approval	NEB Act and <i>Canada Oil and Gas Operations Act</i> <i>Navigable Waters Protection Act</i>
Natural Resources Canada	Ammonium Nitrate Fuel Oil Permit	<i>Explosives Act</i> (Explosive Regulation, 2013)
	Temporary Blaster's License or Blaster's Permit	<i>Explosives Act</i> (explosive regulation, 2013)
	Temporary Magazine License	<i>Explosives Act</i> (explosive regulation, 2013)
Parks Canada	Special Activity Permits	<i>Canada National Parks Act</i>
Transport Canada	Aeronautics Obstruction Clearance (if required during construction)	<i>Aeronautics Act</i> , Canadian Aviation Regulations (dependent upon construction methods chosen and not for the work, only the 'activity', i.e. construction, not structure)
Vancouver Fraser Port Authority	Project Permit (WMT)	Vancouver Fraser Port Authority Letters Patent Port Authority Operations Regulations <i>Canada Marine Act</i>
	Building Permit (WMT)	Vancouver Fraser Port Authority Letters Patent Port Authority Operations Regulations <i>Canada Marine Act</i>

¹² For First Nations operating under the *First Nations Land Management Act* (FNLMA), no *Indian Act* authorization or permits are required. These First Nations make decisions under their own land codes and, if required, community approval processes. The Minister of Indigenous and Northern Affairs does not have a review or decision-making role regarding the reserve lands of First Nations under the FNLMA, as these authorities are now held by operational First Nations.

Table 7 – Potential Provincial Authorizations

Responsible Agency or Department	Permit	Legislation
BC Oil and Gas Commission	Cutting permits under section 47.4 and section 117 to harvest Crown timber	<i>Forest Act</i>
	Temporary occupation of Crown land along the pipeline RoW for camps, access, workspaces, etc. Road Use permits Quarry Permit/Soil Removal Permit, Quarry License of Occupation, and Borrow Pit Permit	<i>Land Act</i>
	Section 10: Use approvals (short-term use of water) Section 11: Changes in and about a stream	<i>Water Sustainability Act</i>
BC Ministry of Environment – BC Parks	Park use permit applications	<i>Park Act</i>
BC Ministry of Transportation and Infrastructure	Section 62 : <ul style="list-style-type: none"> • Lane Closures / Traffic Control • Clearing and Grubbing • Revegetation • Blasting • Survey / Exploratory Work • Burning • Pipeline Crossing Ministry Road RoW • Substation, Camp, etc. • Power Lines within the Ministry RoW • Any work on Ministry RoW Section 12 (Provincial Public Undertaking Reg. 4/2010): <ul style="list-style-type: none"> • Structures within a setback of 4.5 m outside of the Ministry RoW 	<i>Transportation Act</i>
	Section 5 of <i>Industrial Road Act</i> and sections 49 and 62 <i>Transportation Act</i> . <ul style="list-style-type: none"> • Access to Highway • Access / Road Construction within Ministry RoW 	<i>Industrial Road Act & Transportation Act</i>
	Section 8: <ul style="list-style-type: none"> • Commercial vehicle • Oversize vehicles 	<i>Commercial Transportation Act</i>
BC Ministry of Forests, Lands and Natural Resource Operations	Dike Maintenance Application Approval	<i>Dike Maintenance Act</i>
	Works Permit Forest Service Road Junction Permit	<i>Forest Act</i>
	Section 16: Forest Recreation Usage	Forest Recreation Regulation

Responsible Agency or Department	Permit	Legislation
BC Ministry of Forests, Lands and Natural Resource Operations (continued)	Section 12: Heritage Alteration Permit Heritage Inspection Permit – Clearance	<i>Heritage Conservation Act</i>
	Old Growth Management Area Boundary Adjustment Approval	<i>Land Act</i>
	Burning Registration Number	<i>Wildfire Act</i>
	Section 19: General permit, Animal care permit <i>Wildlife Act</i> Exemption Permits Section 40: Temporary Closure to Hunting, Trapping or Guide Outfitting	<i>Wildlife Act</i>
Alberta Culture and Tourism	<i>Historical Resources Act</i> clearance	<i>Historical Resource Act</i>
Alberta Environment and Parks (AEP)	Public Land Agreement (Pipeline Land Agreement) on Crown land	<i>Public Lands Act</i>
	Fish Research License for fish rescue at isolated crossings	<i>Alberta Fisheries Act</i>
	Temporary Field Authorization for access roads on Crown land	<i>Public Lands Act</i>
	Wildlife damage permits for beaver, lodge and beaver dam removal	<i>Wildlife Act</i>
	Research and Collection Permit	<i>Wildlife Act</i>
	<i>Water Act</i> approval for construction within a water body	<i>Water Act</i>
	Notification under the Code of Practice for Watercourse Crossings	<i>Water Act</i>
	Notification under the Code of Practice for Pipelines and Telecommunication Lines Crossing a Water Body	<i>Water Act</i>
	Notification under the Code of Practice for the Temporary Diversion of water for Hydrostatic Testing of Pipelines	<i>Water Act</i>
	Registration under the Code of Practice for the Release of Hydrostatic Test Water from Hydrostatic Testing of Petroleum Liquid and Gas Pipelines	<i>Environmental Protection and Enhancement Act</i>
Alberta Energy Regulator (AER)	Environmental Field Report for Pipeline License or Approval	<i>Alberta Public Lands Act</i>
Alberta Transportation	Roadside Development Permit	<i>Highways Development and Protection Act</i>
	Several other items (e.g., dangerous goods, overweight permit)	

2.3.1 PRINCIPLES INVOLVED IN ESTABLISHING DEPTH OF DUTY TO CONSULT AND IDENTIFYING EXTENT OF ACCOMMODATION

A constitutional duty to consult arises when the following three requirements are present:

- The Crown has actual or constructive knowledge of an Aboriginal Interest;
- The Crown contemplates conduct, including a statutory decision; and
- That conduct or decision may have an adverse impact on the Aboriginal Interest.¹³

In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, the Supreme Court of Canada established that the Crown is required to consult with Aboriginal groups on Crown-authorized activities that might adversely affect the exercise of Aboriginal Interests, and that the extent or level of the consultation is proportionate to preliminary assessments of the following factors:

- Strength of the case for any claimed Aboriginal rights, including title, that may be adversely affected; and
- Seriousness of potential impact of contemplated Crown action or activity to adversely impact Aboriginal Interests.

In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, the Supreme Court of Canada also applied this consultation framework to treaty rights, where a Crown-authorized activity may adversely affect a treaty right. The continued application of this framework to treaty rights was confirmed in *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48. The Crown also has a consultation obligation in relation to potential impacts on other proven or established Aboriginal rights or title.

The extent or level of the Crown's obligation to consult is described in the *Haida* case as lying on a spectrum from notification to deep consultation. The stronger the case for supporting any claimed Aboriginal right, and the greater the potential of impact on an Aboriginal Interest, the deeper the level of consultation that may be required.

Factors that may indicate a low or notification level of consultation include:

- Little or no indication of any historical or current use of area by the Aboriginal group; or
- Proposed Crown action or activity is anticipated to result in minimal to no impact on the land or resources, i.e. potential for adverse impacts on Aboriginal Interests is minor or unlikely.

Conversely, factors that may indicate a deeper level of consultation include:

- Many indications of historical and current use of area by the Aboriginal group; and

¹³ Ref: *Hamlet of Clyde River et. al. v. TGS-NOPEC Geophysical Co. ASA (TGS)*, [2015] F.C.J. No. 991 (FCA) at para. 37 ("Clyde River"); *Haida* at para. 35; *Behn v. Moulton Contracting Ltd.*, [2013] 2 S.C.R. 22 (S.C.C.) at para. 29. Rio Tinto at para. 51

- Proposed Crown action or activity is anticipated to result in a moderate to severe impact on the land or resources and corresponding Aboriginal Interests.

Crown consultation must be carried out in good faith and, where appropriate, may lead to a duty to accommodate. While there is no duty on the government or on the Aboriginal group to reach agreement, the Crown is required to afford the Aboriginal group consultation that is meaningful (i.e. provides opportunities for Aboriginal groups to learn about the Project, have their interests heard, understood and responded to or accommodated as appropriate).

Aboriginal groups should not frustrate the Crown's reasonable, good faith attempts to consult; consider information provided by government, regulatory agencies or the proponent; express their interests and concerns; and consult in good faith.

Initial Depth of Consultation

Based on the application of the above principles, and the initial scope of consultation described above, the federal Crown conducted initial depth of consultation assessments for each Aboriginal group potentially impacted by the Project. Initial depth of consultation assessments were conducted by the MPMO in collaboration with other federal departments based on preliminary strength of claim information, and consideration of an Aboriginal group's proximity to and use of lands and resources in the spatial study areas used for the assessment of the effects of the Project. On May 27, 2015, the Crown filed its preliminary depth of consultation on the NEB hearing record.¹⁴

The NEB and Crown reviewed and refined the depth of consultation assessments throughout the NEB Review and Crown consultation processes, based on the following:

- Information contained in the proponent's Project Application;
- Information provided by Aboriginal groups regarding their views of how their Aboriginal Interests might be adversely impacted by the Project;
- Input received from Aboriginal groups on the Crown's methodology for assessing the seriousness of potential adverse impacts of the Project, including specific criteria and thresholds the Crown should consider;
- Aboriginal group comments received on draft conditions issued by the NEB in respect of the Project;
- Conclusions and recommendations of the NEB in respect of any residual effects of the Project and required regulatory conditions; and
- Consultation with Aboriginal groups regarding potentially outstanding issues, including recommendations for additional accommodation, as appropriate

¹⁴ NRCan's Written Evidence May 27, 2015 – Filing [A70313](#)

Preliminary Understanding of Impacts

The Crown's preliminary understanding of potential adverse Project impacts on Aboriginal Interests and other interests is presented in Section 4.3 of this report, along with consideration of how these potential impacts and interests have been considered in the proponent's Application, the NEB hearing, the NEB Report and the Crown consultation process.

2.3.2 PRELIMINARY STRENGTH OF CLAIM

The regulatory review is not a rights determining process in relation to asserted Aboriginal rights or title. Instead, an objective of the consultation process is to identify potential adverse effects of the Project on Aboriginal Interests and explore measures to avoid, mitigate or otherwise appropriately address such effects. The initial assessment of strength of claims of Aboriginal Interests is specific to the areas that are in proximity to the Project and does not apply to other parts of the asserted traditional territories.

Strength of claims are determined based on information currently available to government, and are subject to change should case law change or additional information become available, including any information that may be provided during consultation. In considering Aboriginal rights claims, information relating to activities, practices, traditions, or customs integral to the distinctive culture at the time of contact by Europeans was considered. In considering Aboriginal title claims, information regarding sufficient and exclusive occupation at 1846 was considered.

The Crown recognizes different perspectives on the scope and nature of Aboriginal rights, and that any discussions of such matters must be sensitive to perspectives of Aboriginal groups on the meaning of their rights, either asserted or negotiated.

To ensure that all potentially affected Aboriginal groups were engaged in consultation, the federal Crown initially focused its consultation efforts at the *Indian Act* Band level, or with organizations representing Métis communities either independently or as part of an umbrella organization or society.

During consultation on the Project, many individual First Nation Bands identified to the Crown their view of collectively held Aboriginal rights and title interests, and indicated a preference to be consulted in that manner. As a result, the Crown consulted at a variety of different levels, including with individual First Nation communities, with nations asserting collectively held rights and title interests, with Treaty First Nations, and with a variety of Métis communities and societies.

2.3.3 ASSESSING POTENTIAL IMPACTS ON ABORIGINAL INTERESTS

The analytical framework for assessing the seriousness of impacts on Aboriginal Interests is not the same as the significance test for environmental, socio-economic or other effects. However, in many instances, information regarding potential biophysical and/or socio-economic effects from a project or activity, and in particular effects to traditional land and marine resource uses, will be relevant to an assessment of adverse impacts on Aboriginal Interests.

The Crown recognizes that adverse Project impacts on Aboriginal Interests may not arise solely from changes to the biophysical environment. Aboriginal Interests are also understood as traditional practices related to hunting, trapping, gathering, fishing and marine harvesting, but rights may not be limited to these practices.

With respect to the assessment of the seriousness of adverse Project impacts on Aboriginal Interests for the Project, the Crown considers the following types of information where available:

- The location of the area understood to be the Aboriginal group's area of traditional use;
- Past, present, and anticipated future Aboriginal uses of the Project area and its surroundings, including the frequency and timing of such uses by each Aboriginal group;
- The baseline conditions of valued component's associated with the exercise of Aboriginal Interests, incorporating consideration of other activities or development in the local or regional area that may contribute to the current condition of the valued components;
- The context within which the rights are exercised, such as the relative importance of the Project area and its surroundings to the exercise of each group's Aboriginal Interests, including any special characteristics or unique features of that area;
- The relative availability of other areas in reasonable proximity, within the traditional territory of each Aboriginal group where the meaningful exercise of Aboriginal Interests could reasonably occur;
- Any residual impacts of the Project and cumulative effects to VCs associated with the exercise of Aboriginal Interests (informed by the NEB Report) including consideration of the magnitude¹⁵ and direction of change, geographic extent¹⁶, duration¹⁷ and frequency of change, reversibility¹⁸ of the change and probability of occurrence¹⁹;
- The extent to which the Project could affect each Aboriginal groups' access to, and use of, the Project area to exercise Aboriginal Interests; and
- Measures proposed to mitigate adverse effects to corresponding Aboriginal Interests.

¹⁵ NEB definition of high magnitude: "effect would affect numerous individuals or affect the resource or parties involved in a substantial manner; is beyond environmental, regulatory or social standards or tolerance; and would impact quality of life, result in lasting stress and is generally not accepted by society."

¹⁶ NEB definitions for geographic extent criteria provided for project footprint (e.g. width of RoW), LSA, RSA for receptor being considered.

¹⁷ NEB definitions for temporal extent criteria provided for short-term (weeks-months), medium-term (months-years), long-term (years-decades).

¹⁸ NEB definitions for reversibility criteria are either: 1) reversible to baseline within the life of the Project; or 2) decades, generations or permanent

¹⁹ Ultimately, the Crown's assessment of the level of seriousness of a potential impact on Aboriginal Interests considers likely adverse residual effects (whether deemed significant or not by the NEB) that could cause a change to the practice of a right.

In considering potential impacts of Project-related activities on Aboriginal harvesting rights claims, the Crown has considered the following three components of Aboriginal rights:

- **Biophysical factors:** Consideration of potential effects to biophysical factors important for, or associated with, the exercise of an Aboriginal harvesting right. This can include consideration of VCs relevant to the exercise of the right, the residual and cumulative effects analysis of those VCs, the species harvested by the Aboriginal group, relevant mitigation measures, and the efficacy of such mitigation measures;
- **Specific sites or areas:** Consideration of potential effects to specific sites or areas of importance for traditional use, or sites or areas where the rights are exercised. This can include consideration of whether there are any traditional land or marine use sites identified overlapping or in proximity to the project area, the number of sites to the project, effects to the access to such sites, and effects to frequency or timing to access such sites, increased public access, relevant mitigation measures, and the efficacy of such mitigation measures; and
- **Social, cultural, spiritual, experiential factors:** Consideration of potential effects to social, cultural, spiritual and experiential aspects of the exercise of the right. This can include potential effects of the project on the experience of exercising rights in the area, effects to community health, on socio-cultural institutions, teaching and knowledge transfer, ceremonial/spiritual practices associated with the right, and the relative importance of the project area to the exercise of right.

In considering potential impacts of Project-related activities on Aboriginal title claims, the Crown has considered the following three components of Aboriginal title:

- **Use and occupation:** Consideration of potential alienation of an area, the degree of potential disturbance or functional effect of the potential disturbance associated with the Project, how the proposed decision might restrict community members' access to the area, and how the proposed decision might affect community members' enjoyment, experience, and use of the area, now and in the future;
- **Decision-making:** Consideration of whether the proposed decision would result in a new tenure or transfer of ownership to the area, the extent to which an Aboriginal community might be involved in the decision-making process, and whether the activity might be consistent/inconsistent with any cultural/other objectives of the Aboriginal group for management in this area, now and in the future; and
- **Economic benefits:** consideration of whether the Project-related decision might affect a community's ability to derive direct and/or indirect economic benefits from the area, and how the proposed decision might affect a community's economic development aspirations for the area, now and in the future.

A final consideration in assessing the seriousness of potential impacts on Aboriginal Interests is the overall level of confidence in the assessment, as limitations may arise from a lack of information relating to baseline conditions, lack of knowledge of cause and effect relationships,

lack of scientific certainty in the review of Project specific data, or the degree of subjectivity or professional opinion applied.

Impacts on Aboriginal Interests are assessed for each individual Aboriginal group and for each category of rights. These impacts are described based on the level of seriousness of potential impacts from negligible to serious, defined as follows:

- Negligible impact – no detectable impact or any change from current conditions;
- Minor impact – ability to exercise the right is minimally disrupted;
- Moderate impact – ability to exercise the right has been diminished or disrupted; and
- Serious impact – ability to exercise the right has been significantly diminished.

In some instances the Crown has used hyphenated levels of impacts (e.g. minor-to-moderate), which indicate that the impacts fall between the two categories. When reporting on impacts for any one Aboriginal group, we acknowledge that the impacts on the group always vary in time and space. That is, impacts on Aboriginal Interests in one area of a group's territory are not the same as elsewhere, and impacts during construction are not the same as during operations. The impact assessment reported for each group is the greatest expected impact on the Aboriginal Interest as a result of routine Project construction and operations.

Impact statements for each Aboriginal group are included in Appendices A-E.

2.4 Asserted or Established Aboriginal Rights and Treaty Rights

The following sections of this report explain how information on the nature and scope of Aboriginal Interests have been considered and used to inform the consultation process to date.

2.4.1 TREATIES

In understanding the scope and nature of the rights and obligations under historic or modern treaties, the Crown is guided by the text of the treaty, as well as the understandings and intentions of the Aboriginal groups and Crown participants to the making of the treaty or subsequent adhesions, following rules of treaty interpretation articulated by the Supreme Court of Canada.

Modern Treaty Nations

Tsawwassen First Nation

The Tsawwassen Final Agreement is a treaty within the meaning of section 35 of the *Constitution Act, 1982*, entered into with BC and Canada and came into effect on April 3, 2009. This treaty sets out requirements for Canada and BC to consult with Tsawwassen, including providing the opportunity to participate in an environmental assessment process.

Maa-nulth First Nations

Subject to the Maa-nulth First Nations Final Agreement, this is a treaty within the meaning of section 35 of the *Constitution Act, 1982*, entered into with BC and Canada and came into effect on April 1, 2011. This treaty sets out that each of the Maa-nulth First Nations has the right to harvest fish and aquatic plants, for food, social and ceremonial purposes, in the Maa-nulth Domestic Fishing Areas, the southern portion of which is in close proximity to the established marine shipping lanes to be used by Project-related tankers and other shipping vessels. The Maa-nulth First Nations and BC entered into a Reasonable Opportunity Agreement on May 22, 2014, setting out a process through which the parties would fulfill the treaty provisions that relate to ensuring that Maa-nulth First Nations are not denied a reasonable opportunity to harvest fish and aquatic plants by any authorizations made by BC. Maa-nulth First Nations also have the right to harvest Wildlife for Domestic Purposes in the Wildlife Harvest Area and the right to harvest Migratory Birds for Domestic Purposes in the Migratory Bird Harvest Area. The southern portion of the Wildlife Harvest Area and the Migratory Bird Harvest Area are also in proximity to portions of the marine shipping lanes. Although not a component of the treaty, the Maa-nulth First Nations hold commercial fishing licences in accordance with a Harvest Agreement.

Historic Treaty First Nations

For the historic treaties, the Crown understands that the parties created mutually binding obligations, and that section 35 of the *Constitution Act, 1982* recognizes and affirms these existing treaty rights. For the parties to it, the Crown understands that the treaties had the effect of exchanging all undefined Aboriginal rights in or to the lands described, both surface and subsurface, for the defined rights in the treaty.

Specifically, with respect to Treaty 6, Treaty 7 and Treaty 8, in exchange for a surrender of “all rights, titles and privileges whatsoever, to the lands” and other promises, the Crown agreed, among other things, to set aside land as reserves, to provide both one-time and annuity payments, and to allow the First Nations to pursue their “usual vocations of hunting, trapping and fishing” subject both to the geographical limitations with respect to lands “required or taken up from time to time for settlement, mining, lumbering, trading or other purposes” and to reasonable government regulation.

Similarly with Douglas Treaties, First Nation signatories agreed to “surrender entirely and for ever” a geographic area described, and the Crown agreed, among other things, to set aside their villages and enclosed fields and agreed that the First Nations would be “at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.”

The Crown also understands that in Alberta, the treaty rights were modified following the conclusion of the *Natural Resource Transfer Agreements*, restricting the hunting, trapping and fishing rights for the purpose of food. Some Aboriginal groups have noted that the Natural Resource Transfer Agreements were not part of their treaty negotiations.

In addition, treaty harvesting rights include those activities reasonably incidental to the right itself, including harvesting activities undertaken for spiritual and cultural purposes.

A number of Aboriginal groups hold different understandings of what was agreed to in these treaties and have informed the Crown of this during consultation.

The historical and cultural context in which the treaties were made is relevant to their interpretation, and the rights and obligations of the parties to it. That context includes reports submitted to the Superintendent General of Indian Affairs which cite assurances given that the treaties would not lead to any “forced interference with mode of life” and that “the same means of earning a livelihood would continue after the treaty as existed before it.” The Crown views these aspects as being consonant with the terms of historic treaties insofar as the mode of life and livelihood referred to in the report were the hunting, trapping and fishing activities protected by the treaty.

As stated by the Supreme Court of Canada in *Mikisew* (SCC, 2005), and reaffirmed in *Grassy Narrows* (SCC, 2014)²⁰, the Crown’s right to take up lands under historic treaties, such as Treaty 6, Treaty 7 and Treaty 8, is not absolute, and is subject to the duty to consult and, if appropriate, accommodate the treaty First Nations’ interests before reducing the area over which their members may continue to pursue their treaty harvesting rights. Although all Treaty 6, Treaty 7 and Treaty 8 First Nations are entitled to engage in hunting, fishing and trapping activities within the whole of their treaty area, where a treaty First Nation no longer has a meaningful right to hunt, trap, or fish in relation to the territory over which it has traditionally hunted, trapped, or fished, this would result in a treaty infringement.

When intending to take up lands, the Crown must exercise its powers in accordance with the Crown obligations owed to the Treaty First Nations, which includes:

- Being informed of the potential impact of the Project on the exercise of the rights to hunt, trap and fish;
- Communicating such findings to the First Nations; and
- Engaging with these First Nations in good faith, and with the intention of substantially addressing their concerns.

The extent or scope of the duty to consult and accommodate required with a treaty First Nation depends on the seriousness of potential impacts on that First Nation, as discussed in the following sections of this report.

Adherents to Treaty 6, Treaty 7 and Treaty 8 have rights to hunt, trap and fish throughout their entire treaty area, and adherents to the Douglas Treaty have rights to hunt and fish within their traditional territories. Land use information and other evidence filed with the NEB was reviewed to understand interactions between the Project and First Nations’ traditional use areas including

²⁰ *Mikisew* para. 56 and *Grassy Narrows* paras. 50-3.

areas used for spiritual and cultural purposes. Where a First Nation appeared to principally exercise treaty harvesting rights distant from the area to be directly impacted by the Project, the Crown determined that it was appropriate to engage with these First Nations at the lower end of the consultation spectrum.

The Crown approached consultation at the higher end of the consultation spectrum where there was clear evidence of potential Project interactions with the exercise of treaty harvesting and other traditional and cultural use rights. See Section 4 and Appendix A and Appendix D for further analysis of the potential impacts of the Project on the Alberta Treaty First Nations' rights and other interests, and the Douglas Treaty First Nations' rights and other interests, respectively.

2.4.2 ABORIGINAL RIGHTS, INCLUDING TITLE

Approach to Consultation with Non-Treaty First Nations

Non-treaty First Nations have asserted or established Aboriginal rights, including title, within their asserted traditional territories. The Crown's approach to understanding the nature of Aboriginal Interests with non-treaty First Nations is described in Section 2.4.2. Information on the unique nature and scope of each First Nations' asserted or established Aboriginal rights and title interests are provided in the group-specific appendix for each of these First Nations (Appendices B, C and D of this report).

Approach to Consultation with Métis Nations

Métis are Aboriginal peoples of Canada, such that section 35 of the *Constitution Act, 1982* protects the customs, practices and traditions that were historically important features of Métis communities, who emerged subsequent to European "contact" and prior to the exercise of "effective control" by the European settlers. For Métis to be able to exercise Aboriginal rights, they must be able to demonstrate they are members of a modern Métis community that has ancestral linkages to an historic rights bearing Métis community. The test for establishing Métis Aboriginal rights was set out by the Supreme Court of Canada decision in *R. v. Powley [2003] 2 S.C.R.*

In 2004, the Métis Nation of Alberta signed an Interim Métis Harvesting Agreement with the government of Alberta. In 2007, this agreement was replaced with the "Métis Harvesting in Alberta Policy" (updated in 2010), further outlining the criteria supported by the 2003 Supreme Court of Canada *Powley* decision. The policy recognizes eight Métis Settlements and seventeen historic and contemporary communities for the purposes of Métis harvesting. Alberta Métis have the right to harvest for food through hunting, trapping, and fishing throughout the year within the community harvesting area (160 km surrounding the settlement or community) unless there is activity or development on the lands that would make harvesting unsafe or there is a closure for conservation reasons. Alberta Métis can also harvest on private lands with permission from owners or occupants.

At this time, the province of Alberta is prepared to consider, for the purposes of Métis harvesting, eight Métis Settlements and the following 17 communities as both historic and contemporary Métis communities: Fort Chipewyan, Fort McKay, Fort Vermilion, Peace River, Cadotte Lake, Grouard, Wabasca, Trout Lake, Conklin, Lac La Biche, Smoky Lake, St. Paul, Bonnyville, Wolf Lake, Cold Lake, Lac Ste. Anne and Slave Lake.

No Métis rights-bearing community in BC has been recognized by a court. In *R v. Willison, 2006 BCSC 985*, the BC Supreme Court was unable to conclude there was an historic Métis community in existence along the fur brigade trail in the southern part of the province. There has not been a judicial determination regarding the existence of a Métis community in northern BC.

There were three Métis groups in BC included in consultation on the Project: Métis Nation BC, BC Métis Federation and the Kelly Lake Métis Settlement Society. The province of BC does not recognize a legal obligation to consult with Métis people as it is of the view that no Métis community is capable of successfully asserting site-specific section 35 rights in BC.

On April 14, 2016 the Supreme Court of Canada, in the Daniels decision, declared that Métis and non-Status Indians are “Indians” for the purpose of federal Parliament’s law-making jurisdiction under sub-section 91(24) of the *Constitution Act, 1867*. The Government of Canada’s position is that not all Canadians who self-identify as Métis are section 35 rights-holders and thus there is a distinction between Métis self-identification and Métis Aboriginal rights. The 2003 Supreme Court of Canada decision in *R. v. Powley* provides the test needed to prove Métis Aboriginal rights, and Métis self-identification is only one component of a broader objectively verifiable process that is required in order to meet the Powley test.

Other Aboriginal peoples (Aboriginal groups) for which a legal duty to consult was not recognized for the purposes of the Project

Please see Appendix 9 of the NEB Report for a list of Aboriginal groups and organizations engaged by the proponent in respect of the Project, for which the Crown did not identify a legal duty to consult.

3. SUMMARY OF CONSULTATION ACTIVITIES

The following sections discuss the procedural elements and chronology of Aboriginal consultations and engagement activities undertaken by the proponent, the NEB, and the Crown.

3.1 Proponent's Engagement Process

In 2011, the proponent began to identify Aboriginal groups potentially impacted by the Project. Before it submitted its Project Application to the NEB, the proponent worked with the federal and provincial governments to develop its initial scope of Aboriginal engagement. The proponent's list included 105 Aboriginal groups, including Aboriginal communities, associations, councils, and tribes and two non-land based Métis groups in BC. As of July 2016, the proponent's engagement list has grown to 133 Aboriginal groups.

In May 2012, the proponent sent letters to Aboriginal groups identified as potentially impacted by the Project. These letters introduced the Project, announced the start of the 18 to 24 month pre-Application phase of the Project, and outlined the anticipated project review schedule and routing. These letters invited Aboriginal groups to share any information related to land or resource use that could potentially be impacted by the Project as well as any other issues and concerns. Of the groups, the proponent identified a sub-set that was not directly in the area of the proposed expansion. For these groups, the proponent's May 2012 correspondence served as a notification letter. Meanwhile, the proponent determined that 62 Aboriginal groups required a deeper level of engagement: the proponent invited these groups to be involved in early project planning and scoping and indicated it would provide funding to these groups so support their involvement.

The proponent engaged with potentially affected Aboriginal groups through its Aboriginal Engagement Program. The proponent provided approximately \$12 million of capacity funding to the potentially affected groups who accepted this offer, as well as funding to conduct TLRU and TMRU studies. Some Aboriginal groups did not accept the proponent's offer for funding.

The proponent has indicated that engagement consisted of one-on-one meetings, community-wide discussions, project newsletters, phone conversations, information sessions, and other forms of correspondence. The proponent also negotiated group and community-specific protocols to guide engagement efforts.

According to the proponent, it collaborated with potentially impacted Aboriginal groups to identify and support economic development opportunities resulting from the Project. As of November 2016, the Crown was aware that 33 potentially affected Aboriginal groups have signed a confidential mutual benefit agreement (MBA), including a letter of support, with the proponent (see Table 12 in Section 4).

Should the GiC approve the Project, the NEB conditions would require the proponent to conduct further engagement with potentially affected Aboriginal groups. The proponent has committed to engaging Aboriginal groups throughout the construction and operation of the Project. If approved by the two responsible BC Ministers, EAO's proposed environmental assessment certificate conditions would also require additional engagement by the proponent with Aboriginal groups. In addition to complying with NEB and EAO conditions, the proponent has indicated that it would continue to engage with groups through the regulatory processes, Project newsletters and updates, ongoing meetings and correspondence.

More detailed information regarding the engagement undertaken by the proponent is provided in its Application (Volume 3B), its consultation updates filed on the NEB evidentiary record, its December 2015 Final Written Argument submitted to the NEB, its Reply Argument filed in February 2016, the *NEB Recommendation Report*, and in the supplemental Aboriginal Engagement Report submitted to the EAO.²¹ The interests and concerns raised by Aboriginal groups during the proponent's engagement process are discussed in Volume 3B, Section 1.5.1 of the Application; updates to the list of interests and concerns raised are provided in subsequent consultation updates. Details relating to the TLRU, TMRU, and cultural use studies conducted by Aboriginal groups are discussed in Volumes 5 and 8 of the proponent's [Application](#), found on the NEB's hearing website for the Project.

3.1.1 TERMPOL ENGAGEMENT

The Technical Review Process of Marine Terminal Systems and Transshipment Sites (TERMPOL) is a voluntary review process, in which proponents involved in building and operating a marine terminal system for bulk handling of oil, chemicals and liquefied gases can participate. No approvals or permits are issued as a result of the TERMPOL review. Through this process, a proponent works with a TERMPOL Review Committee (TRC) chaired by Transport Canada, which provides a report on the proponent's TERMPOL submission with findings and recommendations.

TERMPOL reviews focus on the marine transportation components of a project (i.e., when a tanker enters Canadian waters, navigates through channels, approaches the berth at a marine terminal, and loads or unloads oil or gas) with the intent to improve where possible those elements of a proposal which could in certain circumstances threaten the integrity of a vessel's hull while navigating and/or during cargo transfer operations alongside the terminal.

The TRC for the Project consisted of representatives from federal departments and authorities with expertise and/or responsibilities relevant to the Project and included Transport Canada, Fisheries and Oceans Canada (including the Canadian Coast Guard and Canadian Hydrographic Service), ECCC, Pacific Pilotage Authority, and Port of Vancouver. The BC Coast Pilots Ltd. and United States (US) Coast Guard also provided comments and input.

²¹ http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_document_459_40921.html

The TERMPOL review of the marine shipping component of the Project was carried out from December 2013 to December 2014. As part of the Project review process for marine shipping, the TRC recommended that the proponent engage marine users, including Aboriginal groups, to:

- Provide sufficient information about the Project to enable participants' understanding of the Project;
- Listen to concerns raised by Aboriginal groups and, where possible, address these concerns;
- Provide Aboriginal groups an opportunity to review and comment on the draft surveys and studies of interest, and consider Aboriginal groups' comments;
- Document its efforts to engage Aboriginal groups, including: a written communication log, a summary of issues raised, how the proponent has addressed concerns (as applicable), and a description of outstanding issues;
- Provide Aboriginal groups an opportunity to review and validate the summary of issues raised; and
- Provide Transport Canada with a copy of the documentation above.

In December 2013, Transport Canada sent a letter to 30 Aboriginal groups with traditional territories along the Project's shipping route, providing information on the TERMPOL review process and advising that the TRC had recommended that the proponent engage Aboriginal groups on TERMPOL surveys and studies to incorporate relevant local and traditional knowledge that could enhance the proponent's technical assessment of marine safety. Transport Canada also participated in proponent-led workshops for Aboriginal groups to explain the TERMPOL process, and in December 2014 provided technical briefings on the TERMPOL report findings and recommendations to interested Aboriginal groups. Part 3 of the proponent's Technical Update #3 provides information on the proponent's Aboriginal Engagement Program specific to TERMPOL-related engagement between August 1, 2013 and July 31, 2014. Starting in August 2013, the proponent engaged Aboriginal groups on the type of information and research being undertaken to develop TERMPOL studies. Aboriginal groups expressed interest in the timing, content of studies and process for shaping the TERMPOL studies, and participating in the review process.

On November 13, 2013, the proponent sent a letter to Aboriginal groups to notify them of the availability of the TERMPOL studies for review. Through this letter, the proponent:

- Affirmed that the TERMPOL application and studies would be submitted to Transport Canada in December 2014;
- Committed to distribute the studies to Aboriginal groups that requested copies; and
- Stated a need for advice and feedback to Trans Mountain on the TERMPOL reports within two to three months.

On December 16, 2013 and January 27, 2014 the proponent sent letters to the Aboriginal groups who requested copies of TERMPOL studies. Following the distribution of the letters and studies, the proponent followed up with Aboriginal groups who requested the studies to discuss:

- Participating in a TERMPOL workshop;
- Providing of a written response to Trans Mountain;
- Initiating of a third party review; and/or
- Allocating of capacity funding for the third party review.

Trans Mountain received three formal responses to the TERMPOL studies and conducted three TERMPOL workshops with seven Aboriginal groups. Formal responses were provided to questions raised by Aboriginal groups and information and the proponent used feedback received from Aboriginal groups in its December 2014 filing with Transport Canada.

The results of the TERMPOL review were provided to the NEB in support of its review of the Project.

3.2 National Energy Board Engagement

Prior to its public hearing, the NEB carried out a program of early Aboriginal engagement, consisting of correspondence in August 2013 to 129 potentially interested Aboriginal groups and organizations introducing the Project and the associated regulatory review. This correspondence also included a letter from the MPMO introducing the federal government's proposed approach to Crown consultation for the Project. Between November 2013 and February 2014, NEB staff presented information in person at nine community meetings attended by 22 different Aboriginal groups and organizations.

As discussed in Section 1.3.1, the NEB determined that the Project would be subject to an integrated regulatory review and environmental assessment. Three NEB Board members were appointed to the NEB Panel to conduct the regulatory hearing pursuant to the NEB Act and procedural orders, as well as to serve as the responsible authority for the EA conducted pursuant to the CEAA 2012. The NEB Chair assigned the NEB Panel members on November 28, 2013.

On July 29, 2013, the NEB determined the List of Issues it would consider during the hearing process, which included the potential impacts of the Project on Aboriginal Interests.

The NEB Review started in April 2014 and was subject to a legislated time limit of 15 months; however, on August 12, 2014, the clock on this time limited stopped for a seven month excluded period. On Sept.18, 2015 it stopped again for four months.

Commentors and intervenors in the hearing had an opportunity to express their concerns regarding potential adverse impacts of the Project. For Aboriginal groups, this included impacts on their Aboriginal Interests. The NEB Panel's responsibility included consideration of evidence provided on these potential adverse impacts, including evidence provided by the proponent.

Based on the public reporting of all non-confidential evidence, the Crown was able to track concerns raised by Aboriginal groups along with avoidance, mitigation and accommodation measures proposed by the proponent and recommended by the NEB.

The NEB hearing provided opportunities for Aboriginal group intervenors to give oral traditional evidence (OTE), written evidence, submit information requests, file motions, and submit a final written summary argument and oral summary argument, including comments on draft NEB conditions. Crown officials were present during the majority of OTE hearings and all final oral summary arguments.

In total, 83 Aboriginal groups on the Crown consultation list participated in the NEB hearing, either individually or as part of a collective.

3.3 Federal Government Consultation

As noted above, the MPMO coordinated federal departments' participation in the NEB Review, as well as the Crown consultation process. The federal departments and agencies who provided expertise and advice during the NEB Review and Crown consultations were: Fisheries and Oceans Canada, Canadian Coast Guard, Transport Canada, Natural Resources Canada, ECCC, Health Canada, Parks Canada Agency, Indigenous and Northern Affairs Canada and Vancouver Fraser Port Authority.

3.3.1 EARLY ENGAGEMENT PHASE

In advance of the NEB review, the MPMO and NEB developed a list of potentially impacted Aboriginal groups, and offered to meet with groups on the list to outline the NEB review process and anticipated timelines, availability of participant funding, and Canada's approach to Crown consultations.

Early Crown/NEB Engagement Meetings (Summer-Fall 2014)

In May 2014, the MPMO sent letters to 53 groups identified as potentially being owed a moderate to high level of consultation in respect of the Project. This letter outlined how the Crown's would carry out its duty to consult, noting that the Crown would rely on the NEB Review, to the extent possible. The letter also indicated that Aboriginal groups who had concerns should discuss these concerns with the proponent, and bring forward unresolved concerns to the NEB during the hearing process, as the NEB had authority to develop conditions that could help address these concerns.

This early engagement letter encouraged Aboriginal groups to participate in the oral Aboriginal traditional evidence hearings and to apply for the NEB participant funding program. It indicated that the Crown would track issues raised by Aboriginal groups throughout the NEB Review to determine whether additional consultation was required and if so, that such consultations would

take place after the NEB closed its hearing record. The letter also extended an offer to meet with interested Aboriginal groups in order to discuss the NEB Review and consultation process, respond to any questions or concerns, and provide further information on participation in the project review.

In May 2014, the MPMO invited Aboriginal groups to meet, and as a result, 14 meetings took place with representatives of 31 groups during June and July 2014 to discuss how the NEB hearing would be used in Crown consultations. The NEB participated in some of these meetings.

In February 2015, the MPMO sent letters to 97 Aboriginal groups and organizations representing all 112 individual Aboriginal groups included in the Crown's scope of consultation at that time. This letter set out the Crown's consultation framework which organized consultation into four phases: Phase I – Early engagement; Phase II – NEB hearing; Phase III – government decision making (representing the time between the close of the NEB hearing record and a GiC decision on the Project), and; Phase IV – Regulatory authorizations, should the Project be approved.

The consultation framework communicated in February 2015 continued to be refined, primarily as a result of changes to the timelines described below.

In May 2015, the MPMO sent 95 letters to Aboriginal groups or collective organizations representing 115 individual Aboriginal groups identified as being potentially affected by the Project at that time. One purpose of this correspondence was to offer an opportunity for groups to apply for participant funding from the Crown to support their engagement in the consultation process following the close of the NEB hearing record. The letter also:

- Explained the Crown's intent to use the NEB's June 2015 information request to intervenors round of the NEB hearing to seek feedback on the completeness and adequacy of the Crown's tracking of Aboriginal group issues and proponent commitments to that point in the process;
- Provided information on mandates and expertise of federal departments and agencies involved in the review of the Project; and
- Described the process and substance of consultations to take place following the close of the NEB hearing record, including the purpose of this Consultation and Accommodation Report and options for addressing potentially outstanding concerns as part of the government decision making phase.

Federal officials had nine phone calls with 10 Aboriginal groups and several email exchanges during the spring of 2015. Following the May 2015 letter, 98 follow-up emails were sent and eight calls were made to introduce the newly appointed Crown Consultation Lead. In addition, following the June 22, 2015 information request to other intervenors filing, 57 email follow-ups were sent to help facilitate review and response to the Crown's information request.

3.3.2 NATIONAL ENERGY BOARD HEARING PHASE

The Crown used the NEB review, correspondence and other direct forms of consultations with Aboriginal groups to:

- Inform itself and Aboriginal groups about the Project and the nature of any adverse impacts on Aboriginal Interests;
- Understand issues and concerns of Aboriginal groups participating in the process; and
- Consider mitigation measures proposed by the proponent and/or recommended by the NEB in the form of terms and conditions (including proponent commitments that may address adverse impacts on rights).

Throughout the NEB hearing, each federal authority tracked issues related to the Project, as well as those of Aboriginal groups that were related to the departments' mandates. The MPMO worked with federal departments and agencies to explore in its May 27, 2015 evidence filing and subsequent information requests or responses to the NEB the connections between the issues raised by Aboriginal groups, departmental mandates and potential impacts on Aboriginal Interests.

On May 27, 2015, the MPMO evidence about the government's approach to Crown consultation with the NEB.²² The evidence described the role of the MPMO, the past, ongoing and future consultations through the four consultation phases, and identified all the Aboriginal groups for which the Crown recognized a duty to consult along with the Crown's preliminary assessment of the depth of consultation owed to each of these groups.

On June 22, 2015, the MPMO filed information requests to all Aboriginal group intervenors, seeking feedback on the draft issues tracking tables. Through this request, the MPMO sought to make sure that the issues listed accurately reflected each group's concerns, and whether proponent commitments made to date adequately addressed those concerns.²³ Responses from Aboriginal groups were carefully reviewed and served to further inform the Crown's understanding of Aboriginal groups' issues, concerns and the potential adverse impacts of the Project on their interests.

On January 12, 2016, the MPMO and several other federal departments filed written arguments-in-chief including comments on draft NEB conditions. Several of these comments pertained directly to the Crown's interest in avoiding or minimizing potential adverse impacts from the Project on Aboriginal Interests.

²² <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2786712&objAction=browse&viewType=1>

²³ <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2791135&objAction=browse&viewType=1>

During the NEB hearing, Aboriginal group intervenors were afforded the opportunity to:

- Give evidence during oral traditional evidence hearings sessions;
- Ask questions to the proponent and other intervenors, including federal departments, during the information request rounds;
- Submit written intervenor evidence (both public and confidential);
- Submit written final arguments and comments on the NEB's draft terms and conditions; and,
- Provide oral summary arguments.

The NEB hearing also assisted the Crown in understanding at a broad level the issues and concerns of potentially affected Aboriginal groups who did not participate in the NEB Review, but who engaged in correspondence with the Crown and expressed support or similar issues noted by intervenors in the NEB hearing.

Direct Crown Consultation during the NEB Hearing

During the summer of 2015, the federal government announced action to respond to various procedural concerns raised by Aboriginal groups by placing a renewed focus on building relationships between Crown officials and Aboriginal communities as a complement to the NEB Review. The Crown increased efforts to directly consult potentially affected Aboriginal groups, in addition to its reliance on the NEB process. Consultations took place through a variety of forms, including meetings, letters, emails and phone calls designed to enable Aboriginal groups to:

- Bring issues and information to the NEB and participate in the hearing;
- Participate in direct discussions with the Crown about procedural questions or concerns and potential impacts from the Project on Aboriginal Interests;
- Review and comment on the draft NEB conditions (note: the MPMO offered non-intervenor Aboriginal groups an opportunity to share comments on the draft NEB conditions directly with the MPMO); and
- Inform the development of this Consultation and Accommodation Report.

MPMO maintained a consultation log to track all interactions between the Crown and individual Aboriginal groups or collectives throughout the process.

Excluded Period

On August 21, 2015, the Panel responsible for the NEB's review of the Project announced that it was striking evidence from the hearing record that was prepared by or the under the direction of Mr. Steven J. Kelly, and that oral summary arguments involving Aboriginal group intervenors would be postponed (these had previously been scheduled for September 2015). Subsequently, on September 24, 2015, the NEB announced a 16-week excluded period for its review of the Project. The excluded period (September 17, 2015 to January 8, 2016) allowed the NEB to acquire additional information from the proponent and intervenors in relation to the stricken and replaced

evidence. In [Procedural Direction No.18](#), the NEB set out its revised timeline for the completion of the hearing, and extended the opportunity for participants to comment on the draft conditions to January 12, 2016.

On October 22, 2015, the NEB released [Procedural Direction No. 19](#) which noted that oral summary argument would take place between January 18 and February 12, 2016, and indicated that the NEB hearing record would close in February 2016, immediately following the filing of the proponent's written reply argument.

During the excluded period, the MPMO continued to correspond with Aboriginal groups to provide procedural updates on the NEB Review and consultation process. This correspondence encouraged Aboriginal groups to make use of the extended period for commenting on the draft NEB conditions. The Crown also offered opportunities to meet with Aboriginal groups to discuss the consultation process and their preliminary views on the NEB's draft conditions.

The MPMO offered to meet with Aboriginal groups assessed at the high and moderate levels of the *Haida* consultation spectrum throughout this period. As a result, the MPMO had meetings with the Tsleil-Waututh Nation, Squamish Nation, Leq'a:mel First Nation and the 13 member Bands of the Stó:lō Collective. Several other meetings took place by teleconference. The purpose of these meetings was to develop relationships with the groups, and to discuss the consultation process, related procedural matters and the draft NEB conditions for the Project.

In October 2015, MPMO officials participated in the Kamloops Pipeline Summit attended by several Aboriginal groups being consulted on the Project, and presented information on how the Crown approaches consultation for major pipeline projects subject to regulatory review by the NEB, including the ongoing review of this Project. This opportunity to meet informally with representatives of Aboriginal communities with an interest in the Project coincided with email updates sent on October 26, 2015 and October 29, 2015 reminding groups of the extended comment period on the NEB's draft conditions, and that Crown-Aboriginal group dialogue on potentially outstanding issues would begin with a series of meetings and discussions scheduled to take place immediately following the close of the NEB hearing record in February 2016.

On December 18, 2015, correspondence was sent to Aboriginal groups as another reminder of the NEB's revised deadline of January 12, 2016 for comments on the NEB draft conditions as part of written argument-in-chief. This correspondence also invited Aboriginal groups who were not participating in the NEB Review to submit any views on the NEB's draft conditions directly to the MPMO, to further assist the Crown in understanding any potentially outstanding Project-related issues or concerns.

The December 18, 2015 correspondence recognized various procedural issues raised to that point by Aboriginal groups with respect to the NEB review process and the extent to which the Crown could rely on this process to support its consultation and accommodation obligations, as well as many Aboriginal groups' expressed desire to work in partnership with the Crown to implement a consultation process that would meet commonly-held objectives.

Attached to the December 2015 correspondence to groups was a list of the Crown's objectives for the consultation process during the post-NEB hearing phase:

- To work cooperatively and collaboratively with Aboriginal groups during consultation on the Project;
- To communicate with Aboriginal groups about the Project and to understand the way in which it may adversely impact constitutionally protected Aboriginal rights or treaty rights;
- To respond to specific requests, address topic-specific issues related to the Project, and to gather input from potentially impacted Aboriginal groups regarding their concerns about the Project; and
- To listen to the issues and concerns raised, and create an environment that helps identify options to further avoid, mitigate or accommodate any outstanding concerns related to the Project.

As part of the December 2015 correspondence, Aboriginal groups were invited to share their own objectives for consultation, particularly in light of the December 4, 2015 Speech from the Throne that stated Indigenous peoples will be more fully engaged in reviewing and monitoring major resource development projects moving forward.

Oral Summary Argument

From January to February 2016, several federal officials observed oral summary argument hearing sessions in Burnaby and Calgary. Officials used this experience, as well as a detailed review of written comments provided by Aboriginal groups in their argument-in-chief, to further understand potentially outstanding issues, including adverse impacts of the Project on Aboriginal Interests.

At the oral summary argument hearing in Calgary, the Crown Consultation Lead raised a preliminary matter with the NEB to offer an opportunity to the Panel members to question the Crown on any aspect of its intended approach to consultation.

3.3.3 INTERIM STRATEGY

In the late summer and early fall of 2015, the Crown consultation process had been refined, initially influenced by the 16-week excluded period noted above, but further necessitated by the October 2015 federal election. These changes enabled a detailed review of key procedural concerns with respect to the consultation process up to that point, and a consideration of options for adjustments to the process that supported the new government's commitments, in particular to renew relationships with Indigenous peoples based on the recognition of rights, respect, co-operation and partnership.

As part of this review, the MPMO identified various opportunities and enhancements stemming in part from the input of potentially affected Aboriginal groups through the NEB process or direct consultations with the Crown.

On January 18, 2016, the MPMO sent letters to all potentially affected Aboriginal groups to note the Crown's awareness of procedural concerns, including:

- The impact of legislated time limits on the NEB Review and consultation process;
- The limited scope of the NEB Review;
- Inadequate participant funding for the NEB review process and Crown consultations; and
- An over-reliance on the NEB Review for meeting Crown consultation obligations.

The January letter also noted the government's intention to respond to these concerns through the Prime Minister's mandate letters, and invited groups to meet with the Crown consultation team during the upcoming post-NEB hearing phase.

On January 27, 2016, the federal government announced an interim strategy to support decisions on major resource projects.

The following principles would guide these decisions during the interim period:

1. No project proponent will be asked to return to the starting line — project reviews will continue within the current legislative framework and in accordance with treaty provisions, under the auspices of relevant responsible authorities and Northern regulatory boards;
2. Decisions will be based on science, traditional knowledge of Indigenous peoples and other relevant evidence;
3. The views of the public and affected communities will be sought and considered;
4. Indigenous peoples will be meaningfully consulted, and where appropriate, impacts on their rights and interests will be accommodated; and
5. Direct and upstream greenhouse gas emissions linked to the projects under review will be assessed.

In order to meet this commitment, the Governor in Council extended the time limit for a decision from three to seven months and Budget 2016 increased the amount of participant funding for Indigenous groups from \$700 thousand to \$2.2 million.

The MPMO shared the January 27 announcement with all Aboriginal groups, adjusted its work plans and approach for the post-NEB hearing phase of consultations by dividing the extended time period into two rounds, and in a series of emails, phone calls and subsequent correspondence, extended invitations to approximately 100 individual Aboriginal groups to meet with Crown officials in a first round of meetings prior to the release of the NEB Report, which had previously not been contemplated.

3.3.4 POST-HEARING PHASE LEADING TO GOVERNMENT DECISION

Following the close of the NEB hearing record in mid-February, the MPMO letters to all potentially affected Aboriginal groups the government's interim measures, how the Crown intended to use the additional four months of government decision-making time, and plans to offer additional participant funding.

These letters also provided information on how the Crown assesses the depth of consultation owed to each group and noted the forthcoming opportunity to comment on the draft Crown Consultation and Accommodation Report.

Post-NEB Hearing Phase Consultation

A first set of face-to-face meetings with Indigenous groups took place between the close of the NEB hearing record up to the release of the *NEB Recommendation Report* on May 19, 2016. Individual or collective consultation meetings with approximately 60 Aboriginal groups were conducted during this period, focused on relationship-building and seeking to ensure the Crown understood procedural and substantive concerns in respect of the Project.

Topics discussed included Aboriginal groups' overall objectives for the consultation process and how best to use the period after the release of the *NEB Recommendation Report*. The MPMO also sought a dialogue with Aboriginal groups on the NEB draft conditions and on outstanding concerns, including any proposals from Aboriginal groups for accommodation measures.

Federal officials shared meeting records and lists of follow-up action items with groups for review and comment. The mandate of the Crown consultation team was to listen, understand, engage and report to senior officials, Aboriginal group perspectives. The Minister of Natural Resources and other Ministers were provided a summary of these meetings.

Federal officials sought a second round of meetings with Indigenous groups following the NEB's submission of its final report and recommendations to the government. The purpose of these meetings was to gather feedback from Aboriginal groups on the NEB Report and to identify, consider and attempt to address outstanding concerns and adverse impacts from the Project on Aboriginal Interests that were not addressed by the NEB conditions and proponent commitments.

By mid-July 2016, all Aboriginal groups involved in consultation with the Crown were invited to apply for additional participant funding to support ongoing consultation activities including participation in meetings and provision of written comments on the draft Consultation and Accommodation Report.

Government representatives participating in consultation meetings have endeavoured to meaningfully respond to all questions from Aboriginal groups. As with the first set of meetings in the spring, meeting summaries were prepared and shared back with the groups for comment.

Draft Consultation and Accommodation Report

In August 2016, the draft Consultation and Accommodation Report was shared with Aboriginal groups for written comment and discussion. Aboriginal groups were asked to respond within 30 days although comments were accepted into late October. Groups were invited to submit written comments on the draft report to make sure that the Crown adequately described Aboriginal groups' participation in the consultation process, strength of claims, depth of consultation, potential impacts on Aboriginal Interests, any outstanding concerns raised and views on the status of those concerns (e.g. whether they are addressed by NEB conditions, proponent commitments or whether other accommodation measures were recommended).

Separate Submission

In addition to providing opportunities to Aboriginal groups to review and comment on drafts of the Consultation and Accommodation Report, Aboriginal groups had the opportunity to provide a short submission outlining any outstanding concerns, issues or fundamental views in respect of the Project. This input, along with the Consultation and Accommodation Report, is being provided directly to GiC and BC Ministers to inform their decisions on the Project.

Regulatory and Permitting Stage Consultation

Letters sent to all Aboriginal groups early on in the process explained the Crown's intent to rely on the NEB process to the extent possible to understand potential Project impacts on Aboriginal Interests and meet the duty to consult. However, the Crown also recognized that additional consultation would be required in the regulatory and permitting stage that could potentially follow the GiC and provincial EA certificate decisions on the Project.

3.3.5 BRITISH COLUMBIA

Pursuant to Section 11 of BC's *Environmental Assessment Act*, an order is issued by EAO that sets out, in addition to other matters, how potentially affected Aboriginal groups will be consulted by EAO and the proponent. EAO's initial approach to identifying Aboriginal groups to consult with was based on a geographic analysis of the proximity of the Project to an Aboriginal groups' asserted traditional territory. Aboriginal groups with asserted traditional territory that overlaps with or falls within 2 km of the project corridor were put on Schedule B of the Section 11 Order. Aboriginal groups with an asserted traditional territory more than 2 km away from the project corridor and that may experience indirect impacts from the project, were put on Schedule C of the Section 11 Order.

Consultation with Aboriginal groups on Schedule B was approached at the deeper end of the consultation spectrum, and included the following opportunities:

- Notification of the issuance of any orders under BC's *Environmental Assessment Act* in relation to the Project;

- Discussing and commenting on the issues the Aboriginal group raised through the NEB review and through any subsequent consultation in relation to potential impacts of the Project on areas of provincial jurisdiction on its Aboriginal Interests, and measures to avoid, minimize or otherwise accommodate, as appropriate;
- Reviewing supplemental information provided by the proponent to inform consultation in relation to potential impacts of the Project on areas of provincial jurisdiction on its Aboriginal Interests, and measures to avoid, minimize or otherwise accommodate, as appropriate;
- Providing comments to the proponent on the proponent's draft Aboriginal engagement report;
- Meeting to discuss potential impacts of the Project on areas of provincial jurisdiction on its Aboriginal Interests, and measures to avoid, minimize, or otherwise accommodate such impacts, as appropriate;
- Commenting on the EAO's draft referral materials;
- Providing a submission to the EAO regarding their views on the Project and on the draft referral materials to be included in the package of materials sent to Ministers when the Project is referred to Ministers for decision; and
- At the request of any of these Aboriginal groups, providing additional opportunities to engage with the EAO, within timelines as agreed with that Aboriginal group.

Consultation with Aboriginal groups on Schedule C was approached at a lower level on the consultation spectrum, and included the following opportunities:

- Notification of the issuance of any orders under BC's *Environmental Assessment Act* in relation to the Project;
- Providing comments to the proponent on the proponent's draft Aboriginal engagement report;
- Commenting on the EAO's draft referral materials; and
- Discussing and commenting on the issues the Aboriginal group raised through the NEB review and through subsequent consultation in relation to potential impacts of the Project on areas of provincial jurisdiction on its Aboriginal Interests, and measures to avoid, minimize or otherwise accommodate, as appropriate.

EAO shared a draft of the Section 11 Order with Aboriginal groups on May 9, 2016, and asked for their feedback. After considering feedback received from Aboriginal groups, changes were made to the Section 11 Order. On June 17, 2016, EAO issued the Section 11 Order, which established the consultation activities that both EAO and the proponent would undertake with all Aboriginal groups potentially affected by the Project, as listed on Schedules B and C of the Order.

The proponent submitted its Aboriginal engagement report²⁴ to EAO on August 4, 2016. This report summarized the efforts undertaken by the proponent to consult with Aboriginal groups,

²⁴ http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_document_459_40921.html

identified the feedback and information received from Aboriginal groups during this consultation, identified potential adverse impacts of the Project on Aboriginal Interests for each Aboriginal group, identified how these impacts would be mitigated or otherwise accommodated, and outlined future consultation activities.

EAO built on the consultation that has occurred to date with federal and provincial agencies, the NEB review, and engagement with the proponent, and has been coordinating Aboriginal consultation activities with the MPMO, as described in Section 3.3 and other sections of this report. This section will not repeat the coordinated activities that have occurred.

Permits will not be issued by provincial agencies until the Ministers make a decision on the EA certificate, in accordance with Section 9 of BC's *Environmental Assessment Act*, with the exception of investigative use permits (e.g. permits to collect information to support the assessment of the Project). However, permitting agencies may consult with Aboriginal groups on permit applications prior to the Ministers' decision on the certificate.

As described in Section 2.5, the Province of BC has taken a coordinated approach to Aboriginal consultation for this Project that will be informed by consultation by provincial agencies responsible for permit authorizations, coordinated consultation with the federal government, the NEB process, and information provided by the proponent. While EAO has undertaken a joint approach to Aboriginal consultation with the federal government for Aboriginal groups in BC, the provincial Crown's obligations to consult and accommodate pertain to areas of provincial jurisdiction as circumscribed by the Constitution.

3.3.6 ALBERTA

Within Alberta, the Government of Alberta's Policies on Consultation with First Nations and Métis Settlements on Land and Natural Resource Management direct First Nation and Métis Settlement consultation with respect to the management and development of natural resources on provincial Crown lands. The associated guidelines demonstrate how the Government of Alberta is seeking to fulfill its consultation responsibilities under the consultation policies and are intended to clarify the expectations of all parties engaged in the consultation process by providing an overview of the procedures to follow in the consultation process.

Consultation with First Nations and Métis Settlements is triggered when the Government of Alberta is contemplating conduct that may have an adverse impact on the exercise of Treaty rights or traditional use activities or Métis settlement members' harvesting activities. The Government of Alberta is responsible for overseeing and managing all substantive aspects of consultation. Although the Government of Alberta may delegate some procedural aspects of consultation to proponents, the Crown retains the sole responsibility for overseeing the overall consultation process and ensuring that the proponent's consultation activities comply with the consultation policies and guidelines. The First Nations and/or Métis Settlements that project proponents are directed to consult are based on the location of the project footprint in relation to First Nations' or Métis Settlements' consultation areas as well as other relevant information.

To strengthen the Government of Alberta's role in the First Nation's and Métis Settlement consultation process, the Government of Alberta created the Aboriginal Consultation Office (ACO). The ACO's mandate is to provide consultation management services to meet the needs of Government of Alberta ministries, First Nations, Métis settlements, the Alberta Energy Regulator and project proponents.

The Government of Alberta's First Nations and Métis Settlements consultation guidelines outline the stages of consultation, which include:

1. Pre-consultation assessment
 - a. Assess whether or not consultation is required;
 - b. If consultation is required, identify which First Nations and/or Métis Settlements are to be consulted;
 - c. Assess the potential adverse impacts of the proposed decision or activity;
 - d. Assess the scope of the duty to consult based on available information regarding the potential adverse impacts on Treaty rights, traditional uses or harvesting activities; and
 - e. Assign a level of consultation which corresponds with the scope of the potential adverse impacts. The level of consultation (Level 1 – streamlined, Level 2 – standard and Level 3 – extensive) identifies how deep the consultation should be and what process steps are required.
 - i. Level 3 Consultation requires the proponent to develop a Consultation Plan that the ACO must approve before consultation activities can begin.
2. Information sharing
 - a. Proponents are required to provide comprehensive information to the First Nations and/or Métis Settlements regarding the project, regulatory authorizations being sought, the consultation process, level of consultation, and requests for feedback and any concerns
3. Exploring and documenting concerns
4. Verifying the consultation record with the First Nation and/or Métis Settlement
5. Determining the adequacy of consultation. Although the optimal outcome of consultation is that all consulting parties reconcile interests, agreement of all parties is not required for consultation to be adequate. If consultation is deemed adequate, the proponent proceeds with the application to the appropriate regulatory decision-maker.

The Trans Mountain Expansion Project was assessed as requiring Level 3 (Extensive) consultation. On June 5, 2015, the Government of Alberta directed the proponent to consult on the Project and its ancillary dispositions with the potentially impacted First Nations. The ACO is continuing to work with the proponent, First Nations and other Ministries to facilitate the fulfillment of consultation requirements under Alberta's consultation policies and guidelines.

3.4 Participant Funding

In addition to proponent-led capacity agreements and participant funding provided by the NEB, it is standard practice for the Crown to provide some financial assistance for Aboriginal groups to participate in a regulatory review and consultation process with highly technical components.

The proponent, NEB, the MPMO and EAO offered funding to support the engagement of Aboriginal groups during various stages of the process, from the early Project planning phase, during the NEB Review, and for Crown consultation.

3.4.1 PROPONENT CAPACITY FUNDING

The proponent provided approximately \$12 million in capacity funding, delivered through consultation agreements negotiated with specific Aboriginal groups.

3.4.2 NEB ALLOCATION OF FUNDS FOR PARTICIPATION IN HEARING

On 22 July 2013, the NEB announced it would make \$1.5 million available under its Participant Funding Program (PFP) for the Trans Mountain Expansion Project hearing, and that a higher amount could be considered once applications for funding had been received. On 16 July 2014, the NEB announced it doubled the amount of available funding to \$3 million given the high level of interest. By the 28 November 2014 application deadline, the NEB had received 95 applications requesting over \$24 million from individuals, non-profit organizations and Aboriginal groups.

The NEB offered 54 eligible Aboriginal intervenors \$2.36 million for travel and other eligible expenses to prepare for, and participate in, the review process. In addition, the NEB offered \$10,000 in special funding to each of the two Aboriginal groups directly impacted by the decision to strike the evidence prepared by Mr. Kelly from the hearing record. Overall, awards to Aboriginal intervenors averaged \$43,626 (\$5,000 higher than the average for non-Aboriginal recipients), ranging from a minimum of \$1250 for travel alone to \$550,000 for a collective of 16 Aboriginal groups.

Further information on the NEB's allocation of funds to support participation in the review is available at: <http://www.neb-one.gc.ca/prtcptn/hrng/pfp/lctnfd/trnsmntnxpnsn-eng.html>.

3.4.3 FEDERAL FUNDING

The federal Participant Funding Program supported Aboriginal participation in consultation during the period leading up to the close of the NEB hearing as well as throughout the post-NEB hearing phase.

Table 8 – Summary of Federal Participant Funding for Aboriginal Groups (as of October 25, 2016)

Round 1	Total amount offered in Round 1	\$753,129
	Total amount provided ²⁵	\$471,129
	Total amount dispensed ²⁶	\$187,847
Round 2	Total amount of outstanding funding from Round 1 ²⁷	\$282,000
	Total amount offered in Round 2	\$1,259,000
	Total combined offers	\$1,541,000
	Total amount provided ²⁸	\$933,446
	Total amount dispensed ²⁹	\$4,250
Total	Total funding offered to Aboriginal groups (in Rounds 1 & 2)	\$2,012,129
	Total funding dispensed to Aboriginal groups (in Rounds 1 & 2)	\$192,097

Timing: Initially, the MPMO planned for the post-NEB hearing phase of consultation to take place between December 2015 and February 2016, following the expected release of the *NEB Recommendation Report* in November 2015. In keeping with this timeline, the MPMO sent letters to eligible Aboriginal groups in May 2015, offering participant funding to support these consultations and inviting groups to submit an application for funding.

Contribution agreements between the MPMO and Aboriginal groups were signed between August and November 2015. However, in early 2016, additional groups expressed interest in accessing funding following MPMO’s correspondence in February 2016, and consultation meetings that took place between February and May 2016. MPMO tried to be as flexible as possible in making funding available and Round 1 funding offers were extended into May 2016 for the Peters Band, Kwikwetlem First Nation and Nicomen Indian Band.

Funding Allocations: Several factors were taken into consideration when determining eligibility for participant funding and the levels of funding offered. Individual funding offers were based on four factors: the initial depth of consultation assessment; the group’s level of participation in the NEB hearing (i.e. intervenor, commentor, or non-participant); proximity of traditional use areas to the project footprint, and; whether a group was participating in Crown consultations as part of a larger collective or as an individual group. The MPMO offered a maximum of \$12,000 and a minimum of \$1,500 to individual groups. Collectives were offered between \$18,000 and \$60,000, depending on the number of groups represented by the collective.

²⁵ As per signed contribution agreements between NRCan and Aboriginal groups or collectives

²⁶ As per claims submitted to CEAA for reimbursement

²⁷ Amount of funding offered in Round 1 but for which groups did not sign a contribution agreement

²⁸ As per signed contribution agreements between NRCan and Aboriginal groups or collectives

²⁹ As per claims submitted to CEAA for reimbursement

In total, the MPMO offered \$753,129 in participant funding to 99 Aboriginal groups in the first round of participant funding (76 individual groups and four collectives). Of the 99 groups offered funding, 60 Aboriginal groups (37 individual groups and four collectives) signed contribution agreements with the MPMO in order to access this funding. In other words, the MPMO observed a 60% uptake rate on participant funding offers by Aboriginal groups. The total amount allocated under these contribution agreements was \$471,129. As of October 2016, \$150,640 in participant funding has been dispensed, based on claims submitted by Aboriginal groups for reimbursement.

Second round of Funding

Timing: As a result of the January 2016 interim measures for the Project, the MPMO announced that additional participant funding would be offered for the extended period of consultation on the Project. Individual funding allocations were communicated in early July 2016.

Funding Allocations: For the second round, the MPMO offered \$1,259,000 in participant funding. Funding allocation for the second round was similar to the methodology used in the first, with two notable exceptions, including the fact that participant funding was offered to 118 potentially affected Aboriginal groups, whereas some groups were not eligible for funding in the first round, due to the distance of Aboriginal communities from the Project footprint or lack of participation in the NEB process. Table 9 summarizes the allocation methodologies for both rounds of consultation funding. Appendices A-E indicate specific participant funding offers or disbursements made to each Aboriginal group or collective.

The second round of consultation funding was based on several factors: the preliminary depth of consultation assessment; the Aboriginal group's level of participation in the NEB Review; and whether a group was participating in Crown consultations as part of a larger collective or as an individual group. In general, a maximum of \$14,000 and a minimum of \$3,000 was offered to individual groups. Collectives were offered between \$15,000 and \$70,000, depending on the number of groups represented by the collective. In specific instances, these offers varied to address particular circumstances where additional technical studies were undertaken or protocol development formed a key component of the consultation process with the Crown.

The MPMO re-offered funding to eligible groups that were previously offered participant funding but had not signed contribution agreements. Specifically, 39 of the 99 Aboriginal groups offered participant funding in the first round did not sign a contribution agreement with the MPMO (totaling \$282,000). For these groups, outstanding funding was added to second funding offer.

In total, Round 2 funding allocations combined with the outstanding round 1 funding offers amounted to \$1,541,000. Of the 118 groups offered funding following the release of the NEB Report, 53 Aboriginal groups (35 individual groups and two collectives) signed contribution agreements with the MPMO in order to receive this funding. From July to October 2016, approximately 45% of Aboriginal groups offered participant funding took advantage of the funding offered. The total amount allocated under Round 2 contribution agreements was \$933,446. As of October 2016, \$4,250 in participant funding has been dispensed, as per invoices submitted by Aboriginal groups for reimbursement.

Table 9 – Summary of Funding Allocation Methodology for Round 1 and Round 2 of Crown Consultation

Criteria	Round 1	Round 2
General base funding for each group based on depth of consultation assessment	Deep: \$12,000 Middle: \$12,000 Low: \$3,000	Deep: \$14,000 Middle: \$14,000 Low: \$6,000
Participation in the NEB process	Groups initially identified at the middle to deep end of the <i>Haida</i> consultation spectrum that did not participate in the NEB process received half the base funding. Groups initially identified at the lower end of the <i>Haida</i> consultation spectrum that did not participate in the NEB process were not offered funding.	Any group (deep, middle or low) that did not participate in the NEB process received half the base funding.
Distance from the Project footprint	Groups whose territories were located more than 50 km from the Project footprint were not offered funding as it was determined that potential adverse impacts from the Project would be very low to negligible for these groups.	Aboriginal groups scoped into the Crown consultation process were offered funding to support their participation in meetings and/or to provide written comments on the draft Consultation and Accommodation Report, regardless of the degree of seriousness of impact from the Project.

3.4.4 EAO FUNDING

EAO offered capacity funding to Aboriginal groups on Schedule B of the Section 11 Order issued under the *BC Environmental Assessment Act*, to groups who stated they are actively participating, in the EAO assessment process. EAO offered individual Aboriginal groups \$5,000 and Aboriginal group collectives \$10,000. These funds were provided to assist with Aboriginal groups' participation in consultation activities, such as document review and meetings, as outlined in Section 3.4.1. As of October 29, 2016, 45 Aboriginal groups and three Aboriginal group collectives had been offered funding.

4. CONSIDERATION OF ABORIGINAL INTERESTS AND CONCERNS

This section considers the Aboriginal Interests, issues and concerns of potentially affected Aboriginal groups.

4.1 Crown Consultation Record and Issues Tracking

The governments have kept track of Aboriginal group comments, issues, interests and concerns raised in respect of the Project during the NEB Review process including TLRU and TMRU studies.

Federal officials developed a variety of tracking tools to help ensure that it has an accurate understanding of Aboriginal Interests and concerns. The proponent developed and filed as part of its Application to the NEB consultation logs that presented the issues, concerns and interests identified by Aboriginal groups as understood by the proponent. The proponent also tracked its commitments and actions to address the interests and concerns expressed by various Aboriginal groups. The Crown made use of these documents at an early stage to understand many of the interests and concerns of Aboriginal groups potentially affected by the Project.

The NEB's program of early engagement with Aboriginal groups also generated an awareness of interests and concerns communicated by Aboriginal groups. As part of a Project Agreement with the MPMO, the NEB referred to the MPMO and relevant federal authorities a table of all issues raised by Aboriginal persons or groups in the context of the NEB's early engagement activities. This input, beginning in June 2014, captured issues falling outside of the NEB's mandate as well as issues related to the factors and valued components, which were included in the scope of the NEB Review.

The federal Crown's issues tracking tables maintained during the NEB hearing for each Aboriginal group intervenor organized issues in relation to potential impacts on Aboriginal Interests, as well as other issues and concerns raised by Aboriginal groups during all stages of the process, whether they fell into the scope of the NEB review process or not. Therefore, the categories of issues tracked by the federal Crown did not solely focus on the valued environmental and socio-economic components studied during the NEB regulatory hearing, but also captured broader issues raised by Aboriginal groups that were relevant to the Crown's duty to consult and, as appropriate, accommodate. In addition, federal departments and agencies tracked issues specific to their areas of regulatory jurisdiction or subject-matter expertise.

The federal Crown's issues tracking tables were used to analyze and help respond to issues and potential impacts on Aboriginal Interests, indicating whether in the view of the Crown, the proponent's commitments or NEB conditions addressed these potential impacts, partially addressed them, or inadequately addressed them. In this way, the Crown was able to identify potentially outstanding issues at an early stage, for which incremental or other forms of Crown action or accommodation may be required.

The issue categories tracked by the federal Crown throughout the review of the Project were:

- Pipeline Construction and Operations;
- Pipeline Accidents and Malfunctions;
- Marine Terminal Construction and Operations;
- Marine Terminal Accidents and Malfunctions;
- Marine Shipping Operations;
- Marine Shipping Accidents and Malfunctions;
- Cumulative Effects;
- Social and Cultural Impacts;
- Other Aboriginal and Treaty Rights;
- Review Process and Methodology;
- Economic Effects; and
- Health and Human Safety.

The issues are presented below in terms of the ways in which specific Aboriginal Interests could be adversely impacted (i.e. hunting, trapping, gathering, fishing, marine harvesting, other traditional and cultural practices, Aboriginal title), as well as other interests they may have (e.g. accidents and malfunctions, health and human safety, socio-economic issues, cumulative effects).

Responses to these potential impacts are indicated in terms of proponent commitments, NEB conditions, and Crown responses where available. In addition, Project modifications and other accommodation measures are presented in relation to how they would address Aboriginal Interests and concerns.

The proponent prepared an Aboriginal engagement report to address EAO submission requirements identified in the Section 11 order issued on June 17, 2016. On May 18, 2016, the proponent provided a draft of the report to Aboriginal groups identified in the Section 11 order, and submitted a final report³⁰ August 12, 2016.

Appendices A-E of this report provide an overview of the specific interests and concerns of each potentially affected Aboriginal group. These appendices include a description of the consultation with each Aboriginal group; the concerns raised by the group; a summary of the Crown's strength of claims and depth of consultation assessment for each group; and the Crown's assessment of the potential impacts of the Project on each Aboriginal group's asserted or determined Aboriginal rights, including title, and treaty rights.

³⁰ http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_document_459_40921.html

4.2 Addressing Key Aboriginal Interests and Concerns

4.2.1 PROJECT MODIFICATIONS

During Project planning and throughout the NEB Review, the proponent implemented or committed to implement several design changes to avoid or reduce potential adverse effects from the Project that could directly or indirectly impact Aboriginal Interests.

Routing Principles

The first principle of the Project design was to route the proposed pipeline, wherever possible, so that it would parallel the existing pipeline RoW and/or other linear disturbances. This principle assists the proponent in minimizing disturbance to new traditional use sites, and reducing new or additional impacts on Aboriginal Interests. The proposed pipeline corridor is generally 150 m wide, centred on the existing Trans Mountain pipeline easement, except where deviations are required, for example to avoid areas that have significant environmental value or to minimize routing through extensively developed urban areas.

Environmental factors that were taken into consideration when looking at deviating from the existing pipeline easement included:

- The total number of watercourse crossings;
- Length in the Riparian Reserve Zone;
- Difficult reclamation areas and unstable terrain;
- Length within provincial parks and other designated protected areas;
- The total number of wetland crossings; and
- Creating new access in areas considered to be ecologically important.

Where deviations from the existing pipeline corridor were deemed necessary, Trans Mountain attempted to minimize environmental impacts by having the new pipeline constructed beside rights-of-way of other linear facilities. Access to the RoW and power lines to the pump stations are already established, thereby reducing the need to create additional disturbance for ancillary facilities.

The second principle relied on traditional use information deemed relevant by the proponent to inform routing decisions. The proponent has engaged Aboriginal groups whose traditional territories overlap the study corridor for the proposed route to undertake traditional use studies. These studies identify traditional sites or uses that, according to the proponent, would be adversely affected by the location or timing (e.g., construction times that overlap with the timing for collecting medicinal plants) of the Project and measures to either avoid or reduce the conflict.

The third principle related to pipeline routing was the consideration of Indian Reserves. The proponent has committed (and is legally obliged) not to route the proposed pipeline on an Indian Reserve unless the affected Aboriginal group has agreed to the routing. To date, the proponent has reached agreement to route the pipeline on certain reserves but not others. The proponent has indicated that it continues to engage Aboriginal groups on the pipeline routing on Indian Reserves (see proponent submission to the NEB on July 31, 2015 and August 20, 2015 Reply Evidence).

The proponent also considered the confidential evidence provided by certain Aboriginal groups during the NEB Review (the proponent and the NEB entered into confidentiality agreements with these Aboriginal groups). In some cases, new traditional use sites were identified by Aboriginal groups and the proponent considered these for mitigation or other action, such as route re-alignment or construction space configuration.

Examples of how the above routing and other Project design principles were applied in practice include:

- RoW alignment considered and sought to avoid some known sites of significance, e.g. burial or other culturally important sites;
- The proponent tried as much as possible to follow the existing RoW to reduce the amount of development that had to occur on 'greenfield' areas: 73% of the Project follows the RoW for the existing pipeline and 16% of the Project follows other linear disturbances, which means only 11% of the route would create a new corridor;
- Refined routing to the existing pipeline to avoid 22 crossings at significant fish bearing rivers such as the Fraser River near Rearguard, Thompson River, upper North Thompson, Albreda, Coldwater and Coquihalla rivers;
- Exceed in-stream depth of underground burial requirements required by Code of Practice design and construction standards including using 1:200 year flood design instead of current industry standard of 1:100 year design floods and accounting for climate change effects of increased flood magnitude and frequency;
- Increase in pipeline wall thickness at crossings of watercourses of significance;
- The previously proposed sloped earthen wall at the WMT has been replaced by a vertical retaining wall, which minimizes dredging and significantly reduces the foreshore extension footprint; and
- The proponent identified that the need for a disposal at sea permit for dredging material would most likely be eliminated through refined construction methods at the WMT.

In late summer 2015, federal officials sought additional examples from the proponent where the Project had changed in response to Aboriginal Interests, in particular those that might not already be on the NEB's record in the form of a traditional use study and mitigation measures (e.g., in the Environmental Protection Plan, Aboriginal engagement logs, information request responses, commitment tracking table, or the proponent's August 20, 2015 Reply Evidence).

In response, the proponent indicated that there were very few examples that were not already provided on the NEB’s record; however the proponent did provide an updated list of where known Aboriginal Interests and concerns influenced the design of the Project. The proponent noted it incorporated all Aboriginal Interests and concerns into the Application and evidentiary filings with the NEB, whether resulting in a change to the Project or not. Specific concerns that have been incorporated that resulted in a Project change are included in the table in Appendix F. Appendix G provides the commitment tracking tables that the proponent filed with the NEB. In October 2016 the proponent confirmed that no changes had been made to these tables since their filing.

The proponent noted that Aboriginal Interests in Appendix F associated with a specific geographical site were incorporated into Project planning, including consideration for incorporation into the Environmental Alignment Sheets, which inform Project routing and future planning. The proponent also noted that most of these sites are not within the proposed RoW, and so would not be directly impacted by construction or operations. Additionally, there are several commitments in Appendix G regarding Environmental Protection Plan workshops, which could result in additional route refinements within the corridor.

In the proponent’s Reply Evidence, the outcomes of recently conducted traditional use studies and an updated set of consultation logs were included. Using knowledge gained through the engagement process, the proponent made modifications to the Project, including route refinements. Additionally, the proponent will use Environmental Protection Plans and Mitigation Plans throughout construction to reduce or avoid construction impacts wherever possible.

Project Routing and Indian Reserves

The following tables outline the routing related to Indian Reserve crossings with the existing TMPL corridor and the proposed expansion as of July 2016.

Table 10 – Indian Reserves Crossed by the Existing TMPL Corridor

Indian Reserve Name	Aboriginal Groups with an Interest in Indian Reserve
Coldwater #1	Coldwater Indian Band
Grass #15	Aitchelitz First Nation, Kwaw-kwaw-apilt First Nation, Shxw’ha:y Village, Skowkale First Nation, Skwah First Nation, Soowahlie Indian Band, Squiala First Nation, Tzeachten First Nation, Yakweakwioose First Nation
Joeyaska #2	Lower Nicola Indian Band
Kamloops #4	Tk’emlups te Secwpehc (Kamloops Indian Band)
Kawakawa Lake Reserve #16	Union Bar First Nation
Matsqui Main #2	Matsqui First Nation
Ohamil #1	Shxw’ow’hamel First Nation
Peters #1	Peters Band

Indian Reserve Name	Aboriginal Groups with an Interest in Indian Reserve
Peters #1a	Peters Band
Popkum #1	Popkum First Nation
Popkum #2	Popkum First Nation
Tzeachten #13	Tzeachten First Nation
Whispering Pines #4	Whispering Pines/Clinton Band
Zoht #4	Lower Nicola Indian Band
Zoht #5	Lower Nicola Indian Band

Table 11 – Indian Reserves Crossed by the Proposed Trans Mountain Expansion Project Corridor

Indian Reserve Name	Aboriginal Groups with an Interest in Indian Reserve
Matsqui Main #2	Matsqui First Nation
Ohamil #1	Shxw'ow'hamel First Nation
Peters #1	Peters Band
Peters #1a	Peters Band
Popkum #1	Popkum First Nation
Popkum #2	Popkum First Nation
Tzeachten #13	Tzeachten First Nation

As a result of engagement activities the Project corridor would not intersect the following Indian Reserves:

- Coldwater #1;
- Grass #15;
- Kamloops #4;
- Kawakawa Lake Reserve #16; and
- Whispering Pines #4.

Trans Mountain continues its engagement with Lower Nicola Indian Band to seek the necessary approval to construct the Project across the following Indian Reserves:

- Joeyaska #2;
- Zoht #4; and
- Zoht #5.

4.2.2 PROPONENT COMMITMENTS

The proponent's Application and supporting evidence filed during the NEB hearing set out mitigation and other commitments applicable to the potential adverse effects of the Project on Aboriginal Interests. These commitments would be legally binding and would need to be tracked and reported on, as per the NEB Conditions #2 and #6.

Many of the measures proposed by the proponent for a valued component may also help mitigate potential impacts on Aboriginal Interests and other concerns raised throughout the Project review by Aboriginal groups, where the effects are mitigable. These are additional to mitigation measures that the proponent has committed to implement as part of standard practice during Project construction and operation in compliance with federal and provincial regulatory requirements, in compliance with existing proponent policies and procedures and in accordance with the technically feasible, cost effective and environmentally sound management of large-scale pipeline projects.

Trans Mountain submitted its commitment tracking table and updates to the table to the NEB in January, March, and July 2015. The most recent version of Trans Mountain's commitment tracking table on the NEB's record can be found at [Filing ID A4R6I5](#), which includes commitments up to May 12, 2015.

Proponent-Aboriginal Group Agreements

The proponent has provided, or has committed to providing, economic benefits and capacity-building opportunities specific to Aboriginal groups during activities prior to and during the construction phase of the Project. Highlights of these opportunities include:

- Lump sum cash, up-front costs, training funds prior to CPCN;
- Lump sums following in-service;
- Annual payments over 20 years after CPCN, some indexed to inflation;
- Some agreements allow for renegotiation after 20 years;
- Fees or taxes levied in exchange for land use where reserves are crossed by the RoW;
- Funding for community improvement projects;
- Economic development contributions;
- Funding of committee work;
- Scholarships;
- Funding identified for environmental enhancement; and
- Funding identified for emergency response centers (buildings, equipment).

During consultations, various Aboriginal groups based on Vancouver Island noted to the Crown that Mutual Benefit Agreements (MBAs) that they have entered include proponent commitments to support environmental stewardship.

As of November 2016, the Crown was aware that 33 of the Aboriginal groups being consulted by the Crown had signed an MBA and associated Letter of Agreement with the proponent indicating support for the Project. These groups are highlighted in the table below.

Table 12 – Aboriginal Groups with a Mutual Benefit Agreement or Letter of Support with the Proponent

Alberta Aboriginal Groups:	BC Aboriginal Groups:	BC Métis Groups:
Alexander First Nation	Ashcroft Indian Band	BC Métis Federation
Alexis Nakota Sioux Nation (with Alexis Trappers Association)	Canim Lake Band	Métis Nation of British Columbia
Enoch Cree Nation	Ditidaht First Nation	
Ermineskin Cree Nation	Esquimalt Nation	
O'Chiese First Nation	Halalt First Nation	
Paul First Nation	Lake Cowichan First Nation	
Samson Cree First Nation	Malahat Nation	
	Matsqui First Nation	
	Nicomien Indian Band	
	Pacheedaht First Nation	
	Pauquachin First Nation	
	Penelakut Tribe	
	Peters First Nation	
	Popkum First Nation	
	Scia'new (Beecher Bay) First Nation	
	Seabird Island Indian Band	
	Semiahmoo First Nation	
	Shxw'ōwhámél First Nation	
	Simpcw First Nation	
	Tk'emlúps te Secwépemc	
	T'Sou-ke First Nation	
	Union Bar First Nation	
	Whispering Pines / Clinton Indian Band	
	Yale First Nation	

4.2.3 NATIONAL ENERGY BOARD CONDITIONS

Under the NEB Act, the NEB Panel reviewing the Project Application has a responsibility to submit a recommendation to the Minister of Natural Resources about whether a CPCN should be issued for the Project. In addition, regardless of the NEB's recommendation, it must include all conditions that the NEB considers necessary and desirable in the public interest, should the Project be approved by the GiC.

As the NEB developed conditions, it issued two draft versions of the conditions and invited all hearing participants to provide feedback. The NEB identified a preliminary set of draft conditions on April 16, 2014. In releasing draft conditions early in the hearing process, the NEB provided all participants with information about how potential concerns with the Project could be addressed, while recognizing that draft conditions could be expected to change significantly during the hearing process as new evidence would be filed and assessed by the NEB.

After considering the information submitted throughout its hearing process, the NEB revised the draft conditions and issued the updated set of draft conditions for comment on August 12, 2015. The NEB added additional conditions on December 11, 2015. The comment period on these draft conditions closed on January 12, 2016.

Thirty-five Aboriginal groups provided comments on the draft conditions. Issues raised with respect to the draft conditions included environmental protection, risk of accidents or malfunctions and Aboriginal participation requirements in monitoring and oversight of the Project, if it proceeds. The Stoney Nakoda Nations provided comments on the draft NEB conditions directly to the MPMO, as the Stoney Nakoda Nations did not participate in the NEB hearing.

Federal departments and agencies and the province of BC also commented on the draft NEB conditions.

The NEB reviewed all of these submissions, and set out its final recommended conditions in its May 19, 2016 report. In total, the NEB recommended attaching 157 conditions to the CPCN, should the GiC decide to approve the Project. These NEB's conditions, adopted by the NEB would become legally binding on the proponent. As an overarching condition, the NEB recommended that, if the Project is to proceed, all mitigation measures proposed by or committed to by the proponent during the hearing process become conditions of Project approval. NEB conditions were recommended in the following areas:

- Regulatory oversight;
- Economics and financial responsibility;
- Emergency preparedness and response;
- Environment;
- People, communities and lands;
- Engineering and safety; and
- Multidisciplinary (e.g. WMT and marine shipping).

The NEB conditions for the Project can be found in Appendix 3 of the *NEB Recommendation Report* (Filing [A5A9H1](#)) and are also provided in Appendix H of this report.

The Crown took a significant interest in the development of Project conditions as these measures could potentially address many of the issues and concerns raised by Aboriginal groups during the review of the Project. In addition, a review of Aboriginal groups' comments on the draft NEB conditions enabled the Crown to understand many of the potentially outstanding issues and concerns of these groups in respect of the Project and its potential impacts on Aboriginal Interests and other interests. The NEB conditions recommended by the NEB that would avoid, mitigate or otherwise address key Aboriginal Interests and concerns are discussed in this report, along with key NEB conclusions relating to Aboriginal Interests.

Some Aboriginal groups sought clarification from the Crown as to whether the NEB Act gives exclusive authority to the NEB for identifying Project-specific conditions as part of the CPCN. Some Aboriginal groups noted that in their view, the Minister of Natural Resources or the GiC should be empowered to attach additional conditions to a CPCN if they so wished, in particular to assist in meeting the Crown's duty to consult, and as appropriate, accommodate. The Crown responded that in its view, the GiC has the authority to ask the NEB to reconsider its recommendation for the Project or any of the terms and conditions established by the NEB. While the process for NEB reconsideration has not been defined in policy or procedures, it is reasonable to assume that the NEB's reconsideration could lead to it either revising or recommending additional conditions for the Project.

Federal and provincial authorities with regulatory responsibilities for permits and authorizations following potential issuance of a CPCN, could also impose their own Project-specific conditions that would also become legally-binding on the proponent if the Project is allowed to proceed.

Additional consultation could also be required in relation to permitting activities of federal and provincial authorities should the Project be approved by the GiC and BC Ministers. This determination will be made by the permitting authority, based on their regulatory mandate, on a case-by-case basis. Tables 6 and 7 provide a list of potential federal and provincial regulatory approvals and authorizations.

4.2.4 POTENTIAL PROVINCIAL EA CERTIFICATE CONDITIONS

Pursuant to Section 17 of the BC *Environmental Assessment Act*, if provincial Ministers decide to issue an EA certificate, Ministers may attach any conditions to the EAC the ministers consider necessary. Such conditions would be legally binding on the certificate holder. Based on the NEB's report, the consideration of any additional information and Aboriginal consultation, the EAO will identify any conditions to recommend to provincial Ministers to address Project impacts on areas of provincial jurisdiction. Aboriginal groups will have the opportunity to provide comments on the draft referral materials, which will also include the draft conditions. These conditions would be in addition to any conditions proposed by the NEB.

In consideration of existing legal requirements, and the 157 NEB conditions that would become legally-binding on the Project should it receive GIC approval, EAO is proposing to provincial Ministers an additional 35 conditions that Ministers may attach to a provincial EA certificate, if approved. These conditions are proposed in relation to areas of provincial jurisdiction. EAO recognizes that the NEB has the primary responsibility for ensuring the Project is developed, constructed and operated in a manner that is safe and secure, and protects people, property and the environment.

The EAO's proposed conditions are in response to the concerns that have been raised by Aboriginal groups during the joint Crown consultation undertaken for the Project. The proposed conditions are also in response to the key areas of provincial interest within the EA. The conditions endeavour to ensure that the Project would be developed and operated in a manner that is consistent with provincial policies and programs, in consideration of the existing regulatory regime. The conditions address a variety of issues, including the consultation and engagement of Aboriginal groups, the public and provincial agencies, the mitigation and offsetting of wildlife impacts, greenhouse gas emissions, drinking water, archaeology and heritage resources, emergency response planning, geographic response planning, research related to the fate and behaviour of bitumen, and emergency management preparedness and response exercises. The conditions also support the ongoing participation of Aboriginal groups in the activities of Trans Mountain, including in implementing the requirements of NEB conditions and proposed provincial conditions.

4.2.5 BROAD CROWN INITIATIVES RELEVANT TO THE PROJECT

The initiatives summarized in this section are not specific to the Project, but may further mitigate adverse effects of the Project and in many cases, will include additional engagement with Aboriginal groups.

BC Spill Response Regime

The province of BC has passed legislation that will allow for the implementation of a world-leading preparedness, response and recovery regime for hazardous substance spills. Key elements of the new spill regime, including an initial set of detailed regulations, will come into effect in 2017. The Province released its policy intentions for the proposed regime in April, and through spring 2016 conducted seven regional First Nations workshops as well as a symposium attended by stakeholders and First Nations.

This legislation will:

- Establish new requirements for spill preparedness, response and recovery;
- Create new offences and penalties;
- Enable the certification of a Preparedness and Response Organization; and
- Increase transparency, participation and accountability.

In June 2015, the Ministry of Environment announced seven agreed upon principles for the design of this world-leading regime:

1. Polluter pays – this principle is already in effect in BC and will not change. Companies that spill or pose the risk of having a spill should be responsible for the costs associated with preparing for and responding to a spill.
2. Risk-based requirements – all spillers will be required to meet new response requirements. The requirements for planning and preparedness will be based on a defined risk threshold, which will consider persistence and volume.
3. Avoids unnecessary duplication – recognizing there are some effective and collaborative spill response procedures in place in certain sectors, supplementation is still required to ensure environmental protection and also ensure BC's system can be considered world-leading.
4. Fair and transparent process – government has committed to continued dialogue through consultation on the development of new legislation and regulations.
5. Opportunities for First Nations and communities in preparedness, response and recovery – active engagement by First Nations and communities on all aspects of a world-leading system are considered key to the successful design, implementation and operations.
6. Strong government oversight – new requirements will provide both clarity and certainty for industry, meet public and First Nations expectations and maximize the protection of the environment.
7. Continuous improvement – the BC government is committed to continuous improvement, ensuring a sustainable world-leading system by applying lessons learned from exercises, incidents and other jurisdictions. Additionally, any technological innovations will continue to be adopted.

While response to marine spills falls under federal jurisdiction, spills in the marine environment can negatively impact BC's coast. The province continues to work with federal partners to align regulatory processes for a consistent spill response framework across BC.

Requirements for British Columbia to Consider Support for Heavy Oil Pipelines

On July 23, 2012, the province of BC set out, in the policy paper *Requirements for British Columbia to Consider Support for Heavy Oil Pipelines*³¹, the requirements that it stated must be established in order for the province of BC to consider supporting the construction and operation of heavy oil pipelines within its borders. The policy paper outlined five main requirements, which are:

- Successful completion of the environmental review process;
- World-leading marine oil spill response, prevention and recovery systems for BC's coastline and ocean to manage and mitigate the risks and costs of heavy oil pipelines and shipments;

³¹ http://www.env.gov.bc.ca/main/docs/2012/TechnicalAnalysis-HeavyOilPipeline_120723.pdf

- World-leading practices for land oil spill prevention, response and recovery systems to manage and mitigate the risks and costs of heavy oil pipelines;
- Legal requirements regarding Aboriginal and treaty rights are addressed, and First Nations are provided with the opportunities, information and resources necessary to participate in and benefit from a heavy-oil project; and
- BC receives a fair share of the fiscal and economic benefits of a proposed heavy oil project that reflects the level, degree and nature of the risk borne by the province, the environment and taxpayers.

Strategic Partnership Initiative and West Coast Energy Infrastructure Program

The Strategic Partnership Initiative and West Coast Energy Infrastructure program were established by the Government of Canada to enhance Aboriginal participation in the development of Canada's energy resources and protection of the environment. Aboriginal groups have raised a number of broad issues for the Project that fall outside the scope of the Project review and consultation process. MPMO-West serves as one key point of entry for Aboriginal groups to discuss broader issues surrounding west coast energy infrastructure development including topics related to employment and training, business development and pipeline and marine safety.

For a summary of these broader Government of Canada initiatives related to west coast energy infrastructure development that could have direct or indirect relevance to the Project, please see Appendix I.

Pipeline Safety Act

The *Pipeline Safety Act* received Royal Assent on June 18, 2015 and came into effect in June 2016. Key aspects of the new legislation include:

- Introducing absolute liability for all NEB-regulated pipelines, meaning that companies will be liable for costs and damages irrespective of fault — \$1 billion for companies operating major oil pipelines — the only absolute liability that exists among our peer jurisdictions (US, UK and Australia). Companies continue to have unlimited liability when at fault or negligent;
- Providing the NEB authority to order reimbursement of any clean-up costs incurred by governments, communities or individuals;
- Providing the NEB authority and resources to take control of incident response if a company is unable or unwilling to do so (i.e., in exceptional circumstances); and
- Requiring companies operating pipelines to hold a minimum level of financial resources, set at \$1 billion for companies operating major oil pipelines.

Further information on the *Pipeline Safety Act* and its liability provisions is available on the NEB website: <https://www.neb-one.gc.ca/bts/ctrq/gnnb/dmgprvntnrgltn/pplnsftctfq-eng.html>.

Area Response Planning

During May and June of 2016, the Government of Canada engaged Aboriginal groups and coastal communities on its Area Response Planning Initiative. This initiative is a pilot project jointly led by Transport Canada and the Canadian Coast Guard (CCG) and is aimed at improving Canada's ship-source oil spill preparedness and response regime, as it is defined in Part 8 of the *Canada Shipping Act, 2001*. In accordance with the Act, the pilot project is focused on preparedness and response for oil spills from all vessels over 400 gross tonnages (GT), all tankers over 150 GT and spills from oil handling facilities when a vessel is present.

The Area Response Plan pilot project seeks to identify where improvements can be made to further strengthen the current preparedness and response regime for ship-source oil spills, and to ensure that the regime remains responsive to changing demands and practices. Using a risk management framework, Area Response Plans will be developed that allow flexibility for regional differences and levels of risks. The risk management framework will identify the critical elements of ship-source oil spill prevention, preparedness and response. Transport Canada is developing an Area Risk Assessment Methodology to perform a quantitative analysis of these elements to determine the levels of risks and, ultimately, to inform tailored Area Response Plans.

As part of the Area Response Plan pilot projects, information on cultural/archaeological sites collected will aid the lead agency for response (CCG) in assigning priorities during a response. Information gathered during the Area Response Plans would help Command (in the Incident Command Services) make informed decisions about protecting resources potentially at risk.

Independent Review of the M/V Marathassa Fuel Oil Spill Environmental Response Operation

In addition, following release of the Independent Review of the M/V Marathassa Fuel Oil Spill Environmental Response Operation, the Minister of Fisheries and Oceans accepted and committed to implementing all recommendations, including:

- Review of internal and external notification procedures and practices following a report of marine pollution;
- Improving communications;
- Further implementation of the Incident Command System within CCG and exercising with all partners, including First Nations, provincial and municipal partners, and non-governmental organizations as part of the plan; and
- Clarifying roles and responsibilities, internally, and with our federal and local pollution response partners, to ensure an effective and appropriate pollution response.

Marine Safety Initiatives

The Government of Canada recently announced measures to strengthen Canada's world-leading marine safety system, restore and protect marine ecosystems and habitats, build partnerships with Indigenous communities, and invest in oil spill cleanup research and methods. These marine safety initiatives will benefit all Canadians and were developed to address gaps in Canada's existing marine safety system that were identified by Indigenous and coastal communities, as well as environmental groups, industry, and experts. The specific initiatives respond to where marine safety improvements are needed the most, as identified through Canada-wide consultation efforts.

Indigenous coastal communities will be involved in co-developing aspects of this plan to protect, preserve, and restore Canada's oceans and sea routes, and to play a stewardship role in protecting Canada's coasts by contributing traditional knowledge and expertise. Some example initiatives include: the establishment of Indigenous Community Response Teams and creation of an Indigenous chapter of the Coast Guard Auxiliary; creation of local vessel control areas to minimize safety risks and environmental impacts in collaboration with Indigenous groups; and the design and launch of a five-year program on the South Coast of B.C. to collect and update baseline biological, ecological, social, cultural and economic data to support effective environmental stewardship, also in partnership with Indigenous groups.

The Crown is of the view that these marine initiatives will lead to safer, more responsible marine shipping and cleaner, healthier marine ecosystems for traditional and other community uses. While not specific to any one project, they will nevertheless respond to a variety of concerns that Indigenous groups have raised in the context of the proposed Trans Mountain Expansion Project.

South Coast Marine Safety Workshops

Transport Canada is planning on co-hosting additional workshops in early 2017 with Indigenous groups and responsible authorities of the marine safety system, with respect to ways to improve the system, including increasing involvement of Indigenous groups along the marine shipping route.

Further information on these initiatives that have particular relevance for Indigenous groups who may be potentially affected by the marine shipping element of the Project are forthcoming.

4.2.6 CONTEMPLATED PROJECT-RELATED CROWN ACCOMMODATION MEASURES

Crown analysis of the NEB Report and the outcomes of the consultation process on the NEB Report have identified outstanding issues and general residual effects of the Project that could adversely impact Aboriginal Interests and other interests. Specific Aboriginal group impacts are discussed in Appendices A-E.

In addition to potential impacts on Aboriginal Interests, the Crown has also gained an appreciation for the interest within Aboriginal communities of being involved in ongoing environmental monitoring and oversight of Project construction and operational activities, and in emergency

planning and response. In part, these interests stem from the role Aboriginal groups take with respect to decision making for major resource projects proposed within their traditional territories and asserted title lands. In addition, the Crown understands that Aboriginal groups with title claims and current use of lands and resources for traditional purposes within the Project footprint wish to derive some direct benefits should the Project proceed, over and above any benefits provided through agreements reached with the proponent.

The Crown understands that one form of accommodation to address these issues can come through acknowledgement and respect for traditional governance systems and Aboriginal groups' strong cultural ties to the land³² including past, present and future use of the land for the existing TMPL corridor and the proposed expansion. The Crown also understands that there is currently a lack of trust that pipeline operators and regulatory agencies will protect ecosystems and Aboriginal Interests, despite increasing levels of transparency for compliance and enforcement reporting and emergency planning.

The Crown has also heard through the consultation process that Aboriginal groups wish to collaborate with the proponent, regulatory authorities and the appropriate government authorities to better understand industry standards and technical matters associated with pipeline safety, emergency planning and response, in order to help communicate and manage any incremental risk to communities.

To address these outstanding concerns as well as the incremental risk of the Project to the exercise of Aboriginal Interests where cumulative effects may already place limits on where, when and how traditional activities can be practiced, consultation has been initiated on some specific proposed federal measures, described below.

Proposal for an Indigenous Advisory and Monitoring Committee

The Indigenous Advisory and Monitoring Committee proposal involves establishing a forum for Indigenous communities to engage with federal regulators and the federal government (and potentially provincial governments and proponents) to participate in monitoring of construction, operation, and decommissioning of the Project. Subject to further consultation with interested Indigenous communities, such a committee's role could include:

- Sharing information and local traditional knowledge regarding environmental conditions, community concerns and company performance throughout the lifecycle of the pipeline;
- Collaborative review of plans, reports, and activities related to the Project, and monitoring of compliance with regulatory requirements and Project conditions; and
- Providing advice to the regulator and the proponent on issues with respect to monitoring and mitigation.

³² For example, through consultation on this Project, the Crown has come to understand that the word "land" can mean far more than is commonly understood from the English word. For example, the word "land" in the Nsyilxcen language is "ła_kłtmx"úla?x" (loosely pronounced "tumulx"), which to the Syilx people means everything we are a part and responsible for protecting – including the bugs, birds, bears and the entire ecosystem including what is below the ground.

Recognition of Historical Impacts of the Existing Trans Mountain Pipeline

Governments do not have a duty to consult or accommodate in respect of past or existing projects. Nevertheless, many Aboriginal groups raised concerns that they were not consulted in the early 1950s when the existing TMPL was approved, and that this was important because the Project would become part of the TMPL system if it receives approval.

4.3 General Impacts on Aboriginal Interests and Concerns

4.3.1 IMPACTS ON HUNTING, TRAPPING, AND GATHERING

Early on in the review of the Project, the Crown identified that routine construction and operation of new pipeline segments including terminals, pumping stations and expanded storage facilities could result in changes to hunting, trapping and gathering activities for those groups who exercise rights within the Project footprint.

The Project could result in changes to hunting and trapping through the following potential effects:

- Loss or alteration of wildlife habitat and wildlife movement;
- Changes to terrestrial food sources for wildlife;
- Increased predation risk of harvested species;
- Sensory disturbances to wildlife from short-term noise and vibration;
- Changes to the quality of country (traditional) foods;
- Increased access by non-Aboriginal hunters and trappers; and
- Temporary loss of access to traditional lands.

The Project could result in changes to traditional gathering activities through the following potential effects:

- Loss or contamination of native vegetation, soil degradation, localized changes to topography, erosion, air quality and noise;
- Increased access to previously inaccessible areas; and
- Temporary loss of access to traditional lands.

In the event of an accident or malfunction that allowed for fuel, oil or other deleterious substances to be released into the terrestrial or marine environment, the Project could result in the following changes to the environment and socio-economic conditions, and on hunting, trapping and gathering through the following potential effects:

- Direct loss or alteration of wildlife and wildlife habitat abundance, or quality;
- Direct loss of harvestable plant species of interest to Aboriginal groups; and
- Changes to water and soil quality.

NEB Conclusions in Relation to Potential Impacts on Hunting, Trapping, and Gathering

In respect of the above potential effects, the NEB concluded on page 279 of its report that the ability of Aboriginal groups to use the lands, waters and resources for traditional purposes would be temporarily impacted by construction and routine maintenance activities during operations, and that some opportunities for certain activities such as harvesting or accessing sites or areas of TLRU will be temporarily interrupted.

Other specific conclusions of the NEB in respect of the above noted potential effects of the Project include:

- Not likely to cause significant adverse effects to soil and soil productivity (page 189);
- Not likely to cause significant adverse effects to rare plants and lichens and vegetation communities of concern (page 195);
- No-net-loss of old growth forests within Old Growth Management Areas (page 196);
- Not likely to cause significant adverse effects to wetlands (page 200), wildlife and wildlife habitat (page 204), caribou (page 208) or grizzly bear (page 212), wildlife species at risk (215); and
- Not likely to cause significant adverse effects to surface water quality and quantity (page 177) or groundwater (page 179).

The NEB is of the view that impacts would be short-term, limited to brief periods during construction and routine maintenance, and largely confined to the Project footprint for the pipeline, associated facilities and the on-shore portion of the WMT. The NEB found that these effects would be reversible in the short to long term, and low in magnitude.

The NEB found that Project construction and operation would result in adverse effects to riparian habitat due to clearing of vegetation required for watercourses crossed using trenched methods. Generally, the NEB considers adverse effects to riparian habitat as temporary, since disturbed riparian habitat is likely to return to a similar pre-construction functionality during the life of the Project. However, in certain situations, such as when mature riparian habitat is removed, adverse effects to riparian habitat would be considered permanent such that riparian habitat may not return to pre-construction conditions within the life of the Project.

The following NEB conditions would help avoid or mitigate potential impacts on Aboriginal groups' hunting, trapping, and gathering:

- Overarching conditions (#1,2,3,4) for compliance with commitments, environmental protection, engineering and safety;
- Conditions for soil, vegetation and wetlands protection prior to construction (#40,41,42,45,46,47,71,76,92) and during operation (#151,154,155,156,157);

- Conditions for wildlife and wildlife habitat protection prior to construction (#36,37,38,44,47,56,71,92), prior to operation (#128) and during operation (#37,128,149,150,151,154); and
- Conditions for Aboriginal engagement (#96,146), TLRU and TLMU investigation reporting (#97) and participation in monitoring during construction (#98).

Trans Mountain has also committed to communicating its construction schedule to Aboriginal trappers so that they can set their traplines in areas unaffected by construction activities. Should they lose trapline revenue and or suffer a reduced harvest, the proponent has committed to offering compensation. NEB condition #2 (Compliance with commitments) requires that Trans Mountain fully implement all of the commitments it made in its Application or during the NEB review process.

Many Aboriginal groups stated they have a significant reliance on food gathered from the land as part of their normal diet, and access to this food is directly related to the health and well-being of their people. Interference with the ability to continue harvesting plants for medicinal use was raised as a concern. Some groups said that they had concerns with the clearing of vegetation and with contamination of plants and loss or alteration of traditional use subsistence sites for plant gathering. Aboriginal groups also identified many concerns related to environmental effects of the Project on hunting, trapping, and plant gathering activities.

Aboriginal groups are concerned about the impacts on a wide variety of wildlife species, including species at risk, through habitat loss and fragmentation, increase in predation by creating animal corridors, wildlife displacement and sensory disturbance. Aboriginal groups are concerned that there will be a destruction of plants and medicinal resources relied on by Indigenous people, such as cedar bark, roots, buds, wood, berries, and medicines.

Aboriginal groups raised concerns with the Project's potential impacts on access to hunting, trapping, and plant gathering, including increased barriers to accessing traditional resources and practices, especially during construction. They were concerned that the access to these locations, especially preferred sites, will result in fewer hunting, trapping, and plant gathering opportunities for their community members. Aboriginal groups stated that hunting activities are currently impacted by existing development and that existing fragmented lands in their traditional territories will be further fragmented, enabling increased access to non-Aboriginal recreational hunters. The result is that Aboriginal groups are of the view that fewer hunting opportunities will be available for Aboriginal hunters should the Project proceed.

Aboriginal groups in the Coastal Region of BC raised concerns about restricted marine access to specific hunting, trapping, and plant gathering activities due to increased marine vessel traffic associated with the Project. These Aboriginal groups were concerned that their smaller vessels could be at risk when traversing the established marine shipping lanes, and that some Aboriginal group members will be discouraged from travelling on the water due to Project-related marine vessel traffic.

Aboriginal groups also expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of hunting, trapping, and plant gathering activities. Aboriginal groups were concerned that the Project could impede access to hunt, trap and gather plants, and that this could cause a sense of spiritual and cultural alienation from the land. Groups were also concerned about the use of pesticides to control invasive species and what the impact could be on the health of community members that consume country foods.

The Crown acknowledges that proponent commitments, NEB conditions and the existing pipeline and marine safety regimes would not eliminate the potential adverse impacts of the Project on Aboriginal Interests specific to hunting, trapping, and plant gathering activities. The following is a discussion of the general factors that have been considered by the Crown in assessing the potential impacts on Aboriginal group's Aboriginal Interests associated with hunting, trapping and plant gathering activities.

For all of the valued components assessed by the NEB related to hunting, trapping and plant gathering, adverse effects were found to be limited to directly disturbed areas in the Project footprint, sometimes extending off-footprint into the Local Study Area (LSA). The Project's adverse effects vary in duration and frequency from short-term to long-term including for woodland caribou mortality risk, some weeds/invasive species, and medium-term for soil & soil productivity, rare plants, lichens, vegetation, and wetlands (with reclamation). Other medium to long term effects are predicted to occur for mature trees and grasslands, and terrestrial wildlife including woodland caribou and grizzly bear. The Project's adverse effects to species relied upon for hunting, trapping and plant gathering activities were found by the NEB to range from reversible to permanent.

The Crown notes that there is a divergence of opinion on the magnitude and significance of cumulative effects over a wide array of valued components related to hunting, trapping and plant gathering. The proponent and NEB conclude that the Project's contributions to the total cumulative effects for most VCs are relatively minor, inconsequential or insignificant. The NEB cites the voluntary commitment of the proponent to develop an Environment Stewardship Program, where the proponent would seek opportunities, alone or in partnership, to restore, secure, or enhance elements of aquatic and terrestrial ecosystems above and beyond regulatory requirements.

The baseline information related to the construction and operation of the pipeline RoW and associated facilities is well understood. In the Crown's view, the construction and operation of the pipeline, WMT and associated facilities represent a low to moderate magnitude change in the established baseline environment. The majority of effects – primarily in the biophysical context – are reversible within the Project lifecycle with a small number of effects being more permanent over decades/generations related to removal of riparian habitat and mature vegetation for the RoW and facilities maintenance. Adverse effects are short-term in duration and frequency during the Project construction; long term in duration for operations and maintenance over the Project life cycle.

However, the Crown notes that many Aboriginal groups maintain that the cumulative effects of development activities have severely impacted their ability to exercise their Aboriginal and treaty rights to hunt, trap and gather plants. Aboriginal harvesting activities continue to be adversely affected by development, with fragmentation of lands, loss of access to hunting and trapping areas, encroachment of developments, and loss of natural habitat. Project-related impacts on access to, or use of culturally sensitive sites and practices are viewed as additive to the current baseline which reflects cumulative effects of past development activities.

In consideration of concerns raised by Aboriginal groups during the NEB hearing and through Crown consultation, and in consideration of the conditions proposed by the NEB, the existing regulatory regime, and the jurisdiction of the province, EAO is also proposing a number of conditions, which BC Ministers may attach to the provincial EA certificate, if approved. Conditions particularly relevant to avoiding or mitigating impacts on Aboriginal groups' hunting, trapping and gathering include:

- EAO Conditions 10 and 12 require Aboriginal consultation and Aboriginal construction monitors;
- EAO Conditions 16-20 require a range of wildlife management and offsetting plans, a weed and vegetation management plan, and an access management plan. These plans establish incremental requirements to the NEB conditions, and include the requirement to consult Aboriginal groups in the development of the plans; and
- EAO Condition 22 requires the proponent to prohibit hunting, fishing trapping and plant gathering by employees and contractors.

The potential impacts of the project on Aboriginal Interests associated with hunting, trapping and gathering activities for each Aboriginal group are discussed in Appendices A-E.

4.3.2 IMPACTS ON FRESHWATER FISHING

Early on in the review of the Project, the Crown identified that routine construction and operation of new pipeline segments, terminals, pumping stations and expanded storage facilities could result in changes to freshwater fishing for those groups exercising rights within the proposed pipeline RoW and related facilities.

The Project could result in changes to freshwater fishing through the following potential effects:

- Temporary loss of or impeded access to traditional fishing sites;
- Disturbance to riparian habitat at pipeline watercourse crossings leading to indirect effects to fish harvesting; and
- Reduction in water levels or quality.

NEB Conclusions in Relation to Potential Impacts on Freshwater Fishing

During the NEB hearing and Crown consultation with Aboriginal groups, concerns were raised regarding the potential impacts of the Project on fish, and in particular, Pacific salmon, as a culturally, economically and ecologically important species within BC. Concerns were raised about the existing cumulative effects from industrial and urban development, impacts on riparian areas, and potential impacts on species at risk. Chapter 10.2.5 of the NEB Report provides the assessment of the potential impacts on freshwater fish and fish habitat, including the key mitigation measures identified by Trans Mountain. The NEB found that proposed watercourse crossings designs, mitigation measures, reclamation activities, and post construction monitoring would be appropriate and would effectively reduce the extent of effects to fish and fish habitat. Watercourse crossings would need to comply with federal (NEB and Fisheries and Oceans Canada [DFO]) and provincial laws and regulations, and would require permits under the *BC Water Sustainability Act*, which protects the quality and quantity of water for fish and fish habitat. The NEB agreed with Trans Mountain's self-assessment of the potential for serious harm, in that the majority of proposed watercourse crossings would not constitute serious harm to fish under the *Fisheries Act*.

NEB condition 43 requires site-specific information to make an accurate serious harm determination for higher risk crossings, and would include consideration of fish habitat features and functions, species use, and composition of riparian habitat. The NEB noted that it would use this information to conduct a site-specific review of each of the proposed watercourse crossings where Trans Mountain cannot meet all of DFO's Measures to Avoid Causing Harm to Fish and Fish Habitat, and to verify the results of Trans Mountain's self-assessment of the potential for serious harm to fish. The NEB would refer to DFO any watercourse crossing activities that may likely result in serious harm to fish and require authorization under the *Fisheries Act*. DFO would then be responsible for reviewing the proponent's Application for Authorization, making a determination on whether serious harm to fish is likely, and issuing potential *Fisheries Act* authorization(s). The NEB did not anticipate impacts on critical habitat of the Nooksack dace and Salish sucker (fish species at risk) provided that trenchless watercourse crossing methods are employed, as required in NEB Condition 75. The NEB concluded that there would not be significant adverse effects to freshwater fish and fish habitat (page 185-6).

The NEB concluded that the Project was not likely to cause significant adverse environmental effects to surface water quality and quantity (page 177) or groundwater (page 179). The NEB is of the view that the proposed Environmental Protection Plans would effectively reduce the extent of any effects of Project construction and operation on surface water quality and quantity.

The following NEB conditions would help avoid or mitigate potential impacts on Aboriginal groups' freshwater fishing:

- Overarching conditions (#1,2,3,4) for compliance with commitments, environmental protection, engineering and safety;
- Conditions for water quality protection (#35,39,47,71,87,113,130,151,154);

- Conditions for fish and fish habitat (#43,47,71,75,92,108, 110,151,154);
- Conditions for watercourses (#43,47,48,65,67,71,72,74,75,87,92,94,108,110,113, 151,154); and
- Conditions for Aboriginal engagement (#96,146), TLRU and TLMU investigation reporting (#97) and participation in monitoring during construction (#98).

Many Aboriginal groups stated they have a significant reliance on food gathered from the land as part of their normal diet, and access to this food is directly related to the health and wellbeing of their people. Aboriginal groups identified many concerns related to environmental effects of the Project on fishing activities, in particular, risks to marine and freshwater habitats that are important to salmon in the Fraser River on already stressed salmon populations that have been experiencing low returns in recent years.

Aboriginal groups raised concerns with the Project's potential impacts relating to specific locations and access to fishing activities, specifically the destruction of traditional resources, including spiritually and culturally important sites, increased barriers to accessing traditional resources and practices, and increased access to the land by members of the public due to Project-related activities.

Aboriginal groups expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its fishing activities, and sense of spiritual and cultural alienation. Aboriginal groups in the Fraser Basin stated that salmon are key species in their culture, connected to community members' social well-being, spirituality, way of life, and connection to their land.

The Crown acknowledges that proponent commitments, NEB conditions and the existing pipeline safety regime would not eliminate the potential adverse impacts of the Project on Aboriginal Interests specific to freshwater fishing. The following is a discussion of the general factors that have been considered by the Crown in assessing the potential impacts on Aboriginal group's Aboriginal Interests associated freshwater fishing activities.

For all of the VCs assessed by the NEB related to freshwater fishing, adverse effects were found to be limited to directly disturbed areas in the Project footprint, sometimes extending into the LSA. The Crown notes the NEB's finding that proposed watercourse crossings designs, mitigation measures, reclamation activities, and post-construction environmental monitoring, as proposed by Trans Mountain, are appropriate and would effectively reduce the extent of effects to fish and fish habitat. The Crown also notes that all watercourse crossings will need to comply with federal (NEB and DFO) and provincial laws and regulations, and will require section 11 permits under BC's *Water Sustainability Act* that protects the quality and quantity of water for fish and fish habitat.

This Project is subject to the December 2013 Memorandum of Understanding between DFO and the NEB for the Cooperation and Administration of the *Fisheries Act* and the *Species at Risk Act* Related to Regulating Energy Infrastructure. As such, the NEB reviewed and assessed effects to fish and fish habitat associated with the pipeline component. DFO's response to effects to marine fish and fish habitat, and marine mammals (including species at risk) associated with the marine terminal and marine shipping Project components is discussed in section 4.3.3.

If, following the identification of mitigation measures, a watercourse crossing is likely to result in serious harm to fish, then the NEB will inform DFO that a *Fisheries Act* authorization under paragraph 35(2)(b) is likely to be required. Similarly, if it is anticipated that there will be unavoidable impacts on aquatic species at risk associated with watercourse crossings, the NEB will inform DFO.

Once DFO receives the proponent's application for authorization, it will review the application, conduct consultation with potentially affected Aboriginal groups, and issue an authorization if deemed appropriate. Authorizations issued by DFO would relate specifically to those works, undertakings or activities that are likely to result in serious harm to fish as defined by the *Fisheries Act*, and not the entire Project. DFO would undertake appropriate Aboriginal consultation in the regulatory phase should a *Fisheries Act* authorization or SARA permit be required.

The Project's adverse effects to surface water and freshwater fish and habitat due to watercourse crossings were determined by the NEB to be short-term and reversible. The proponent and NEB concluded that the Project's contributions to the total cumulative effects for most VCs are relatively minor, inconsequential or insignificant. The Board cites the voluntary commitment of the proponent to develop an Environment Stewardship Program, where the proponent would seek opportunities, alone or in partnership, to restore, secure, or enhance elements of aquatic ecosystems above and beyond regulatory requirements.

The baseline information related to the construction and operation of the pipeline RoW and associated facilities is well understood. In the Crown's view, the construction and operation of the pipeline, WMT and associated facilities represent a low to negligible magnitude change in the established baseline environment related to fish and fish habitat. The majority of effects – primarily in the biophysical context – are reversible within the Project lifecycle. Adverse effects to traditional freshwater fishing practices are viewed by the Crown as short-term in duration and frequency during the Project construction.

However, the Crown notes that many Aboriginal groups maintain that the cumulative effects of development activities have severely impacted their ability to exercise their Aboriginal and treaty rights to fish. Aboriginal fishing activities continue to be adversely affected by development and the effects of climate change. Project-related impacts on access to fishing, or use of culturally sensitive sites and practices associated with fishing activities are viewed as additive to the current baseline which reflects cumulative effects of past development activities.

In consideration of concerns raised by Aboriginal groups during the NEB hearing and Crown consultation, and in consideration of the conditions proposed by the NEB, the existing regulatory regime, and the jurisdiction of the province, EAO is also proposing a number of conditions, which BC Ministers may attach to the provincial EA certificate, if approved. Conditions particularly relevant to avoiding or mitigating impacts on Aboriginal groups' freshwater fishing include:

- EAO Conditions 10 and 12 require Aboriginal consultation and Aboriginal construction monitors;
- EAO Condition 20 requires an access management plan, including measures to avoid or mitigate disruption of the access by members of Aboriginal groups carrying out traditional use activities. This plan establishes incremental requirements to the NEB condition, and includes the requirement to consult Aboriginal groups in the development of the plan; and
- EAO Condition 22 requires the proponent to prohibit hunting, fishing, trapping and plant gathering by employees and contractors.

The potential impacts of the Project on Aboriginal Interests associated with freshwater fishing activities for each applicable Aboriginal group are discussed in Appendices A-E.

4.3.3 IMPACTS ON MARINE FISHING AND HARVESTING

Early on in the review of the Project, the Crown identified that construction and operation of the WMT and routine marine shipping operations could result in changes to marine fishing and harvesting for those groups exercising rights within Burrard Inlet, Salish Sea and Strait of Juan de Fuca in the vicinity of the designated traffic separation schemes or marine shipping lanes³³.

The Project could result in changes to marine fishing and harvesting through the following potential effects:

- Loss or alteration of marine foraging habitat, bird habitat and other species habitat associated with marine harvesting as a result of WMT expansion;
- Sensory disturbances to marine mammals and marine birds from short-term noise and vibration;
- Temporary loss or impeded access to traditional fishing or marine harvesting sites;
- Temporary loss of access to ocean harvesting areas for short durations from shipping;
- Vessel strikes and other interference with vulnerable or endangered species of significance to Aboriginal groups such as the Southern Resident Killer Whale; and
- Environmental effects such as routine marine-related discharges, invasive species, air and light pollution.

³³ For impacts related to accidents and malfunctions, see section 4.3.6.

NEB Conclusions in Relation to Potential Impacts on Marine Fishing and Harvesting

For the TMRU activities directly affected by the WMT, the NEB concluded on p. 279 of its report that effects of WMT construction and operation would persist for the operational life of the Project, as TMRU activities would not occur within the expanded water lease boundaries for the WMT. The NEB found that while the effects would be long term in duration, these would be reversible in the long term. The NEB notes that the anticipated loss of marine fish and fish habitat would be offset, and that specific offsetting measures will be determined in consultation with DFO and affected Aboriginal communities. The NEB acknowledges the concerns expressed by Aboriginal groups about the effects to harvesting and traditional user vessel movements in the vicinity of the WMT, but notes that the dock and associated vessel movement have been present for many years. Aboriginal groups would likely be able to adapt to the expanded water lease boundary. Therefore, the NEB concluded that for the WMT, the Project's effects to TMRU are low in magnitude.

The NEB concluded that marine shipping from the Project would disrupt Aboriginal marine vessels and harvesters, and that this could disrupt activities or access to sites. The Board is of the view that these disruptions would be temporary, only occurring during the period of time when Project-related tanker vessels are in transit. The NEB is of the view that Aboriginal marine vessel users would maintain the ability to harvest marine resources and to access subsistence and cultural sites in the presence of the periodic and short-term disruptions caused by Project-related vessels. The NEB found that, with the exception of effects to the Southern Resident Killer Whale, the magnitude of effects of Project-related marine vessel traffic on traditional marine resource uses, activities, and sites is low.

The Board agreed with DFO and Trans Mountain that there is no direct mitigation Trans Mountain can apply to reduce or eliminate potential adverse effects from Project-related marine vessels. The Board recognizes that altering vessel operations, such as shifting shipping lanes away from marine mammal congregation areas or reducing marine vessel speed, can be an effective mitigation to reduce impacts on marine mammals from marine shipping.

Given the low frequency, duration and magnitude of effects associated with potential disruptions, and Trans Mountain's commitments to provide regular updated information on Project-related marine vessel traffic to Aboriginal communities, the Board finds that adverse effects to traditional marine resource uses, activities and sites are not likely, and that contribution of Project-related marine traffic to overall effects related to changes in traditional marine use patterns is not likely to be significant.

The NEB noted that Trans Mountain has committed to initiating public outreach program prior to beginning operations to educate public on marine shipping and provide regular updated information on marine vessel traffic, including the area around Swiftsure Bank (page 362).

Other specific conclusions of the NEB in respect of potential effects of the Project to marine fishing and harvesting include:

- The Project is not likely to cause significant adverse environmental effects to marine sediment and water quality (page 219), marine fish and fish habitat (page 222), marine mammals (page 225), or marine birds (page 226);
- The impact of marine shipping on marine fish and fish habitat will be low magnitude and reversible (page 340);
- Underwater noise from marine shipping will create a long term sensory disturbance for marine mammals, however this effect is reversible (page 349);
- Marine shipping lane utilization is expected to increase regardless of whether or not the Project is approved (page 349);
- The Marine Mammal Protection Program is meant to ensure Trans Mountain participates in the development of industry wide best practices (page 349);
- Project related marine vessels would have some impact on humpback whales, transitory killer whales, and other baleen whales, however these effects would be inconsequential (page 351);
- Effects of marine shipping on marine birds are expected to be long term, but reversible, and of low magnitude (page 351); and
- Disruption of Aboriginal traditional marine use, such as through interference or collisions with marine tanker traffic, are unlikely due to existing regulatory standards (page 362).

If the Project is approved, the following NEB conditions would either directly or indirectly avoid or reduce some of the impacts and concerns raised by Aboriginal groups in respect of potential impacts on marine fishing and harvesting:

- Overarching conditions (#1,2,3,4) for compliance with commitments (including TERMPOL recommendations and findings), environmental protection, engineering and safety;
- Conditions for protection of fish and fish habitat (#92, 109, 151);
- Conditions for protection of marine mammals (#92,132,151); and
- Conditions for the WMT:
 - Prior to construction: #8,21,30,33,34,35,52,53,80,81,82,83,84,97,101;
 - Prior to operation: #30, 109,118,119,123,126,127,129,130,136,138;
 - During operation: #109, 141; and
 - Hydrostatic Testing Plan: #113.

The above-noted NEB conditions for the WMT include various requirements to develop more detailed mitigation plans during the permitting phase. These include:

- Condition 35 – Marine Sediment Management Plan (Possible mitigations for harvesting: test dredges for gauging sediment behavior; use of silk screens to contain sediment; uplands disposal of dredge materials; disposal at sea behind a berm);
- Condition 80 – Noise Management Plan for construction at terminals and pump stations (Possible mitigations for impacts on harvesting include: use of alternative underwater techniques – underwater bubble curtains, isolation casing for piles);
- Condition 81 – Westridge Marine Terminal Environmental Protection Plan (Possible mitigations for impacts on harvesting include: reliance upon a Fisheries Impact Study looking at what impacts their proposed project may have on Aboriginal fisheries and fish and fish habitat, carried out by an Aboriginal group that resides in the Inlet; developing and implementing an oyster shell replacement plan; support funds for the Lynn Creek Estuary Legacy Project. Possible mitigations for impacts on cultural practices: for anchorages, VFPA officials – in response to complaints – asking vessels to power down lights and boilers);
- Condition 83 – Westridge Marine Terminal (offshore) – pile design (Possible mitigations for impacts on harvesting include: construction activities carried out outside fish window; use of steel instead of creosote treated piles; and
- Condition 98 – Plan for Aboriginal group participation in construction monitoring (Possible mitigations for impacts on culture / cultural practices include: instituting archaeological chance find procedures for construction activities and in some instances ensure Aboriginal monitors are on site during works.)

In addition to the above, the following conditions are generally applicable to protecting marine fishing or harvesting activities in the vicinity of the Project:

- Reports on improvements to Trans Mountain's Emergency Preparedness Program (#117) and Implementing improvements to Trans Mountain's Emergency Preparedness Program (#124);
- Conditions for project-related marine shipping (#91,131,132,133,134,144);
- Conditions for Aboriginal engagement (#96, 146), TLRU and TLMU investigation reporting (#97) and participation in monitoring during construction (#98); and
- Community Benefit Program progress reports (#145).

Condition 131 would require Trans Mountain to develop a public outreach program prior to Project operations in order to ensure that the program is designed in consultation with the Pacific Pilotage Authority and implemented in a manner that is appropriate to its intended audience. The NEB also noted that Project-related marine vessels are required to fully comply with all applicable navigational, communications and safety regulations including those of Transport Canada, the Canadian Coast Guard, the Pacific Pilotage Authority and Vancouver Fraser Port Authority (VFPA), including adherence to VFPA's guidelines regarding noise and light pollution for tankers docked at VFPA managed anchorages (page 356).

Aboriginal groups on the Salish Sea raised concerns with potential Project impacts related to their Aboriginal right to fish and harvest marine resources.

Aboriginal groups were concerned that routine shipping could adversely impact marine organisms of critical importance through chemicals released through the discharge of ballast water, impacts from invasive species transported via the hull of a ship or in ballast water, ongoing sensory disturbance to marine fish and mammals, erosion and damage to intertidal and shoreline habitat from wakes.

Aboriginal groups raised concerns that increased tanker traffic will disrupt the ability of community members to access marine fishing and harvest areas, and have concerns for the safety of community members on the water when tankers are transiting due to increased vessel wake and potential collisions. Groups noted that access to some harvesting areas is already constrained, and increasing use of shipping lanes is impairing access to and use of some areas. If shipping traffic becomes too high, some groups expressed that it may effectively prevent use in some areas.

Aboriginal groups raised concerns with direct and indirect effects of Project-related marine shipping activities on social, cultural, spiritual, and experiential aspects of its marine fishing and harvesting activities. Groups are concerned that increases in tanker traffic that may discourage community members from travelling on the ocean, interfere with travel to traditional territories, and adversely impact the ability of community members to exercise their fishing rights and cultural practices, including the transfer of traditional knowledge. Aboriginal groups raised concerns that reduced harvests would impact economic, cultural and social structures within the community through lack of connection with historical and current traditions.

The following is a discussion of the general factors that have been considered by the Crown in assessing the potential impacts on Aboriginal Interests associated with marine fishing and harvesting activities resulting from: environmental effects, the WMT, routine Project-related marine vessel traffic and interference, marine vessel wake and shoreline erosion, and Southern Resident Killer Whale, Stellar Sea Lions, and other marine mammals.

Westridge Marine Terminal

The current Westridge Marine Terminal dock complex extends 75 m into Burrard Inlet. The proposed expanded dock is anticipated to extend approximately 250 m into Burrard Inlet with a maximum marine footprint of construction activities estimated to be 350 m. Construction would take approximately two years. Given the potential increase in marine shipping associated with the Project, the Crown understands that the four existing anchorages within eastern Burrard Inlet proximal to the WMT would be used at a greater frequency and more continuously over the life of the Project if it proceeds.

The First and Second Narrows contain deep-sea transit routes and are subject to movement restrictions. The Second Narrows Movement Restriction Area (MRA) is subject to additional procedures facilitating safe transit and order of priority for large vessels due to extremely strong currents and available clearance and depth of the channel. It is expected that vessels less than 20 m (including fishing vessels) shall not impede the passage of larger vessels within a narrow channel, or hamper the movements of vessels maneuvering on or off a berth.

While limited recreational boating is allowed between the Lions Gate and Second Narrows bridges, pleasure craft must have outboard motors for transiting through the Inner Harbour. Anchoring, crabbing, fishing, sailing, rowing, paddling, jet-skiing or waterskiing is prohibited for reasons pertaining to human safety, with the exception of Coal Harbour. Further exacerbating the congestion of navigation, the Inner Harbour contains eight commercial anchorages and 16 deep sea terminals.

The proponent has noted that the proposed WMT expansion may result in serious harm to fish. As such, a *Fisheries Act* authorization under Paragraph 35(2)(b) will likely be required. However, details on site-specific effects to marine fish and fish habitat have not been provided at this time. Should the Project proceed to the regulatory phase, the proponent would be required to provide more detailed information to support any future *Fisheries Act* authorization application process. Consultation with potentially affected Aboriginal groups would take place prior to the issuance of an authorization.

Any dredging associated with the construction of new berths at the WMT would require mitigation for limiting the impacts of water-borne, contaminated sediment, and could require uplands disposal or disposal at sea. In terms of managing dredged sediment disposal, NEB condition 65 includes consideration of options for and minimizing the amount of material that may be considered for disposal. If a disposal at sea permit is required, ECCC will review the proponent's permit application in consultation with potentially affected Aboriginal groups before a decision on issuing a permit.

Burrard Inlet and Indian Arm constitute Management Area 28, which is regulated by DFO. DFO issues licences for food, social and ceremonial (FSC) purposes and commercial fishing within this area, subject to concerns regarding conservation and public health. Squamish Nation has licences for salmon, crab, prawn and shrimp in Eastern Burrard Inlet and Indian Arm. However, baseline conditions in Burrard Inlet, relative to the practice of Aboriginal Interests, are not conducive to supporting a subsistence marine fishing or harvesting economy or unfettered and unregulated marine travel in relation to marine fishing and harvesting. Additionally, cultural activities associated with these traditional practices have been limited by the increasing urbanization of the Inlet.

The area is closed to the fishing of rockfish and lingcod (including catch and release) and the harvesting of bivalve molluscs all year. Surf smelt closures apply from July to August during the peak spawning period. Harvesting of crab, shrimp and prawns is closed between Lions Gate Bridge and the Second Narrows Bridge all year to avoid any conflicts with navigational activity in the harbour.

The Rockfish Conservation Area in Eastern Burrard Inlet – which surrounds the WMT – is closed to all recreational fishing except invertebrates by hand picking or diving, crab by trap, shrimp/prawn by trap, and smelt by gillnet. The safety of navigation through port waters has taken precedence over harvesting or fishing in Burrard Inlet.

The Crown acknowledges that navigation and harvesting require special attention, as there have been measurable decreases in Aboriginal groups' ability to practice these rights over the last 200 years.

In regard to marine vessel source pollution in the vicinity of the WMT, VFPA does not allow ballast exchange or black water discharge within its jurisdiction. Grey water can only be discharged within VFPA jurisdiction if authorized to do so. When, where and how grey water is authorized to be discharged is informed by sampling conducted by VFPA. Hull cleaning within VFPA jurisdiction is not permitted unless authorized. To be authorized, the vessel must propose appropriate mitigation measures that prevent adverse impacts on the aquatic environment and prevents the introduction of invasive species. Some vessel pollution prevention is regulated by TC. VFPA's Port Information Guide addresses issues within VFPA's jurisdiction.

Despite Burrard Inlet being a heavily urbanized environment, Aboriginal groups have managed to sustain minimal levels of harvesting while pursuing re-establishment of certain species, and remediation of polluted areas. The Crown understands that there are five Aboriginal group entities that either exercise established or asserted fishing rights and/or assert a range of other Aboriginal rights in the vicinity of the WMT: Tsleil-Waututh Nation, Squamish Nation, Musqueam Indian Band, First Nations of the Hul'qumi'num Treaty Group, and four Stó:lō groups (Shxw'ow'hamel, Soowahlie, Skawahlook, and Seabird Island). In particular, Tsleil-Waututh Nation members are active users of the eastern end of Burrard Inlet, and their early efforts at remediating contamination in Maplewood Mudflats are part of their work towards restoring bivalve harvesting within a generation.

In regard to the impacts of marine vessel traffic, the Crown notes that marine travel supporting potential marine harvesting in the vicinity of the WMT has been limited for quite some time, but has the potential to be further limited given increased traffic in the waters surrounding the WMT. The VFPA has been slowly making changes to its navigation channels and anchorages to align with modern demands. However, the Crown notes that the Project would result in more marine vessel traffic in eastern Burrard Inlet and potential conflicts with Aboriginal groups.

In general, the Crown views there being a low possibility of navigational impacts affecting access to marine harvesting activities. Vessel traffic from the WMT will utilize existing deep-sea navigational channels and constraints for vessel interactions with these channels will remain unchanged. The Crown notes that Project-related impacts on navigation and cultural practices – specifically in eastern Burrard Inlet in proximity to the WMT – would exist for the lifetime of the Project, and would occur daily. While navigation is already significantly affected by deep-sea vessel traffic in Burrard Inlet, the existing four anchorages south and east of Cates Park would be occupied consistently if terminal operations commence, which is not the case currently.

Mitigation for impacts on valued components that affect marine harvesting would involve off-setting habitats destroyed by the Project as noted in the NEB conditions. However, additional effort could involve the collection of baseline data and remediation initiatives. The Crown notes that destruction of parts of the rockfish conservation area surrounding WMT is a measurable, not speculative impact.

Routine Project-Related Marine Vessel Traffic

For interference from Project-related marine vessels, there would be an increase from approximately five Aframax class vessel visits to the WMT per month currently, to approximately 34 visits per month. The NEB expressed its view that Aboriginal marine vessel users will maintain the ability to continue to access subsistence sites in the presence of periodic and short-term disruptions from marine shipping related to the Project. The TERMPOL Report concluded that the established marine shipping lanes can accommodate additional vessels from the Project and that existing marine resources and capacity to support additional vessel traffic is sufficient.

In regard to impeded access to sites used for traditional purposes in the marine environment or upland areas accessed via waters transected by the marine shipping corridor for the Project, the Crown notes that mariners are obliged to follow the rules of the Collision Regulations to minimize vessel interference.

However, the Crown recognizes that the cumulative impacts associated with existing shipping activity must be taken into account when considering the incremental impacts on Aboriginal Interests from Project-related marine shipping activities. The designated shipping lanes may currently limit access to some Aboriginal groups traveling across or within the shipping lanes to access hunting, trapping, plant gathering, fishing, marine harvesting or other sites of cultural or spiritual importance to Aboriginal groups. The Crown understands that temporary, short-term and low magnitude interference from marine vessels associated with the Project may also occur. However, Project-related marine vessels are not expected to follow any different navigation routes than the existing traffic, which is confined to the designated shipping lanes and monitored by MCTS via the Canadian Coast Guard. The use of designated shipping lanes helps to protect the safety and security of all users of the marine environment.

The Crown estimates that the direct effects of a Project-related tanker transit would last approximately 15 minutes through any given area. As there would be up to two transits a day by ships associated with the Project, this amounts to 0.5 hours per day of potential interference. In other words, incremental interference would be possible up to 2% of the time. The NEB noted that all other marine vessels, including Aboriginal marine vessel users, would be able to continue their movements very shortly after the transit of a tanker, representing a temporary and reversible effect. The TERMPOL Report did not identify any navigation or regulatory concerns for tankers, tanker operations, the proposed route, or navigability, in terms of conflicts with other waterway users. The TERMPOL Report did not consider the overall increase in marine traffic levels to be an issue, but it did support additional measures to promote shared safe use of the preferred shipping

route. The Crown also notes that the proponent has made several commitments including implementation of TERMPOL recommendations and findings. Many of the measures go beyond regulatory requirements, and include:

- Extended use of tethered and untethered tug escort;
- Safety calls by laden tankers when in transit; and
- An engagement and awareness strategy to promote safe navigation and interaction between Project-related tankers and recreational boaters, fishing vessel operators, and operators of small vessels.

Transport Canada acknowledges the concerns raised by some Aboriginal groups that tanker vessel wakes could undermine the stability of smaller boats. The size of wake depends on a number of unique factors such as vessel draft and configuration, vessel speed and water depth. Transport Canada does not regulate vessel wake, but notes that speed limits can be set by port authorities within their jurisdictional boundaries, and vessel pilots can use their discretion to manage wake by modifying vessel speed.

The NEB concluded that the proponent's support of TERMPOL Report Recommendation 11 is a key measure to minimize potential disruption to recreational boaters, fishing vessel operators, and operators of small vessels as a result of increased Project-related marine vessel traffic.

In addition to the physical effects of marine shipping activities associated with the Project, the Crown's assessment considered site-specific, social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests, including Aboriginal group perspectives. For groups who frequently traverse or use the marine shipping lanes to access site-specific hunting, trapping, plant gathering, fishing, marine harvesting sites or areas of cultural or spiritual importance, impacts may be greater at times based on the seasonality of these practices or the uniqueness of a specific area or use, such as Swiftsure Bank.

Southern Resident Killer Whale, Stellar Sea Lions and other Marine Mammals

The NEB concluded that Project-related vessel traffic would have a significant adverse effect on Southern Resident Killer Whales. Many international bodies have responsibilities for the protection of the marine environment, including the protection of cetaceans from the negative effects of anthropogenic noise. Most of the available data on bio-acoustic impacts is limited to short-term responses in individual mammals, therefore the management of underwater noise focuses on specific events limited in space and time (such as pile driving and sonar). Research into the impacts on whales of chronic noise from ships is less advanced and therefore not as well-represented within international regulations.

The NEB was of the view that Project-related vessels have the potential to strike a marine mammal vessel, and that this would likely contribute to the cumulative risk of marine mammal strikes. The NEB does not provide their view on the probability of such strikes. However, based on the expert knowledge of marine mammal researchers within the Department of Fisheries and Oceans

Canada (DFO), the Crown is of the view that the risk to Southern Resident Killer Whale and stellar sea lions from Project-related vessel collisions may be extremely low to negligible. The proponent has recognized that alterations in ship speed and routing can be effective mitigation measures to reduce ship strike risk, but has not proposed to adopt such measures because it does not own or operate the shipping vessels or possess the regulatory authority to require such alterations.

Section 7 of the Marine Mammal Regulations made under the *Fisheries Act* protects marine mammals by prohibiting their disturbance, subject to the exception set out therein. All vessels in Canadian waters must abide by these regulations to avoid impacts on marine mammals. At this time, the Crown notes there are a variety of initiatives and programs underway (e.g., Enhancing Cetacean Habitat and Observation (ECHO) and Green Marine programs) aimed at developing mitigation measures to reduce effects of underwater noise and ship strikes on marine mammals. The Vancouver Fraser Port Authority leads the ECHO Program, which aims to improve understanding and management of the impact of shipping activities on at-risk whales throughout the southern coast of BC. The ECHO Program's long-term goal is to develop mitigation measures that will lead to a quantifiable reduction in potential threats to whales as a result of shipping activities.

The Crown notes that the ECHO program in itself is not a mitigation measure, and at this time, has not yet proposed potential mitigation measures. The ECHO Program is currently in a phase of advancing scientific studies to support decisions on potential mitigation.

In 2014, the International Marine Organization (IMO) produced guidelines for commercial ships on ways to reduce underwater noise because of concerns about the short- and long-term negative impacts on marine life, especially marine mammals. Guidelines relate to features of ship design (such as hull and propeller shapes), on-board machinery, and various operational and maintenance recommendations (such as hull cleaning). These guidelines are voluntary.

The Crown understands that Aboriginal groups still have serious concerns regarding impacts on marine mammals with increased vessel traffic. Transport Canada has indicated a willingness to participate in a coordinated approach with other agencies to study the issue prior to developing mitigation measures. For example, Transport Canada provides funding for and is an active participant in the ECHO initiative.

Marine Vessel Wake and Shoreline Erosion

The NEB recognized the concerns in regards to potential impacts on shorelines and associated biota from Project-related marine vessel wake waves. The NEB concurred with Trans Mountain and DFO that Project-related marine vessels are unlikely to result in any measurable changes to the biophysical characteristics of intertidal habitats, but acknowledged that there could be some localized, small areas where there may be some impacts on intertidal habitat, such as increased sedimentation.

Transport Canada acknowledges the concerns raised by a number of Aboriginal groups who exercise Aboriginal Interests and have culturally important sites along the shorelines proximal to the designated shipping lanes. Transport Canada notes that the size of a wake depends on a number of unique factors such as vessel draft and configuration, vessel speed and water depth. Transport Canada does not regulate vessel wake, but notes that speed limits can be set by port authorities within their jurisdictional boundaries, and pilots can use their discretion to manage wake by modifying vessel speed. Outside port jurisdiction, speed is regulated by the Collision Regulations, which do not set speed limits. Rather, they require vessels to proceed at a safe speed at all times such that the vessel can take proper and effective action to avoid collision. Safe speed is determined by such factors as visibility, traffic density and presence of other vessels, maneuverability, weather and sea conditions and the depth of the water relative to the vessel's draught.

Under the *Canada Shipping Act, 2001*, the ship master has the responsibility for the safety of the ship. Under the *Pilotage Act*, the pilot is responsible for the safe conduct of the ship. This means that the master and pilot have the discretion to choose the route, speed, and any other maneuver that keeps the ship safe. For these reasons, Transport Canada is unlikely to impose site-specific restrictions on vessels by means of regulation.

Transport Canada notes there are mechanisms other than regulations that can minimize potential damage to culturally sensitive sites. Policy approaches such as notices to mariners, agreements with the Pacific Pilotage Authority (PPA) and additional training for Indigenous communities on communication protocols can be effective at raising awareness of the issues among maritime users.

While this was not identified as an issue by the NEB, Transport Canada recommends that where Aboriginal groups have site-specific concerns, they can contact the PPA to notify them of their concern. The Pacific Pilotage Authority can work with pilots to modify vessel speed, where possible within the parameters required to maintain safe vessel movement, to minimize potential wake-related damage at specific sites.

Conclusions

Overall, the Crown acknowledges that proponent commitments, recommended NEB conditions, the existing marine safety regime and marine mammal protection programs would only partially address the ongoing burdens and risks identified by the NEB for Aboriginal groups who exercise traditional marine fishing and harvesting activities in the vicinity of the WMT and marine shipping corridor for the Project. In particular the Crown notes the NEB conclusion that that the effects of the proposed WMT expansion on Aboriginal users of the area would be low in magnitude, but would persist for the operational life of the Project. Further discussion on marine safety initiatives and proposed federal Crown action in the form of an Indigenous Advisory and Monitoring committee may help to further address these ongoing burdens and risks.

In consideration of concerns raised by Aboriginal groups during the NEB hearing and Crown consultation, and in consideration of the conditions proposed by the NEB, the existing regulatory regime, and the jurisdiction of the province, EAO is also proposing a number of conditions, which BC Ministers may attach to the provincial EA certificate, if approved. Conditions particularly relevant to avoiding or mitigating impacts on Aboriginal groups' marine fishing and harvesting include:

- Conditions 10 and 12 require Aboriginal consultation and Aboriginal construction monitors;
- Condition 11 requires the development and implementation of a marine outreach program for Aboriginal groups; and
- Condition 22 requires the proponent to prohibit hunting, fishing, trapping and plant gathering by employees and contractors.

The potential impacts of the Project on Aboriginal Interests associated with marine fishing and harvesting activities for each applicable Aboriginal group are discussed in Appendices A-E.

4.3.4 IMPACTS ON OTHER TRADITIONAL AND CULTURAL PRACTICES

Early on in the review of the Project, the Crown identified that routine construction and operation of new pipeline segments, terminals, pumping stations, expanded storage facilities and marine shipping could result in changes to other traditional and cultural practices for Aboriginal groups who exercise rights within the Project footprint. In addition, the Crown understands that the broader effects of the Project, should they occur, could adversely impact claimed or currently practiced traditional systems of governance used to manage the sustainable use of lands, waters and resources.

The Project could result in changes to other traditional and cultural practices through the following potential effects:

- Changes in access may affect use of trails, travelways and hunting, trapping and plant gathering areas by restricting access to sites or by increasing access by non-Aboriginal users;
- Disruption or alteration of trails and travelways through clearing of the Project footprint;
- Disrupted use of habitation sites or cause alteration of habitation sites through changes to visual quality, air quality, noise levels, and disrupting access. The Project could affect the enjoyment of the activity or use of the sites through the perception of a decrease in the quality of the experience;
- Potential sensory disturbance to marine species and birds including indirect effects from increased underwater noise;
- Potential effects to marine mammal species of importance to Aboriginal groups via vessel strikes;

- Reduced abundance and quality of country (traditional) foods;
- Potential change to the ability of Aboriginal groups to carry out cultural or spiritual practices as a result of impeded access or reduced quality of experience as a result of visual disturbance, noise, or physical alteration of cultural sites;
- Incremental increase in marine vessel traffic from the Project may displace members from one community practicing Aboriginal rights within their traditional territory into the territory of another community;
- Any reduction in fishing, hunting or harvesting resources within an Aboriginal community's asserted traditional territory may result in impacts on asserted governance rights, and trade or bartering activities between Aboriginal communities;
- Potential effects to lands, waters and resources could impact the cultural expression of rights incidental to hunting, trapping, gathering, fishing and marine harvesting;
- Spiritual and cultural reliance on the Southern Resident Killer Whale could be adversely affected by knowledge that project approval would lead to increased risk of vessel strikes and disturbance from ships; and
- Cumulative effects of all aspects of the project could further diminish Aboriginal groups' ability to meaningfully exercise traditional and cultural practices within the project footprint and adjacent areas.

In its Application, the proponent identified the following Aboriginal use sites that exist within the proposed pipeline RoW and would require mitigation:

- Trails and travelways;
- Habitation sites;
- Plant gathering sites;
- Hunting sites;
- Fishing sites;
- Trapping sites;
- Gathering places; and
- Sacred areas.

The proponent in its application for CPCN did not assess the impacts of the Project on traditional governance systems. The NEB in its recommendation report, also did not specifically assess how the residual effects of the Project or the Project itself, could adversely impact traditional governance systems.

NEB Conclusions in Relation to Potential Impacts on Other Traditional and Cultural Practices

The NEB accepted Trans Mountain's assessment that, in relation to the pipeline and associated facilities, despite some interruptions to Aboriginal cultural and spiritual practices as a result of construction and operations of the Project, this would not result in significant adverse effects to the ability of Aboriginal groups to use land, waters or resources for traditional purposes. The NEB also accepted Trans Mountain's statement that the Project's contribution to potential broader cultural impacts related to access and use of natural resources is not significant.

On page 279 of its report, the NEB concluded that the ability of Aboriginal groups to use the lands, waters and resources for traditional purposes would be temporarily impacted by construction and routine maintenance activities, and that some opportunities for certain activities such as harvesting or accessing sites or areas of the TLRU will be temporarily interrupted. However, the NEB determined that these impacts would be short term, as they would be limited to brief periods during construction and routine maintenance, and these effects would be largely confined to the Project footprint for the pipeline, associated facilities and the on-shore portion of the WMT site. The NEB determined that these effects would be reversible in the short to long term, and low in magnitude.

With respect to the WMT, the NEB accepted Trans Mountain's assessment that while the expanded dock complex would become a permanent feature of the inlet, traditional resource use patterns will likely adapt over time. As a result, the NEB accepted Trans Mountain's assessment that no significant residual effects are likely to occur as a result of construction and operation activities of the WMT.

In relation to the potential effects of marine shipping on other traditional and cultural practices, the NEB concluded the following:

- There will not be an impact to archaeological sites located on the shoreline due to an increase in marine traffic (page 356);
- The effect of Project-related vessel wakes will not be detectable from existing wave conditions (page 356); and
- Wakes will not have an impact on shoreline archaeological sites (page 356).

In relation to large marine mammals and in particular killer whale, the NEB acknowledged that Project-related marine vessels will encounter a killer whale relatively often. However, given the limited number of recorded killer whale marine vessel strikes and the potential avoidance behaviors of killer whales, the Board agrees with Trans Mountain and DFO that the probability of a Project-related marine mammal vessel strikes on a Southern Resident Killer Whale is low. Nevertheless, the Board expressed its view that the Southern Resident Killer Whale population has crossed a threshold where any additional adverse environmental effects would be considered

significant, and the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects to the traditional Aboriginal use associated with the Southern Resident Killer Whale (page 350).

The NEB is of the view that Aboriginal marine vessel users will maintain the ability to continue to harvest marine resources and to access subsistence and cultural sites in the presence of these periodic and short-term disruptions. The Board therefore finds that, with the exception of effects to the Southern Resident Killer Whale, the magnitude of effects of Project-related marine vessel traffic on traditional marine resource uses, activities and sites is low (page 362).

The NEB finds, as described in its views in this chapter on marine mammals that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects to the Southern Resident Killer Whale. The Board finds that Project-related marine vessel traffic would further contribute to total cumulative effects which are determined to be significant, with or without the Project. Given these conclusions and recognizing the stated cultural importance of the killer whale to certain Aboriginal groups, the Board finds that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects to the traditional Aboriginal use associated with the Southern Resident Killer Whale (page 363). In regard to the effects of marine shipping on traditional marine use, the Board noted its view that Project-related marine traffic's contribution to cumulative effects is of low to medium magnitude and reversible in the long-term.

The NEB concluded that that any disruptions to Aboriginal marine vessel users that would result from Project-related marine vessel traffic would be temporary, that the frequency of Project related marine vessels would be one return transit per day, and that all other marine vessels, including Aboriginal marine vessel users, would be able to continue their movements very shortly after the transit of the tanker (page 362).

The NEB concluded that Project-related marine vessels are unlikely to result in any measurable changes to coastal habitats, harvesting and culturally sensitive areas; that the proponent's support of TERMPOL Report Recommendation 11 is a key measure to minimize potential disruption to recreational boaters, fishing vessel operators, and operators of small vessels as a result of increased Project-related marine vessel traffic.

Aboriginal groups expressed concern with damage or loss of areas of cultural and spiritual importance to Aboriginal groups in the Project RoW. These areas include archaeological sites, sacred and spiritual areas, traditional use areas, trails and travelways, and areas of historical significance.

Aboriginal groups were concerned that the Project would contribute to the disruption to their way of life, including the loss of traditional knowledge, diminishment of community culture and cohesion, diminishment of relations with other communities, inter-generational alienation, loss of the medicinal value of traditional foods and loss of confidence in the healthiness of traditional foods.

Many coastal Aboriginal groups stated that they have strong cultural ties to the Southern Resident Killer Whale, a listed species under the federal *Species at Risk Act* (SARA), and have concerns that underwater noise from shipping will increase the cumulative impact on this species. Aboriginal groups also were concerned that the increase in shipping will also increase the likelihood of vessel strike mortalities for marine mammals of cultural significance.

Aboriginal groups expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of traditional and cultural practices. Aboriginal groups expressed concern with the potential change to the ability to carry out cultural or spiritual practices as a result of impeded access or reduced quality of experience as a result of visual disturbance, noise, or physical alteration of cultural sites.

It was noted by some groups that there is not a legal requirement, for the project or more broadly, to compensate Aboriginal groups for cultural losses.

The following is a discussion of the general factors that have been considered by the Crown in assessing the potential impacts on Aboriginal group's Aboriginal Interests associated with other traditional and cultural practices.

The NEB concluded that Aboriginal groups would sustain modest burdens to their ability to use the lands, waters and resources for traditional purposes, and that the level of risk of a Project-related spill was acceptable.

Many of the NEB conditions already noted above in Sections 4.3.1 to 4.3.3 would either directly or indirectly avoid or reduce some of the impacts and address concerns raised by Aboriginal groups regarding potential impacts on other traditional and cultural practices. In addition, the NEB has established conditions broadly addressing effects to communities (including Aboriginal), and specific impacts on Aboriginal Interests. However, the Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline and marine safety regime would only partially address the potential impacts of the Project on cultural integrity, heritage and the sense of belonging that most Aboriginal groups have to the land as understood from an Aboriginal perspective.

Proponent compliance with NEB conditions would avoid or minimize some Project-related impacts on access to or use of culturally sensitive areas or places and on the practice of cultural activities in general. During the NEB review process Aboriginal groups were encouraged to identify potentially impacted culturally sensitive sites and practices so that the NEB could take them into consideration while assessing the environmental and socio-economic effects of the Project, and effects of the Project on Aboriginal interests.

Should the Project be approved, the Crown notes that the proponent will be required to manage access to culturally sensitive sites pursuant to conditions imposed by the NEB and the proponent's commitment to implement an access management plan. The proponent will be required to justify any area subject to access control, including during the construction

and operational phases of the Project. To limit the impact on Aboriginal groups, NEB draft condition 24 “Access Management Plan” includes requirements for the proponent to incorporate Aboriginal Traditional Land Use and Traditional Ecological Knowledge into the design of its access management plan.

With respect to cultural losses associated with project construction, operation or potential accidents and malfunctions, the Crown is not aware of any NEB condition, proponent commitment or regulatory law or policy that currently addresses the issue of potential cultural losses resulting from impacts of pipelines, marine terminals or ship-source spills.

With respect to potential impacts of Project-related marine shipping on the Southern Resident Killer Whale, the Crown understands that the population of this species is in decline within the area to be used by Project-related tankers. The Crown also understands that marine mammals are of importance to many Coast Salish First Nations but that killer whales especially hold strong spiritual and cultural importance. The Crown accepts the NEB’s conclusion that effects to the endangered Southern Resident Killer Whale and Aboriginal cultural use of Southern Resident Killer Whale from Project-related marine shipping will be significant.

Overall, the Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support potentially affected Aboriginal groups’ ongoing involvement and participation in the proponent’s detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Aboriginal groups in emergency response planning activities. The federal Crown is also considering incremental measures that would further accommodate the potential adverse impacts of the pipeline, WMT and marine shipping components of the Project on Aboriginal Interest, as discussed in Sections 4 and 5 of this report. Further discussion on marine safety initiatives may also help to further avoid or mitigate adverse impacts on Aboriginal Interests in the marine corridor, including greater involvement of Aboriginal groups in emergency response planning activities.

In consideration of concerns raised by Aboriginal groups during the NEB hearing and Crown consultation, and in consideration of the conditions proposed by the NEB, the existing regulatory regime, and the jurisdiction of the province, EAO is also proposing a number of conditions, which BC Ministers may attach to the provincial EA certificate, if approved. In addition to the proposed conditions discussed in the preceding sections, conditions particularly relevant to avoiding or mitigating impacts on Aboriginal groups’ other traditional and cultural practices include:

- EAO Condition 13 requires the proponent to engage with the Aboriginal group to seek to identify opportunities for cultural awareness and recognition;
- EAO Condition 21 requires the proponent to engage Aboriginal groups in the development of their workforce accommodation strategy; and
- EAO Condition 25 requires the proponent to engage Aboriginal groups on the reporting, management and mitigation of impacts on archaeological and heritage resources.

Aboriginal group-specific potential impacts of the Project on Aboriginal Interests associated with other traditional and cultural practices are discussed in Appendices A-E.

4.3.5 IMPACTS ON ABORIGINAL TITLE

As discussed in Section 2.4.3 of this report, the Crown has considered how Project-related activities, inclusive of the pipeline, marine terminal, shipping activities, and associated facilities, may impact each of the following three components of Aboriginal title claims overlapping the Project area: use and occupation, decision-making, and economic benefits. Mitigation measures relevant to address impacts on each component of Aboriginal title are also considered and described in the paragraphs that follow.

Use and Occupation

As described in TLU information submitted by Aboriginal groups during the NEB process and Crown consultation process, terrestrial, marine, and aquatic environments within or near the Project area have been historically and/or currently used for resource harvesting activities with intended future use for harvesting activities. Impacts associated with the use and occupation component of Aboriginal title, certain impacts have been identified below.

Temporary effects related to the proposed pipeline RoW may include:

- Potential disruption of subsistence activities, including hunting, trapping, fishing and plant gathering, during construction;
- Access for Aboriginal groups to the Project area to hunt, trap, fish, gather or conduct other activities may be affected in the short term, for a limited area and time during the construction phase, where access may be restricted for safety reasons; and
- Disruption of use and connectivity of trails and travelways through clearing.

Longer term impacts from Project operation along the proposed pipeline RoW and from associated facilities and supporting infrastructure may include:

- RoW clearing may disrupt use of lands including use of areas as trails, travelways, resource harvesting and habitation sites;
- Associated infrastructure including access roads, pump stations, transmission lines, storage facilities and the expanded WMT would limit or remove an ability to use these areas for resource harvesting, habitation sites, trails or travelways over the long term lifespan of the Project; and
- Pipeline and related facilities operations (including the WMT) may reduce Aboriginal community member's enjoyment and experience of using the affected area and proximal areas, including from increased access by non-Aboriginal people, routine maintenance activities, noise, light and other visual and sensory disturbances.

Potential impacts on Aboriginal title claims from the construction and operation of the WMT and supporting infrastructure may include:

- Disruption of subsistence activities, including hunting, trapping, plant gathering, freshwater fishing and potential marine fishing and harvesting activities in proximity to the Project footprint;
- Loss of access for Aboriginal groups to the Project footprint in relation to potential use of these areas for hunting, trapping, gathering, fishing, or carrying out of other social, cultural or ceremonial activities (access would be restricted for the life of the Project at these locations for safety and security reasons);
- Disruption of use and connectivity of trails and travelways, cultural, habitation and spiritual sites within and around the Project footprint; and
- May reduce Aboriginal community member's enjoyment and experience of using the WMT footprint and proximal areas, including from increased access by non-Aboriginal people, routine maintenance activities, noise, light and other visual and sensory disturbances.

Potential impacts on Aboriginal title claims from shipping within Burrard Inlet, Salish Sea and the designated marine shipping lanes may include:

- Increases in marine traffic resulting in temporary daily disruption in access to specific marine resource harvesting locations;
- Disturbance from temporary daily marine vessel transits in proximity to shoreline resource harvesting and other cultural activities, including potential low magnitude effects to intertidal and subtidal archaeological sites resulting from vessel wake; and
- Potential reduction in the enjoyment of the land and marine areas in proximity to the shipping route for the Project from visual, noise, light and other sensory disturbance.

Numerous Aboriginal groups raised concerns associated with the enjoyment, experience, and use of areas that would be impacted by Project-related activities, including shipping. These concerns, which differ widely by Aboriginal group, traditional activity, and Project-related activity, include impacts on species important for the practice of Aboriginal rights, cultural and spiritual practices and the health and well-being of Aboriginal peoples, as well as the extensive development in Aboriginal group's asserted traditional territory that has adversely impacted the enjoyment of using areas.

Groups also identified concerns related to access restrictions that could prevent or deter Aboriginal groups from using particular areas, and the resulting impacts on cultural continuity from disrupting members' ability to transmit knowledge and practices to younger generations. Some groups raised concerns that the existence of the Project could negatively impact their spiritual connection with the land and water as well as their identity as Aboriginal peoples. Several Aboriginal groups that would be impacted by the increase in Project-related marine shipping activities expressed concern that the Project could adversely affect the psychological well-being of their community members as a result of acoustic disturbance, impaired views, loss of privacy, on-water hazards, perceived pollution, physical obstruction, and perceived danger.

In considering potential Project impacts on the use and occupancy component of Aboriginal title claims, the Crown has considered the following factors:

- The potential alienation of an area used by Aboriginal groups for exercising their asserted rights depends on the specific Project-related activity. With respect to the pipeline portion, the pipeline would be fully buried, with the exception of pipeline within compressor and meter station yards. The proposed Project includes 11 compressor stations, and each would typically require 9.5 ha to 20 ha of land. Approximately 89% of the proposed RoW for the Project will be contiguous with existing disturbances. With regard to the WMT, the Crown understands that permits for the marine terminal and corresponding expansion of the existing water lease is required under the *Canada Marine Act*. The Crown understands that WMT is located on fee simple land owned by the proponent and the site is located in an industrialized area that is fenced suggesting limited current use by Aboriginal groups. The water lease is leased from the Crown by the proponent. There is no contemplation of transfer of ownership of Crown land to the proponent; the proponent would be granted a lease providing for use and occupation. With respect to the marine shipping component of the Project, there is no proposal for any alienation or removal of land in areas upland of the marine shipping lanes that would be used by Project-related tankers;
- The NEB concluded that traditional land and resource users may be unable to use, or be deterred from using, certain areas at times during construction and periods of site-specific maintenance. Furthermore, the ability of Aboriginal groups to use the lands, waters and resources for traditional purposes would be temporarily impacted by construction and routine maintenance activities, and that some opportunities for certain activities such as harvesting or accessing sites or areas of the TLRU will be temporarily interrupted - these impacts would be short term, as they would be limited to brief periods during construction and routine maintenance, and that these effects will be largely confined to the Project footprint for the pipeline, associated facilities and the on-shore portion of the WMT site. The NEB finds that these effects would be reversible in the short to long term, and low in magnitude;
- The NEB concluded that routine Project operations would cause low to moderate magnitude impacts on the lands, waters and resources impacted by the Project. With respect to the impact of the marine shipping on the use of upland areas, the NEB also concluded that the Project could result in significant adverse effects to greenhouse gas emissions from Project-related marine vessels, as well as Project spills and spills from Project-related tankers;
- For the TMRU activities directly affected by the WMT, the NEB finds that these effects would persist for the operational life of the Project, as TMRU activities would not occur within the expanded water lease boundaries for the WMT. The NEB finds that while the effects would be long term in duration, they would be reversible in the long term. Aboriginal groups would likely be able to adapt to the expanded water lease boundary. Therefore, the NEB finds that for the WMT, the Project's effects to the TMRU are low in magnitude;

- NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with the degree of disturbance of the Project. NEB Conditions related to the protection of environmental resources (included but not limited to fish and fish habitat, wetlands, water quality, wildlife and wildlife habitat, and marine mammals) referenced in section 4.3 would reduce disturbance associated with Project-related activities in the marine, terrestrial, and aquatic environments. The proponent has also undertaken many commitments in an attempt to reduce potential impacts of Project-related activities to environmental resources (Appendix G);
- In terms of access restrictions, the ability of Aboriginal groups to use lands, waters, and resources would be temporarily interrupted during construction and during routine maintenance. The Crown understands that these effects will be largely confined to the Project footprint for the pipeline, associated facilities and the on-shore portion of the WMT site. The Project would also result in some disruption of traditional marine use that would persist for the operational life of the project, and that these effects would be reversible. The Crown notes that access restrictions could become prolonged in the event of a credible worst-case spill that occurs along the pipeline RoW, at the marine terminal, or during marine shipping, although the NEB concluded that the likelihood of such an event occurring is very low;
- The Crown understands that the proponent has committed to several mitigations that would reduce access restrictions for Aboriginal groups using areas impacted by routine Project activities. The proponent has committed to minimize the development of access routes, control public access along the construction RoW, select appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent has also committed to working with applicable resource managers, traditional land and resource users to define locations where access control is necessary, and what type(s) of access control will be implemented. In the marine environment, the proponent must communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would help to reduce potential disruptions from tankers when travelling to and from sites located in areas upland of the shipping lanes; and
- The Crown appreciates that the Project could adversely impact the enjoyment and experience of Aboriginal groups using areas impacted by the Project and that reduced levels of enjoyment and/or a negative experience have the potential to deter community members from participating in future activities. Although the suite of mitigation measures that would be implemented if the Project is approved would help to reduce impacts on Aboriginal group's enjoyment, experience, and use of areas, the Crown acknowledges that there will be residual Project impacts on the enjoyment, experience, and use of areas.

Decision-making

Aboriginal groups raised concerns with how the proposed project could affect their ability to manage and make decisions over the Project area in accordance with their traditions, cultures and/or customs, now and in the future. Aboriginal groups also identified how the proposed project might be consistent or inconsistent with any cultural/other objectives for management in this area.

Several groups expressed concerns related to the traditional use information that helped to inform the decision-making process. These concerns included the perspective that traditional knowledge collected by the proponent should not be considered as scientifically credible and should not be used in the decision-making process. Groups also expressed the view that traditional knowledge information was inadequate to understand Aboriginal rights, traditional land use practices and traditional knowledge in order to assess the potential effects of the Project on lands and resources used by Aboriginal groups.

Other concerns identified by Aboriginal groups were thematic of the role of Aboriginal peoples as stewards of the land. Indeed, several groups described the responsibility that Aboriginal communities have in maintaining the care, protection, health and well-being of the land and raised concerns that these rights of stewardship would be impacted by the Project. Aboriginal groups who have ongoing environmental and/or species restoration programs and stewardship initiatives in their traditional territories suggested that the Project is inconsistent with these management objectives.

The Crown acknowledges the view of many Aboriginal groups, that the lack of a fixed operating life of the Project, or any plans to decommission the Project (or the existing TMPL), will place limits on the ability of Aboriginal groups to make decisions over lands and resources or to develop lands within or proximal to the Project for many generations.

Aboriginal groups also expressed concern with the NEB process and Crown consultation process. Groups criticized the NEB process for a narrow in scope that does not adequately incorporate the laws, spirituality, and traditional knowledge of Aboriginal groups in a way that acknowledges interconnections among Aboriginal people, families and family groupings, culture, the elements of the landscape. Many Aboriginal groups raised procedural concerns related to funding, timelines, consultation, capacity, and resources. A group located along the marine shipping corridor expressed concern regarding the lack of transparency in how the federal Cabinet reaches its decisions.

In considering potential Project impacts on the decision-making component of Aboriginal title claims, the Crown has considered the following factors:

- While the Project does not have a fixed operating life, with regard to changes in tenure along the pipeline, there is no contemplation of transfer of ownership of land to the Proponent along the RoW. In BC, the proponent would be granted a temporary Licence of Occupation under section 39 of the *Land Act*, and upon completion of legal survey requirements a statutory RoW for the life of the Project would be issued under section 40 of the *Land Act*. The WMT is located on fee simple land owned by the proponent, most of which has been zoned for industrial use. The water lease is leased from the Crown by the proponent. There is no contemplation of transfer of ownership of Crown land to the proponent; the proponent would be granted a lease providing for use and occupation. The Crown notes there would be no change in tenure for upland areas along shipping lanes;
- The Crown notes that the construction and operation of the Project in reserve lands under the *First Nation Land Management Act* would require instruments and approvals pursuant to an Aboriginal group's approved land code. The Crown also notes that the construction and operation of the Project in reserve lands under the *Indian Act* would require instruments authorized under Sections 35 and 28 of the *Indian Act* for staging areas and the pipeline RoW;
- As described in section 5.1, the Crown has attempted to undertake a principled, meaningful and responsive consultation process characterized by genuine efforts to acknowledge and document Aboriginal concerns as well as to identify ways to demonstrably address these concerns prior-to or as part of the decision-making process. Throughout the Project review, Aboriginal groups were provided with opportunities to describe their views of the nature and scope of potential impacts of the Project on their Aboriginal Interests and on mitigation or accommodations measures that could be applied to address those potential impacts. The Crown consultation process provided Aboriginal groups with an opportunity to provide their perspective on the extent to which the Project affects their ability to manage and make decisions over areas impacted by the Project; and
- Should the Project proceed, the proponent would be required to continue consultation with potentially affected Aboriginal groups, and to finalize the development of its plans and measures to reduce and mitigate the potential effects and to protect the environment and the resources that are of importance to and utilized by Aboriginal groups. Ongoing consultation with Aboriginal groups as identified in NEB Conditions for Aboriginal engagement (#96, 146), TLRU and TLMU investigation reporting (#97) and participation in monitoring during construction (#98). The Crown understands the proponent has committed to ongoing engagement with Aboriginal groups including but not limited to commitments #1, 3, 8, 597, 600, 2, 551, 697, 691, 896, 854, 936-8, 7, and 488. These mitigations would reduce potential impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project. However, the Crown understands that the Project may not be consistent with the management objectives of every Aboriginal group potentially impacted by the Project.

Economic Benefits

Aboriginal groups have indicated that the pipeline and related facilities operations, including the WMT, may reduce Aboriginal groups' economic development aspirations for the affected area and proximal areas as physical use of the Project footprint and adjacent areas would be limited for any other physical works. Specific concerns identified by Aboriginal groups in relation to the economic benefit component of title include potential effects from construction and operation of the pipeline on the ability of Aboriginal groups to derive future economic benefits from the area, the lack of Project-related economic, training, and business opportunities for Aboriginal groups, and potential negative impacts on local economies. Some groups raised dissatisfaction with the lack of compensation offered by the proponent for disrupting the traditional way of life of an Aboriginal community. Aboriginal groups with existing economic activities in their traditional territories raised concerns about the potential loss to their economic interests from the Project, as well as limitations to other development opportunities including oceanfront property assets along the marine shipping lanes and in the vicinity of the marine terminal. Other Aboriginal groups expressed interest in exploring opportunities for training and employment contracts in order to develop transferable skills and employment capacity within their communities.

In considering potential Project impacts on the economic component of Aboriginal title claims, the Crown has considered the following factors:

- The NEB noted that the Project presents an economic opportunity for Aboriginal communities, but also concluded that the ability of Aboriginal groups to use lands, waters, and resources would be temporarily interrupted during construction and during routine maintenance;
- Construction and operation of the Project have the potential to limit economic aspirations for the area. These impacts would largely be concentrated along the pipeline corridor, as the 18-m easement that remains over the operating life of the Project would limit the economic uses of the area to certain type of activities that do not conflict with the underground pipeline. Project-related marine vessels have the potential to impact economic aspirations along and within the shipping corridor;
- Mitigation measures associated with the ability of Aboriginal groups to derive direct and/or indirect economic benefits if the Project is approved include NEB Conditions for Aboriginal, local, and regional skills and business capacity inventory (NEB Condition 11), training and education monitoring plan (NEB Condition 12), training and education monitoring reports (NEB Condition 58), plan for Aboriginal group participation in construction monitoring (NEB Condition 98), Aboriginal, local, and regional employment and business opportunity monitoring reports (NEB Condition 107), procurement opportunities for Aboriginal groups (commitments 14, 440, 442, 447, 451), employment and business opportunities for Aboriginal groups (commitment 952, 445), and hiring of Aboriginal monitors (commitment 113), among others (see Appendix G); and

- As of November 2016, the Crown is aware that 33 potentially affected Aboriginal groups have signed an MBA or letter of support with the proponent. Although MBAs are confidential, the Crown understands they may contain provisions for financial, environmental and training benefits that could further reduce impacts on Aboriginal title claims if the Project proceeds. For those Aboriginal groups that signed MBAs, the Project could partly satisfy current and future economic development aspirations for the area impacted by the Project.

In consideration of concerns raised by Aboriginal groups during the NEB hearing and Crown consultation, and in consideration of the conditions proposed by the NEB, the existing regulatory regime, and the jurisdiction of the province, EAO is also proposing a number of conditions, which BC Ministers may attach to the provincial EA certificate, if approved. Specific conditions have been summarized in many of the preceding and subsequent sections. However, the conditions proposed by EAO would help support the mitigation of impacts on Aboriginal groups' Aboriginal title in a number of ways:

- Many of the proposed EAO conditions ensure greater opportunity for the ongoing participation of Aboriginal groups in informing the development and implementation of the Project;
- Several of the conditions require consideration and integration of Aboriginal use and practices into the development of mitigation; and
- Conditions recognize the important tie of Aboriginal peoples to their territories, by requiring opportunities for construction monitors, archaeological monitors, and cultural awareness and recognition.

The potential impacts of Project-related activities on Aboriginal title for each applicable Aboriginal group are discussed in Appendices A-E.

4.3.6 OTHER COMMON ABORIGINAL GROUP CONCERNS

Impacts Associated with Accidental Pipeline, Westridge Marine Terminal or Marine Spills

In the event of an accident or malfunction that released fuel, oil or other deleterious substances into the terrestrial or marine environment, the Project may result in the following changes to the environment and socio-economic conditions, and on fishing and marine harvesting through the following potential effects:

- Direct loss or alteration of wildlife and wildlife habitat, abundance, or quality;
- Direct loss of harvestable plant species of interest to Aboriginal groups;
- Changes to water, soil and sediment quality;
- Direct loss of fish and aquatic species or alteration of fish and aquatic bird habitat and other resources used for fishing and marine harvesting;
- Direct loss or reduced quality of harvestable marine plant species of interest to Aboriginal groups;

- Impacts to human health; and
- Loss or alteration of traditional resources used for cultural or spiritual practices.

The NEB found that over the life of the Project, the probability of a small spill is high, where a small spill includes those caused by relatively minor equipment failure or human error and would likely occur on proponent-owned property such as pump stations and tank farms. The NEB noted that in the event of a small spill, response personnel and equipment would be readily available and clean up would be expected to be effective.

For the existing Trans Mountain pipeline, between 1961 and 2013, Trans Mountain reported 81 liquid hydrocarbon spill incidents of all magnitudes to the NEB and the “uncontained spillage” of approximately 5,799,700 litres of liquid hydrocarbons.³⁴ Of these incidents, the proponent acknowledges five have been significant spills. The NEB noted the proponent’s statement that there have been five spills from the existing Trans Mountain pipeline since 1953, and that these were remediated to the standards of the time.

In the event of a spill from the pipeline or at the WMT, the NEB concluded on page 279 of its report that, depending on the extent and location of the spill, response time and the effectiveness of response measures, there could be significant adverse environmental effects to the use of lands, waters and resources for traditional purposes.

The NEB found that, depending on the size, location and conditions of a spill and the effectiveness of response measures, there could be significant adverse effects to Aboriginal traditional uses, practices and activities. However, the NEB concluded that there is a very low probability of a Project spill (i.e., from pipeline, tank terminals, pump stations, or WMT) that may result in a significant effect (high consequence) and that the level of risk is acceptable. The NEB also concluded that there is a very low probability of a marine spill from a Project-related tanker that may result in a significant effect (high consequence) and that this level of risk is acceptable.

The NEB considered impacts associated with small tanker spills and credible worst-case tanker spills. A small spill that is contained quickly, the NEB concluded, could have low-magnitude adverse effects. Conversely, impacts from a credible worst-case spill would probably be adverse and significant, although the probability of a worst-case spill is very low. Adverse effects from a credible worst-case spill could occur over a larger geographic extent and longer duration [than smaller spills]. The NEB acknowledged that environmental effects of a tanker spill would depend on numerous factors including the volume and type of product spilled, the location of the spill, the time required to respond to the spill, the effectiveness of spill containment and clean up, valued components that are impacted, weather conditions, and the time of year that the spill occurs.

³⁴ Sean Kheraj, *Historical Background Report: Trans Mountain Pipeline, 1947-2013*; City of Vancouver, C77-27-19 - Appendix 18 (A4L7X6), p. 21

The NEB also concluded that there is a very low probability of a marine spill from a Project-related tanker that may result in a significant effect (high consequence) and that this level of risk is acceptable. The NEB also concluded that the effects of a credible worst-case spill on the current use of lands, waters and resources for traditional purposes by Aboriginal people would likely be adverse and significant.

Spill impacts on important marine habitats (e.g. salt marshes, eelgrass beds, and kelp forests) could affect marine species reliant upon these habitats as well as terrestrial species, including SARA-listed plant species, along the coastal area. According to the NEB, most impacted areas and species would likely return to biological conditions that existed prior to the spill through the process of natural recovery. This recovery could occur within one to two years or may occur over a decade or more depending on the valued component, while some SARA-listed species may not recover to pre-spill conditions. Population level impacts could occur from the mortality of individuals of SARA-listed species. The NEB refers to the potentially catastrophic impacts associated with the exposure of Northern or Southern Resident Killer Whales to spilled oil, despite the low probability of this exposure.

In Section 14.6.2 of its report, the NEB noted the proponent's commitment to use available spill response technologies to mitigate spill impacts on ecosystems and assist in species recovery. The NEB is of the view that implementation of an appropriate spill response, and measures such as compensation and harvest restrictions or closures would lessen the effects experienced until resource-dependent species recover.

The NEB also noted its view that, should the Project be designed, constructed and operated according to the fulfillment of its certificate conditions and Trans Mountain's commitments, an accident or malfunction that could result in significant adverse environmental or socio economic effects is not a likely event.

In regard to emergency response, the NEB concluded that an effective response does not guarantee recovery of all spilled oil, and that no such guarantee could be provided, particularly in the event of a large terrestrial, freshwater, or marine spill. The oil spill preparedness and response commitments made by the proponent cannot ensure recovery of the majority of oil from a large spill. Recovery of the majority of spilled oil may be possible under some conditions, but experience indicates that oil recovery may be very low due to factors such as weather conditions, difficult access, and sub-optimal response time, particularly for large marine spills.

The following are some additional specific conclusions of the NEB with respect to accidents, malfunctions, emergency preparedness and response:

- The Board is of the view that the evidence filed by those bodies that regulate marine shipping and by Trans Mountain indicate that there is an acceptable level of safety in place regarding marine shipping associated with the Project. To monitor future developments of Trans Mountain's Tanker Acceptance Standard, the Board would impose Condition 134 requiring Trans Mountain to file the Standard and future updates with the Board;

- Some participants raised the need for additional tugs to escort Project-related vessels and Trans Mountain made a voluntary commitment to implement enhanced tug escort measures that exceed regulatory requirements. Evidence filed by Trans Mountain, Transport Canada and the Pacific Pilotage Authority indicates that tug escort is an important mitigation measure. In its report, the TERMPOL Review Committee supported the implementation of Trans Mountain's key risk reduction measures, including but not limited to, enhanced tug escort. The Board expects Trans Mountain to follow through on this voluntary commitment and would make it a requirement of any certificate issued by imposing Condition 133 requiring Trans Mountain to implement enhanced tug escort measures. The NEB also noted that should such a voluntary commitment become mandatory under federal marine shipping- related legislation, Trans Mountain could apply to the Board to have its certificate varied accordingly (page 377);
- The NEB noted that the south coast of B.C. has been identified as a high risk area based on both the environmental sensitivity of the area and the probability of a tanker spill occurring (page 378), but the NEB also noted there are no proposed or widely accepted risk acceptance criteria for marine oil spills (page 377); and
- The NEB noted that a large spill in Burrard Inlet would result in significant adverse environmental and socio-economic effects and cited (page 378) Tsleil-Waututh's assessment as indicating the extent of possible impacts. However, the NEB concluded a very low probability of a credible worst-case event: "The Board finds that there is a very low probability of a marine spill from a Project-related tanker that may result in a significant effect (high consequence). The Board finds this level of risk to be acceptable." (page 17)

Other specific conclusions of the Panel in respect of potential spills include:

- The Board rejected evidence of a credible worst-case scenario of 8,000-16,000 m³ in Burrard Inlet, English Bay, or at the WMT (page 378);
- The Board found that diluted bitumen would weather quickly, making it possible that some spilled oil would submerge and strand on shorelines if not recovered quickly (page 387);
- The Board would impose Condition 90 requiring Trans Mountain to engage with stakeholders, including Aboriginal groups, when designing its emergency spill response plan (page 387);
- A small spill would have adverse effects of low magnitude, whereas a worst case spill could have adverse effects that are larger and longer in duration (page 397);
- Even after a worst case spill the environment would eventually return to a biological state similar to pre-spill conditions (page 399); and
- Effects of a spill on human health would be context dependent (i.e. severity of the spill, proximity to spill). However, because spill risk is low, risk to human health from a spill is low (page 404).

These NEB conditions, if the Project is approved, would assist in reducing the likelihood of accidents and malfunctions including spills, or enable improved response and recovery in the case of an accident or malfunction involving a spill:

- Overarching conditions (#2,3,4) for compliance with commitments, environmental protection, engineering and safety; and
- Conditions for emergency preparedness and response (#89,90,117-120,123-127,136, 138,145,153).

The NEB stated that liability for any spill along the pipeline route or from the WMT into marine water before the product is loaded in the tanker would be covered by the liability regime amended through the *Pipeline Safety Act*. The act establishes the absolute liability limit for companies that have the capacity to transport at least 250,000 bpd (such as Trans Mountain) at no less than one billion dollars, regardless of whether there is proof of fault or negligence. If the pipeline operator is found at fault, there is no limit to liability.

The NEB noted that spills associated with marine shipping are governed by the framework set out in the *Marine Liability Act*. The NEB noted that in the event of an oil spill in Canadian waters, the owner of the tanker would be liable for the cost of cleanup and compensation to affected parties subject to the limits of their liability, which is limited based on vessel tonnage to a maximum of about CAD \$136.8 million. Beyond that liability limit, compensation is available through a tiered funding system in the event of an oil spill in a marine environment. The funding includes approximately \$1 billion through the International Oil Pollution Compensation Fund and the Supplementary Fund Protocol, and up to approximately \$168 million from Canada's Ship-source Oil Pollution Fund. In total, there is approximately \$1.3 billion in funding available to address the costs of emergency response, cleanup and compensation in the event of an oil spill from a tanker.

The proponent has agreed to the following mitigation measures related to potential spills:

- Facilitating \$100 million investment in new equipment by the Western Canada Marine Response;
- Investing in new spill-response bases that will be located at ports in Delta, Nanaimo, Sidney, Sooke and Ucluelet; and
- Ensuring an untethered tug accompanies 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 tug can be tethered.

During the NEB process and Crown consultation, most Aboriginal groups expressed some level of concern about the potential for an oil spill, and the possible impacts a spill would have on their environment that they rely on and consequently on their way of life. Many Aboriginal groups during the NEB hearing noted that even a low probability of a spill event is a concern and that any incremental risk may have implications for those exercising Aboriginal rights on the lands and waters, and may erode the ability of Aboriginal groups to preserve these rights for future generations.

There are concerns that low-level leakage from the pipeline, as well as catastrophic pipeline failure or a shipping spill could lead to contamination of terrestrial, aquatic and marine ecosystems. Groups are concerned that any spill could have catastrophic impacts on Aboriginal well-being by placing long-term limits on traditional and cultural activities (such as hunting, fishing and gathering), access to sacred places, diminish food and water security. Other indirect impacts arise from a perceived increased risk, leading to diminished mental and spiritual health.

Groups on the coast and in the Fraser River Basin have concerns that a spill ending up in rivers or in the Salish Sea when salmon are migrating could have devastating long-term impacts on already stressed salmon populations that have been experiencing low returns in recent years. Salmon not only serves as the main food source for many Indigenous people, but they also rely on as a source of material wealth, physical activity, and cultural and spiritual enrichment. Groups on the Fraser River have also relied on eulachon and sturgeon, two fish species that are currently designated as endangered by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). Groups on the coast also rely on marine resource harvesting areas such as fish spawn collecting areas, shellfish and intertidal gathering areas, waterfowl hunting areas, and plant harvesting sites that could be impacted by a spill. Shoreline oiling in estuaries, sensitive habitats, sandbanks, marshlands, and mudflats would impact habitats for migratory birds, wildfowl, and juvenile salmon, harvestable marine plant species, among other species. Alberta groups were concerned about the potential for significant adverse environmental effects to the environment should a major rupture occur at the Athabasca River.

Many groups expressed concern that a spill would have impacts on human health and safety through contamination of food and water, and through perceived risks. Groups were concerned that a spill could have devastating and long-term impacts on their communities' drinking water through impacts on surface water and ground water. Groups were concerned about the perceived risks of a spill. Risk perception is connected not only to contaminants, but also a sense of place, connection to the land, social relationships, and traditional cultural spiritual practices.

Some groups raised concerns on both spill effects and lack of data on marine life, such as humpback whales, killer whales (resident and transient populations), right whales, grey whales, steller sea lions, sea otters, abalone, and marine birds. There was also concern by some groups about spill impacts on sensitive ecosystems, such as the biofilm on which migratory birds feed at Roberts Bank.

Aboriginal groups also raised concerns about uncertainties of whether dilbit will sink or float and that spill science research is incomplete. They argued that risk has been understated by the proponent and the NEB, and that their communities have much less tolerance for risk than the NEB and proponent.

Aboriginal groups expressed concern about the adequacy, readiness and capacity of local oil spill response, especially in all weather conditions where access during severe snow or rain events, rough sea conditions, high river conditions, coupled with the remoteness of locations would

make the site inaccessible and delay response times. Groups have expressed an interest in being involved as local first responders in their own territory. This includes being involved in emergency spill response planning, having local resources and equipment available, and training.

Aboriginal groups also expressed concerns regarding inadequate knowledge and experience with the fate and behavior of diluted bitumen; the adequacy, readiness and capacity of oil spill response; appropriate mechanisms for avoidance, mitigation, and compensation for impacts; and liability and responsibility for damages and ecosystem recovery.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline or marine tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal groups has a high degree of uncertainty.

In respect of small spills, the NEB found that over the life of the Project, the probability is high. The seriousness of impact on Aboriginal Interests will depend on the size, location and conditions of a spill and the effectiveness of response measures. The Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill regardless of its size.³⁵

A credible worst-case spill has the potential to result in serious impacts on Aboriginal Interests. However, the Crown agrees with the NEB's assessment of the very low likelihood of such an occurrence. The Crown also acknowledges the comprehensive set of mitigation measures committed to by the proponent to minimize the likelihood of a spill and reduce the magnitude of impacts in the event a spill occurs.

The Crown notes that each NEB regulated company must have an emergency management program that anticipates, prevents, manages and mitigates conditions during an emergency. The company's management system and processes must also be evident in its emergency management program.

An emergency management program must include:

- The identification and analysis of potential hazards;
- The evaluation and management of risks associated with all hazards;
- An up-to-date emergency procedures manual that is filed with the NEB;
- Liaising with agencies that may be involved in an emergency situation;
- Taking all reasonable steps to inform all persons who may be associated with an emergency response activity on the pipeline of the practices and procedures to be followed;

³⁵ Trans Mountain Final Argument, p. 85 and 207

- Having a continuing education program for the police, fire departments, medical facilities, other appropriate organizations and agencies and the public residing adjacent to the pipeline to inform them of the location of the pipeline, potential emergency situations and the safety procedures to be followed in case of an emergency;
- Procedures for the safe control or shutdown of the pipeline system in the event of an emergency;
- Sufficient response equipment;
- Training to instruct employees on the emergency procedures and emergency equipment; and
- A verifiable capability to respond to an emergency demonstrated through emergency response exercises.

Terrestrial Accidents and Malfunctions

If a pipeline spill incident does occur, the NEB will verify that there is adequate and appropriate clean-up and full remediation of any environmental effects resulting from the incident. The company must conduct, to the NEB's satisfaction, a complete clean-up and remediation of any adverse environmental effects. Pipeline Financial Requirements Regulations, as announced and explained on the NEB's website in October 2016, provide further details of the liability and compensation regime in place for pipelines (see: <http://www.gazette.gc.ca/rp-pr/p1/2016/2016-10-08/html/reg3-eng.php>).

The proponent would also need to notify the province of spills and for any instances of contamination that migrate off the RoW. Trans Mountain would be required to comply with the Contaminated Sites Regulation, Hazardous Waste Regulation and Spill Reporting Regulation under the *Environmental Management Act*. The province of BC is also in the process of updating the Provincial Spill Response System, which will include new requirements for spill preparedness, response and recovery, as outlined in Section 4.2.5.

In respect of seismic hazards, Natural Resources Canada's recommendations to the NEB have led to a requirement for the proponent to provide the results of its fault-mapping studies prior to the commencement of construction. This condition also requires the proponent to provide specific conclusions on four potentially active faults along with potential hidden faults.

To confirm that the potential for liquefaction-triggered ground movement is adequately assessed in detailed engineering and design, the NEB imposed Condition 68 requiring the proponent to identify sites with very high, high, and moderate liquefaction potential and describe how the potential for liquefaction-triggered ground movement will be mitigated at each site.

While it is the responsibility of individual First Nations to ensure their emergency response plans are current and reflect the specific hazards, risks and vulnerabilities of their community (including oil spills), First Nations interested in developing their emergency plans and/or undertaking training

should contact INAC. INAC supports an all-hazards approach to emergency management on-reserve which includes the four pillars of prevention and mitigation, preparedness, response and recovery.

When First Nations require outside assistance to manage an emergency, INAC relies on emergency management organizations (such as provincial/territorial emergency management agencies or non-government agencies) for the delivery of response and recovery services on reserve. INAC's arrangements with these organizations ensure that First Nations have access to comparable emergency assistance services available to other nearby non-Aboriginal communities.

INAC's Emergency Management Assistance Program is the Government of Canada's primary mechanism for supporting emergency management on-reserve. INAC assumes responsibility for 100% of eligible emergency response and recovery activities carried out exclusively for onreserve First Nations except when the emergency responsibilities fall within the mandate of another department, agency or the private sector.

In the event of a spill on-reserve, INAC will work in collaboration with the impacted First Nations, the emergency service provider, the party responsible for the spill, and other public safety partners to help coordinate emergency response activities. In the case of a ship-source spill impacting reserve lands, the agency with jurisdiction over the spill would be the Canadian Coast Guard/ Transport Canada.

Further information regarding INAC's role in emergency management and a copy of INAC's National Emergency Management Plan can be found on the departmental website.

The preparedness for and response to an oil spill is regulated under various regimes depending on the source of the spill. If the spill is from a ship during the transfer of oil while the ship is at the terminal, the spill response is regulated by Transport Canada. Other sources of spills from the WMT are regulated by the NEB.

Marine-based Accidents and Malfunctions

Marine vessels and oil handling facilities (OHF) are required to have pollution emergency plans in place that outline how they comply with the Vessel Pollution and Dangerous Chemical Regulations and how they will prevent discharges while engaged in transfer operations with prescribed vessels. In addition, emergency response plans must specify arrangements in place with the TC-certified local response organization, Western Canada Marine Response Corporation (WCMRC).

Oil handling facilities are categorized by their maximum oil transfer rate, and based on that are required to plan and prepare for a minimum spill size. The WMT, with a transfer rate of more than 2000 m³/h, is categorized as a Level 4 facility and therefore must plan to respond to a spill of at least 50 m³.

TC inspects the WMT annually to ensure compliance with requirements for safe transfers of oil, such as:

- Trained Supervisor of Oil Transfer Operations (SOTO) as required by Marine Personnel Regulations;
- Sufficient lighting at work areas for transfer connections;
- Procedures for shut-down in the event of a spill;
- Coordination and communication between the terminal and the vessel; and
- Standards and testing for pipes and hoses.

The marine safety system is based on a process of continuous improvement through the ongoing evaluation of its components, including seeking input from stakeholders, and making adjustments such as new regulations, as appropriate.

Canada's marine safety system is effective, as demonstrated by a strong safety record and the Government's plans to continue to strengthen the marine safety system, in accordance with the Minister's mandate letter (<http://pm.gc.ca/eng/minister-transport-mandate-letter>). The recently announced marine initiatives outline concrete measures that the Government of Canada will take to improve marine safety, as described in section 4.2.5.

Canada's marine safety system has continuously improved over the past 25 years, by making the most of advances in science and technology, and industry best practices. For more detail on the marine safety system, TC's Written Evidence, Appendix A – Marine Safety Framework. Recent work by the Canadian Council of Academies has found British Columbia experiences the highest level of shipping activity, the accident rate and the nature of the cargo shipped, together with current and planned moratoriums, suggest it has a relatively low risk profile compared to other regions (from Commercial Marine Shipping Accidents: Understanding the Risks in Canada, <http://www.scienceadvice.ca/en.aspx#1>). Despite increased vessel traffic and the volume of oil transported, the number and severity of ship-source oil spills have decreased over the years. An independent pan-Canadian risk assessment indicated that there is a very low risk of a ship-source oil spill over 10,000 tonnes. However, as marine traffic increases, smaller oil spills, particularly of fuel oil, are more likely to occur.

Canada has a robust system in place to prevent a ship-source spill; however, the risk can never be reduced to zero. In the highly unlikely event of a spill, Canada remains prepared to respond to spills to contain them and to clean them up as quickly and effectively as possible. Should individuals suffer pollution damage, claims can be made to the domestic compensation fund, the Ship-Source Oil Pollution Fund (www.ssopfund.ca/) and international funds.

Trans Mountain has committed to adopting the TERMPOL 31 findings and 17 recommendations in addition to mitigation measures proposed as part of the Project. TRC supports the following measures that will provide for a high level of safety for tanker operations, which will reduce risk and enhance awareness:

- Extended use of tethered and untethered tug escort (Finding 17, 18, Recommendation 8, 9, 10);
- Extension of the pilot disembarkation zone (Finding 18);
- Safety calls by laden tankers when in transit (Finding 19);
- Guidance on communication between masters and watch keeping personnel to support strong communication between tankers and their escort tugs (Finding 21); and
- An engagement and awareness strategy to promote safe navigation and interaction between Project tankers and recreational boaters, fishing vessel operators, and operators of small vessels (Recommendation 11, Finding 20).

The TRC also supports risk-based response planning and Western Canada Marine Response Corporation's efforts to increase capacity and reduce response time (Finding 28).

While the Crown understands that the risk of accidents and malfunctions, including oil spills, cannot be eliminated, it views the probability of any long-term, irreversible, high magnitude effects from increased marine vessel traffic to be very low.

Transport Canada administers a liability and compensation regime that applies only to spills from ships. The responsible authority for pipeline oil spills (even if the oil spill enters the water) is the NEB. If the spill occurs during the transfer of oil while a ship is at the terminal, the spill is regulated by Transport Canada. Under Part 8 of the *Canada Shipping Act, 2001*, Transport Canada ensures that the appropriate level of preparedness is available to respond to marine oil pollution incidents in Canada of up to 10,000 tonnes within prescribed time standards and operating environments.

The regime is based on the polluter pay principle and as such, costs of maintaining a preparedness capacity are covered by its users. The regime is built on the principle of cascading resources, which means that in the event of a spill larger than 10,000 tonnes the regime can be supplemented by the Canadian Coast Guard and resources from other regions, such as the United States Coast Guard (in the event of trans-boundary spill) and their partner oil spill response organizations. If necessary, additional resources may be requested from other countries under the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC).

In Canada, claimants have three tiers of compensation available to them: 1) ship owners' insurance; 2) international funds; and 3) Canada's domestic Ship-Source Oil Pollution Fund (<http://www.ssopfund.ca/>). In the case of a spill from a crude oil tanker, up to approximately \$1.5 billion is available in compensation. In the unlikely event that a spill should occur, the current compensation regime provides adequate compensation to cover economic losses, including such losses related to Aboriginal fisheries, loss of income for individuals, and subsistence fishing and harvesting.

Transport Canada understands that Aboriginal groups have concerns regarding potential spills and spill response planning. During the review of the Project and the related Crown consultation process, many Aboriginal groups have requested more information and involvement in the emergency response components of the marine safety system, and have provided technical suggestions for improvement.

With respect to the former, TC is offering to provide information sessions to groups along the marine shipping route to inform them about the existing emergency response framework; including the new Area Response Planning pilot project, which emphasizes input from Aboriginal groups in developing plans and responding to incidents (as noted in section 4.2.5)

Also noted in Section 4.2.5, TC is also planning on co-hosting workshops with Aboriginal groups and responsible authorities of the marine safety system, with respect to ways to improve the system, including increasing involvement of Aboriginal groups along the marine shipping route. These discussions would not be project specific, as the marine safety system is consistent across projects. These workshops will occur in early 2017 and provide an opportunity for facilitating discussions with Aboriginal groups in the marine safety system.

Section 4.2.5 also describes the newly announced whole of government marine safety initiatives that will lead to safer, more responsible marine shipping and cleaner, healthier marine ecosystems for traditional and other community uses. While not specific to any one project, they will nevertheless respond to a variety of concerns that Indigenous groups have raised in the context of the Project.

The interaction between oil and sediment is still an active area of research. Environment and Climate Change Canada is studying these interactions and any new knowledge gained from this research will enhance confidence in the prediction of spill behaviour, including the potential for oil submergence.

Environment and Climate Change Canada (ECCC) investigates and measures oil properties and publishes this data in a publicly accessible data base. Officials within ECCC also research the major chemical and physical processes that affect spills and contribute that insight to improve computer models. It is expected that ECCC's research results will help proponents to strengthen their emergency response plans and minimize risk by modeling and predicting the fate and behaviour of their oil products over the full range of realistic spill conditions, including rare or extreme events. Research carried out by ECCC is generally applicable to any spill in Canada.

Proponents are responsible for acquiring, and making accessible, specific spill information related to their development project and the particular marine environment in which it is proposed to be located. High-confidence predictions of spill behaviour are possible when accurate and complete chemical and physical property data are available and the computer model can demonstrably represent the known physical and chemical mechanisms important for determining spill behaviour over time. However, where all the necessary data on the specific petrochemical products that are to be transported are unavailable, the certainty of those particular spill behaviour predictions is reduced.

In consideration of concerns raised by Aboriginal groups during the NEB hearing and Crown consultation, and in consideration of the conditions proposed by the NEB, the existing regulatory regime, and the jurisdiction of the province, EAO is also proposing a number of conditions, which BC Ministers may attach to the provincial EA certificate, if approved. In addition to the proposed conditions discussed in the preceding sections, conditions particularly relevant to avoiding or mitigating impacts on associated with spills include:

- EAO Condition 24 requires the proponent to provide drinking water if a person's water supply becomes contaminated as a result of a spill;
- EAO Condition 30 requires additional information regarding emergency response plans, and require the plans to include a description of how the proponent would coordinate the participation of Aboriginal groups and other parties that may be involved in emergency response;
- EAO Condition 31 and 32 require the development of geographic response plans and the proponent's participation in coastal geographic response planning;
- EAO Condition 33 requires that Trans Mountain undertake additional research regarding the behaviour and clean-up of heavy oils spilled in freshwater and marine aquatic environments, with the objective of providing Trans Mountain and spill responders with improved information on how to effectively respond to spills; and
- EAO Conditions 34 and 35 increase the requirements associated with Trans Mountain's emergency preparedness and response exercise and training program, including testing additional plans in the exercises and additional full-scale exercises prior to the commencement of operations.

The potential impacts of a spill on Aboriginal Interests for each Aboriginal group are discussed in Appendices A-E.

Ship Source Pollution

In addition to the risk of spills from marine vessels, Aboriginal groups raised concerns about operational ship source pollution in respect of Project-related tanker traffic.

Discharges from ships as a result of routine operations are regulated under the Vessel Pollution and Dangerous Chemicals Regulations, which implement international standards set out under International Convention for the Prevention of Pollution from Ships (MARPOL). These include standards for ships to manage oil and oily wastes, chemicals (noxious liquid substances), packaged dangerous goods, sewage and garbage. For air emissions, TC implements in Canada the standards for the North American Emission Control Area (ECA) adopted under MARPOL. As of January 1, 2015, the maximum allowable sulphur content for marine fuels within the ECA is 0.1%, the lowest in the world and represents a 96% reduction in sulphur emissions. New vessels built after January 1, 2016, are required to meet Tier III standards for nitrogen oxides, which represent an 80% reduction from Tier I standards.

Ballast water is regulated under the Ballast Water Control and Management Regulations, which require vessels to exchange their ballast water 200 nautical miles offshore, among other conditions. Since mid-ocean ballast water exchange requirements were introduced in 2006, introductions of invasive species have been reduced, but we acknowledge remain a concern. For this reason, Canada is a party to the International Convention on the Control and Management of Ships' Ballast Water and Sediments, which is expected to enter into force in 2017 or 2018. The Convention will shift ships to manage ballast water to fit treatment systems in order to meet performance standards.

These international standards are continually under review by the International Maritime Organization and technical updates to MARPOL are routinely adopted every year.

If the Project is approved, compliance inspections and monitoring of tanker traffic by federal authorities with jurisdiction in marine safety, such as Transport Canada and the Canadian Coast Guard, will increase (TERMPOL Finding 2). It includes all types of inspections currently under the jurisdiction of TC such as port state (inspections of foreign vessels), OHF, security, and for CCG inspections of navigation aids.

Health and Human Safety Concerns

Throughout the review of the Project, a number of Aboriginal groups raised issues and concerns with respect to the impacts of the Project on human health and safety. The following is a summary of the key issues raised:

- Country food contamination, including everything that could have an indirect effect on country food and physical health;
- General negative human health effects from a holistic (Aboriginal) perspective – cultural aspects, psychosocial wellbeing;
- Air quality as a result of an accident or malfunction (marine or terrestrial);
- Drinking water quality and water for spiritual and cultural use;
- Noise of operations and during construction; and
- Adverse health effects from spills.

NEB Conclusions and Recommendations related to Health and Human Safety

The NEB found that with Trans Mountain's commitments and the NEB's recommended conditions, during construction and routine operation there would be no significant adverse effects to human health, including the health of Aboriginal people. With respect to the WMT, the NEB acknowledged evidence submitted about the existing air quality at the WMT site and the predicted exceedances for respiratory irritants during routine operations of the WMT. The NEB found that the Project's contribution to these already predicted exceedances would be inconsequential.

Regarding air quality associated with marine shipping, considering that Trans Mountain will be required to adhere to all federal and international emission requirements to reduce emissions from the Project-related marine shipping, the Board determined that the residual effects from Project-related marine shipping is not likely to cause significant adverse effects to human health (page 367).

The Board acknowledges that there is an existing regulatory regime governing air emissions from tankers underway or in transit. Trans Mountain would require Project related tankers and barges to follow international and federal regulations and apply best practices during operations. Under Transport Canada's Vessel Pollution and Dangerous Chemicals Regulations pursuant to the *Canada Shipping Act*, these tankers would be required to carry onboard a volatile organic compound management plan that meets the requirements of the International Convention for the Prevention of Pollution from Ships (page 367).

In the case of a spill or accident, the NEB found that the effects to human health that may result from a spill or accident would be largely limited to mild and transitory effects. The NEB concluded that based on the evidence presented, there would likely be potential adverse effects to human health for those people in the vicinity of a spill, but that these effects would be limited in duration and magnitude and therefore these are not likely to cause significant adverse effects to human health.

The Board is of the view that, in the event of a spill in the marine environment during shipping, including a large spill, there would be adverse effects to human health. These effects would vary over time and space depending on the location and extent of the spill, and there would likely be exceedances of certain short-term exposure limits for some chemicals of potential concern, including both carcinogenic and non-carcinogenic chemicals, but these would be expected to diminish in the hours following a spill. Some people would likely experience health effects, including a range of transient effects. These health effects could be experienced in all spills, but the intensity of the effects would be greatest for the larger-sized spills because of the higher concentrations of the chemical vapours that could be encountered and the longer durations of exposure (page 404).

Other specific conclusions of the NEB in respect of the above noted potential effects of the Project on health and human safety include:

- Not likely to cause significant adverse environmental effects to marine sediment and water;
- Not likely to cause significant adverse environmental effects relating to increase in ambient air emissions from construction or operations (pages 171-172);
- PM_{2.5} and NO₂ concentrations in area around WMT will remain well below acceptable levels;
- There will be minor exceedances of short-term exposure limits for respiratory irritants at the Squamish Nation Capilano # 5 reserve and for the District of North Vancouver; however, these are not likely to have a significant adverse effect on human health (page 367);

- Long term exposure to chemicals, such as benzene, will remain below exposure limits (page 367);
- The Board accepts Trans Mountain's conclusion that for the construction of the Project and for routine operation of the pipeline, pump stations and Edmonton, Burnaby and Sumas tank terminals, adverse health effects would not be expected... The Board therefore finds that these elements of the Project are not likely to cause significant adverse effects to human health, including the health of Aboriginal people (page 287); and
- The Board is of the view that with Trans Mountain's proposed measures and commitments, and with the Board's conditions, the construction and routine operations of the pipeline and the WMT facilities are not likely to cause significant adverse effects to community health, including the health of Aboriginal communities (page 291).

Regarding human safety, the Board has examined the evidence and tested the assertions made by Trans Mountain and other hearing participants. The Board determined that the proposed design approach demonstrates that the conceptual and preliminary design of the Project complies with current and applicable regulations and standards (page 54).

Trans Mountain would be subject to *Pipeline Safety Act* financial liabilities, including \$1 billion in absolute liability and unlimited liability for at fault incidents (page 320).

If approved, the Board would impose a condition requiring Trans Mountain to develop a Financial Assurances Plan made up of two components that total \$1.1 billion. First, Trans Mountain must have ready cash of at least \$100 million to cover immediate costs of a spill. Second, Trans Mountain must have core coverage of \$1 billion to cover the costs of cleaning up a spill, remediating the environment and compensating affected third parties. This core coverage must be a portfolio of financial instruments (page 321).

Health Canada considers country foods (also known as traditional foods) as any food that is trapped, fished, hunted, harvested or grown for subsistence or medicinal purposes, outside of the commercial food chain, and that is not regulated under the *Food and Drugs Act* including the following:

- Aquatic and terrestrial fauna that are fished, trapped, hunted and/or harvested (e.g. game animals and birds, fish and seafood) for domestic consumption;
- Produce harvested from naturally occurring sources (e.g. berries, seeds, leaves, roots and lichen);
- Plant tissues (roots, bark, leaves and seeds) that are ingested for medicinal or other uses (e.g. teas, etc.);
- Produce (fruit, vegetables and fungi) grown in gardens and/or home orchards; and
- Aquatic and terrestrial fauna (and their by-products) produced for domestic consumption but not for market (e.g. ducks, chickens or other fowl, eggs and dairy products).

Chemical contamination of country foods may occur from pipeline leaks/ruptures affecting wild game, fish and vegetation, as well as spills from marine tanker accidents and malfunctions affecting marine seafood. Measures to minimise the likelihood of accidents and malfunctions, resulting in oil spills in the marine and terrestrial environments also serve to mitigate the impacts of spills on human health resulting from contamination of country foods. The Crown notes that the NEB have recommended a number of conditions related to the protection of human health and safety that would limit Project impacts on country foods, air quality, drinking water and noise pollution.

Health Canada is responsible for establishing standards for the safety and nutritional quality of all foods sold in Canada. The department exercises this mandate under the authority of Canada's *Foods and Drugs Act* and pursues its regulatory mandate under the Food and Drugs Regulations. While the department does not have a regulatory role with respect to contamination of country foods or the determination for the need for a consumption advisory, Health Canada would work with other departments and be able to review information and provide related technical advice to support the Government of BC or the BC First Nations Health Authority (FNHA), upon request by either party.

Determining the need for, issuing, and the subsequent communication of any consumption advisory related to non-commercial foods is the responsibility of the Government of British Columbia.

The FNHA provides environmental public health services to BC First Nations communities, including services aimed to assess impacts on human health from food, water, air and sanitation. As part of its services to BC First Nations communities, the FNHA may be able to review any Provincial consumption advice as it pertains to community specific factors and work with health authorities to ensure relevant and community-specific advice.

The safety of commercial foods falls within the responsibilities and mandate of the Canadian Food Inspection Agency (CFIA) and the provinces' Health Authorities. Commercial foods distributed to the public that could be contaminated by the Project are subject to Canada's *Food and Drugs Act* and the *Canada Agricultural Products Act*. Levels of chemicals in commercial foods are monitored by the CFIA through its National Chemical Residue Monitoring Program. The monitoring program is used to determine the need for directed sampling which focuses on identified chemical contamination issues and compliance sampling to support the removal of food in violation of standards from the marketplace.

The Canadian Shellfish Sanitation Program (CSSP) is a federal food safety program whose goal is to protect Canadians from the health risks associated with the consumption of contaminated bivalve molluscan shellfish (e.g. mussels, oysters and clams). It is jointly administered by CFIA, ECCC and DFO. Under the CSSP, the Government of Canada implements controls to verify that only shellfish that meet food safety and quality standards reach domestic and international markets.

Provincial Health Authorities and the FNHA in BC also have a role in monitoring foods that may be contaminated and in issuing consumption advisories.

NEB condition 81 requires the proponent develop a Project-specific WMT Environmental Protection Plan that addresses impacts related to all Project phases and activities, including construction. The proponent is required to consult with government authorities (including VFPA) and Aboriginal groups during the development of this plan.

Through its Project and Environmental Review of a Project Permit application, VFPA would review the proponent's WMT Environmental Protection Plan and would require the proponent to adhere to conditions for the mitigation of potential environmental effects that could impact traditionally harvested foods.

Regarding the responsibilities of federal departments in managing the effects of marine spills, Transport Canada is the lead agency responsible for Canada's Marine Oil Spill Preparedness and Response Regime. Under Part 8 of the *Canada Shipping Act, 2001*, Transport Canada ensures that the appropriate level of preparedness is available to respond appropriately to marine oil pollution incidents in Canada of up to 10,000 tonnes within prescribed time standards and operating environments.

Should a marine spill occur, the Canadian Coast Guard is the lead federal agency to ensure a rapid response to a ship-source spill. The Incident Command System (ICS), a widely-accepted emergency management system is utilized to enable a coordinated response to incidents by all emergency responders.

In terms of air quality, ECCC made specific recommendations to the NEB related to mitigation and monitoring which are partially addressed. NEB acknowledged the specific ECCC recommendation for a monitoring site to be established at or adjacent to Tsleil-Waututh Nation reserve and noted that conditions 52 and 53 along with proponent commitment 210 could accommodate this potential need. ECCC is prepared to assist in the implementation of these conditions and commitment to help ensure the environmental protection objectives are achieved. ECCC will also be available to provide input to the consultation process for the Air Emissions Management Plan (AEMP) for the WMT. ECCC suggests that uncertainty about the potential for air contaminant exceedances of thresholds at the Tsleil-Waututh Nation reserve would be reduced if the air monitoring program outlined in condition 52 incorporated these principles:

- The monitoring site would be located with the intention of recording the highest concentrations in the vicinity (such as at a location on the proposed foreshore);
- Monitoring to be conducted on an hourly-continuous basis, throughout the year; and
- The criteria and thresholds that would trigger the implementation of additional mitigation measures would be based on the most conservative Canadian or Metro Vancouver air quality standards applicable.

ECCC would also be available to contribute to any discussions with respect to the possible “ambient survey” at the Tsleil Waututh Nation reserve if requested. ECCC would suggest that if the ambient survey proceeds, at a minimum it should monitor NO₂ and PM_{2.5}, follow a recognized ambient monitoring protocol (see Condition 52c), monitor pollutant concentrations on an hourly-continuous basis and establish the timing and duration of the survey so as to make it highly likely that the annual maximum concentration would be recorded. Monitoring for at least one year would of course capture the annual maximum and establish a solid basis for comparison between the concentrations at Tsleil Waututh and the Westridge monitoring site.

In respect to the general negative human health effects from a holistic (Aboriginal) perspective including cultural aspects and psychosocial well-being, the Crown acknowledges that no mitigation is available to directly address these aspects.

In addition, EAO proposes a condition (21) to Ministers that requires the proponent to engage Aboriginal groups in the development of their workforce accommodation strategy, which would include mitigation measures related to the environmental and social-economic impacts of workforce accommodations on potentially impacted Aboriginal groups, as well as a plan for provision of medical and health services for employees and contractors using the temporary worker camps during Project construction.

Cumulative Effects

A number of Aboriginal groups expressed concerns about cumulative effects to the TLRU, the TMRU and the underlying valued components that support Aboriginal traditional uses of these resources. During OTE presentations, Aboriginal groups shared their observations of changes to the land and waters in their traditional territories as a result of development.

In general, Aboriginal groups said that these changes have affected their ability to practice TLRU and TMRU activities, such as hunting, plant gathering, fishing, and trapping, as well as cultural ceremonies and gatherings.

Some groups expressed concerns about the effects of existing development on the health of the ecosystems and resources harvested, as well as the impacts on their cultural and spiritual well-being, and the potential effects of the Project in addition to these existing effects. Various Aboriginal groups have said that they have concerns about the pressure the Fraser River is under and noted that Sockeye salmon, a species with the significant importance, has suffered a long decline.

A number of Aboriginal groups raised concerns about how Trans Mountain conducted its cumulative effects assessment. Many groups felt that Trans Mountain’s assessment was inadequate to assess the effects of the Project on their rights and interests. Many expressed the view that group specific cumulative effects assessments specific to them or their areas of interest should have been conducted. Some groups said it did not accurately characterize or reflect the implications of incremental impacts on their use and occupancy of their territory, their interests, or their Aboriginal rights and title.

Within the NEB's report, the Board is explicit in its recognition of "the importance that Aboriginal groups place on being able to continue their traditional uses and activities within the entire area of their traditional territories." In respect to the evidence (oral and written) these Aboriginal groups provided the Board, the NEB described the information provided to them in the following way:

... Aboriginal groups explained how they continue to use the lands, waters and resources within their traditional territories for a range of activities, including hunting, trapping, fishing, gathering of resources on the land, and to continue to access sites and locations of cultural and spiritual importance. Groups also described the significant role that these activities and locations on the landscape have within their cultures and societies. They described how the transmission of cultural knowledge relies on the continued ability to access resources, sites and locations for traditional purposes. The Board acknowledges the strongly held views expressed by Aboriginal groups about the relationships between their use of the lands, waters, and resources and the importance of these within each Aboriginal society.

The NEB recognized that the Project's route (89% is on the existing RoW) "traverses land and water areas in Alberta and BC that Aboriginal groups use for traditional activities, uses and practices and for exercising various potential or established Aboriginal and treaty rights." The NEB in its review of the Project noted its concerns, at various points in their report, regarding historic and current impacts of the existing infrastructure.

In regard to the existing situation of watersheds crossed by the pipeline, the NEB made the following comment:

Existing cumulative effects differ in the various watersheds crossed by the proposed pipeline corridor. Numerous current and historical activities have reduced the abundance and health of fish species and the quality of habitat within the pipeline corridor. For some species and watersheds, existing cumulative effects could be considered substantial or above environmental regulatory thresholds.

The NEB also took note of the submissions of the Cities of Burnaby and Vancouver that the proposed pipeline route may include lands used historically by industry and that there are potential sources of contamination from these previous activities. The proponent has indicated that historical and current reporting indicates that "the existing berth at the Westridge Marine Terminal has elevated levels of certain contaminants (such as polycyclic aromatic hydrocarbons, cadmium, and mercury) in the subtidal sediment" at this location. The NEB stated "that the marine sediment and water quality surrounding the Westridge Marine Terminal (WMT) have been affected by historical and existing terminal activities" and that "some contaminants are present at levels higher than the applicable criteria due to historical and existing terminal activities."

In respect to traditional use of land and marine areas, the NEB found that the total cumulative effects (from agriculture, forestry, transportation, roads and other infrastructure) from past and existing projects and physical activities could be significant in certain areas of high development.

Citing filings from the proponent, government departments and Aboriginal groups, the NEB noted the evidence that Burrard Inlet has been significantly cumulatively impacted by industrial and urban development and that a large percentage of the intertidal habitat has been modified.

In evaluating the significance of cumulative effects under Paragraph 19(1)(b) of the CEAA 2012, the NEB focused on the total cumulative effects of the Project from past, existing and reasonably foreseeable physical facilities and activities, including the Project's effects. In so doing, the NEB rejected the proponent's approach to evaluating the significance of the Project's contribution to cumulative effects, rather than total cumulative effects. The NEB took the approach that if the total cumulative effects were considered to exceed a relevant threshold for a particular valued component, or found to be substantial, then effects to that component would generally be found to be significant unless the Project contribution to total cumulative effects was determined to be inconsequential.

The NEB observed that for various valued components, cumulative effects were already significant without the Project. For example:

- Certain ambient concentrations of airborne contaminants around the Edmonton Terminal and WMT already exceeded or were approaching the applicable ambient air quality objectives;
- Numerous watersheds crossed by the proposed pipeline corridor could be considered significantly impacted by cumulative effects due to past industrial and urban development has reduced the quality and quantity of surface water;
- Cumulative effects to groundwater resources could be significant in areas where vulnerable aquifers are present or where more concentrated agricultural, municipal and industrial activities result in higher groundwater usage and demand;
- Current and historical activities have reduced the abundance and health of fish species and the quality of habitat within the pipeline corridor. For some species and watersheds, existing cumulative effects could be considered substantial or above environmental regulatory thresholds;
- A relatively high percentage (approximately 39%) of soils in the local study area for the Project are already disturbed and therefore cumulative effects to soil and soil productivity is already significant;
- Existing cumulative effects to native vegetation are already substantial in the regional study area for vegetation in Alberta and in the lower mainland of BC, which place various rare plants, lichens and vegetation communities at risk due to sustainability thresholds being exceeded for the species or community;
- Existing cumulative effects to old growth and mature forests in BC are already substantial in some areas, including substantial forest health related damage from mountain pine beetle;
- Presence of weeds and resulting adverse effects is already substantial in some areas with high existing disturbance;

- For wildlife species, existing cumulative effects to Woodland caribou are already substantial because existing cumulative effects have already exceeded a sustainability threshold for the species, and for certain populations of grizzly bear, regional cumulative effects to mortality risk is considered substantial due in part to linear disturbances;
- Some marine sediment and water quality contaminants are present at levels higher than the applicable criteria due to historical and existing terminal activities in the vicinity of the WMT;
- Cumulative effects to marine fish and fish habitat could be considered substantial and above environmental regulatory thresholds within the RSA and LSA as Burrard Inlet has been altered by urban and industrial development that has resulted in a loss of habitat and a decrease in marine fish abundance; and
- Existing cumulative effects for marine mammals could be considered substantial or above environmental regulatory thresholds for Burrard Inlet as industrial and urban development have substantially altered areas formerly considered high quality habitat in this area.

For all of the above, the Board would impose conditions on the proponent to minimize or offset the Project's contribution to these already significant cumulative effects, including measures proposed by the proponent, the NEB determined that the Project's contribution to total cumulative effects is expected to range from inconsequential to relatively minor.

With respect to the total cumulative effects of the Project on TLRU and TMRU, factoring in the suite of mitigation measures to address biophysical effects that support these activities, the NEB determined that the Project's contribution to cumulative effects to the TLRU and TMRU were not significant.

The NEB did conclude that effects from the operation of Project-related marine vessels would contribute to the total cumulative effects to the Southern Resident Killer Whale population and would further impede the recovery of the endangered Southern Resident Killer Whale population for which the cumulative effects are already significant.

EAO proposes a number of conditions relevant to the mitigation of cumulative effects, many of which are discussed above. Conditions have been included for wildlife species that have been particularly vulnerable to cumulative effects, including species at risk (16), grizzly bear (18), and caribou (19).

Cumulative Effects associated with Greenhouse Gas Emissions

Given the link between greenhouse gas emissions and the effects of climate change on Aboriginal traditional uses of lands, waters and resources, various concerns were raised about the direct and indirect sources of greenhouse gases (GHGs) associated with the Project.

The NEB accepted the proponent's analysis that the Project would generate 1,020,000 tonnes of CO₂e during construction (primarily from land clearing) and 407,000 tonnes per year of CO₂e during annual operations. The NEB noted that construction-related GHGs are not reportable under any existing federal regulations, however given the substantial amount of anticipated emissions,

the NEB proposed condition 140 requiring quantification of the total direct GHGs after all construction activities are complete and condition 142 requiring development of an offset plan for the Project's entire direct construction-related GHGs. The intent would be to confirm there are no net GHGs from Project construction.

With respect to GHGs emitted during annual operations, the NEB found these would be below national reporting thresholds and therefore were not considered significant.

With respect to the marine shipping aspect of the Project, the NEB found GHGs from Project-related marine vessels are likely to be significant. The NEB estimated these emissions to be 68,100 tonnes of CO₂e per year, resulting in a 2.1% increase in estimated marine provincial emissions, or a 0.11% increase in BC's total GHG (based on 2012 levels).

To address certain Project-related contributions to GHG emissions, the NEB recommended the proponent files a Post-construction GHG assessment report (Condition # 140) and implements a GHG Emission Offset Plan for the project construction phase (Condition #142).

In respect of the NEB's findings on GHG emissions, the Crown notes that there are two parts to the GHG and climate change that were assessed by the federal government direct and upstream GHGs. GHG emissions directly attributed to the Project were considered within the scope of the NEB review process and the Crown notes these GHG emissions will be partly offset via proponent compliance with NEB condition #142.

Upstream GHG emissions were considered outside the NEB process. The transition strategy the Government of Canada announced in January 2016 for projects currently undergoing EA included a commitment to assess the upstream GHG emissions linked to projects under review. As such, ECCC conducted an assessment of the upstream GHG emissions associated with the Project. This assessment was released to the public and Aboriginal groups for comment. The purpose of the assessment is to provide information to the Project decision makers on the upstream GHG emissions associated with the project. Because the upstream emissions were not included in the NEB review and are not under the care and control of the proponent there are no conditions that would apply to the upstream assessment.

Transport Canada acknowledges the Board's significance finding related to GHG emissions from Project vessels. Canada is working towards the control and reduction of GHG emissions from ships on a global scale as a member state of the International Maritime Organization (IMO) and participation on the IMO's Marine Environment Protection Committee (MEPC).

In 2011, the IMO adopted mandatory technical and operational reduction measures under MARPOL. These measures include the Energy Efficiency Design Index (EEDI) and the Ship Energy Efficiency Plan (SEEMP). The EEDI applies to new ships and sets a standardized means to calculated energy efficiency (the EEDI formula) and requires new vessels to meet minimum efficiency targets become more stringent in phases. The SEEMP is required to be onboard all ships and set out operational measures for how a ship will improve its energy efficiency. These measures constitute the first-ever mandatory global GHG reduction regime for an entire global

industry sector. The regulations entered into force on January 1, 2013 and apply to all ships over 400 gross tonnages. Based on compliance results of current newly built vessels with the EEDI, the efficiency targets for new ships are currently under review by IMO with the view to increasing stringency.

ECCC does not regulate marine shipping GHG emissions. However, ECCC does produce the National Marine Emissions Inventory (MEI), a database of marine emissions from all commercial vessels operating in Canadian waters, based on current activity data, and is updated on an on-going basis.

The Crown notes that neither the direct nor the upstream GHG emissions of a particular project can be linked to local changes to the environment. However, a project's direct and upstream GHG emissions are an important consideration for the decision makers because they would contribute to global GHG emissions and subsequent climate change impacts.

The Governments of Canada and British Columbia are committed to addressing climate change, and the Government of Canada is working in collaboration with provincial and territorial governments, municipalities and Indigenous peoples. First Ministers have established working groups to identify specific actions to grow Canada's economy while reducing greenhouse gas emissions and adapting to climate change. These working groups will develop reports identifying options for action in four areas: clean technology, innovation and jobs; carbon pricing mechanisms, specific mitigation opportunities; and adaptation and climate resilience. These reports will help inform the development of the pan-Canadian framework on clean growth and climate change, which First Ministers are to finalize this fall for implementation beginning in early 2017.

The federal government is also determined to make sure the voices and perspectives of Indigenous peoples are heard and included in the pan-Canadian framework on clean growth and climate change. Working groups are specifically including Indigenous peoples, in particular the Assembly of First Nations, the Métis National Council and Inuit Tapiriit Kanatami.

The Government is also addressing climate change through some specific measures. Canada, together with the US, has committed to take action to reduce methane emissions by 40-45 percent below 2012 levels by 2025 from the oil and gas sector, the world's largest industrial methane source, in support of achieving international climate change commitments.

In order to implement this target, ECCC will put in place national regulations in collaboration with provinces/territories, Indigenous Peoples and stakeholders. Environment and Climate Change Canada intends to publish an initial phase of proposed regulations by early 2017.

In 2007, the BC Government passed the *Greenhouse Gas Reduction Act*, legislating provincial GHG reduction targets of 33% below 2007 emission levels by 2020 and 80% below by 2050. Interim reduction targets of 6% by 2012 and 18% by 2016 have been set in policy to guide and measure progress. In the province's most recent Greenhouse Gas Inventory Report, BC's 2012 CO₂e emission levels were reported at 61,500 kt, 4.4% below 2007 levels.

In order to achieve the legislated GHG reduction goals, BC has designed and implemented a suite of policy, regulatory, and legislative measures to reduce emissions across the province. These measures include:

- A provincial carbon tax, introduced in 2008 through the *Carbon Tax Act*;
- A carbon-neutrality mandate for all public sector operations (Carbon Neutral Government Regulation), largely achieved through the sourcing of province-based offsets; and
- Mandatory GHG reporting program for industrial facilities (Reporting Regulation).

EAO proposes several conditions particularly related to greenhouse gas emissions within BC:

- Condition 26 requires the proponent quantify and report greenhouse gas emissions in a manner that is consistent with BC's *Greenhouse Gas Industrial Reporting and Control Act* and accompanying regulations; and
- Condition 27 requires the proponent to purchase all greenhouse gas emissions offsets for emissions within BC through the BC Carbon Registry to ensure that the offsets meet the standards established in BC's *Greenhouse Gas Industrial Reporting and Control Act* and accompanying regulations.

Socio-economic and Socio-cultural Effects

A number of Aboriginal groups raised concerns about socio-economic, community and socio-cultural effects. As some of these issues may relate to potential impacts on Aboriginal Interests, they are also discussed in the preceding sections. Key issues identified in this topic area included the following:

- Loss of access or damage to culturally sensitive sites;
- Cultural impacts associated with the potential loss of culture and loss of ability to practice traditional resource use or ceremonial activities, e.g. as a result of operations, a spill, or increased traffic through traditional territory;
- Visual disturbances;
- Potential community effects during construction;
- Training and employment;
- Procurement and business opportunities;
- Partial ownership, revenue sharing, or other economic benefit;
- Access to salvageable timber;
- Impacts on trapping and the need for notification and compensation;
- Negative economic impacts associated with construction or operation, e.g., value of land; and
- Quality of economic data Trans Mountain submitted to the NEB.

In its report, the Board acknowledged that the Project would pass through areas of importance to many groups and stakeholders, including Aboriginal groups.

The NEB found that the potential effects of the Project on physical and cultural heritage resources would be confined to the Project footprint and the WMT site boundary, would be short to long term, reversible to permanent, and of low to moderate magnitude. The NEB concluded that, with proponent commitments to avoid all sites where possible, implement its Heritage Resources Discovery Contingency Plan and fulfill its obligations to meet provincial requirements, the Project is not likely to cause significant adverse environment effects to heritage resources, including with respect to Aboriginal groups.³⁶

The NEB conditions require the proponent to manage access to culturally sensitive sites and implement an access management plan. Trans Mountain would be required to justify any area subject to access control, including during the construction and operational phases of the Project. To limit the impact on Aboriginal groups, NEB condition #24 for an Access Management Plan includes requirements for Trans Mountain to incorporate Aboriginal Traditional Land Use and Traditional Ecological Knowledge into the design of its access management plan.

Condition #64 requires the proponent to develop a Project-specific WMT Environmental Protection Plan that addresses impacts related to all Project phases and activities, including construction. The proponent is required to consult with government authorities (including VFPA) and Aboriginal groups during the development of this plan. VFPA would review the proponent's WMT Environmental Protection Plan and would require the proponent to adhere to any conditions for the mitigation of potential environmental effects that could impact traditionally harvested foods, or other potential community effects.

Regarding trapping, Trans Mountain has committed to communicating its construction schedule to Aboriginal trappers so that they can set their traplines in areas unaffected by construction activities. The proponent has stated that should trappers lose trapline revenue and or suffer a reduced harvest, they are committed to offering compensation. Condition #2 ("Compliance with Commitments") requires that Trans Mountain fully implement all of the commitments it made in its Project Application or during the NEB review process.

The NEB acknowledged that the Project has the potential to affect the quality of life within affected communities, as well as the well-being of individuals due to potential changes in population and community life. In order to address potential negative socio-economic effects, the NEB proposed Condition #13 requiring the proponent to file a plan for monitoring the potential adverse socio-economic effects from the Project as a means of ensuring that measures to reduce or eliminate adverse effects are implemented within timeframes for which effects might occur.

³⁶ The Panel acknowledged the concerns raised by Aboriginal groups regarding the potential effects of the Project on physical and cultural heritage resources and stated that a limited number of sites had been identified through the impact assessment performed by the proponent.

With respect to potential positive socio-economic effects for communities, the NEB proposed Condition #145 requiring the proponent to file progress reports on a Community Benefit Program. Overall, based on proponent commitments and the NEB's recommended conditions, the NEB concluded that potential effects to the social and well-being of communities can be effectively addressed.

EAO proposes a number of conditions that would contribute to the mitigation of potential adverse socio-economic and socio-cultural effects, which have been discussed in the preceding sections.

A number of issues associated with socio-economic, community and socio-cultural effects are also relevant to assessing impacts on Aboriginal title, which is further considered in the applicable Appendices A-E.

4.3.7 PROCEDURAL CONCERNS

Throughout the Project review and Crown consultation process, many Aboriginal group participants expressed their opposition to the Project, criticized the NEB Review as fundamentally flawed, and raised various concerns regarding the Crown's approach to consultation including reliance on the NEB Review, to the extent possible, to satisfy aspects of the Crown's legal duty to consult. This section summarizes the key procedural issues raised, and offers responses where provided either by the NEB or the Crown.

NEB List of Issues, Scoping, and Proponent's Assessment Approach

The NEB's Filing Manual establishes the requirements proponents must follow in submitting applications to the NEB for CPCN. The NEB selected the List of Issues that would be examined in the hearing process, as well as the scope of the environmental assessment and scope of the factors to be assessed under CEAA 2012.

One key theme of Aboriginal group concerns about the NEB Review involved the lack of opportunities they felt were available to influence the direction the NEB provided to the proponent to respond to issues and concerns raised about evidence filed by the proponent. The proponent set out its assessment of the Project in its Application to the NEB, guided by the requirements of the NEB filing manual, the regulatory order issued in respect of the scope of the EA, and scope of the factors to be assessed under CEAA 2012. However, various Aboriginal group participants wanted to be consulted on the scope of the review process and the list of issues that the NEB would examine during the hearing process.

Aboriginal groups wanted to have the NEB further direct the proponent to conduct specific assessments of valued components important to them. Two key examples of components that Aboriginal groups felt were lacking were: 1) an assessment of greenhouse gas emissions indirectly associated with the Project, and 2) an assessment of potential adverse impacts on Aboriginal Interests. In each instance, Aboriginal groups wanted the NEB to require this information as part of the hearing process, so that it could be factored into the Project assessment and public interest recommendation.

The view that a historical and current context was lacking from the traditional use studies undertaken by the proponent in its Project Application was also provided in many Aboriginal groups' evidentiary filings with the NEB. In the view of many Aboriginal groups, the indicators and measurements used by the proponent in regard to subsistence activities and sites (including hunting, trapping, fishing, plant gathering, trails and travel ways, and habitation sites), as well as cultural sites (including gathering places and sacred areas), did not accurately represent an understanding of the impacts of the Project on their Aboriginal Interests.

Some Aboriginal groups also criticized the baseline studies conducted by the proponent. In these groups' view, the proponent's studies revealed that they do not know where and when the baseline values should be established. Without an appropriate historic and current context, many Aboriginal groups believe any baseline cannot provide a useful reference point against which future conditions are compared for assessing Project-specific and cumulative effects. Also of concern to Aboriginal groups has been the need to understand the degree of future impacts based upon having effective data on the prior conditions. Tsleil-Waututh Nation, for example, noted the importance of this information within their discussion of their own consideration of baseline and current conditions in Burrard Inlet:

[118.] The Assessment Report [of Tsleil-Waututh Nation] describes baseline conditions – the conditions of Burrard Inlet pre-contact and at the time of the Crown's assertion of sovereignty – as well as current conditions. Baseline and current conditions provide a means by which cumulative effects on TWN's title, rights, and interests may be measured over time. They are the "existing state of affairs" through which, as a matter of law, the seriousness of additional Project impacts must be viewed and assessed.³⁷

In response to these issues, the NEB concluded in its report that the proponent had considered and, to the extent possible, incorporated the information provided by Aboriginal groups in its studies, design, and mitigation measures. The NEB would require Trans Mountain to continue its consideration and incorporation of additional information it receives from Aboriginal groups as it proceeds to final design. A number of NEB conditions for the Project require ongoing engagement of Aboriginal groups; however, Aboriginal groups remain concerned about the completeness and quality of the information relied upon by the NEB during the hearing process, to inform its assessment of the Project, and its ultimate recommendation in respect of whether the Project is in the public interest.

³⁷ C358-30 – Tsleil-Waututh Nation – Written Argument-in-Chief (A75090). p.47. The citation for quotation used here is to: Moberly First Nations v British Columbia (Chief Inspector of Mines), 2011 BCCA 247, 2011 Carswell BC 1238 at para 119 (WL) [TWN Authorities, Vol 3, Tab 42].

NEB Hearing Process

Various Aboriginal group intervenors noted that the NEB did not offer an oral hearing that would have enabled direct cross-examination of the proponent and other intervenors' evidence. A low rate of direct response to information requests provided to the proponent raised frustration that the NEB did not hold the proponent accountable to addressing issues raised by Aboriginal groups through a written 'testing of the evidence'. In addition, several Aboriginal groups expressed that the quasi-judicial nature of the Board's hearing process made it adversarial, and some Aboriginal groups did not participate because the hearing format did not respect the preferred manner in which they would want to provide information.

The majority of Aboriginal groups engaged in consultation with the Crown stated that the NEB Review places an unreasonable burden on intervenors to assess the Project. The view strongly expressed by Aboriginal groups is that it is up to intervenors to submit research and reports to challenge the assumptions made by the proponent in its application, and that intervenors are often poorly resourced to perform this function.

In general, Aboriginal groups expressed concern with the perceived lack of flexibility shown by the NEB for the provision of oral evidence, filing of evidentiary updates by Aboriginal group intervenors, and the refusal to accept late submissions of traditional use information.

In addition, Aboriginal groups felt that the requirement placed on them to participate as formal intervenors was at odds with meaningful engagement, as Aboriginal groups would have preferred to work collaboratively with the Crown to understand the impacts of the Project on their specific Aboriginal Interests and other interests.

Level of Participant Funding

Many Aboriginal groups raised concerns about the level and consistency in approach with respect to the NEB's participant funding program, as well as the participant funding offered by Natural Resources Canada to support the participation of Aboriginal groups in the consultation process.

Many Aboriginal groups raised the concern that for an administratively burdensome process that is legalistic in nature, costs for meaningful engagement and review of technical information far outweighed the level of funding offered by the NEB to support participation in the hearing. Some groups were not able to obtain any NEB participant funding as a result of the timing of their applications to participate, while others received what they felt was an arbitrary and minimal funding allocation compared to other groups. Several groups indicated they spent substantially more of their own resources participating in the Project review process than they were allocated by the NEB or the Crown.

Crown's Reliance on the NEB Hearing to Inform Crown Consultation

Given the above procedural concerns, most Aboriginal group participants in the NEB hearing expressed concern over what they viewed as the Crown's over-reliance on the NEB Review process to satisfy key aspects of the duty to consult, and as appropriate, accommodate for potential adverse Project impacts on Aboriginal Interests.

Time limit constraints and timing of the Post-NEB hearing phase of consultation, as well as the capacity for Aboriginal groups to engage in consultation during the summer months, were also raised as key concerns by many participants. Many Aboriginal groups expressed a desire for more time to meet face-to-face and respond to issues raised during the post-NEB hearing phase.

Another procedural concern raised many groups was that the NEB process did not adequately incorporate consultation and accommodation considerations in respect of the Crown's duty to consult. A key element of this concern was the view that the NEB's recommendation for GIC to approve the Project did not consider justification under the constitutional framework in place for protecting Aboriginal rights, or whether the Crown's duty to consult, and as appropriate, accommodate was adequately met.

The Crown has consulted meaningfully during the post-NEB hearing phase of consultation on the Project, and to identify measures available to avoid or minimize potential adverse impacts on Aboriginal Interests. If adverse effects cannot be fully mitigated, the Crown consults towards arriving at a common-ground view of the degree of seriousness of impacts potentially arising from Crown decision making in respect of the Project. In addition, the Crown has sought to work closely with potentially impacted Aboriginal groups to inform recommendations to decision makers for accommodation or other action to address potential impacts as appropriate in an effort to reconcile Aboriginal Interests with other public interests.

The Crown is committed to meeting its duty to consult, which includes a consideration of the seriousness of the potential impacts of Crown decisions in relation to the Project, on Aboriginal Interests. This consideration will include whether potential impacts on a group can be addressed by the NEB conditions, or whether additional Crown action may be needed. Provincially, these additional Crown actions may include proposed EA certificate conditions. Federally, these Crown actions could include referring aspects of the *NEB Recommendation Report* back for reconsideration, saying no to the Project, or if the Project is approved, accommodating Aboriginal groups in a manner that is commensurate to the degree of seriousness of the impact.

Through the Crown's efforts during the NEB review process and the post-NEB hearing phase, the Crown has provided opportunities for Aboriginal groups to provide feedback on the NEB's recommendation and conditions for the Project, raise potential outstanding issues, discuss possible mitigation and accommodation measures as well as discuss any other issues groups wished to raise. This dialogue, as well as consultation on this report, seeks to ensure that the Governments' decisions are informed by a record that reflects the views and concerns of Aboriginal groups and presents actions recommended to meaningfully respond to those concerns.

4.4 Common Outstanding Issues Raised by Aboriginal Groups Post-NEB Report

During consultation meetings and through the review of comments received on the initial draft of this report, several common themes emerged in terms of Aboriginal group responses to the NEB Report and the NEB's recommended terms and conditions for the Project. Common concerns include:

- Disagreement with NEB conclusions in respect of the temporary, reversible or insignificant nature of adverse effects pertaining to Aboriginal groups;
- View that the NEB Report includes inaccurate, incomplete and faulty information which has undermined confidence in the findings of the report or adequacy of recommended mitigation;
- Lack of specificity of NEB findings and the general nature of conditions relating to “potentially affected Aboriginal groups” that many Aboriginal groups view as providing too much discretion to the proponent and the NEB in determining which groups to engage, and how to engage them and whether that engagement was satisfactory in avoiding impacts on Aboriginal Interests and other interests;
- Some Aboriginal groups suggested that a specific set of standards and methods be established for the proponent to adhere to for meeting compliance with each NEB condition that requires consultation with Indigenous groups, similar to regulatory conditions on other projects;
- Inadequate ability to evaluate to what extent the NEB Report or recommended conditions may address specific concerns raised by Aboriginal groups including impacts on Aboriginal Interests. In particular given the high level and generic approach taken by the NEB for documenting its assessment of Project-related impacts on Aboriginal group interests, several Aboriginal groups questioned whether the NEB had fully satisfied its statutory obligations under CEAA 2012 or the policy objectives of integrating traditional knowledge into the process;
- Lack of specific protection through NEB conditions for cultural or sacred sites, or continued ability to use and transfer traditional knowledge;
- Lack of compensation for cultural losses in the event of a spill or accident from pipeline, the WMT, or marine shipping components of the Project;
- Concern that NEB condition 98 uses the term “Aboriginal Monitors” which in the view of Aboriginal groups, does not provide certainty that local traditional knowledge holders would be engaged in construction monitoring within a specific Aboriginal group’s territory to help protect values such as traditional land and resource use and traditional marine resource use; and
- Absence of NEB mandate or findings with respect to assessing impacts on Aboriginal title claims, and absence of any mitigation or compensation in respect of potential impacts or risks of impact on Aboriginal title.

Other key common issues expressed to the Crown during the post-NEB Report round of consultations include:

- Expression that more time is needed for the Crown to meaningfully consider Aboriginal group comments and concerns prior to a decision on the Project;
- Some groups indicated that they required more time and funding to participate in Crown consultation to consider the impacts of the Project on their communities;
- Suggestion that the Crown has responsibility to ensure traditional knowledge, cultural and sacred sites and Aboriginal rights and title are meaningfully considered by the proponent and the NEB throughout the planning, construction, operation and lifecycle regulation of the Project;
- Suggestion that the proponent has not adequately considered or collected traditional knowledge or use information in Project plans developed to date and that there has been a lack of consistent proponent engagement or follow-up with many groups who are seeking to have an active and ongoing dialogue with the proponent;
- Some groups indicated a lack of proponent follow-up on commitments made but that were not formally documented in the proponent's engagement logs filed with the NEB or shared with Aboriginal groups;
- In the absence of a decision to delay the decision, many Aboriginal groups urged the Crown to order the NEB to reconsider its recommendation or terms and conditions in particular to ensure the direct involvement of potentially affected Aboriginal groups in the proponent's detailed Project planning;
- In a number of consultation meetings and via correspondence, Aboriginal groups recommended that GIC consider referral back to the NEB for reconsideration, the definition of terms element of Appendix 3 of the NEB Report to more specifically define the term "potentially affected Aboriginal groups" referred to throughout the conditions;
- If the Project is approved, that additional resources will be required by Aboriginal groups to reviewing and responding to referrals;
- If the Project is approved, desire for an ongoing Project oversight and monitoring role for Aboriginal groups, to ensure the proponent complies with conditions affecting Aboriginal group interests;
- Many groups noted their view that an oversight committee should not be 'advisory' but have the ability to ensure requirements are met, and should include an ability to have technical sub-committees established comprised of local Aboriginal group experts;
- Some groups noted an oversight committee function could be directly referenced in the NEB conditions such that it could receive draft proponent plans and reports directly from the proponent and is provided capacity to review these plans and reports over the lifecycle of the Project;

- Desire of several Aboriginal groups to have certainty that they will have official standing in any future detailed route alignment hearing process established by the NEB and that this will allow Aboriginal group interests to be directly factored into future Project planning to avoid or minimize impacts;
- Ongoing concerns about the environmental impacts of the Project;
- Ongoing concerns about the cumulative effects of development in Aboriginal groups' traditional territories;
- Ongoing concerns about the potential for serious adverse impacts from any Project-related spill;
- Ongoing concerns about the adequacy of the spill response systems for pipeline and marine-based accidents;
- Ongoing concerns that the Project would adversely impact Aboriginal title claims;
- Desire to benefit economically from the Project;
- Lack of trust in proponent, regulatory agencies and institutions of Government to meaningfully address Aboriginal group interests and to sustain investment in ongoing relationships with Aboriginal groups;
- Reconciliation requires parties moving towards consensus, common positions or partnerships which may involve some degree of compromise or middle-ground solutions that try to meet the interests of Canada as a nation and Indigenous peoples as well; and
- In some cases, a desire for consultation protocols to be developed with the Crown on the Project or to address broader issues including cumulative effects and broader natural resource development taking place within an Aboriginal group's traditional territory.

5. CONCLUSIONS

5.1 Summary of Conclusions of Impacts on Aboriginal Interests

This section presents a summary of the Crown's conclusions about the impacts of the Project on Aboriginal Interests. The assessment of impacts on Aboriginal Interests for each individual Aboriginal group, along with a summary of strength of claims, consultation activities, and key issues and concerns, are provided in the group-specific appendices to this Report.

The following tables summarize the Crown's conclusions regarding the depth of consultation owed to each Aboriginal group, the potential Project-related impacts on specific Aboriginal Interests for each Aboriginal group, and the overall range of potential Project-related impacts. The tables are organized by geographic region.

Table 13 – Alberta Groups: Conclusions Regarding Impacts on Aboriginal Interests and Depth of Consultation

Aboriginal Group	Depth of Consultation	Assessed Impact on Aboriginal Interest				Greatest Assessed Impact on Aboriginal Interests
		Hunting, Trapping, and Plant Gathering	Fishing and Harvesting	Other Traditional and Cultural Activities	Aboriginal Title	
Alexander	deeper	minor-to-moderate	minor	minor-to-moderate	(treaty)	minor-to-moderate
Alexis Nakota Sioux	deeper	minor-to-moderate	minor	minor-to-moderate	(treaty)	minor-to-moderate
Enoch Cree	deeper	minor-to-moderate	minor	minor-to-moderate	(treaty)	minor-to-moderate
Ermineskin Cree	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor
Horse Lake	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor
Louis Bull	middle	minor-to-moderate	negligible-to-minor	negligible-to-minor	(treaty)	minor-to-moderate
Montana	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor
O'Chiese	middle	minor-to-moderate	minor	minor-to-moderate	(treaty)	minor-to-moderate
Paul	deeper	minor-to-moderate	minor	minor-to-moderate	(treaty)	minor-to-moderate
Samson Cree	middle	minor-to-moderate	minor	minor-to-moderate	(treaty)	minor-to-moderate
Stoney Nakoda Nations	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor
Sturgeon Lake Cree Nation	lower	minor	minor	minor	(treaty)	Minor
Sucker Creek First Nation	lower	minor	minor	minor	(treaty)	Minor
Sunchild First Nation	middle	minor	minor	negligible-to-minor	(treaty)	negligible-to-minor
Whitefish (Goodfish) Lake First Nation & Saddle Lake Cree Nation	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor

Table 14 – BC Interior Groups: Conclusions Regarding Impacts on Aboriginal Interests and Depth of Consultation

Aboriginal Group	Depth of Consultation	Assessed Impact on Aboriginal Interest				Greatest Assessed Impact on Aboriginal Interests
		Hunting, Trapping, and Plant Gathering	Fishing and Harvesting	Other Traditional and Cultural Activities	Aboriginal Title	
Adams Lake	Middle	minor	minor	minor	negligible	Minor
Ashcroft	Middle	minor	minor	minor	negligible	Minor
Bonaparte	Middle	negligible	negligible	negligible	–	Negligible
Boston Bar	middle to deeper	Minor-to-moderate	minor	Minor-to-moderate	minor	Minor-to-moderate
Canim Lake (Tsqescen)	Lower	minor	minor	negligible-to-minor	negligible	Minor
Coldwater	Deeper	minor-to-moderate	minor-to-moderate	minor-to-moderate	minor-to-moderate	minor-to-moderate
Cook's Ferry	Deeper	minor-to-moderate	minor	minor-to-moderate	minor	Minor-to-moderate
High Bar	Lower	negligible	negligible	negligible	–	Negligible
Kanaka Bar	Middle	negligible	negligible	negligible	–	Negligible
Lheidli T'enneh	Lower	negligible-to-minor	negligible	negligible	negligible	negligible-to-minor
Lhtako Dene	Lower	negligible	negligible	negligible	negligible	Negligible
Little Shuswap Lake	Lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	negligible	negligible-to-minor
Lower Nicola	Deeper	moderate	minor-to-moderate	minor-to-moderate	minor-to-moderate	Moderate
Neskonlith	Lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	negligible	negligible-to-minor
Nicomen	Middle	negligible	negligible	negligible	–	Negligible
Nooaitch	Middle	minor	minor-to-moderate	minor	minor	minor-to-moderate
Nlaka'pamux Nation Tribal Council*	middle to deeper	minor	minor	minor	minor	Minor
Shackan	middle to deeper	minor	Negligible-to-minor	minor	–	Minor

Aboriginal Group	Depth of Consultation	Assessed Impact on Aboriginal Interest				Greatest Assessed Impact on Aboriginal Interests
		Hunting, Trapping, and Plant Gathering	Fishing and Harvesting	Other Traditional and Cultural Activities	Aboriginal Title	
Shuswap	Lower	negligible	negligible	negligible	–	Negligible
Simpcw	Deeper	minor	minor	minor	negligible	Minor
Siska	Middle	Minor-to-moderate	minor	Minor-to-moderate	Minor	Minor-to-moderate
Splats'in	Middle	negligible	negligible	negligible	–	Negligible
Stk'emlupsemc te Secwepemc Nation **	Deeper	minor	minor	minor	minor	Minor
Stswecem'c Xgat'tem	Lower	negligible	negligible	negligible	–	Negligible
Syilx (Okanagan Nation Alliance) ***	Deeper	moderate	minor-to-moderate	moderate	minor-to-moderate	Moderate
Toosey	Lower	negligible	negligible	negligible	–	Negligible
Ts'kw'aylaxw (Pavilion)	Lower	negligible	negligible	negligible	–	Negligible
Whispering Pines/Clinton	Lower	negligible-to-minor	negligible-to-minor	negligible	–	negligible-to-minor
Williams Lake	Lower	negligible	negligible	negligible	–	Negligible
Xatsull First Nation (Soda Creek)	Lower	negligible	negligible	negligible	–	Negligible

* Nlaka'pamux Nation Tribal Council member groups are Boothroyd Indian Band, Oregon Jack Creek Indian Band, Lytton First Nation, Spuzzum First Nation, Skuppah Indian Band and Boston Bar First Nation.

** Stk'emlupsemc te Secwepemc Nation member groups are Skeetchestn Indian Band and Tk'emlups Band.

*** Syilx (Okanagan Nation Alliance) member groups are Lower Similkameen Indian Band, Okanagan Indian Band, Penticton Indian Band, Upper Nicola Indian Band, Upper Similkameen Indian Band, and Westbank First Nation.

Table 15 – BC Lower Fraser Groups: Conclusions Regarding Impacts on Aboriginal Interests and Depth of Consultation

Aboriginal Group	Depth of Consultation	Assessed Impact on Aboriginal Interest				Greatest Assessed Impact on Aboriginal Interests
		Hunting, Trapping, and Plant Gathering	Fishing and Harvesting	Other Traditional and Cultural Activities	Aboriginal Title	
Chawathil	Deeper	minor	minor	minor	minor	Minor
Cheam (Pilalt)	Deeper	minor	minor	minor	minor	Minor
Katzie	Deeper	minor	minor	minor	minor	Minor
Kwantlen	Deeper	minor	minor-to-moderate	minor	minor	minor-to-moderate
Kwikwetlem	Deeper	minor	minor	minor	minor-to-moderate	minor-to-moderate
Matsqui	Deeper	minor-to-moderate	minor-to-moderate	minor	negligible	minor-to-moderate
Musqueam	Deeper	minor	minor-to-moderate	minor-to-moderate	minor	minor-to-moderate
Peters	Deeper	minor-to-moderate	minor-to-moderate	moderate	negligible	Moderate
Popkum	Deeper	minor	minor-to-moderate	minor	negligible	minor-to-moderate
Seabird Island	Deeper	minor	minor	minor	negligible	Minor
Shx'wow'hamel	Deeper	minor-to-moderate	minor	minor-to-moderate	negligible	minor-to-moderate
Squamish	Deeper	negligible-to-minor	minor	minor	minor	Minor
Stó:lō Collective	Deeper	minor	minor-to-moderate	minor-to-moderate	minor-to-moderate	minor-to-moderate
Sts'ailes (Chehalis)	Lower	negligible	negligible	negligible	–	Negligible
Tsawwassen	Deeper	negligible-to-minor	minor	moderate	(treaty)	Moderate
Tsleil Waututh	Deeper	minor	moderate	moderate	minor-to-moderate	Moderate
Union Bar	Deeper	minor	minor	minor	negligible	Minor
Yale	Middle	minor	negligible-to-minor	minor	negligible	Minor

* Stó:lō Collective member groups are Aitchelitz First Nation, Kwaw-Kwaw-Apilt First Nation, Leq'a:mel First Nation, Shxwha:y First Nation, Skawahlook First Nation, Skowkale First Nation, Skwah First Nation, Soowahlie First Nation, Squiala First Nation, Sumas First Nation, Tzeachten First Nation, Yakwekwioose First Nation, and Scowlitz First Nation.

Table 16 – BC Vancouver Island and Other Coastal Groups: Conclusions Regarding Impacts on Aboriginal Interests and Depth of Consultation

Aboriginal Group	Depth of Consultation	Assessed Impact on Aboriginal Interest				Greatest Assessed Impact on Aboriginal Interests
		Hunting, Trapping, and Plant Gathering	Fishing and Harvesting	Other Traditional and Cultural Activities	Aboriginal Title	
Cowichan Tribes	Middle	minor	minor	negligible-to-minor	negligible-to-minor	Minor
Ditidaht	Middle	negligible-to-minor	minor	negligible-to-minor	–	Minor
Esquimalt	Middle	negligible	negligible	negligible	(treaty)	Negligible
Halalt	Middle	minor	minor	negligible-to-minor	negligible	Minor
Hwlitsum *	Middle	–	–	–	–	Minor
Lake Cowichan	Middle	negligible	negligible-to-minor	negligible-to-minor	negligible	negligible-to-minor
Lyackson	Middle	negligible-to-minor	minor	moderate	negligible-to-minor	Moderate
Maa-nulth	Lower	negligible	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor
Malahat	Middle	minor	negligible-to-minor	moderate	(treaty)	Moderate
Pacheedaht	Middle	negligible-to-minor	minor	moderate	none	Moderate
Pauquachin	Middle	negligible-to-minor	minor	moderate	(treaty)	Moderate
Penelakut Tribe*	Middle	negligible-to-minor	minor	negligible-to-minor	negligible	Minor
Scia'new (Beecher Bay)	Middle	negligible	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor
Semiahmoo	Lower	negligible-to-minor	minor	negligible-to-minor	negligible	Minor
Snaw-naw-as (Nanoose)	Lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor
Snunemuxw (Nanaimo)	Middle	negligible	negligible	negligible	(treaty)	Negligible
Songhees (Lekwungen)	Middle	negligible-to-minor	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor
St'zuminus (Chemainus)	Middle	negligible-to-minor	minor	moderate	negligible-to-minor	Moderate

Aboriginal Group	Depth of Consultation	Assessed Impact on Aboriginal Interest				Greatest Assessed Impact on Aboriginal Interests
		Hunting, Trapping, and Plant Gathering	Fishing and Harvesting	Other Traditional and Cultural Activities	Aboriginal Title	
Tsartlip	Middle	negligible-to-minor	negligible-to-minor	moderate	(treaty)	Moderate
Tsawout	Middle	minor	minor	moderate	(treaty)	Moderate
Tseycum	Middle	negligible-to-minor	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor
T'Sou-ke	Middle	minor	minor	moderate	(treaty)	Moderate

* The Crown is of the view that Hwlitsum is a family group/component of Penelakut Tribe. However, the Crown is aware of Hwlitsum's views that it is an Aboriginal group independent of the Penelakut Tribe or any other Cowichan community. Therefore the overall conclusions reported for Hwlitsum are the same as for Penelakut Tribe.

Table 17 – Métis Groups: Conclusions Regarding Impacts on Aboriginal Interests and Depth of Consultation

Aboriginal Group	Depth of Consultation	Assessed Impact on Aboriginal Interest				Greatest Assessed Impact on Aboriginal Interests
		Hunting, Trapping, and Plant Gathering	Fishing and Harvesting	Other Traditional and Cultural Activities	Aboriginal Title	
Gunn Métis Local 55, Lac Ste. Anne Métis (Alberta)	Middle	minor-to-moderate	minor-to-moderate	minor-to-moderate	–	minor-to-moderate
Métis Nation of Alberta and Métis Nation of Alberta – Regional Zone 4	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	–	negligible-to-minor
Mountain Métis Nation Association	middle	negligible-to-minor	negligible-to-minor	minor-to-moderate	–	minor-to-moderate
Kelly Lake Métis Settlement Society	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	–	negligible-to-minor
British Columbia Métis Federation	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	–	negligible-to-minor
Métis Nation of British Columbia	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	–	negligible-to-minor

Table 18 identifies the greatest potential impact on each Aboriginal group's Aboriginal Interests, as well as the depth of consultation.

There are total of 117 individual Aboriginal groups listed in the tables above, including the groups within collectives³⁸. In total 43 Aboriginal groups were identified as being owed a deeper level of consultation (4 First Nations in Alberta and 39 First Nations in BC), 7 Aboriginal groups were assessed as being owed a middle-to-deep level of consultation (all in BC), 35 Aboriginal groups were assessed at the middle of the consultation spectrum (4 First Nations in Alberta, 29 in BC, and 2 Métis groups), and 32 Aboriginal groups were assessed as being owed a low depth of consultation (7 First Nations in Alberta, 21 in BC, and 4 Métis groups).

³⁸ The accounting of the overall number of individual Aboriginal groups consulted with by the Crown on the Project varied over time as the scope of consultations evolved. Consultations were informed by an understanding of the basis for which an Aboriginal group may represent the interests of a collective rights bearing entity under Section 35 of the *Constitution Act, 1982*, or whether a group preferred to be consulted as a Band under the *Indian Act*. In some cases more than one distinct Aboriginal community is recognized as part of the same First Nation under the *Indian Act*.

Table 18 – Greatest Assessed Impact on Aboriginal Interests and Depth of Consultation for Each Group

Seriousness of Impacts	Moderate		Lyackson; Malahat; Pacheedaht; Pauquachin; St'zuminus (Chemainus); Tsartlip; Tsawout; T'Sou-ke	Lower Nicola; Peters; Sylix (Okanagan Nation Alliance) [5 groups]; Tsawwassen; Tsleil- Waututh
	Minor-to-Moderate		Gunn Métis Local 55, Lac Ste. Anne Métis; Louis Bull; Mountain Métis Nation Association; Nooaitch; O'Chiese; Samson Cree; Siska	Alexander; Alexis Nakota Sioux; Boston Bar; Coldwater; Cook's Ferry; Enoch Cree; Kwantlen; Kwikwetlem; Matsqui; Musqueam; Paul; Popkum; Shx'wow'hamel; Stó:lō Collective [13 groups]
	Minor	Canim Lake; Semiahmoo; Sturgeon Lake; Sucker Creek	Adams Lake; Ashcroft; Cowichan Tribes; Ditidaht; Halalt; Hwlitsum; Penelakut Tribe; Yale	Chawathil; Cheam; Katzie; Nlaka'pamux Nation Tribal Council [5 groups]; Seabird Island; Shackan; Simpcw; Squamish; Stk'emlupsemc te Secwepemc Nation [2 groups]; Union Bar;
	Negligible-to-Minor	British Columbia Métis Federation; Ermineskin; Horse Lake; Kelly Lake Métis Settlement Society; Lheidli T'enneh; Little Shuswap Lake; Maa-nulth [5 groups]; Métis Nation of Alberta and Métis Nation of Alberta – Regional Zone 4; Métis Nation of British Columbia; Montana; Neskonlith; Stoney Nakoda Nations; Snaw-naw-as (Nanoose); Whispering Pines/Clinton; Whitefish (Goodfish) Lake First Nation & Saddle Lake Cree Nation	Lake Cowichan; Scia'new (Beecher Bay); Songhees; Sunchild; Tseycum	
	Negligible	High Bar; Lhtako Dene; Shuswap; Sts'ailes (Chehalis); Stswecem'c Xgat'tem; Toosey; Ts'kw'aylaxw (Pavilion); Williams Lake; Xatsull First Nation (Soda Creek)	Bonaparte; Esquimalt; Kanaka Bar; Nicomen; Splats'in; Snuneymuxw (Nanaimo)	
			Low	Middle
Depth of Consultation				

As shown in Table 18, 17 Aboriginal groups were assessed as having Aboriginal Interests that have the potential to be up to moderately impacted by the Project (all in BC). Thirty-four Aboriginal groups are expected to have up to a minor-to-moderate level of impact (25 First Nations in BC, 7 First Nations in Alberta, and 2 Métis), 27 would have up to a minor level of impact (25 First Nations in BC, 2 First Nations in Alberta), 24 would have up to a negligible-to-minor level of impact (14 First Nations in BC, 6 First Nations in Alberta, and 4 Métis), and 15 would have up to a negligible level of impact (all in BC).

The nature of the impacts on Aboriginal Interests from the Project itself (that is, the pipeline, terminals and supporting infrastructure) would differ from impacts associated with Project-related marine shipping activities. In general, the Crown is of the view that the Project's routine construction and operation would result in a minor level of impacts on Aboriginal groups' Aboriginal Interests. There are a range of factors that contributed to a greater assessed impact on groups' Aboriginal Interests, including: a greater number or proportion of sites or areas that would be impacted by the Project; important sites or areas that would be impacted by the Project, and; increased ways in which the Project would impact cultural or experiential aspects for an Aboriginal group. This information was made available by Aboriginal groups through the NEB process and Crown consultation.

Project-related marine vessels have the potential to impact the Aboriginal Interests of coastal Aboriginal groups who rely on the marine environment for traditional use. The Crown is of the view that the routine operation of Project-related marine vessels would result in a negligible-to-minor level of impacts on Aboriginal groups' Aboriginal Interests. The Crown concluded that Aboriginal groups that identified cultural use of Southern Resident Killer Whale would be moderately impacted as a result of the significant adverse effects to Southern Resident Killer Whale and to the traditional use of Southern Resident Killer Whale found by the NEB. The 10 Aboriginal groups that identified cultural use for Southern Resident Killer Whale are Lyackson, Malahat, Pacheedaht, Pauquachin, St'zuminus (Chemainus), Tsartlip, Tsawout, T'Sou-ke, Tsawwassen and Tseil-Waututh.

The NEB found that there is a very low probability of either a Project spill (i.e. from pipeline, tank terminals, pump stations, Westridge Marine Terminal) or a marine spill from a Project-related tanker that may result in a significant effect (high consequence). However, over the life of the Project the probability of small spills is high. The Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill regardless of its size. The seriousness of impact on Aboriginal Interests will depend on the size, location and conditions of a spill and the effectiveness of response measures, and the Crown is of the view that spills have the potential to result in impacts on Aboriginal Interests that could range from negligible to serious.

5.2 Adequacy of Consultation

Principles

The Crown's consultation objectives are to meet the legal duty, uphold the honour of the Crown and to help build long-term relationships based on shared reconciliation objectives. Meeting the legal duty to consult depends on the context and facts for the particular decision before the decision makers. The practice for meeting this duty is informed by government policies, best practice and evolving jurisprudence. The principles that guide the Crown's efforts to ensure a meaningful and responsive consultation process include:

- The process needs to reflect that the Crown has made meaningful efforts to understand Aboriginal concerns, potential impacts, and identify solutions for accommodation;
- The process needs to afford Aboriginal groups opportunities appropriate to their depth of consultation to learn about the Project and its potential impacts, evaluate the Project, communicate their concerns to the Crown;
- The Crown should also demonstrate that it has sought to accurately understand all issues and potential impacts on Aboriginal Interest raised by Aboriginal groups, and respond to issues in a meaningful way, including through consideration of appropriate mitigation and accommodation measures;
- Through its consultation record, the Crown needs to demonstrate that the process remained flexible and had the ability to amend the proposal to address impacts on Aboriginal Interests;
- Responses to Aboriginal groups need to be reasonable and meaningful, where 'meaningfulness' is measured by sufficiency, quality, and consistency;
- As appropriate, accommodation should be considered, and commensurate to the degree of seriousness of the potential impact to Aboriginal Interests;
- Responsiveness is central to both procedural and substantive aspects, and needs to be readily demonstrated and evaluated;
- Overall, the process is accessible, reasonable, flexible and fair;
- The process is founded in the principles of good faith, respect and reciprocal responsibility; and
- The process is respectful of the uniqueness of each Aboriginal group or nation.

Adequacy Assessment

During consultation, the Crown considered Aboriginal Interests and other interests to inform the assessment of potential impacts from the Project, and considered the appropriateness of measures to avoid, mitigate and, as appropriate, accommodate such impacts.

The Crown communicated the framework for consultation early on during Project planning, and adapted it, to the extent possible, over the course of the Project review process to:

- Incorporate lessons learned and best practices from other consultation processes;
- Reflect changes resulting from the federal government's January 2016 Interim Strategy;
- Keep pace with case law and evolving government policy informing the conduct of Crown-Aboriginal consultation processes; and
- Reflect the feedback provided by Aboriginal groups.

Crown officials developed a process for gathering relevant information, assessing the level of potential adverse impacts, making preliminary assessments of Aboriginal rights and title claims, interpreting treaty provisions, understanding Aboriginal concerns with the Project, and considering the potential impacts on Aboriginal Interests and the adequacy of mitigation measures (e.g. conditions, commitments, and existing regulatory requirements), and considering the need for additional accommodation.

The Crown's conclusions of the impacts of the Project on Aboriginal Interests have been considered for each Aboriginal group, including how aspects of the Project may interact with the exercise of the different aspects of Aboriginal Interests. Information made available through this process, including information made available by Aboriginal groups, the proponent and the NEB, have also been documented in this report, including how they have helped to inform decisions on the Project, and any accompanying rationale for these decisions.

The Crown's view is that consultation on the Project, beginning in June 2014, has enabled a meaningful and responsive two-way dialogue to take place between the Crown and potentially impacted Aboriginal groups on both procedural and substantive matters. During this period, the policy and legal environments have evolved, with the Government of Canada re-setting its priorities with Indigenous peoples.

The size and complexity of the Project – spanning new oil pipeline development, operational expansion of a marine terminal and increases in marine vessel traffic – combined with the large number of potentially affected First Nation and Métis groups, led to complex discussions among Canada, British Columbia and Indigenous groups.

Throughout the Project review, Aboriginal groups were provided opportunities to describe their views on the nature and scope of potential impacts of the Project on their Aboriginal Interests and on the environment in general, and on mitigation or accommodations measures that could address those potential impacts. When Aboriginal groups raised concerns, the Governments meaningfully considered the concerns and communicated their understanding and responses to these concerns during meetings, in correspondence or in this report.

Both governments have relied on the NEB Review to assess and seek to avoid or minimize, to the degree possible, the potential adverse impacts of the Project on Aboriginal rights, title and interests, thereby supporting the Crown's broader duty to consult obligations.

Some Aboriginal groups have questioned the extent to which the Crown can rely on the NEB Review. Some of the specific concerns raised by Aboriginal groups regarding the NEB process include:

- The time-bound, quasi-judicial regulatory review process has impaired their ability to participate meaningfully or at all; to explore issues related to Aboriginal Interests, particularly title, or seek to fully understand and resolve their key issues of concern;
- Additional studies were required following the completion of the NEB process, particularly in relation to the impacts on Aboriginal Interests, and there has not been sufficient time, capacity and resources to conduct this;
- It is uncertain how traditional knowledge, traditional ecological knowledge, up-to-date TLU and TMRU information, and other site-specific detail would be integrated into NEB-required Project mitigation plans and other conditions, should the Project proceed;
- It is uncertain whether Aboriginal groups will have the ability to work collaboratively with the proponent and regulator to develop and review draft management plans in advance of the proponent submitting final plans to the NEB; and
- There is uncertainty as to whether the NEB will grant standing in a detailed route alignment hearing process to Aboriginal groups who assert Aboriginal Interests to lands affected by the proposed pipeline.

Consultation on the Project occurred within a defined timeframe, as specified under the NEB Act, and many Aboriginal groups are of the view that more time is needed for the Crown to consult meaningfully, develop a comprehensive understanding of concerns and potential impacts related to the Project and strive for consensus or consent for the Project at a nation-to-nation level. The timeline for decision making was previously extended by up to four months to specifically accommodate additional time needed for Aboriginal consultation, and the GIC retains the option of further extending the timeline pursuant to the NEB Act.

With respect to perceived inadequacies in the NEB review process, the Crown notes the Government's commitment to modernize the NEB and to restore public trust in federal environmental assessment processes. The Crown further notes that consultations on these processes have been launched and will include the engagement of Indigenous groups. Overall, however, Government, through its Interim Strategy, indicated that no project proponent would be sent back to the beginning, which means that project currently undergoing regulatory review would continue to do so within the current framework.

Throughout and after the NEB Review, the Crown has answered questions regarding the methodology and information used to inform the Crown's assessment of the depth of consultation owed to an individual Aboriginal group, including the Crown's analytical framework for understanding the potential adverse Project impacts on Aboriginal Interests. The Crown has provided an opportunity for all potentially impacted Aboriginal groups to comment on those assessments, which in turn will be relied upon to establish the basis for whether additional accommodation measures may need to be considered by the Crown, either federal or provincial.

The Crown will also continue to respond to ongoing correspondence, and engage in other consultation activities, leading up to and following a decision on the Project.

For consultation following the release of the *NEB Recommendation Report*, the Crown sought an understanding of the following:

- The nature and severity of the impact of the Project on the exercise of each Aboriginal group's Aboriginal Interests;
- Whether there are outstanding issues which the NEB's recommendation report and conditions do not fully address in respect of potential impacts on Aboriginal Interests;
- Whether the resulting depth of consultation in respect of these potential impacts gives rise to a duty to accommodate; and
- Recommendations for action that Governments may need to consider in contemplating decisions on the Project.

Consultation involved discussions about a variety of potential actions by decision makers including potential incremental measures that could further mitigate or accommodate impacts on Indigenous rights; additional time for consultation prior to a decision; reconsideration by the NEB of its recommendation; or specific terms and conditions for the Project.

More than 75 individual Aboriginal groups participated in the post-NEB hearing stage of consultation by providing written comments on documents and/or participation in consultation meetings with Crown officials. The consultation process undertaken with each Aboriginal group has been commensurate with the depth of consultation identified by the Crown as appropriate, and was responsive to new information to the extent possible within the timelines. Through the NEB's recommended conditions and the regulatory permitting stage that would occur if the Project proceeded, the Governments recognize that consultation and engagement in respect of the Project, if approved, will continue.

This report is provided to federal and provincial decision makers to inform their respective decisions. Crown officials also invited Aboriginal groups to provide a short separate submission that outlines any outstanding concerns in their own words. These submissions were provided to the respective federal and provincial decision makers along with this report and other referral material to inform their respective decisions.

Taking into account the overall process of consultation, federal government departments and agencies and the EAO are of the view that consultation has been carried out in good faith and that the Crown's process of seeking to understand potentially outstanding issues and impacts was reasonable. In the following section, some additional details are provided on what we heard from Aboriginal groups regarding possible ways to address potential impacts. Crown officials consider the consultation with Aboriginal groups during the review of the Project, as documented in this report, to be procedurally adequate to allow for informed decisions regarding potential impacts on Aboriginal Interests.

5.3 Status of Accommodation

In applying the principles described above for a meaningful and responsive consultation process, Governments retain flexibility in how they seek to meet any need for accommodation. A “spectrum of duties” is used by courts in order to measure the depth of consultation required in a particular context and the level of effort to accommodate and be responsive to the concerns raised.³⁹ This spectrum of duties is based upon the degree of adverse impacts that the proposed activities may have on Aboriginal Interests and the strength of any claimed Aboriginal rights or title. The level of responsiveness or “accommodation” that may be required increases the more severe the impact and, where relevant, the stronger the claimed Aboriginal rights or title.

Aboriginal group-specific appendices provide details on the assessment of the strength of any Aboriginal rights and title claims for each Aboriginal group, as appropriate, and the assessment of the impacts that the Project may have on each Aboriginal group’s Aboriginal Interests. Proposals for mitigation and accommodation provided by Aboriginal groups are also referenced in these sections, along with a summary of feedback that was provided by the Crown.

If the Project is approved, the general recommendations for incremental federal Crown accommodation or action, which are reflective of input received from Aboriginal groups are:

1. Commitment to design, fund and implement, in full collaboration with potentially affected Aboriginal groups and appropriate government and regulatory authorities, an Indigenous Advisory and Monitoring Committee for the Project; and
2. Recognition of historical impacts associated with the existing Trans Mountain Pipeline System.

In addition to the above, the federal Crown intends to work with potentially impacted Aboriginal groups to ensure that they are supported in making submissions for any future detailed route hearing process, should the GIC approve the project. This may afford Aboriginal groups further opportunities to raise concerns related to the best possible detailed route and methods and timing of construction.

The consideration or implementation of these Crown measures could help to address the impacts associated with temporary and ongoing use of lands or waters by the Project, acknowledge the potential impacts on Aboriginal Interests, and support the strong interest of Aboriginal groups to meaningfully participate in decisions taking place within their traditional territories or territories subject to treaty provisions.

³⁹ For a detailed description of the spectrum of duties and the core assessments required to inform it please refer to *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, March 2011 at pp.42-44. [Note, Guidelines under revision]

Providing potentially affected Aboriginal groups with a role in oversight or monitoring throughout the life of the Project would provide a meaningful opportunity for Aboriginal groups to have a deep, ongoing engagement in the Project. This process has the potential to provide opportunities to continue to incrementally address key concerns of groups, including related to the risk and consequence of a spill that could ultimately affect the future use of a territory, resource or culturally important site.

The recognition component of the recommended accommodation measures seeks to acknowledge, in part, that the establishment of the existing pipeline had an impact on Aboriginal groups, and that that impact may not have been considered in the same way we consider impacts on Aboriginal Interests today. To be clear, there is no duty to consult on or accommodate in relation to past actions. Nevertheless, by acknowledging past and present Government-authorized use of land by a third party, and respecting the desire of both Governments and Aboriginal groups to strive towards consensus for future projects, it is hoped that recognition and an oversight role for the Project can together represent a form of collaborative partnership in sustainable resource development.

The Crown also acknowledges that key concerns remain for many Aboriginal groups with respect to the Project at the time of finalizing this report. Concerns related to specific Aboriginal Interests are discussed in Section 4.3, and concerns raised by individual Aboriginal groups are discussed in greater detail in each group's respective appendix.

One of the key concerns of many Indigenous groups is that the NEB's recommended conditions do not adequately mitigate impacts on Aboriginal Interests and would not establish a comprehensive and active role for Aboriginal groups in relation to compliance oversight. In consideration of this concern, the approach suggested here is to consider implementing the proposed Indigenous Advisory and Monitoring Committee for the Project to increase the level of certainty that condition compliance by the proponent will avoid or reduce to the extent possible, impacts on Aboriginal Interests. An alternative approach available to the GIC pursuant to the NEB Act is to order reconsideration of the *NEB Recommendation Report*.

5.4 Weighing Impacts on Aboriginal Interests with Other Interests

Decision makers in respect of the Project have a duty to weigh impacts on Aboriginal Interests with other societal interests, including the potential social, environmental and economic costs and benefits of the Project. In weighing the Project costs and benefits with the impacts on Aboriginal Interests, the following factors regarding the Project are relevant to consider:

- Significance of any environmental or socio-economic effects of the Project;
- Potential adverse impacts of the Project on Aboriginal Interests, including potential consequences of a major oil spill in the marine environment;
- Resources or values that may no longer be available for future generations;
- Benefits and costs of the Project on local communities, including Aboriginal peoples;

- Potential economic contribution of the Project at the local, regional and national scales;
- Potential contribution of the Project to local and regional communities, to provinces and to Canada as a whole; and
- Economic viability of the Project.

In terms of ensuring a fair distribution of any Project-related benefits with potentially affected Aboriginal groups, the governments of Canada and BC can rely on proponent-led or existing provincial and federal programs to help provide direct or indirect economic development opportunities and financial benefits to potentially affected Aboriginal groups. These benefits are discussed in section 4.2 and 4.3.5 of this report and section 11.5 of the NEB Report.

5.5 Overall Conclusion

The Crown has provided its views on the potential adverse impacts of the Project on each Aboriginal group's Aboriginal Interests. The Crown recognizes that in the view of a number of potentially affected Aboriginal groups, not all concerns they raised have been expressly addressed or accommodated through the NEB process.

Project modifications, proponent commitments and agreements entered into with Aboriginal groups, NEB conditions that would be legally binding to a potential Certificate of Public Convenience and Necessity and EAO's proposed conditions for a provincial EA certificate would all help to avoid, mitigate or otherwise accommodate for adverse Project impacts on Aboriginal Interests. In addition, to assist in addressing residual impacts on Aboriginal Interests, various options exist for decision makers, including implementing incremental Crown measures beyond the recommended regulatory conditions as is suggested in this report.

Given the uniqueness of each Aboriginal group, and in recognition of the different ways in which biophysical, area-specific and experiential impacts could affect each specific group's exercise of Aboriginal or treaty rights, the Crown has attempted to document its understanding and assessment of these potential impacts in each Aboriginal group's appendix to this report. Similarly, the Crown's assessment of impacts on Aboriginal title has also considered a wide range of factors unique to each Aboriginal group, including the impacts on a group's use and occupation of the land, decision-making, and economic benefits.

As summarized in Tables 13 through 18 above, all impacts resulting from the routine construction and operation of the Project are assessed to fall between the range of none or negligible to moderate for the Aboriginal groups consulted. While the seriousness of impact of spills on Aboriginal Interests would depend on the size, location and conditions of a spill and the effectiveness of response measures, the potential impacts on Aboriginal Interests could range from negligible to serious, with serious impacts occurring with a very low likelihood. The details of the individual assessments for each Aboriginal group are important to consider in order to fully understand the impacts on each unique Aboriginal group.

Appendix B.6 – Kanaka Bar Indian Band

I. Background Information

The T'eqt'aqtn'mux ("the crossing place people") or Kanaka Bar Indian Band (Kanaka Bar) are a community of the Nlaka'pamux (pronounced "Ing-khla-kap-muh") people whose asserted traditional territory encompasses part of south central British Columbia (BC) from the northern United States to north of Kamloops. Kanaka Bar holds six reserves situated in the watersheds of the Fraser and adjacent small rivers. Kanaka Bar has a registered population of 235, including 64 members living on-reserve.

Kanaka Bar members historically spoke Nteʔkepmxcín, the language of the Nlaka'pamux people, which falls into the Interior Salish language group. The [Report on the Status of BC First Nations Languages](#) [2014] states that amongst Nlaka'pamux people, 2.1% are fluent speakers, 5.5% have some level of skill with language, and 6% are learners.

Kanaka Bar is a party to the Nlaka'pamux Nation's *Writ of Summons*, which was filed in the BC Supreme Court on December 10, 2003, asserting Aboriginal title to a territory identified in the writ.

II. Preliminary Strength of Claim Assessment

- Kanaka Bar is a member band of the Nlaka'pamux Nation. Approximately 226 kilometres (km) of the proposed pipeline right-of-way (RoW) and four pipeline facilities (i.e. Kamloops Terminal, Stump Station, Kingsvale Station and Hope Station) would be located within Nlaka'pamux's asserted traditional territory. However, the RoW does not overlap any portion of the consultation area utilized for Kanaka Bar. The distance from the RoW to the nearest Kanaka Bar community is 47.2 km.
- The Crown's preliminary assessment of the Nlaka'pamux Nation's claim for Aboriginal rights, over the section of the Project that spans Kamloops to southwest of Hope, involves a range of a weak to strong *prima facie* claims. The areas assessed to have strong *prima facie* claims are in the vicinity of the Nicola Valley south towards the Coquihalla Lakes, which most available ethnographers indicate to be within the Nlaka'pamux territory, and there are some indications of Nlaka'pamux hunting, fishing, gathering uses in the Nicola valley area around the time of contact, with connecting trails. The claims diminish in the area north of Stump Lake, as it is unclear whether this falls within Nlaka'pamux territory, and there is indication of an ancestral connection between the Nlaka'pamux community who moved into the north end of Nicola Lake, intermarrying with the Stewix/Okanagan, which could support a moderate *prima facie* claim. The *prima facie* claim diminishes to weak in the vicinity of Hope as it is understood that area is outside the area ethnographers attribute to historic Nlaka'pamux use¹.

¹ Ministry of Justice, Aboriginal Research Division, Nlakapamux: Review of Ethnographic and Historical Sources (Revised November 20, 2013); Teit, James, "The Thompson Indians of British Columbia" in *Memoirs of the American Museum of Natural History*, Volume II, 1900.; Dawson, George M., "Notes on the Shuswap People of British

- The Crown's preliminary assessment of the Nlaka'pamux Nation's claim for Aboriginal title over the section of the Project that spans Kamloops to southwest of Hope, involves a range of a weak to strong *prima facie* claims. The area assessed to have a strong *prima facie* claim is in the vicinity of Merritt, which is within the area considered by ethnographers to be within Nlaka'pamux territory, and there are indications for several historic villages in proximity in the Nicola Valley that were likely occupied by the Nlaka'pamux at 1846. The areas with weaker claims include those outside the area ethnographers attribute to the Nlaka'pamux (e.g. north of Stump Lake to Kamloops, and in the vicinity of Hope) and there is no/limited indication of historic Nlaka'pamux use at 1846².

III. Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Kanaka Bar's Aboriginal Interests, the Crown is of the view that the legal duty to consult Kanaka Bar lies at the middle portion of the *Haida* consultation spectrum. In consideration that the Project would not intersect with Kanaka Bar's asserted traditional territory, Kanaka Bar was placed on Schedule C of the Section 11 Order issued by the Environmental Assessment Office (EAO). The consultation that was provided to Kanaka Bar is described in Section III of this appendix and is consistent with the middle portion of the *Haida* spectrum.

Kanaka Bar did not participate in the National Energy Board (NEB) hearing process, and did not submit an application for funding to the NEB, but was interested in meeting with the Crown to discuss the community's views on the Project. Kanaka Bar met with the Crown on May 19, 2016, and witnessed together the public release of the *NEB Recommendation Report* via live press conference.

The Major Projects Management Office (MPMO) offered Kanaka Bar \$6,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Kanaka Bar an additional \$7,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Kanaka Bar did not use these funding opportunities.

The Crown provided a first draft of this Report to Kanaka Bar for review and comment on August 17, 2016. The Crown did not receive comments from Kanaka Bar on the draft Report. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016. The Crown has not received comments from Kanaka Bar.

Columbia" in Transactions of the Royal Society of Canada, Section II, 1891; Wyatt, David, "Thompson" in Handbook of North American Indians, Vol. 12, Washington: Smithsonian Institution, 1998.

² Ibid.

IV. Summary of Kanaka Bar's Key Issues and Concerns Raised

The Crown has drawn its understanding about the issues and concerns of Kanaka Bar based on information brought forward at the May 19 and June 24, 2016 meetings as well as concerns raised in a July 2016 letter to Natural Resources Canada and EAO. The following concerns were raised by Kanaka Bar during Crown consultation:

Impacts Associated with Spills

- Potential environmental impacts in the event of a pipeline or tanker spill;
- Concerns around emergency spill response plan for the mid-pipeline section, as well as conditions to examine the fate and distribution of bitumen; and
- Concerns about oil shipments given the experience of Exxon Valdez, and that spills like that can't be completely cleaned up.

NEB Process and Methodology

- Concerns around a number of science gaps and uncertainty in the NEB review, involving such issues as the fate and behavior of diluted bitumen; and
- Limited mandate of the NEB review process.

Environmental Impacts

- Potential environmental impacts to the Fraser River, particularly wild salmon populations;
- Serious concerns about the potential extirpation of the salmon in the Fraser River; and
- Climate change impacts.

Impacts on Aboriginal Rights and Title

- Potential impacts to Kanaka's history, culture, language, laws, and economy in the event of a spill in the Fraser River; and
- Adverse impacts on Nlaka'pamux rights and title in terms of decision-making and jurisdiction over land and resource use.

Other Concerns

- Significant concerns wherever there is delegation of work and responsibilities by proponents to contractors, as contractors tend to bend or break the rules. Kanaka Bar has experience with its hydro partnership in providing ongoing monitoring to make sure that contractors are following the rules. Chief Mitchell was on that project site every day, and believes Kanaka Bar could perform a similar function on this Project; and
- Concerns about the safeguards in place in the event of a major earthquake, given their view it is common knowledge on the west coast that a big earthquake is a matter of 'when' not 'if.'

Although Kanaka has raised specific issues and concerns related to the Project, they defer decision making authority to the Nlaka'pamux communities adjacent to the Project.

Kanaka Bar's Response to NEB Recommendation Report

No specific comments received on the *NEB Recommendation Report*.

V. Potential Impacts of the Project on Kanaka Bar's Aboriginal Interests

A discussion of the Crown's approach to assessing Project impacts on Aboriginal Interests is provided in Section 2.4.3 of this Report. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

It is the Crown's understanding that Kanaka Bar did not participate in the NEB process and did not complete a traditional land and resource use study for the Project. As a result, the Crown has limited information on the specific sites and resources used by Kanaka Bar for traditional purposes that could be impacted by the Project. Kanaka Bar identified concerns during the Crown consultation process, which the Crown has taken into consideration in its assessment of potential impacts on Kanaka Bar's Aboriginal Interests.

The general direct and indirect effects of the Project on Aboriginal Interests, along with key mitigation measures, are described in Section 4.3 of the main body of this Report. As described in that section, routine Project-related activities are likely to result in low to moderate impacts on the lands, waters and resources that Aboriginal groups use to exercise their hunting, trapping, plant gathering, fishing, and other traditional activities. Short-term, temporary access disruptions to traditional activities are expected, although these impacts would be localized within the Project footprint for the pipeline and associated facilities. The distance of Kanaka Bar's traditional territory from the Project area of approximately 47 km significantly reduces the potential for Kanaka Bar's exercise of Aboriginal Interests to be directly impacted by routine Project activities. In consideration of the information available to the Crown from the NEB process, Crown consultation with Kanaka Bar, Kanaka Bar's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province, the Project is expected to result in a negligible impact on Kanaka Bar's Aboriginal Interests.

A discussion of the potential impacts of a pipeline spill on Aboriginal Interests is provided in Section 4.3.6 of this Report. In consideration of this information and analysis, as well as information available to the Crown on Kanaka Bar's Aboriginal Interests, concerns raised by Kanaka Bar during the Crown consultation process, and the distance of Kanaka Bar's asserted traditional territory to the Project area, a pipeline spill associated with the Project could result in negligible to moderate impacts on Kanaka Bar's exercise of Aboriginal Interests, depending on the characteristics and severity of the spill. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty.

VI. Conclusions

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. In respect of these findings, and based on the information available to the Crown about areas where Kanaka Bar exercises Aboriginal Interests, the Crown expects that under the typical conditions for construction and operations, impacts of the Project on Kanaka Bar would be negligible.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Kanaka Bar's ongoing involvement and participation in the proponent's detailed Project planning including the development of site-specific measures or pipeline routing to ensure negligible impacts on Kanaka Bar's Aboriginal Interests, as well as the involvement of Kanaka Bar in emergency response planning activities.

Appendix B.7 – Nicomen Indian Band

I - Background Information

Nicomen Indian Band (Nicomen) is part of the Nlaka'pamux (pronounced "Ing-khla-kap-muh") Nation, whose asserted traditional territory encompasses part of south central British Columbia (BC) from the northern United States to north of Kamloops. Nicomen's community is located near Lytton, BC, and has 16 reserves. The reserves are located in the lower Thompson Canyon. Nicomen's registered population as of April 2016 was 134, with 51 members living on reserve. Nicomen asserts that its members exercise Aboriginal rights throughout the Nlaka'pamux Nation's territory, including hunting, fishing, harvesting/medicine gathering. Nicomen members historically spoke the Nlaka'pamux language. Nicomen is affiliated with the Nicola Tribal Association.

Nicomen is a party to the Nlaka'pamux Nation protective *Writ of Summons*, which was filed in the BC Supreme Court on December 10, 2003, asserting Aboriginal title to a territory identified in the writ.

II - Preliminary Strength of Claim Assessment

- Nicomen is one of the Nlaka'pamux Nation bands. Approximately 226 kilometres (km) of the proposed pipeline right-of-way (RoW) and four pipeline facilities (i.e. Kamloops Terminal, Stump Station, Kingsvale Station and Hope Station) would be located within Nlaka'pamux's asserted traditional territory.
- The RoW does not enter into the area Nicomen claims as its traditional territory in the 014 Forest and Range Consultation and Revenue Sharing Agreement between Nicomen and the Province of British Columbia. The nearest point to a Nicomen reserve is about 40 km from the RoW. It is understood that as a member band of the Nlaka'pamux Nation, Nicomen has requested consultation on this Project.
- The Crown's preliminary assessment of the Nlaka'pamux Nation's claim for Aboriginal rights, over the section of the Project that spans Kamloops to southwest of Hope; involves a range from weak to strong *prima facie* claims. The areas assessed to have a strong *prima facie* claim are in the vicinity of the Nicola Valley, which most available ethnographers indicate to be within the Nlaka'pamux territory, and there are some indications of Nlaka'pamux hunting, fishing, gathering uses in the Nicola valley area around the time of contact, with connecting trails. The areas of weaker (i.e. weak) claims are those outside the area ethnographers attribute to the Nlaka'pamux (e.g. north of Stump Lake to Kamloops, and in the vicinity of Hope) and there is no/limited indication of historic Nlaka'pamux use¹.
- The Crown's preliminary assessment of the Nlaka'pamux Nation's claim for Aboriginal title over the section of the Project that spans Kamloops to southwest of Hope, involves a range from weak to strong *prima facie* claims. The area assessed to have a strong *prima facie* claim is in the vicinity of Merritt, which is within the area considered by ethnographers to be within Nlaka'pamux territory and there are indications for several historic villages in proximity in the Nicola Valley that were likely occupied by the Nlaka'pamux at 1846. The areas with weaker (i.e.

¹ Ministry of Justice, Aboriginal Research Division, Nlakapamux: Review of Ethnographic and Historical Sources (Revised November 20, 2013); Teit, James, "The Thompson Indians of British Columbia" in *Memoirs of the American Museum of Natural History*, Volume II, 1900.; Dawson, George M., "Notes on the Shuswap People of British Columbia" in *Transactions of the Royal Society of Canada*, Section II, 1891; Wyatt, David, "Thompson" in *Handbook of North American Indians*, Vol. 12, Washington: Smithsonian Institution, 1998.

weak) claims include those outside the area ethnographers attribute to the Nlaka'pamux (e.g. north of Stump Lake to Kamloops, and in the vicinity of Hope) and there is no/limited indication of historic Nlaka'pamux use at 1846².

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Nicomen's Aboriginal Interests, the Crown is of the view that the legal duty to consult Nicomen lies at the middle portion of the *Haida* consultation spectrum. In consideration that the Project would not intersect with Nicomen's asserted traditional territory, Nicomen was placed on Schedule C of the Section 11 Order issued by the Environmental Assessment Office (EAO). The consultation that was provided to Nicomen is described in Section III of this appendix and is consistent with the middle portion of the *Haida* spectrum.

Nicomen did not participate in the National Energy Board (NEB) hearing process. However, Nicomen has been engaged in the Crown consultation process and met with the Crown consultation team on May 6 and September 19, 2016.

The Major Projects Management Office (MPMO) offered Nicomen \$6,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Nicomen an additional \$7,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Nicomen signed a contribution agreement with the MPMO in response to the first offer, receiving a total of \$6,000 in allocated funding.

Nicomen signed a letter of support with the proponent on May 7, 2015, but have subsequently noted in a meeting that their support of the Project was based on a misunderstanding that they were entering into a training agreement, and that the decision was taken without community consultation or discussions with Nicomen Council.

The Crown provided a first draft of this Report to Nicomen for review and comment on August 17, 2016. The Crown did not receive comment from Nicomen on the draft Report. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016. The Crown has not received comments from Nicomen.

IV - Summary of Key Nicomen Issues and Concerns Raised

The Crown has drawn its understanding of the issues and concerns of Nicomen based on information brought forward at the May 6 and September 19, 2016 meetings, as well as KMC's *Supplemental Filing: Part 2 Aboriginal Engagement Report*. The Crown's understanding of Nicomen's key Project-related issues and concerns raised during the NEB process and during the Crown consultation meetings is summarized below. This is a summary of the key issues raised by Nicomen, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions.

Review Process and Methodology

Nicomen expressed that the available federal Participant Funding Program is inadequate given the scope of the proposed Project and its potential impacts on Nicomen's Aboriginal rights and title. Nicomen also

² Ibid

noted the lack of clarity on the Crown consultation process, and concern that Nicomen's issues and concerns raised will be missed during the Cabinet Ministers' review prior to making a decision.

Environmental Impacts

In general, Nicomen is concerned that the Project will have a great effect on the environment and the proponent did not complete sufficient. Nicomen identified water quality and quantity, water flows, sedimentation, aquatic resources, and interconnection of waterways as a key issue due to Nicomen's strong connection to water. Nicomen is reliant on salmon in the rivers in the BC interior, and raised concerns regarding marine shipping and the effects on salmon.

Concerns were expressed about potential effects of construction activities (specifically noise) on wildlife, as well as overall effects to wildlife trails, wildlife habitat and fragmentation, and displacement of wildlife. Specifically, Nicomen raised concerns about increasing stress levels in ungulates that will affect calving season in the spring season, and species at risk (e.g., Great Horned Owl, American Badger, Lewis's Woodpecker, and Williamson's Sap Sucker), and interruptions to migration patterns.

Other concerns were raised about potential cumulative environmental impacts on wildlife, marine and terrestrial ecosystems in their asserted traditional territory resulting from various projects. These concerns include the use of pesticides and herbicides along the Project's RoW corridor.

Cultural and Social Impacts

Nicomen expressed concerns regarding Project-related effects to medicinal plants, and sustenance effects on berry picking, particularly huckleberries and blueberries. There are traditional berry picking sites along the Coquihalla. Nicomen Indian Band is concerned about road construction and access where there never was access previously.

Impacts on Aboriginal Rights and Title

Concerns were raised over the expected influx of outsiders that would be brought into work on the Project (if approved) and potential impacts on Nicomen's ability to hunt, as well as over-hunting by non-Aboriginal hunters. Negative impacts on the natural environment (both terrestrial and marine) that could impede Nicomen's ability to hunt, fish, and gather food in their asserted traditional territory are of concern to Nicomen.

Accidents and Malfunctions

In general, Nicomen is concerned about the amount of product through the pipeline, the increase to potential hazards to health and environment, and impacts on water, air and land due to spills or breaks. Specifically, Nicomen expressed concern for the potential impacts to wildlife following a marine spill, the effectiveness of the Project's spill response regime, and overall concerns about Project safety (e.g. pipeline replacement procedures and safety protocols). Potential for mudslides and/or rockslide, and earthquake and seismic activity risk were also raised as concerns.

Other Concerns

Nicomen also expressed concerns about proposed mitigation measures, as Nicomen's experience with RoW management of past projects has created problems for Nicomen members. Nicomen also raised concerns about monitoring and requested that more First Nations participate in monitoring.

The Crown is in receipt of an open letter dated June 15, 2016, sent to Prime Minister Justin Trudeau, Alberta Premier Rachel Notley, and British Columbia Premier Christy Clark from a collective of Aboriginal

groups, including Nicomen. This letter identifies interests and concerns related to Indigenous consent of the Project and the Project's consultation process.

Accommodation Proposals

During the September 19, 2016 meeting, both Nicomen and the Crown noted some possible accommodation measures to address potential impacts of the Project on Nicomen Aboriginal Interests. The Crown noted a possible accommodation measure to form an oversight committee that would include an active and ongoing role for Aboriginal Groups. Nicomen expressed interest in this committee. The Crown also noted that the *NEB Recommendation Report* Conditions 66 to 70 could help to address some of Nicomen's concerns. Some proposed accommodations from Nicomen include:

- The proponent must clearly articulate and demonstrate the safety measures in the Project's construction and operation plans to the Nicomen community, with specific consideration to the risk of mudslides/rockslides;
- The proponent must outline how the Project conditions and commitment address Nicomen's concerns, and that Nicomen has an opportunity to review;
- Funding to support Aboriginal engagement and hiring of technical experts to review Project details and to ensure Nicomen's concerns have been addressed;
- Improved job training and economic opportunities for community members; and
- Increased and/or revitalized education and health care services in the community.

As summarized in the proponent's Aboriginal Engagement Report (July 2016):

- Nicomen requests the proponent increase riparian buffers.
- Nicomen recommends no access during construction (or a small amount of access) should take place during the calving season in the spring.
- Nicomen requests that construction does not take place during the nesting season May - August.
- Nicomen requests more studies on the effect of the Project on the native plants adjacent to the pipeline RoW, and that post-construction monitoring and data collection is required over 5 years. Nicomen requests this work and planning strategies involve the Nicola Tribal Association, Nicola Watershed Stewardship and Fisheries Authority.

Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Nicomen that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

Nicomen's Response to *NEB Recommendation Report*

No specific comments received on the *NEB Recommendation Report*.

V - Potential Impacts of the Project on Nicomen's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests are provided in Sections 2.4.3 and Section 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Nicomen's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Nicomen's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Nicomen's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Nicomen, Nicomen's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate (EAC) issued by the Province.

Nicomen participated in a joint third-party traditional land and resource use (TLRU) study with Shackan Indian Band and Nooaitch Indian Band led by Nicola Tribal Association. The study, titled *Final Report: TmixW Research Traditional Land Use/Traditional Knowledge Study* was submitted to the proponent in September 2014. The Interim Report *TmixW Research Traditional Land Use/Traditional Knowledge Study*, was summarized in a Supplemental Technical Report submitted to the NEB by the proponent on July 21, 2014 (Filing IDs [A3Z4Z2 to A3Z4Z5](#)). The study identifies traditional land uses in the segment of the proposed pipeline from Black Pines to Hope. Traditional land uses identified by Nicola Tribal Association include hunting mammals and birds, gathering plants, information on fishing sites, sacred sites, trapping sites, habitation sites, gathering areas for community members and trails and travelways. None of the Aboriginal Interests identified by Nicola Tribal Association in the TLRU study overlap with the proposed pipeline corridor. In its Supplemental Technical Report ([A4F5D1](#)), the proponent estimated approximate distances and directions from the proposed pipeline corridor based on information in Nicola Tribal Association's report.

Impacts on Hunting, Trapping, and Plant Gathering

Nicola Tribal Association identified hunted species such as white-tailed and mule deer, moose, elk, beaver, marmot, rabbit, otter, brown and spruce grouse, geese, and duck. Nicola Tribal Association members also snare grouse and collect eggs from some migrating birds.

Nicomen identified several concerns related to environmental effects of the Project on hunting, trapping, and plant gathering activities, to cumulative environmental impacts on wildlife and terrestrial ecosystems and the use of pesticides and herbicides. As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, old growth forests, wetlands, and wildlife and wildlife habitat (including species at risk) listed species. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping, and gathering (Section 4.3.1 of this Report). With regards to specific concerns raised by Nicomen, the proponent would implement several mitigation measures to reduce potential effects to species important for Nicomen's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the

work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP), and the vegetation and wildlife management plans.

The proponent is committed to implementing weed management (as outlined in the Weed and Vegetation Management Plan) to reduce the potential for weed infestation following construction, and utilizing an Integrated Vegetation Management approach intended to reduce the use of herbicides and promote healthy ecosystems. The proponent will consult with Aboriginal groups regarding problem vegetation management and methods of treatment. Measures outlined in the proponent's Reclamation Management Plan are intended to stabilize and revegetate affected lands to achieve land productivity along the construction RoW and footprint, equivalent to the adjacent land use. The proponent has also committed to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

In their TLRU study for the Project, Nicola Tribal Association did not identify hunting or trapping or sites. One plant gathering site was identified in the Coquihalla and Coldwater areas; however the approximate distance from the Project Area was not stated in the TLRU study. No hunting, trapping or plant gathering sites were identified in the proposed pipeline corridor.

Nicomen raised concerns with the Project's potential impacts relating to specific locations and access on hunting, trapping, and plant gathering activities, including increased access affecting Nicomen's ability to hunt or gather berries, specifically berry picking sites along the Coquihalla. Project-related construction and routine maintenance is expected to cause short-term, temporary access disruptions to hunting, trapping and plant gathering activities, largely confined to the Project footprint for the pipeline and associated facilities. Access disruptions from construction and reclamation activities may result in a loss of harvesting opportunities within the Project footprint. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access to hunting, trapping, and gathering sites (Section 4.3.1 of this Report).

With regards to specific concerns raised by Nicomen, the proponent would implement several mitigation measures to reduce potential effects on TLRU sites, such as management plans that include access management, scheduling and notification of Project activities, and environmental monitoring programs that monitor access control measures. The Access Management Plan is intended to reduce disturbances caused by access, construction equipment and vehicle traffic, during and following construction in order to minimize access disturbance. The proponent is committed to minimizing the development of access routes, controlling public access along the construction right-of-way, selecting appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent will work with applicable resource managers, traditional land and resource users to define locations where access control is necessary, and what type(s) of access control will be implemented. In the event that hunting, trapping, and plant gathering sites are identified during ongoing engagement with Nicomen prior to construction, the sites will be assessed, and appropriate mitigation measures will be determined. The proponent committed to working with Nicomen to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Nicomen expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities, including sustenance effects due to Project impacts on berry picking. Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions within the footprint of the Project. NEB conditions,

if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities (Section 4.3.1 of this Report). The proponent has also committed to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Nicomen, Nicomen's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project construction and routine maintenance during operation are expected to result in a negligible impact on Nicomen's hunting, trapping, and plant gathering activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to cause low to moderate magnitude environmental effects on species associated with hunting, trapping, and plant gathering activities;
- Project-related pipeline and facility construction and routine maintenance activities are likely to cause negligible disruptions to Nicomen's community members accessing traditional hunting, trapping and plant gathering sites that are not within the Project footprint;
- Concerns identified by Nicomen regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their hunting, trapping and plant gathering activities; and
- The Project would not intersect with Nicomen's asserted traditional territory.

Impacts on Freshwater Fishing

Nicola Tribal Association members fish for numerous species including coho and Chinook salmon, trout, whitefish, sucker, and minnow.

Nicomen identified many concerns related to environmental effects of the Project on freshwater fishing activities, impacts on water quality and quantity, and in particular, impacts on coho salmon and habitat in the Coldwater River, and cumulative environmental impacts on freshwater ecosystems and the use of pesticides and herbicides. As described in the *NEB Recommendation Report*, Project-related construction and operation could result in low to moderate environmental effects on fish and fish habitat and surface water. Moderate effects to fish and fish habitat would be localized to individual watercourse crossings where any potential serious harm would be compensated by offset measures. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Section 4.3.2 of this Report). A number of recommended NEB conditions require the proponent to file reports that will monitor Project-related impacts to fish, fish habitat and riparian habitats.

In their TLRU study for the Project, Nicola Tribal Association identified three fishing sites more than 2 km from the Project Area or the approximate distance from the Project Area was not stated in the study.

Nicomen raised concerns with the Project's potential impacts relating to specific locations and access to freshwater fishing activities, road construction in particular, and the creation of new access to areas where there was none previously. Project-related construction and routine maintenance activities are expected to cause short-term, temporary disruptions to fishing activities, which would largely be confined to the Project footprint for the pipeline and associated facilities during construction and reclamation. NEB conditions, if the Project is approved, would either directly or indirectly avoid or

reduce potential impacts on specific locations and access to fishing sites (Section 4.3.2 of this Report). With regards to specific concerns raised by Nicomen, the proponent would implement several mitigation measures to reduce potential effects to fishing sites important for Nicomen's fishing activities. As previously discussed, the proponent is committed to minimize disturbance to access, as described in the Access Management Plan. The proponent is committed to working with Nicomen to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Nicomen expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its freshwater fishing activities, in particular Nicomen's ability to fish. The interconnection of waterways is a key issue due to Nicomen's strong connection to water, and Nicomen is reliant on salmon in the rivers in the BC interior. As described previously, Project construction and routine maintenance is expected to cause short-term, temporary disruptions confined to the Project footprint. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on social, cultural, spiritual or experiential aspects of fishing activities (Section 4.3.2 of this Report).

In consideration of the information available to the Crown from the NEB process, consultation with Nicomen, Nicomen's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project construction and routine maintenance during operation are expected to result in a negligible impact on Nicomen's freshwater fishing activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to cause low to moderate magnitude environmental effects on fish and fish habitat;
- Project-related pipeline and facility construction and routine maintenance activities are likely to cause negligible disruptions to Nicomen's community members accessing traditional fishing sites that are not within the Project footprint;
- Concerns identified by Nicomen regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their freshwater fishing activities; and
- The Project would not intersect with Nicomen's asserted traditional territory.

Impacts on Other Traditional and Cultural Practices

As described in Section 4.3.4 of this Report, Project-related activities are not likely to result in significant adverse effects on the ability of Aboriginal groups to use land, waters or resources for traditional purposes. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental impacts on physical and cultural heritage resources (Section 4.3.4). With regards to specific concerns raised by Nicomen, the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources. The proponent has committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during RoW finalization, narrowing the RoW in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments.

Nicola Tribal Association identified a total of four trails and travelways in their TLRU study, none of which are within the proposed pipeline corridor. One trail/travelway from Coquihalla Lake to Boston Bar Creek is within 2 km of the Project Area, while the remaining three sites identified by Nicola Tribal

Association are more than 2 km away from the Project Area or the approximate distance from the Project Area is unknown.

Nicomen raised concerns with the Project's potential impacts relating to specific locations and access to other cultural and traditional practices, road construction in particular, and the creation of new access to areas where there was none previously. As described in Section 4.3.4 of this Report, Project-related activities are expected to cause short-term disruptions that temporarily affect the ability of Aboriginal groups to access land, waters or resources for traditional purposes. These disruptions would be largely confined to sites within the Project footprint for the pipeline and associated facilities. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific sites and access to physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown notes the proponent's commitment to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

Nicomen expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its other traditional and cultural practices, including the expected influx of outsiders brought in to work on the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Nicomen, Nicomen's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project construction and routine maintenance during operation are expected to result in a negligible impact on Nicomen's other traditional and cultural practices. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related activities are not likely to result in significant adverse effects on the ability of Aboriginal groups to use land, waters or resources for traditional purposes;
- Project-related pipeline and facility construction and routine maintenance activities are likely to cause negligible disruptions to Nicomen's community members accessing traditional and cultural sites that are not within the Project footprint;
- Concerns identified by Nicomen regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their other cultural and traditional practices; and
- The Project would not intersect with Nicomen's asserted traditional territory.

Impacts Associated with Accidental Spills

Nicomen expressed several concerns with direct and indirect effects of Project-related pipeline spills on their Aboriginal Interests, particularly potential hazards to health and environment, potential impacts to wildlife following a marine spill, the effectiveness of the Project's spill response regime, and overall concerns about Project safety (e.g. pipeline replacement procedures and safety protocols).

The Crown also acknowledges Nicomen's concerns regarding spills, and the potential for a spill to impact Nicomen's use and occupation of its asserted traditional territory, ability to make decisions over the area impacted, and the potential for a spill to adversely impact any economic development aspirations Nicomen has for its territory.

A discussion of the potential impacts of a pipeline spill on Aboriginal Interests is provided in Section 4.3.6 of this Report. In consideration of this information and analysis, as well as information available to the Crown on Nicomen's Aboriginal Interests and concerns raised by Nicomen during the

NEB process and Crown consultation process, a pipeline spill associated with the Project could result in negligible to moderate impacts on Nicomen's Aboriginal Interests. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who live nearby and rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill³.

VI - Conclusions

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations, the Crown expects impacts of the Project on the exercise of Nicomen Indian Band's Aboriginal Interests would be negligible.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Nicomen's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Nicomen in emergency response planning activities. The federal Crown is also considering incremental measures that would further accommodate the potential adverse impacts of the Project on Nicomen, as discussed in Sections 4 and 5 of the main body of this report.

In addition, the Crown is aware that the proponent has entered into a Mutual Benefits Agreement with Nicomen. Although these agreements are confidential, the Crown understands they may contain provisions for financial, environmental and training benefits that could further reduce or accommodate impacts if the Project proceeds.

³ Trans Mountain Final Argument, p. 85 and 207

Appendix B.10 – Coldwater Indian Band

I - Background Information

The Coldwater Indian Band (Coldwater) is part of the Nlaka'pamux (pronounced "Ing-khla-kap-muh") people, whose asserted traditional territory encompasses part of south central British Columbia (BC) from the northern United States to north of Kamloops. Coldwater holds three reserves situated near Merritt and/or the banks of the Coldwater River: Coldwater Indian Reserve no. 1 (1,838 hectares [ha]), Gwen Lake Indian Reserve no. 3 (17 ha) and Paul's Basin Indian Reserve no. 2 (646 ha). Coldwater's registered population is approximately 330 members living on Coldwater's reserve lands, 54 members living on other reserves and 455 living off reserve for a total registered population of 840.

Coldwater is part of what was historically called Cawa'xamux or Tcawa'xamux ("people of the creek"), or the Nicola section of the upper Nlaka'pamux peoples, originating from a number of Cawa'xamux village communities. The Nicola Athapaskan speaking people of this region (called by the Nlaka'pamux: Stuwixamux) lived in this vicinity during the early 19th century. Coldwater is a member of the Nicola Tribal Association which also includes: Siska Indian Band, Nicomen Indian Band, Shackan Indian Band, Nooaitch Indian Band, Cook's Ferry Indian Band and Upper Nicola Band. Coldwater members historically spoke Nlaka'pamux or the language of the Stuwixamux. The former is the language of the Nlaka'pamux people, which falls into the Interior Salish language group.

Coldwater is a party to the Nlaka'pamux Nation's *Writ of Summons*, which was filed in the BC Supreme Court on December 10, 2003, asserting Aboriginal title to a territory identified in the writ. The *Writ of Summons* also includes Lower Nicola Indian Band, Ashcroft Indian Band, Boothroyd Indian Band, Boston Bar First Nation, Cook's Ferry Indian Band, Kanaka Bar Indian Band, Lytton First Nation, Nicomen Indian Band, Nooaitch Indian Band, Oregon Jack Creek Indian Band, Shackan First Nation, Siska Indian Band, Skuppah Indian Band, and Spuzzum First Nation.

II - Preliminary Strength of Claim Assessment

- Coldwater is one of the Nlaka'pamux Nation bands. Approximately 226 km of the proposed pipeline right-of-way (RoW) and four pipeline facilities (i.e. Kamloops Terminal, Stump Station, Kingsvale Station and Hope Station) would be located within Nlaka'pamux's asserted traditional territory. Coldwater Indian Reserve no. 1 is adjacent to the proposed pipeline RoW and will not be crossed by the Project; however, the existing Trans Mountain pipeline transects Coldwater Indian Reserve no. 1.
- The Crown's preliminary assessment of the Nlaka'pamux Nation's claim for Aboriginal rights, over the section of the Project that spans Kamloops to southwest of Hope, involves a range of a weak to strong *prima facie* claims. The areas assessed to have strong *prima facie* claims are in the vicinity of the Nicola Valley south towards the Coquihalla Lakes, which most available ethnographers indicate to be within the Nlaka'pamux territory, and there are some indications of Nlaka'pamux hunting, fishing, gathering uses in the Nicola valley area around the time of contact, with connecting trails. The claims diminish in the area north of Stump Lake, as it is unclear whether this falls within Nlaka'pamux territory, and there is indication of an ancestral

connection between the Nlaka'pamux community who moved into the north end of Nicola Lake, intermarrying with the Stewix/Okanagan, which could support a moderate *prima facie* claim. The *prima facie* claim diminishes to weak in the vicinity of Hope as it is understood that area is outside the area ethnographers attribute to historic Nlaka'pamux use¹.

- The Crown's preliminary assessment of the Nlaka'pamux Nation's claim for Aboriginal title over the section of the Project that spans Kamloops to southwest of Hope, involves a range of a weak to strong *prima facie* claims. The area assessed to have a strong *prima facie* claim is in the vicinity of Merritt, which is within the area considered by ethnographers to be within Nlaka'pamux territory, and there are indications for several historic villages in proximity in the Nicola Valley that were likely occupied by the Nlaka'pamux at 1846. The areas with weaker claims include those outside the area ethnographers attribute to the Nlaka'pamux (e.g. north of Stump Lake to Kamloops, and in the vicinity of Hope) and there is no/limited indication of historic Nlaka'pamux use at 1846².

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Coldwater's Aboriginal Interests, the Crown is of the view that the legal duty to consult Coldwater lies at the deeper end of the *Haida* consultation spectrum. Coldwater was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which affords Coldwater opportunities to be consulted at a deeper level.

Coldwater was an active intervenor in the National Energy Board (NEB) review of the Project, and provided correspondence, information requests, oral traditional evidence, and written evidence, including confidential traditional land use information. Coldwater responded to Natural Resources Canada's Issues Tracking Table Information Request [\[A71235\]](#) by further elaborating their concerns, and provided written and oral summary argument to the NEB.

Coldwater has also corresponded actively with the Crown in respect of the proposed approach to consultation, NEB review process and the Project, and met with Crown officials on March 31, May 4, and October 7, 2016 to discuss these issues.

Coldwater signed a contribution agreement with the NEB for \$48,490 in participant funding, including travel for three to the hearing. The Major Projects Management Office (MPMO) offered Coldwater \$52,000 to support their participation in consultations. Coldwater signed contribution agreements with

¹ Ministry of Justice, Aboriginal Research Division, Nlaka'pamux: Review of Ethnographic and Historical Sources (Revised November 20, 2013; Teit, James, "The Thompson Indians of British Columbia" in *Memoirs of the American Museum of Natural History*, Volume II, 1900.; Dawson, George M., "Notes on the Shuswap People of British Columbia" in *Transactions of the Royal Society of Canada*, Section II, 1891; Wyatt, David, "Thompson" in *Handbook of North American Indians*, Vol. 12, Washington: Smithsonian Institution, 1998.

² Ibid.

the MPMO in response to both of these offers, for a total of \$26,000 in allocated funding. On October 14, 2016, Coldwater was issued \$5,000 in capacity funding by EAO to participate in consultation with the Crown.

A first draft of this Consultation and Accommodation Report (the Report) was provided to Aboriginal groups for review and comment on August 17, 2016. Coldwater provided comments on the first draft of this Report on September 19, 2016. These comments have been considered and addressed in this version of the Report. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016, and Coldwater provided comments on November 15, 2016. Comments included particular concerns with the Crown conclusions about impacts on Aboriginal rights and title. Coldwater also provided a separate Aboriginal group submission to the Crown on November 15, 2016.

IV - Summary of Key Coldwater Interests and Concerns Raised

The Crown has gained its understanding of Coldwater's Interests and concerns through Coldwater's involvement in the NEB process, including the responses Coldwater provided to Natural Resources Canada on its Information Request (IR) addressed to them, and through other engagement and correspondence with the Crown. The Crown's understanding of Coldwater's key Project-related issues and concerns is summarized below. This is a summary of the key issues raised by Coldwater, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions.

Cultural and Social Impacts

Coldwater has stated that every part of the Coldwater Valley, and larger Nlaka'pamux territory is of cultural and social importance to Coldwater members. Coldwater has communicated their position that any disturbance of their territory would have corresponding impacts on Coldwater members, and the cultural and social impacts of the Project would not be limited to Project impacts on creeks in Coldwater Indian Reserve No. 1. Coldwater also noted that climate change impacts are exacerbating impacts on water and changing water flow behavior.

Coldwater expressed concern that the Project would increase barriers to accessing traditional resources and practices, including plant harvesting, hunting and fishing; and sense of spiritual and cultural alienation on the land; and result in loss of lands and traditional resources, including but not limited to spiritually and culturally important sites such as Coldwater Creek and Kwinshatin Creek. Coldwater's oral traditional evidence identified the cultural, social and spiritual importance of water, providing examples of specific creeks and waters of importance in the Coldwater Valley. These included Coldwater Creek and Kwinshatin Creek, where there are a number of spiritual places, including burial sites and places where cradleboards have been hung, that may be impacted by the Project. Coldwater is concerned that the proponent's proposed mitigation (i.e., an environmental education program, intended to inform all construction personnel of the location of known sacred sites and burial sites) is inappropriate. Coldwater have requested that the proponent consult with them regarding cultural and social impacts of the Project, including the development of avoidance, mitigation and accommodation measures.

Impacts from Existing Pipeline

Coldwater noted a lack of any accommodation or mitigative actions in relation to the existing pipeline. Coldwater's evidence recounts the Chief being forced to sign an agreement in respect of the existing pipeline in 1954, and concerns remain about the safety of the existing pipeline. Coldwater has expressed particular concern with the impact that a potential spill or leak would have on water resources and fish, which would impact all Aboriginal peoples in the territory from oil being carried down into the Fraser River from local waterways. Additionally, Coldwater noted that construction and clearing for the original pipeline led to a loss of berries, traditional medicines, and harvesting opportunities along the original RoW which have never fully recovered. Coldwater provided examples when community members were prevented from accessing their traditional berry picking grounds by Kinder Morgan employees doing maintenance work on the existing pipeline in the Coquihalla area. Coldwater found this particularly problematic because Kinder Morgan failed to notify Coldwater that they would be conducting work in their traditional territory, nor were the workers willing to disclose to community members what type of work they were conducting.

Coldwater stated that they have not been consulted on a 50,000 barrel per day increase in throughput of the existing pipeline and have serious concerns with expansion and potential ongoing and increasing risks associated with the existing pipeline on Coldwater's reserve. Coldwater have stated that both the existing pipeline and the proposed pipeline RoW pose risks to the aquifer that is the source of the domestic and agricultural water for their community.

Coldwater has also raised concerns over the seemingly disproportionate number of community members who have died from cancer and lupus, and wonder if these illnesses are related to the existing pipeline. Coldwater noted that the existing pipeline has leaked on the reserve on at least one occasion. There are additional concerns about whether or not a previously replaced section of pipeline was left in the ground or removed, and the status of remedial efforts to address potential soil contamination in this specific site.

Methodology, Process and Consultation

Coldwater expressed deep concerns with the adequacy of the NEB process to ensure necessary information was before the Crown. Coldwater has raised numerous concerns with respect to the methodology used by the proponent to assess Project impacts. These concerns include, but are not limited to, whether the proponent has assessed Coldwater's strength of claim to Aboriginal rights and title as well as the potential adverse impacts from an oil or fuel spill on rights and title interests. Coldwater asked for clarification on how its Aboriginal traditional knowledge was used by the proponent in developing the Project application, what the methodology is for assessing potential adverse impacts on Coldwater's rights and title interests, and the mitigation measures proposed to address those impacts.

Coldwater has repeatedly stated that they have serious concerns with the Crown's consultation process and have requested a separate Coldwater-specific consultation process for meaningful consultation between Coldwater and the Crown. Concerns include a lack of consultation regarding the Equivalency

Agreement, EAO's decision to accept the NEB Recommendation Report as the assessment report and insufficient funding to participate in the provincial process for the Project.

Coldwater expressed frustration that Coldwater had not had an opportunity to meet with decision makers on the Project. Coldwater indicated that it does not feel that their concerns have been taken seriously as part of the NEB process, or by Natural Resources Canada and the EAO following the close of the NEB hearings. Coldwater is seeking to engage in government-to-government dialogue to find solutions to the impact of the Project on Coldwater's rights, but stated they have not yet had this opportunity. Coldwater are concerned that they have not received a substantive Crown response to Coldwater's concerns with the NEB process or lack of appropriate assessment and information required to inform consultation. Coldwater remains frustrated, and hold the view that the timeline for Crown consultation should be extended to provide time for the gathering of critical information and analyses needed to inform consultation and ultimately to inform the Crown's decision on the Project.

Coldwater formally requested that the Crown recommend that the Governor in Council (GIC) either dismiss the Project as proposed or refer the NEB's recommendation back for reconsideration with clear direction that a complete analysis of Project routing in the Coldwater Valley, including with respect to relocating the existing pipeline be undertaken.

Cumulative Effects

Coldwater has noted that the cumulative effect of the Project on their rights and title interests has not been considered in a manner they can agree with. Coldwater stated in evidence that the Nlaka'pamux territory has been subject to extensive development since Europeans first came to the territory and that the result has been a steady degradation of Coldwater's rights and title interests. Major industrial developments of particular impact noted by Coldwater include the construction and operation of the Coquihalla highway and the existing Trans Mountain pipeline, both of which are large linear disturbances which limit the ability of Coldwater members to use the territory and alienated a significant portion of the Nlaka'pamux territory. Coldwater's view is that the Project must be considered against a pre-industrial baseline, and that a full cumulative impacts assessment should be undertaken that takes into account the historical context within which Coldwater exercise their rights and title interests within their traditional territory.

Environmental Impacts

Coldwater expressed concern about the following environmental issues: the potential impacts of the Project on water resources in the territory (groundwater contamination, water scarcity, and loss of drinking water), loss of plants and medicine resources relied on by Coldwater members, and potential impacts on a wide variety of wildlife species (which are noted as having direct impacts on Coldwater rights and interests). Risks to Coldwater's lands and marine and freshwater resources that are important to salmon in the Fraser River were also raised as concerns.

Coldwater expressed interest to the proponent in developing a reclamation and management plan in consultation with Coldwater specific to potential Project impacts to Coldwater, and targeted and specific

consultation with Coldwater to develop appropriate avoidance, mitigation and accommodation of potential Project impacts to wildlife. Coldwater also requested the proponent consult with Coldwater and other impacted Aboriginal groups on land reclamation within Nlaka'pamux Territory, and fully fund Coldwater to participate in restoration and monitoring activities for the life of the Project.

Coldwater's Groundwater Resources

Coldwater expressed deep concern about the assessment of impacts, including a lack of assessment of route alternatives in the Coldwater Valley that would avoid risk to the aquifer (e.g., West Alternative Route), and a lack of understanding and assessment of the potential environmental, health, and social effects on groundwater in the Coldwater Valley.

The NEB denied Coldwater's request to undertake a complete reanalysis of Project routing through the Coldwater Valley. Coldwater is of the view that there are alternative routes that do not put their drinking water supply at risk, and that neither the alternative routes nor the impacts of the Project on their water supply have been adequately considered. Coldwater expressed that this is evidenced by the current uncertainty as to the extent of the aquifer and the NEB Condition 39 that requires the proponent undertake a hydrogeological study to determine the extent of the aquifer. Coldwater are concerned that the study must be filed only six months prior to construction in the Coldwater Valley, and that this may mean that this is not the practical opportunity to consider rerouting.

Coldwater stated that, to date, the Crown has failed to provide any meaningful feedback or response to their most serious concerns that the impacts of the various Project routes through the Coldwater Valley have not yet been considered or understood, and the information needed to inform this assessment has not been gathered. Coldwater consider this assessment, which includes an assessment of impact of the proponent's preferred Project route, critical to meaningful consultation and appropriate accommodation. Coldwater stated the honour of the Crown cannot be met by reliance on the anticipated provision of a study to the NEB and EAO six months prior to the commencement of construction.

Coldwater raised concerns that the proponent did not consult them regarding the removal of the various corridor options from consideration in the Project application and that in their view the West Alternative could be a better option based on the potential effects to the aquifer on which Coldwater rely for water, as well as Coldwater's rights and its overall quality of life and sense of well-being. Coldwater stated that the West Alternative Route had not been fully considered or analyzed, and the route would significantly reduce risks and impacts to the community, its reserve lands, and to the aquifer that supplies approximately 90% of the water used by Coldwater community members. Coldwater specifically noted that Project routing and mitigation measures could be taken to avoid impacts to their drinking water supply.

Coldwater commissioned a third-party study, submitted to the Crown consultation team in September 2016, which outlined the serious concerns Coldwater has with the proposed project routing. While Coldwater does not necessarily consider the West Alternative as the solution to their concerns,

Coldwater suggested that the alternative route is one way to accommodate Coldwater and reduce the impacts and risks of the Project on Coldwater. Coldwater expressed its concern that, given the momentum behind the Project following a GIC approval, it would take a major adverse finding in the NEB Condition 39 report for the West Alternative to become a viable consideration. Coldwater also stated that they do not consider a detailed route hearing as a viable option for addressing Coldwater's serious concerns about Project routing, and in particular around avoiding risk to the Coldwater aquifer.

Coldwater noted that recent engagement with the proponent has not been productive and has confirmed the Crown's critical role. Coldwater raised concerns that the West Alternative route, which Coldwater has been urging the Crown to study, while technically feasible, is no longer a routing option. Coldwater emphasized that the proponent's commitment "to meeting with Coldwater prior to the start of construction to discuss avoiding, mitigating, and accommodating potential effects associated with routing through the Coldwater Valley" must be considered in this context. Coldwater indicated that the proponent has refused to undertake a detailed analysis of the impacts of routing options through the Coldwater Valley, and stated the proponent did not consider impacts on Aboriginal Interests in their routing analysis.

Coldwater stated that the hydrogeological study must be considered by the GIC before a final decision on the Project is made, and routing options and complete knowledge of risk and impacts of the Project on Coldwater must be dealt with in advance of any decision by the GIC to approve the Project. Coldwater emphasized that their concerns are too critical to be left to a process from which the Crown representatives charged with discharging duty to consult are absent and which will occur after the Project has gained significant momentum and may already be under construction. Coldwater indicated that the Crown has an opportunity and a responsibility to ensure that these concerns are addressed in advance of a final decision on the Project. Coldwater remains critically concerned about the impacts of the Project on Coldwater's Aboriginal Interests.

Coldwater formally requested that the GIC either dismiss the Project as proposed or refer the NEB's recommendation back for reconsideration with clear direction that a complete reanalysis of Project routing in the Coldwater Valley occur, including consideration of a hydrogeological study of the aquifer and potential impacts of the Project on Coldwater's water supply.

The Crown has considered these concerns, including reviewing the hydrogeological study, and responded in meetings and correspondence. These concerns have informed the development of incremental conditions proposed by EAO regarding both the Coldwater aquifer and the provision of drinking water in the case of contamination.

Health and Human Safety

Coldwater raised concern about the potential for spills to impact critical groundwater resources, and the associated adverse effects a spill would cause to Coldwater members' health and cultural well-being. Specifically, Coldwater expressed concern about the impacts of a pipeline rupture or spill uphill from Coldwater Indian Reserve No.1 and the potential anxiety that Coldwater community members could

experience from the real and perceived consequences of such a spill. Concerns were also raised related to the potential impact of a system failure resulting in an oil spill on Nlaka'pamux lands, including sensitive areas, wildlife habitat and fresh water aquatic habitat such as the Coldwater, Nicola, Thompson and Fraser Rivers. Further, Coldwater identified concerns related to spill prevention and the capabilities of the proponent to effectively respond. Coldwater is not aware of information from the proponent that would establish that the spill response measures proposed are practicable and effective. Coldwater states that this information should be considered by the Crown before a decision on the Project is made, and such critical issues cannot be delayed until after Project approval is in place.

Coldwater expressed serious concerns about the safety risks posed by the Project, including the use of pesticides to control invasive and other plant species. Community members continue to harvest suwetta and other country foods along the existing pipeline route.

Impacts on Aboriginal Rights and Title

It is the strong view of Coldwater that the Project would result in significant adverse impacts on Coldwater's Aboriginal rights and title interests. Coldwater has stated its concerns about the impact of the Project on the full suite of Nlaka'pamux rights and title interests, including the economic component of Aboriginal title and the transmission of Nlaka'pamux culture and language to the next generation. Coldwater is concerned that the Project could affect Coldwater's mission to enhance and sustain their quality of life through wellness and culture, and to utilize and preserve all of Coldwater's' resources for now and future generations.

They state there has been no meaningful assessment of Project impacts on Coldwater's traditional practices. Coldwater requested a full assessment of the Project's potential impacts on Coldwater traditional land uses in order to determine appropriate measures to avoid, mitigate or accommodate impacts on Coldwater. They deem the proponent's mitigation measures to be deficient. It is of Coldwater's view that the consent of Coldwater should be secured before the Crown authorizes the Project to proceed (if such action is taken) based on their asserted claim to Aboriginal title over the lands impacted by the Project (as part of the Nlaka'pamux Nation).

Economic Impacts

Before authorizing the Project to proceed, Coldwater is of the view that the Crown should secure the consent of Coldwater, including negotiating a share in any economic benefits stemming from the Project.

Project Construction Phase

Coldwater raised concerns with respect to the impacts of constructing the pipeline adjacent to the reserve and across their traditional territory, including effects of construction on groundwater and surface water, the location of the Project and taking-up of lands, the social, cultural, spiritual and economic impacts of constructing the Project through the territory, and safety risks posed by Project construction.

Accommodation Proposals

During Crown consultation, Coldwater stated that Project impacts on their rights need to be assessed, and mitigation measures identified before Coldwater would be in a position to discuss accommodation. Coldwater provided the federal and provincial Crown with two proposed accommodation measures to consider in relation to accommodating potential impacts of the Project on Coldwater's Aboriginal Interests:

- The GIC should direct the NEB to dismiss the proponent's application pursuant to s. 54(1)(b) of the *National Energy Board Act*; or
- The GIC should refer the *NEB Recommendation Report* back for reconsideration pursuant to s.53(1) of the *National Energy Board Act* with clear direction to assess the impacts of the Project on Coldwater's unique rights and interests, including a complete re-analysis of Project routing through the Coldwater Valley and an examination of the proposed routes included in the proponents' original application. The reanalysis should be required to: consider a hydrogeological study of Coldwater's aquifer to be conducted in cooperation with Coldwater; determine which Project route will minimize impacts on their Aboriginal rights and Interests; and consider whether relocating the existing pipeline route off of Coldwater reserve no.1 is feasible.

Section 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Coldwater that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

Coldwater's Response to NEB Recommendation Report

Coldwater communicated to the Crown that the *NEB Recommendation Report* failed to identify or assess the Project impacts on Coldwater's rights and title interests. Coldwater stated that while the *NEB Recommendation Report* generally acknowledged Coldwater's concerns with routing through the Coldwater Valley, it did not draw any conclusions about the adequacy or appropriateness of routing through the Valley. Coldwater expressed strong concern that the NEB process and report did not consider the West Alternative Project route because the proponent removed the route option early in the process.

According to Coldwater, NEB Condition 39 (requiring a hydrological study of Coldwater IR No. 1 to identify the nature and extent of the aquifer) appears to be an acknowledgement of deficiencies in the proponent's routing assessment, but the condition did not provide any mechanisms to address problems with routing selection, as the study is to be filed only after Project approval. It is unclear to Coldwater whether NEB Condition 130 (requiring groundwater monitoring program) will be required for Coldwater's aquifer as the proponent has yet to determine whether it is a "vulnerable aquifer". Coldwater stated that NEB Condition 93 (requiring a water well inventory of wells within 150 m of the pipeline ROW) does not account for the existing pipeline or potential water quality and quantity impacts beyond the ROW, and does not require the proponent to be informed or confirmed by local water users.

Coldwater is concerned that NEB Condition 93 does not establish thresholds and triggers for when water wells must be replaced due to adverse impacts from the Project.

Coldwater identified fundamental issues with conditions in the *NEB Recommendation Report*, none of which they believe would provide final or binding conditions on Project approval that guarantee impacts to Coldwater's rights will be avoided, mitigated or accommodated.

The Crown is of the view that routing options had been appropriately considered by the NEB through the hearing process and that further routing refinements may occur through the routing process, if the project is approved. The Crown is also of the view that the conditions imposed by the NEB and proposed by the EAO would provide for incremental and reasonable mitigation of effects and risk posed by the Project.

V - Potential Impacts of the Project on Coldwater's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests are provided in Sections 2.4.3 and Section 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted or established traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Coldwater's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Coldwater's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Coldwater's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Coldwater, Coldwater's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province.

Esh-kn-am Cultural Resource Management Services conducted a joint, third-party traditional land and resource use study, the *Traditional Knowledge Project for the Kinder Morgan Trans Mountain Pipeline Expansion Project* (the Traditional Knowledge Project) for Coldwater Indian Band, Cook's Ferry Indian Band, Siska Indian Band, and Boston Bar First Nation (participating bands). The Traditional Knowledge Project was filed confidentially with the NEB. In November 2016, the *Traditional Knowledge*

Project report was provided to the Crown on the condition that it be used for the Project, and not be used for any other purpose, and that it is a small sampling of Aboriginal rights practitioners due to time and budget constraints and is not a definitive study on the use of Aboriginal title lands or the practice of Aboriginal rights by the participating bands. The report includes site-specific information and estimates of the number of hectares that may be directly or indirectly impacted by the Project. The Crown has relied on this information to assess potential impacts of the Project on Coldwater's Aboriginal Interests.

Coldwater submitted written evidence to the NEB in 2015 ([A4Q0W6](#)) that describes the history of Coldwater, the history of the Trans Mountain pipeline through Coldwater's reserve, impacts of the Project on Coldwater's Interests, and Project routing. The evidence also includes several appendices including Nlaka'pamux Area of Interest, a redacted ethnographic and traditional use study titled *Coldwater Indian Band: Preliminary Ethnographic and Historic Overview and Traditional Use Study* ([A4L9Q0](#)) and a redacted traditional land use and traditional knowledge study prepared by Esh-kn-am Cultural Resources Management Services titled *Coldwater Indian Band Traditional Land Use and Traditional Knowledge Study of Coldwater IR #1 for the Proposed Trans Mountain Expansion Project* ([A4Q0X1](#)), as well as a hydrogeology study titled *Hydrogeologic Overview of the Area Surrounding the Trans Mountain Pipeline Expansion* ([A4Q0W9](#), [A4Q0X0](#)), among other appendices. In the *Coldwater Indian Band: Preliminary Ethnographic and Historic Overview and Traditional Use Study*, Coldwater Nlaka'pamux Knowledge Holders and Resource Users identified a total of 175 traditional use sites for harvesting resources for materials, food, medicine, and cultural purposes in the study area³. Many resources and traditional areas identified by Coldwater along the Coldwater River and in the Nicola Valley are used by community members as part of a seasonal round.

Impacts on Hunting, Trapping, and Plant Gathering

According to Coldwater's written evidence, community members continue to rely heavily on deer, elk, moose, berries and plants, medicines and materials. Coldwater identified 32 hunting sites and 101 berry/plant gathering sites in the evidence submission. Specific species hunted by Coldwater community members include: beaver, deer, mule deer, white-tailed deer, ducks, elk, goose, grouse, blue grouse, spruce grouse, moose, rabbit and squirrel. Coldwater identified the following plant species gathered by community members: alder, balsamroot, gooseberries, huckleberries, Saskatoon berries, soapberries, wild raspberries, wild strawberries, birch bark, bitterroot, cedar, chokecherries, cottonwood, fir boughs, fir tree bark, Indian carrot, Indian celery, Indian potato, Indian rhubarb, juniper, Labrador tea, lodgepole pine sap, medicinal plant, various mushrooms including cottonwood, pine, sand, shaggy mane, spring, thunder, as well as other species such as Oregon grape, pine cone seeds, red willow, rosehips, stinging nettle, trapper's tea, tree needles, wild onions, and willow sticks.

Coldwater identified many concerns related to environmental effects of the Project on hunting, trapping, and plant gathering activities, including loss of berries, traditional medicines, and harvesting

³ According to Coldwater, the study area is centred on the Nicola and Coldwater Valley watersheds and roughly covers the territory of the Nicola division of the Nlaka'pamux.

opportunities, loss of plants and medicinal resources relied on by Coldwater members, and impacts on a wide variety of wildlife species. As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, old growth forests, wetlands, and wildlife and wildlife habitat (including species at risk) listed species. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping, and gathering (section 4.3.1 of this Report). With regards to specific concerns raised by Coldwater, the proponent would implement several mitigation measures to reduce potential effects to species important for Coldwater's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP) and the Wildlife Management Plans.

Community members rely heavily on resources located on the sides and bottom of the Coldwater Valley due to its proximity to Coldwater Reserve No. 1. Other areas of consistent use identified by community members in Coldwater's evidence include Coquihalla Summit and Lakes area, the Spius Creek and Stoyoma Mountain area, Boss Lake and Davis Lake area, Minnie Lake, Aspen Grove, and Nicola Lake. Mushroom collecting is concentrated along the Coldwater River, as well as in the Aspen Grove and Minnie Lake areas south of Nicola Lake. As summarized in the *Traditional Knowledge Project* report, the total hectares of the hunting and trapping areas in the Project area is more than 2,060 ha (over 59% of the Project area within Nlaka'pamux territory), and the total hectares of plant gathering and medicinal sites is more than 1,962 ha (over 56% of the Project area within Nlaka'pamux territory). Hunting and trapping areas have a high overall value to participating bands. Of the hunting and trapping areas identified within the Project area, ungulate cultural use areas and fur-bearer cultural use areas were noted as having high cultural, social, economic and subsistence values. Participating bands identified more than 70 important plants gathered, and engage in far-reaching plant gathering activities across the traditional territory. The plant gathering sites have different meanings and uses associated with them, including gathering plants for food and medicine, or sites associated with plants used for construction of drying racks for smoking meat. Of the plant sites identified within the Project area, participating bands indicated they have high cultural, social, economic, and subsistence value.

Coldwater raised concerns with the Project's potential impacts relating to specific locations and access to hunting, trapping, and plant gathering activities, including increased barriers to accessing traditional resources and practices, such as plant harvesting and hunting, and potential impacts of increased access to the land by members of the public. Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Coldwater's access to hunting, trapping and plant gathering activities, largely confined to the Project footprint for the pipeline and associated facilities. The Crown appreciates that with construction and reclamation activities disruptions to access may result in a loss of harvesting opportunities for Coldwater. NEB conditions, if the Project is approved, would

either directly or indirectly avoid or reduce potential impacts on specific locations and access associated with hunting, trapping, and gathering sites (section 4.3.1 of this Report). With regards to specific concerns raised by Coldwater, the proponent would implement several mitigation measures to reduce potential effects on traditional land resource use (TLRU) sites important for Coldwater's hunting, trapping, and plant gathering activities, such as management plans that include access management, scheduling and notification of Project activities, and environmental monitoring programs that monitor access control measures. The Access Management Plan is intended to reduce disturbances caused by access, construction equipment and vehicle traffic, during and following construction in order to minimize disturbance to access to Coldwater's traditional lands. The proponent has committed to minimizing the development of access routes, controlling public access along the construction right-of-way, selecting appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent has also committed to work with applicable resource managers, traditional land and resource users to define locations where access control is necessary, and what type(s) of access control will be implemented. In the event that hunting, trapping, and plant gathering sites are identified during ongoing engagement with Coldwater prior to construction, the sites will be assessed, and appropriate mitigation measures will be determined. The proponent committed to working with Coldwater to develop strategies to most effectively communicate the construction schedule and work areas to community members. Further, the proponent has committed to meeting with Coldwater prior to the start of construction to discuss avoiding, mitigating, and accommodating potential effects associated with routing through the Coldwater Valley.

Coldwater expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities, including a sense of spiritual and cultural alienation on the land, impacts to human health from the use of pesticides to control invasive and other plant species, particularly impacts to community members that harvest country foods. Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Coldwater's hunting, trapping, and plant gathering activities. The Crown appreciates that this short-term disruption could temporarily alter the behaviour of community members' hunting, trapping or plant gathering activities during construction, and that reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the Project footprint, could have spiritual and cultural impacts on community members. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential social, cultural, spiritual, and experiential effects associated with hunting, trapping, and plant gathering activities (section 4.3.1 of this Report).

With regards to specific concerns raised by Coldwater, the proponent would implement several mitigation measures to reduce potential effects to Coldwater's hunting, trapping, and plant gathering activities. The proponent has committed to implementing weed management (as outlined in the Weed and Vegetation Management Plan) to reduce the potential for weed infestation following construction, and utilizing an Integrated Vegetation Management approach intended to reduce the use of herbicides and promote healthy ecosystems. The proponent will consult with Aboriginal groups regarding problem

vegetation management and methods of treatment. Measures outlined in the proponent's Reclamation Management Plan are intended to stabilize and revegetate affected lands to achieve land productivity along the construction RoW and footprint, equivalent to the adjacent land use. The proponent has also committed to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Coldwater, Coldwater's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor-to-moderate impact on Coldwater's hunting, trapping and plant gathering activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Coldwater;
- Project-related pipeline and facility construction and routine maintenance activities within Coldwater's traditional territory are temporary and thus, likely to cause minor disruptions to Coldwater's community members accessing traditional hunting, trapping and plant gathering sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Coldwater regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their hunting, trapping and plant gathering activities.

Impacts on Freshwater Fishing

Specific species fished by Coldwater community members include: fish weir, numerous species of salmon (i.e. coho, kokanee, sockeye, spring, and steelhead), suckers, numerous species of trout (i.e. bull, Dolly Varden, lake, rainbow) and whitefish. According to Coldwater's written evidence, salmon has always been important to Coldwater community members. Community members fish for sockeye at specific fishing stations on the Fraser River and also travel to the Thompson River to harvest salmon for their families. Coldwater River supports a number of species of salmon, including coho, early-run chinook, and steelhead although Coldwater expressed concerns that the river no longer supports significant harvest levels. According to Coldwater, the entire river system, inclusive of the Coldwater, Nicola, Thompson, and Fraser Rivers has been central to Coldwater's way of life for millennia.

Coldwater identified several concerns related to environmental effects of the Project on fishing activities, in particular, risks to Coldwater's marine and freshwater resources important to salmon in the Fraser River, and the loss of traditional resources. As described in the *NEB Recommendation Report*, Project-related construction and operation could result in low to moderate magnitude effects on fish and fish habitat and surface water. Moderate effects to fish and fish habitat would be localized to individual watercourse crossings where any potential serious harm would be compensated by offset measures. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce

potential environmental effects on fishing activities (section 4.3.2 of this Report). A number of recommended NEB conditions require the proponent to file reports that would monitor Project-related impacts to fish, fish habitat and riparian habitats. With regards to specific concerns raised by Coldwater, the proponent would implement several mitigation measures to reduce potential effects to species important for Coldwater's fishing activities. The proponent has committed to time watercourse crossing construction activities to occur within the least risk biological windows in an attempt to avoid causing serious harm to fish, has committed to working with Aboriginal groups to identify the most appropriate means of offsetting serious harm to marine fish and fish habitat, and has proposed the implementation of channel and bank reclamation measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat.

Coldwater identified 24 fishing sites in evidence submitted to the NEB. In Coldwater's written final argument ([A4X5J8](#)), Coldwater identified the historical and current use of fishing locations along the Coldwater River, as well as in Lily and Gwen Lakes. As summarized in the *Traditional Knowledge Project* report, participating bands indicated that 1,427 ha of land associated with existing fishing activities would be impacted by the Project.

Coldwater raised concerns with the Project's potential impacts relating to specific locations and access to fishing activities, specifically the loss of traditional resources, including spiritually and culturally important sites such as Coldwater Creek and Kwinshatin Creek, increased barriers to accessing traditional resources and practices, and increased access to the land by members of the public due to Project-related activities. Project-related construction and routine maintenance activities are expected to cause short-term, temporary disruptions to Coldwater's access to fishing activities. The Crown appreciates that if construction and reclamation occur during the fishing season, there could be a potential reduction in access to waterways, staging areas, and fishing sites for Coldwater community members. However, disruptions to access would largely be confined to the Project footprint for the pipeline and associated facilities during construction and reclamation. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access to fishing sites important for Coldwater (section 4.3.2 of this Report). With regards to specific concerns raised by Coldwater, the proponent would implement several mitigation measures to reduce potential effects to fishing sites important for Coldwater's fishing activities. As previously discussed, the proponent is committed to minimize disturbance to access to Coldwater's traditional lands, as described in the Access Management Plan. The proponent committed to working with Coldwater to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Coldwater expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its fishing activities, and sense of spiritual and cultural alienation. As described previously, the Project construction and routine maintenance is expected to cause short-term, temporary disruptions to Coldwater's fishing activities. The Crown appreciates that this temporary interruption could mean that community members alter their fishing activities during construction, which could affect their participation in the traditional activity. NEB conditions, if the Project is

approved, would either directly or indirectly reduce the social, cultural, spiritual or experiential effects associated with fishing activities (section 4.3.2 of this Report).

In consideration of the information available to the Crown from the NEB process, consultation with Coldwater, Coldwater's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor-to-moderate impact on Coldwater's freshwater fishing activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Coldwater;
- Project-related pipeline and facility construction and routine maintenance activities within Coldwater's traditional territory are temporary and thus, likely to cause minor disruptions to Coldwater's community members accessing traditional fishing sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Coldwater regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their freshwater fishing activities.

Impacts on Other Traditional and Cultural Practices

As described in Coldwater's evidence, traditional foods are traded and served at cultural events such as the sun dance, which is held at two sites on Coldwater Reserve No. 1. Materials harvested by Coldwater community members are used for building sweat lodges, the sun dance ring, funerals and other traditional items such as drums and cradle boards, which are hung in special areas after single use. Community members use streams and rivers for cleansing and ritual bathing, and honour spirit beings in lakes and at waterfalls. Coldwater's evidence describes traditional use sites as part of the cultural fabric of being a member of the Coldwater community. For community members, being out in Coldwater's territory connects them to the past and their generations of ancestors.

As summarized in the *Traditional Knowledge Project* report, 11 different Cultural Survival Area site types were identified by participating bands within the Project footprint: Fix Oneself, Ghosted, Gravesite, Legend/Myth/Origin Story, Little People, Pit House, Puberty Site, Sasquatch, Sweathouse, Training Site, and Xa?xa?. Each Cultural Survival Area site has unique, culturally significant and important aspects. During the TLU, 14 tutelary species and cultural occurrences (e.g., trails, gathering places, camp sites, drying rack sites, trading places, and cultural activities such as swimming in rivers and hiking) were identified by participating bands in the Project area. A tutelary species is defined as a guardian, patron or protector of a particular place, geographic feature, person, lineage, nation, culture or occupation (e.g., bald eagle, golden eagle, great horned owl, hawk, rubber boa). Trails, place names and camps provide important ways for the participating bands to access and live on the lands and gather resources or engage in cultural and spiritual practices. The tutelary species and cultural occurrences identified within the Project area are considered to have high cultural, social, economic and subsistence value.

Coldwater identified many concerns related to environmental effects of the Project on other traditional and cultural practices, including to spiritually and culturally important sites such as Coldwater Creek and Kwinshatin Creek, burial sites and places where cradleboards have been hung. As described in section 4.3.4 of the Report, Project-related activities are not likely to result in significant adverse effects on the ability of Aboriginal groups to use land, waters or resources for traditional purposes. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental impacts on physical and cultural heritage resources (section 4.3.4 of this Report). With regards to specific concerns raised by Coldwater, the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources important for Coldwater's traditional and cultural practices. The proponent has also committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during RoW finalization, narrowing the RoW in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments.

In evidence submitted to the NEB, Coldwater identified 4 archaeological sites (e.g., pit houses), 27 dwelling sites (e.g., campsite, homestead, houses, and pit houses), 1 named place, 2 recreation areas (i.e. childhood playground/territory and swimming), 5 sites for Legendary Beings (e.g., little people, sasquatch, wild man, and *xaxaku*), 23 sacred/ceremonial sites (including cradleboards, ritual bathing, spiritual training, and vision quest area, among others), 6 traditional history sites, and 2 trails/travelways (e.g., horse tie-up). Other traditional use sites identified by Coldwater include environmental features (e.g., waterfalls), forestry (e.g., cedar), and marker sites (e.g., avoidance area). In Coldwater's written final argument, Coldwater identified sweathouses along creeks and the Coldwater River and bathes in the Coldwater River. Spiritual beings, known as little people, are considered by Coldwater to live along creeks in Coldwater Reserve No. 1, including Kwinshatin Creek and along the Coldwater River and ancestors of community members are buried in these locations. Kwinshatin Creek is where people used to congregate. It is Coldwater's view that all the lands are sacred, and spiritual grounds are very important.

As summarized in the *Traditional Knowledge Project* report, the existing and proposed pipeline corridor would have substantial and permanent impacts on 11 identified Cultural Survival Areas encompassing over 1,725 ha (59% of the proposed Project area within Nlaka'pamux territory), and would create significant changes and impacts which exceed 1,427 ha of spiritual and cultural places and existing fishing sites including 40% of Tutelary (spiritual protection). Participating bands noted that the Project would impact 894.8 ha of Cultural Survival Areas sites and approximately 25% of the Cultural Survival Areas that occur within the Project area.

Coldwater raised concerns with the Project's potential impacts relating to specific locations and access to other cultural and traditional practices and increased access to the land by members of the public due to Project-related activities. Project-related activities are expected to cause short-term disruptions that temporarily affect the ability of Aboriginal groups to access land, waters or resources for traditional

purposes. The Crown appreciates that Coldwater's opportunities for certain traditional and cultural activities will be temporarily interrupted during construction and routine operation, and there could be reduced access to travelways, habitation sites, gathering sites, and sacred areas. However, temporary disruptions to Coldwater's traditional and cultural practices would be largely confined to sites within the Project footprint for the pipeline and associated facilities. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific sites and access to physical and cultural heritage resources (section 4.3.4 of this Report). The Crown notes the proponent's commitment to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project and the proponent's commitment to meeting with Coldwater prior to the start of construction to discuss avoiding, mitigating, and accommodating potential effects associated with routing through the Coldwater Valley.

Coldwater expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its other traditional and cultural practices, including impacts affecting the transmission of Nlaka'pamux culture and language to the next generation, and cultural and social impacts of the Project on creeks located inside and outside of Coldwater Indian Reserve No. 1, including Coldwater Creek and Kwinshatin Creek. As described previously, the Crown appreciates that this may result in temporary interruptions to Coldwater's cultural and spiritual practices, or that their participation in the traditional activity is curtailed, during Project construction and routine maintenance activities.

In consideration of the information available to the Crown from the NEB process, consultation with Coldwater, Coldwater's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor-to-moderate impact on Coldwater's other traditional and cultural practices. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on Coldwater's traditional and cultural practices;
- Project-related construction and routine maintenance activities within Coldwater's traditional territory are temporary and thus, likely to cause minor disruptions to Coldwater's community members accessing traditional and cultural practice sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Coldwater regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their other cultural and traditional practices.

Impacts on Aboriginal Title

The Crown notes that the Project would be located within an area of Coldwater's traditional territory assessed as having strong *prima facie* claim to Aboriginal title, in the vicinity of Merritt where there are indications of several historic villages in proximity in the Nicola Valley.

The Crown has actively consulted with Coldwater throughout the NEB process and Crown consultation process at a deeper level in an attempt to better identify, understand, and resolve concerns relating to Aboriginal title. Concerns related to Aboriginal title raised by Coldwater throughout the NEB and Crown consultation process include:

- Impacts could impede or disrupt Coldwater's use of its asserted traditional territory, including potential alienation of Nlaka'pamux territory and impacts to groundwater;
- Activities could affect Coldwater's ability to manage and make decisions over the Project area, including the inconsistency of the Project with Coldwater's mission to enhance and sustain their quality of life through wellness and culture, and to utilize and preserve all of their resources for now and future generations; and
- Project-related activities that could affect Coldwater's economic development aspirations for its asserted traditional territory.

The Crown provides a description of the potential impacts of the Project on Aboriginal title in section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid/reduce Project impacts associated with the degree of disturbance to terrestrial and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as well as NEB Conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved. The Crown understands that, in addition to NEB conditions that would require the proponent to report on heritage resources and traditional use investigations (NEB Conditions 97 and 100), the proponent has committed to meeting with Coldwater prior to the start of construction to discuss avoiding, mitigating, and accommodating potential effects associated with routing through the Coldwater Valley. The Crown also understands the proponent, based on discussions with Coldwater, did not pursue pipeline routing that crosses Coldwater Indian Reserve No. 1. Further, the NEB conditioned the proponent to complete a hydrogeological report relating to the aquifer at Coldwater Indian Reserve No. 1 that requires quantifying the risks posed to groundwater supplies on Coldwater Indian Reserve No. 1 and describing measures to address these risks including routing and Project design. It is noted that Coldwater has not executed a Mutual Benefits Agreement with the proponent.

Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in section 4.3.5, it is the Crown's opinion, the Project is expected to have minor-to-moderate impacts on Coldwater's asserted Aboriginal title to the proposed Project area.

Impacts Associated with Accidental Pipeline Spills

Coldwater expressed several concerns related to potential direct and indirect effects of Project-related pipeline spills on their Aboriginal Interests, particularly related to groundwater resources. Specific concerns related to groundwater include potential impacts on groundwater contamination and water

scarcity, risks and potential for spills to impact Coldwater's critical groundwater resources and associated adverse effects of a spill on Coldwater members' health and cultural well-being. Coldwater also mentioned spill-related impacts from oil being carried down into the Fraser River from local waterways, risks to Coldwater's lands and marine and freshwater resources important to salmon in the Fraser River, and anxiety experienced by Coldwater members associated with the perceived consequences of a pipeline spill uphill from Coldwater Indian Reserve No.1. Other concerns expressed include impacts to sensitive areas, wildlife habitat and fresh water aquatic habitat in the Coldwater, Nicola, Thompson and Fraser Rivers, and spill prevention and response capabilities of the proponent.

The Crown also appreciates Coldwater's concerns regarding spills, and the potential for a spill to impact Coldwater's use and occupation of its asserted traditional territory, ability to make decisions over the area impacted, and the potential for a spill to adversely impact any economic development aspirations Coldwater has for its territory.

A discussion of the potential impacts of a pipeline spill on Aboriginal Interests is provided in section 4.3.6 of this Report. With regards to groundwater resources, NEB Condition 39 requires the proponent to file a hydrogeological report relating to the aquifer at Coldwater Indian Reserve No. 1 that must include, among other things, quantification of the risks posed to groundwater supplies on Coldwater IR No. 1 in the event of leaks, accidents or malfunctions from the Project, a description of proposed measures to address identified risks, and a summary of consultations undertaken with the Coldwater. In consideration of this information and analysis, as well as information available to the Crown on Coldwater's Aboriginal Interests and concerns raised by Coldwater during the NEB process and Crown consultation process, a pipeline spill associated with the Project could result in minor to serious impacts on Coldwater's Aboriginal Interests. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. The Crown acknowledges that Coldwater relies primarily on an aquifer crossed by the Project for their drinking water, as well as subsistence foods and natural resources, and are at greater risk for adverse effects from an oil spill⁴. To address the concerns raised by Coldwater during the post-NEB Crown consultation period, EAO proposes a condition that would require, in addition to NEB Condition 39, characterization of the aquifer recharge and discharge sources and aquifer confinement, and include an assessment of the vulnerability of the aquifer.

Subsequent to the identification and apparent remediation of contamination at or near a site located on the Coldwater Indian Band reserve, continuing concerns were expressed by Coldwater and additional contamination was identified and has been investigated. To follow-up on this concern, the Crown consultation team worked with the NEB to seek an update on progress towards resolving the issue. As of October 2016, the NEB has confirmed that this is an ongoing file under the NEB's Remediation Process Guide. Trans Mountain has submitted a Remedial Action Plan (RAP) to the NEB for review, and provided

⁴ Trans Mountain Final Argument, p. 85 and 207

a copy to Coldwater seeking its feedback. This is also an active file under the NEB's engagement and issue resolution program.

VI - Conclusions

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations, the Crown expects impacts of the Project on the exercise of Coldwater's Aboriginal Interests would be minor-to-moderate.

The Crown is also supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Coldwater's ongoing involvement and participation the proponent's detailed Project planning, including the development of site-specific measures to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Coldwater in emergency response planning activities. The federal Crown is also considering incremental measures that would further accommodate the potential adverse impacts of the Project on Coldwater, as discussed in Sections 4 and 5 of the main body of this Report.

Appendix B.11 – Lower Nicola Indian Band

I - Background Information

Lower Nicola Indian Band (Lower Nicola) is part of the Nlaka'pamux (pronounced "Ing-khla-kap-muh") Nation, whose asserted traditional territory encompasses part of south central British Columbia (BC) from the northern United States to north of Kamloops. Lower Nicola's asserted traditional territory is in the valley of the Lower Nicola River. Lower Nicola has 7,128 hectares of reserve land, spread out over 10 reserves. As of June 2016, Lower Nicola had a registered population of 1,253 (504 members are living on Lower Nicola's reserves, 52 are living on other reserves, and 694 are living off-reserve). Lower Nicola members historically spoke the Nlaka'pamux language. Today, there are a small and growing number of Nlaka'pamux speakers and the community is working to revitalize its language.

Lower Nicola is a party to the Nlaka'pamux Nation protective *Writ of Summons*, which was filed in the BC Supreme Court on December 10, 2003. The *Writ* also includes Ashcroft Indian Band, Boothroyd Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Kanaka Bar Indian Band, Lytton First Nation, Nicomen Indian Band, Nooaitch Indian Band, Oregon Jack Creek Indian Band, Shackan First Nation, Siska Indian Band, Skuppah Indian Band, and Spuzzum First Nation.

Lower Nicola's filings with the National Energy Board (NEB) state that their people have long relied on hunting and fishing for sustenance and for cultural fulfillment and that they have and continue to hunt moose, elk, and deer throughout their territory. Lower Nicola also states that they have traditionally used the Coquihalla and Fraser River to fish for salmon, whitefish, sucker, sturgeon, and Dolly Varden trout. The Coquihalla River is also an important site for the gathering of various bird species.

The proponent will be seeking Governor-in-Council authorization for *Indian Act* s.35 tenures if the proponent is granted rights to expropriate or alternatively *Indian Act* s.28(2) permits from Lower Nicola Indian Band to allow for the expansion of the pipeline. The *Indian Act* tenures will require a Band Council Resolution requesting the tenures be issued. Additionally, the form of agreements and fair market compensation will be considered before the approval of the tenures. The proponent will also be seeking permits from Indigenous and Northern Affairs Canada (INAC) for temporary stockpile sites proposed on reserves of the Lower Nicola.

II - Preliminary Strength of Claim Assessment

- Lower Nicola is one of the Nlaka'pamux Nation bands. Approximately 226 kilometres (km) of the proposed pipeline right-of-way (RoW) and four pipeline facilities (i.e. Kamloops Terminal, Stump Station, Kingsvale Station and Hope Station) would be located within Nlaka'pamux's asserted traditional territory. The existing RoW passes through three Lower Nicola reserves and is adjacent to others. The Project would cross the following Lower Nicola reserves: Joeyaska #2; Zoht #4; and Zoht #5.
- The Crown's preliminary assessment of the Nlaka'pamux Nation's claim for Aboriginal rights over the section of the project that spans Kamloops to southwest of Hope involves a range of a weak to strong *prima facie* claims. The areas assessed to have a strong *prima facie* claim are in the vicinity of the Nicola Valley south towards the Coquihalla Lakes, which most available ethnographers indicate to be within the Nlaka'pamux territory, and there are some indications of Nlaka'pamux hunting, fishing, gathering uses in the Nicola valley area around the time of contact, with connecting trails. The claims diminish in the area north of Stump Lake, as it is unclear whether this falls within Nlaka'pamux territory, and there is indication of an ancestral

connection between the Nlaka'pamux community who moved into the north end of Nicola Lake, intermarrying with the Stewix/Okanagan, which could support a moderate prima facie claim. The prima facie claim diminishes to weak in the vicinity of Hope as it is understood that area is outside the area ethnographers attribute to the Nlaka'pamux¹.

- The Crown's preliminary assessment of the Nlaka'pamux Nation's claim for Aboriginal title over the section of the project that spans Kamloops to southwest of Hope, involves a range of a weak to strong *prima facie* claim. The area assessed to have a strong *prima facie* claim is in the vicinity of Merritt, which is within the area considered by ethnographers to be within Nlaka'pamux territory, and there are indications of several historic villages in proximity in the Nicola Valley that were likely occupied by the Nlaka'pamux at 1846. The areas with weaker claims include those outside the area ethnographers attribute to the Nlaka'pamux (e.g. north of Stump Lake to Kamloops, and in the vicinity of Hope) and there is no/limited indication of historic Nlaka'pamux use at 1846².

III – Involvement in the NEB and Crown Consultation Process

Given the nature and location of the project, and the potential impacts of the project on Lower Nicola's Aboriginal Interests, the Crown is of the view that the legal duty to consult Lower Nicola lies at the deeper end of the *Haida* consultation spectrum. Lower Nicola was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which affords Lower Nicola opportunities to be consulted at a deeper level.

Lower Nicola was an intervenor in the NEB review of the project. They provided oral traditional evidence ([A4E9I3](#)), multiple rounds of information requests and written evidence and written final argument. Lower Nicola signed a contribution agreement with the NEB for \$80,500 in participant funding and travel for four to the hearing. The Major Projects Management Office (MPMO) provided Lower Nicola \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Lower Nicola an additional \$14,000 to support their participation in consultation following the release of the *NEB Recommendation Report*. Lower Nicola signed a contribution agreement with the MPMO for a total of \$12,000 in allocated funding. EAO provided \$5,000 in capacity funding to Lower Nicola to participate in consultation with the Crown.

Lower Nicola met with the Crown on June 12, 2014, May 17 and October 12, 2016 to discuss the project.

A first draft of this Consultation and Accommodation Report (the Report) was provided to Aboriginal groups for review and comment on August 17, 2016. Lower Nicola provided preliminary comments on the first draft of this Report on August 25, 2016. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016 and Lower Nicola provided comments on November 15, 2016. Lower Nicola noted that the comments on the first and second draft were submitted to the Crown under protest due to unrealistic timelines, lack of capacity, and lack of adequate funding. Comments received on the second draft included Lower Nicola's disagreement with the

¹ Ministry of Justice, Aboriginal Research Division, Nlakapamux: Review of Ethnographic and Historical Sources (Revised November 20, 2013; Teit, James, "The Thompson Indians of British Columbia" in *Memoirs of the American Museum of Natural History*, Volume II, 1900.; Dawson, George M., "Notes on the Shuswap People of British Columbia" in *Transactions of the Royal Society of Canada*, Section II, 1891; Wyatt, David, "Thompson" in *Handbook of North American Indians*, Vol. 12, Washington: Smithsonian Institution, 1998.

² Ibid

Crown's assessment of the degree of impacts of the project on Lower Nicola's Aboriginal Interests, specifically stating the Crown mischaracterizes the level, detail and intensity of the potential impact of the project, and the potential impacts of the project on Lower Nicola's Aboriginal title are significant and permanent. Lower Nicola also stated that they disagreed with the Crown's preliminary assessment of the Nlaka'pamux Nation's claim for Aboriginal title over the section of the project, maintaining the Nlaka'pamux Nation has a strong *prima facie* case for Aboriginal title in all areas asserted. Lower Nicola provided a separate Aboriginal group submission to the Crown on November 15, 2016.

IV - Summary of Key Lower Nicola Issues and Concerns Raised

Throughout the NEB review and Crown consultation process, Lower Nicola has raised the community's views of the consequences of the project proceeding to construction and operation. Lower Nicola's key concerns have focused on cultural and social impacts, environmental impacts, and food security. The Crown has gained its understanding of Lower Nicola's issues and concerns through the community's involvement in the NEB process, including submissions made during the NEB hearings^{3,4,5}, the responses Lower Nicola provided to the Crown on its Information Request (IR), and through consultation with the Crown, including correspondence and meetings held in June 2014, May 2016 and October 2016. In addition, the Crown has considered information regarding the proponent's engagement with Lower Nicola as described in the proponent's Aboriginal Engagement Report (July 2016). The Crown has considered all comments and information received from Lower Nicola throughout the environmental assessment process. The Crown's understanding of Lower Nicola's key Project-related issues and concerns is summarized below. This is a summary of the key issues raised by Lower Nicola, and does not present the views of the Crown as to whether it agrees or not with the issues.

Cultural and Social Impacts:

Lower Nicola is concerned that their access to traditional land use (TLU) sites will be impacted by the Project crossing their traditional territory. Lower Nicola has stated that its members gather various wild berries and other foods, including huckleberries, soapberries, blueberries, potatoes, garlic, and mosses and that they are concerned that these plant species will be harmed by the project, possibly rendering them inedible or unavailable. Lower Nicola also noted they are concerned with the alteration of culturally important native vegetation species, and that proper and effective reclamation of any construction phase effects would be required to ensure their continued ability to practice traditional gathering activities. Sustainability of local mule deer, elk and moose populations is also important for maintaining a traditional lifestyle and changes to ungulate habitat is a primary concern.

The TLU Study prepared by the Lower Nicola for the project demonstrated that moose occur in high densities near Lac le Jeune, particularly in the area designated as critical wintering range in the Kamloops Land and Resource Management Plan, which is to the west of the proposed pipeline RoW.

³ LGL Limited Environmental Research Associates. 2015. Information Request Route 2. Prepared for Lower Nicola Indian Band. January 2015. ([A4G6G7](#))

⁴ LGL Limited Environmental Research Associates. 2016. Trans Mountain Pipeline Expansion Project: Final Argument. Prepared for Lower Nicola Indian Band. (January 12, 2016) ([A4X5T8](#))

⁵ d'Entremont, M.V. and K. Froese. 2015. Trans Mountain Pipeline ULC Trans Mountain Expansion Project - Technical Review of ESA submitted to the National Energy Board as per Hearing Order OH-001-2014. Unpublished report by LGL Limited environmental research associates, Sidney, BC, and GatePost Risk Analysis, Calgary, AB for the Lower Nicola Indian Band, Merritt, BC. 36 pp ([A4Q7H4](#))

Another important Lower Nicola hunting area for moose is in the hills southeast of Zoht reserve no. 5, which also is in close proximity to the proposed project RoW. Lower Nicola stated that potential effects to moose will be of direct consequence to Aboriginal rights related to the ongoing practice of hunting moose. Lower Nicola noted that present disturbances on the landscape, including the existing Trans Mountain Pipeline, have had negative impacts on local fish and wildlife populations and on Lower Nicola's traditional seasonal round. Lower Nicola are concerned about project effects on trapping, and in particular notification and compensation in respect of any loss of use of Lower Nicola members' trap lines.

Cultural ceremonies, traditions and historic sites, as well as access to TLU sites, will be impacted by the project crossing Lower Nicola's traditional territory, including impacts on previously unrecorded pithouses located on the north end of Zoht Indian Reserve no.4. Lower Nicola are concerned about the loss of access or damage to culturally sensitive sites (e.g., sacred or ceremonial sites), and cultural impacts associated with the potential loss of culture and loss of ability to practice traditional resource use or ceremonial activities (e.g., as a result of operations, a spill, or increased traffic through traditional territory).

Methodology, Process, and Consultations

Lower Nicola has also expressed dissatisfaction with the NEB process and Crown consultation process, stating they are too restrictive in terms of the issues considered and the time allotted. Due to unrealistic timelines, lack of capacity to complete document review, a lack of expertise capacity for technical review and lack of funding overall, Lower Nicola has stated that the consultation process is fundamentally flawed and it is unrealistic to expect them to meaningfully participate in the information-sharing that forms the foundation of any consultation. Lower Nicola does not accept that the Crown can discharge its duty to consult through reliance on the NEB process. Lower Nicola is of the view that there has been a lack of discussion around financial benefits, and compensation and accommodation of Lower Nicola's rights and interests.

Lower Nicola found it very challenging to address the concept of holism from the Aboriginal definition of health in the context of the environmental assessment and the NEB project review process and approach. Lower Nicola is concerned that the information presented in the Application reflects an inadequate understanding of the Lower Nicola's Aboriginal rights, traditional land use practices and traditional knowledge. Specifically, Lower Nicola stated:

- The breadth of traditional ecological knowledge (TEK) provided in the Application was minimal and did not demonstrate full consideration of TEK;
- The proponent used and assessed TEK as an add-on to field survey work, which shows a lack of understanding of appropriate social science research design, methods and ethical standard for consent, as well as a lack of respect for TEK;
- The collection of TEK through the participation of Aboriginal communities in field studies likely represents only a very small portion of use and occupancy in the project area; and,
- The results and conclusions of the Application with regard to TEK are not scientifically credible and should not be used in the decision making process.

Lower Nicola also expressed their view that BC failed to engage in a meaningful and honest way with Lower Nicola and that a critical flaw in the consultation process is that the Crown is relying on information gathered by the proponent to come to conclusions on rights and impacts without appropriate third party verification. Lower Nicola does not feel that the Crown has consulted with them on a Nation-to-Nation basis.

Cumulative Effects

Lower Nicola is concerned that many of the components of the project application are evaluated in isolation of each other which is incompatible with Aboriginal perspectives on health and well-being that takes a more holistic approach. Lower Nicola is concerned about the level of cumulative impacts on wildlife and wildlife habitat within the Nlaka'pamux traditional territory. They stated that the environmental assessment approach excluded existing cumulative effects by failing to recognize historical conditions and environmental trends, and inadequately addressing effects on the status of wildlife populations. Lower Nicola is concerned that continued resource development in the region will further erode ecological integrity unless effective mitigation measures are implemented. Lower Nicola also stated that the NEB should consider the issue of climate change as they are concerned about the projects' contribution to greenhouse gas emissions and the federal governments' perceived lack of action.

Environmental Impacts

Lower Nicola members have long relied on hunting and fishing for sustenance and for cultural fulfillment. They have hunted, and continue to hunt moose, elk, and deer throughout their territory. The Coquihalla River is also an important site for the gathering of various bird species. Lower Nicola is concerned about the long-term impacts of the creation of a pipeline corridor or a pipeline rupture on these important species. Protection of wildlife corridors and mitigation measures (e.g., wildlife bridges) to enable unimpeded migration was also raised by Lower Nicola. Lower Nicola are concerned about impacts on wildlife (habitat, dens, and nests) and species at risk, and the pipeline corridor crossing parks and protected areas. Of particular concern are wildlife species that are hunted by community members for subsistence purposes. Lower Nicola noted concerns about the impacts of the Project to the land, water and plant and wildlife species, including moose, deer, grizzly bear, spotted owl habitat, Lac du Bois Grasslands Protected Area, Finn Creek Provincial Park, North Thompson River Provincial Park and Coquihalla Summit Recreational Area.

Lower Nicola emphasized that the Project runs parallel to waterways which are of central importance to the community. Concerns related to potential impacts to the Coquihalla, Fraser and Nicola River watersheds and Clapperton Creek region, including the issues of erosion, sediment control and water quality impacts related to the project were also raised. Lower Nicola requested that the proponent use a trenchless crossing, specifically horizontal directional drilling (HDD), for the Nicola River crossing. Any oil spills that impact the Fraser and Thompson River basins would also affect fish and fish habitat in the lower Nicola River. Lower Nicola is concerned that the Nicola River already has excessive bank erosion, lateral channel migration and poor pool-riffle development as a result of forestry, agriculture, irrigation and urban developments. Concerns related to the contamination of waterways due to use of herbicides to manage vegetation in the pipeline right-of-way were also raised.

Air quality concerns (as a result of construction, operation, and/or accident or malfunction) have also been expressed by Lower Nicola for both marine and terrestrial environments. Lower Nicola raised major concerns that the project will result in significant and negative contribution to climate change, and the project's impact on climate change should be evaluated.

Health and Human Safety Impacts

The project is proposed to cross the Zoht and Joeyaska reserves, near member residences, in addition to land at Coquihalla/Juliet Creek that Lower Nicola owns fee simple, and the group is concerned about human health risks, including negative impacts to human health caused by an oil spill in these areas. Contamination of country food is a concern, including all project-related activities that could have an

indirect effect on country food and physical health. Lower Nicola is also concerned that the assessment of community health in the Application generalized the project's effects on the indicators of community health across the entire length of the pipeline.

Accidents and Malfunctions (marine/terrestrial)

Lower Nicola is also concerned about the likelihood and prevention of spills. Key concerns arise particularly from the potential for low-level leakage from the pipeline and catastrophic pipeline failure leading to contamination of terrestrial and aquatic (freshwater) ecosystems. Additional concerns are about the potential for oil spills in the Salish Sea that could have a devastating impact on the salmon that serves as many band members' main food source. The group is concerned about the potential effects of a catastrophic oil spill on Aboriginal well-being, considering impacts on traditional and cultural activities (hunting, fishing, gathering), sacred places, food and water security, and indirect impacts due to risk perception, and mental and spiritual health. Risk perception is connected not only to contaminants, but also a sense of place, connection to the land, social relationships, and traditional cultural spiritual practices. Lower Nicola also expressed concern of the lack of clarity of the role Lower Nicola will have in developing spill response plans.

Lower Nicola also noted concerns that the proposed Ajax Mine, whose footprint overlaps the proposed project, will have potential impacts to the safe operation of the pipeline.

Impacts on Aboriginal Rights and Title

Lower Nicola stated that the project has the potential to adversely impact Lower Nicola's Aboriginal rights and title. Lower Nicola is concerned with the proponent's Environmental and Socio-economic Assessment (ESA), and lack of clarity around how Aboriginal rights were assessed. The results and conclusions of the ESA with regard to TEK are not considered scientifically credible by Lower Nicola and should not be used in the decision-making process. Also, the information presented in the ESA is not considered an adequate understanding of Lower Nicola's Aboriginal rights, traditional land use practices and traditional knowledge to assess the potential effects of the project on Lower Nicola use of lands and resources. Lower Nicola noted that impacts on Aboriginal title have both governance and economic considerations. Alteration of native vegetation is of concern, in particular the direct impact on asserted and established Aboriginal rights to harvest plants species of cultural importance. A reduction of effective moose winter foraging habitat and effective winter security / thermal habitat in the southern and central interior ecoprovinces, which overlap Nlaka'pamux traditional territory, directly affects the ability of Aboriginal people to practice their rights. An important hunting area for moose is located in the hills southeast of Zoht IR no.5, in close proximity to the proposed pipeline corridor. Potential effects to moose will have a direct impact on Aboriginal rights related to the ongoing practice of hunting moose. It is not clear to Lower Nicola what environmental protection measures BC will take to protect their rights and title. Lower Nicola also notes that the infringements of the existing pipeline on their rights and title has not yet been addressed.

Economic Impacts

Lower Nicola notes the economic impacts of community members not being able to use the land and having to purchase food, and guides that rely on the land. Specifically, Lower Nicola is concerned about the project crossing the intersection of Highway 5 and Highway 5A (i.e., Exit 286), which is fee simple land. From the perspective of commercial development, this intersection is considered high value land. Lower Nicola considers this location an economic opportunity. Also, it is not clear to Lower Nicola the extent to which BC will share future tax revenues with Lower Nicola.

The Crown is in receipt of an open letter sent to Prime Minister Justin Trudeau, Alberta Premier Rachel Notley, and British Columbia Premier Christy Clark from a collective of Aboriginal groups, including Lower Nicola. This letter identifies concerns related to Indigenous consent for the Project and sets out the example of an Indigenous Committee as one means of potentially engaging Aboriginal groups directly in the regulatory oversight of the Project.

Accommodation Proposals

Lower Nicola provided the federal and provincial Crown with proposed accommodation measures to consider in relation to accommodating potential impacts of the Project on Lower Nicola's Aboriginal Interests, including, but not limited to:

- Lower Nicola is seeking financial benefits from the Crown, both in relation to the existing pipeline and the proposed expansion. Lower Nicola is interested in having financial benefits conversations with Canada, BC and the Province of Alberta;
- As stated in the Proponent's Aboriginal Engagement Report (July 2016), Lower Nicola request:
 - Mitigation and reclamation strategies similar to those outlined in the Rare Ecological Community and Rare Plant Population Management Plan be implemented for plant species of cultural importance and that Lower Nicola be involved in the implementation of these mitigation measures, including participating in supplemental surveys, in advance of construction, to identify the plant species of cultural importance;
 - A trenchless crossing, specifically HDD, be implemented for the Nicola River Crossing;
 - Quality assurance verification to include reporting of actions taken, or proposed, to correct non-conformances of NEB conditions;
 - The TLU and traditional marine resource use (TMRU) Investigation Report to include a description and justification for how Trans Mountain has incorporated the results of consultation with Aboriginal groups and government authorities;
 - Plans (e.g., Training and Education Monitoring Plan, Access Management Plan, Pipeline Environmental Protection Plan, Riparian Habitat Management Plan, Wildlife Species at Risk Mitigation Plan, Habitat Restoration Plan, and Grizzly Bear Mitigation Plan) be developed in collaboration with, and approved or validated by the affected Aboriginal groups;
 - Proposed measures to address business capacity gaps for Aboriginal groups include skills training and education;
 - Request that Trans Mountain must file with the NEB, at least 4 months prior to commencing construction, a Traditional and Culturally Significant Plant Species Mitigation and Replacement Plan;
 - The updated lists of infrastructure sites and watercourse crossings be provided to affected Aboriginal groups at the same time that they are filed with the NEB, and the HDD geotechnical and feasibility reports be provided to affected Aboriginal groups prior to being accepted;
 - The development of offsetting plans and measures be developed in collaboration with Aboriginal groups and should prioritize options to improve Aboriginal fisheries;
 - Apply the same level of reporting and protection to be used for municipal water sources for water wells;
 - Trans Mountain collaborate with Lower Nicola on a plan for Aboriginal group participation in construction monitoring, the Emergency Response Plan (ERP) for construction include a reporting component that meets the requirements outlined in NEB Condition 140, and Lower Nicola be included in the consultation on improvements to Environmental Management Plan (EMP); and

- The Emergency Preparedness and Response Exercise and Training Program to include the participation of affected Aboriginal groups and that, prior to commencing operations, an emergency response exercise be carried out with affected Aboriginal group. The full-scale emergency response exercises to be carried out during operations should include participation by Lower Nicola with training for Lower Nicola members in emergency response procedures.

Section 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Lower Nicola that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

Lower Nicola's Response to NEB Recommendation Report

Lower Nicola communicated to the Crown that the *NEB Recommendation Report* failed to account for significant and unique impacts on Lower Nicola interested, referring to Aboriginal groups, and treating Aboriginal groups as a single collective. Lower Nicola stated that the *NEB Recommendation Report* mischaracterized the level of detail and seriousness of impacts of the project on Lower Nicola, in that the project's impacts can be reversed. However, Lower Nicola disagree with this considering the proponent is not required to remove the project at the end of its useful life and many impacts of the project, if they occur, will not be reversible. The *NEB Recommendation Report* notes temporary impacts during construction; however Lower Nicola considers the land to be already converted to a point where it does not allow Lower Nicola to use their territory as desired.

Lower Nicola noted the *NEB Recommendation Report* did not consider spills that have occurred on or near existing infrastructure. Lower Nicola expressed concerns that the potential impacts of project are more intense and significant, and less reversible, than characterized in the *NEB Recommendation Report*. Modifications to the draft conditions set out by the NEB to address gaps and Lower Nicola's concerns are listed above.

V - Potential Impacts of the Project on Lower Nicola's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the project on Aboriginal Interests are provided in Sections 2.4.3 and Section 4.3 of this report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal Group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), including by individual members or families.

The discussion in this section focuses on potential impacts of the project on Lower Nicola's Aboriginal Interests. These potential impacts are characterized by considering how the project could affect several factors important to Lower Nicola's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of project impacts on Lower Nicola's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Lower Nicola, Lower Nicola's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued.

Lower Nicola completed a traditional land and resource use (TLRU) study in 2014 titled "*Traditional Land Use Report*". The report included identification of traditional land uses in the segment of the proposed pipeline from Black Pines to Hope. Traditional land uses identified by Lower Nicola include hunting moose and deer, gathering plants, information on fishing sites, sacred sites, trapping sites, habitation sites, gathering areas for community members and trails travelways. The interim results of the TLRU were summarized in *Volume 5B* ([A3S1S0](#)) and *Volume 5D* ([A3S2H1](#)) of the Project Application. In its Supplemental Technical Report ([A4F5D1](#)), the proponent estimated approximate distances and directions from the pipeline corridor based on information in Lower Nicola's final TLRU report.

Impacts on Hunting, Trapping and Plant Gathering

As summarized in the TLRU, Lower Nicola community members historically hunted moose, deer, elk, mountain goat, bighorn sheep, beaver, bear, ducks, geese, and grouse. Lower Nicola gathered a variety of roots, berries, seeds, nuts, tree bark, lichen, mushrooms, tobacco, cedar, and other wild plants. Lower Nicola community members used controlled burning to clear brush in order to grow berries and roots for harvesting. Plants gathered were used for food, medicine, dye, cleansing agents, adhesives, fuel, building material, baskets caches, and trade. Community members also noted that Saskatoon berries are an important resource that were used to trade with other First Nations along the Pacific Coast. In terms of trapping activities, Lower Nicola community members trapped beaver, coyote, marten, mink, muskrat, rabbit, fox, grouse, ermine, lynx and mink. Currently, community members hunt moose and deer, trap muskrat, beaver, bobcat, lynx, mink and weasel, and harvest berries and mushrooms. As stated in Lower Nicola's Final Argument submitted to the NEB, the Nlaka'pamux people used more than 120 species of native vegetation as foods and at least 200 species for medicinal purposes

Lower Nicola identified many concerns related to environmental effects of the project on hunting, trapping, and plant gathering activities, including protection of wildlife corridors and migration, sustainability of local mule deer and moose populations, changes to ungulate habitat, and long-term impacts of the creation of a pipeline corridor on moose, elk, deer and various bird species throughout their territory. Other concerns include the alteration of native vegetation, in particular the direct impact on asserted and established Aboriginal rights to harvest plants species of cultural importance, and plant species that may be harmed by the project, possibly rendering them inedible or unavailable. As described in the *NEB Recommendation Report*, project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, old growth forests, wetlands, and wildlife and wildlife habitat (including species at risk) listed species. NEB conditions, if the project is approved, would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping, and gathering (section 4.3.1 of this Report). With regards to specific concerns raised by Lower Nicola, the proponent would implement several mitigation measures to reduce potential effects to species important for Lower Nicola's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the

immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP), and the vegetation and wildlife management plans. The proponent is also committed to meeting with Lower Nicola to further discuss and address concerns, where possible, prior to the start of construction.

As described in the Final Argument submitted to the NEB, Lower Nicola traditionally followed a seasonal round of traditional land and resource use and moved throughout their territory according to the season. Traditional hunting grounds of the Nlaka'pamux people encompass three major rivers: Fraser, Thompson, and Nicola; and the valleys of these rivers. During the TLRU study, Lower Nicola identified a total of 55 hunting, trapping, and plant gathering sites. Twelve of these sites are located within the proposed pipeline corridor: six hunting sites, including sites along the Coldwater and Nicola Rivers and Clapperton and Godey Creeks; four plant gathering sites including sites along the Coldwater and Nicola Rivers; and two trapping sites including sites in the Coldwater and Nicola regions. An additional five hunting, trapping, and plant gathering sites are located within 2 km of the proposed pipeline corridor, while the remaining 38 hunting sites are 2 km outside of the project area or the approximate distance from the project area was not stated in the TLRU study.

Lower Nicola raised concerns with the project's potential impacts relating to specific locations and access to hunting, trapping, and plant gathering activities, particularly that their access to TLU sites will be impacted by the project crossing their traditional territory, and moose hunting sites near Lac le Jeune and in the hills southeast of Zoht reserve no. 5. Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Lower Nicola's access to hunting, trapping and plant gathering activities, largely confined to the project footprint for the pipeline and associated facilities. Construction and reclamation activities may result in disruptions to access and a loss of harvesting opportunities for Lower Nicola. NEB conditions, if the project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access to hunting, trapping, and gathering sites (section 4.3.1 of this Report). With regards to specific concerns raised by Lower Nicola, the proponent would implement several mitigation measures to reduce potential effects on TLRU sites, such as management plans that include access management, scheduling and notification of Project activities, and environmental monitoring programs that monitor access control measures. The Access Management Plan is intended to reduce disturbances caused by access, construction equipment and vehicle traffic, during and following construction in order to minimize disturbance to access to Lower Nicola's traditional lands. The proponent is committed to minimizing the development of access routes, controlling public access along the construction right-of-way, selecting appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent will work with applicable resource managers, traditional land and resource users to define locations where access control is necessary, and what type(s) of access control will be implemented. In the event that hunting, trapping, and plant gathering sites are identified during ongoing engagement with Lower Nicola prior to construction, the sites will be assessed, and appropriate mitigation measures will be determined. The proponent committed to working with Lower Nicola to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Lower Nicola expressed concern with direct and indirect effects of the project on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities, including cultural impacts associated with the potential loss of culture and loss of ability to practice traditional

resource use. Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Lower Nicola's hunting, trapping, and plant gathering activities. This short-term disruption could temporarily alter the behaviour of community members' hunting, trapping or plant gathering activities during construction, and that reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the project, could have spiritual and cultural impacts on community members. NEB conditions, if the project is approved, would either directly or indirectly avoid or reduce potential impacts on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities (section 4.3.1 of this Report). The proponent has also committed to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the project.

In consideration of the information available to the Crown from the NEB process, consultation with Lower Nicola, Lower Nicola's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, project construction and routine maintenance during operation are expected to range from minor-to-moderate to moderate impacts on Lower Nicola's hunting, trapping, and plant gathering activities. The moderate impacts on Lower Nicola's trapping activities would arise from project construction and routine maintenance, and would occur within the project footprint. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Lower Nicola;
- Project-related pipeline and facility construction and routine maintenance activities within Lower Nicola's traditional territory are temporary and thus, likely to cause minor disruptions to Lower Nicola's community members accessing traditional hunting, trapping and plant gathering sites within the project footprint, and negligible disruptions for sites that are not within the project footprint; and
- Concerns identified by Lower Nicola regarding project-related effects on social, cultural, spiritual, and experiential aspects of their hunting, trapping and plant gathering activities.

Impacts on Freshwater Fishing

As described in the Final Argument submitted to the NEB, fishing has been key to the Nlaka'pamux economic, cultural, and social lifestyles and the Nlaka'pamux have a rich history with respect to fish harvesting, particularly salmon. As summarized in the TLRU, fishing was historically a communal activity for Lower Nicola as each community had a fishery that was typically designated by a fishing rock. Community members used various methods, including fish traps, spears, gill nets, bag nets and corralling fish with stones, in order to catch trout, salmon, Dolly Varden, suckers, kokanee and whitefish. The Nicola and Fraser Rivers are of particular importance to the Lower Nicola and fish such as burbot, kokanee, whitefish and other species continue to be an important resource for the community. Community members fish for salmon in the Nicola, Coldwater, Fraser and Thompson Rivers using traditional dip and gill nets, and ice fish for rainbow trout on Mammot Lake, Fish Lake and Nicola Lake. Burbot, kokanee and whitefish are also harvested and community members preserve fish by drying, canning or smoking.

Lower Nicola identified many concerns related to environmental effects of the project on freshwater fishing activities, including potential impacts to the Coquihalla, Fraser and Nicola River watersheds and Clapperton Creek region, in particular fish and fish habitat and riparian habitats and issues of erosion, sediment control and water quality. Lower Nicola specifically requested that the proponent use a

trenchless crossing, horizontal directional drilling (HDD), for the Nicola River crossing. As described in the *NEB Recommendation Report*, Project-related construction and operation could result in low to moderate environmental effects on fish and fish habitat and surface water. Moderate effects to fish and fish habitat would be localized to individual watercourse crossings where any potential serious harm would be compensated by offset measures. NEB conditions, if the project is approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (section 4.3.2 of this Report). A number of recommended NEB conditions require the proponent to file reports that will monitor project-related impacts to fish, fish habitat and riparian habitats. With regards to specific concerns raised by Lower Nicola, the proponent would implement several mitigation measures to reduce potential effects to species important for Lower Nicola's fishing activities. The proponent submitted a feasibility report to the NEB for the Nicola River crossing. Further, the proponent has committed to time watercourse crossing construction activities to occur within the least risk biological windows in an attempt to avoid causing serious harm to fish, has committed to working with Aboriginal groups to identify the most appropriate means of offsetting serious harm to marine fish and fish habitat, and has proposed the implementation of channel and bank reclamation measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat.

In their TLRU study, Lower Nicola identified a total of 15 fishing sites, five of which are within the proposed pipeline corridor including sites along Clapperton and Moore Creeks as well as the Coldwater and Nicola Rivers. Lower Nicola identified an additional two fishing sites within 2 km of the proposed pipeline corridor, while the remaining eight sites are outside 2 km of the project area or the approximate distance from the was not stated in the TLRU study. In *Volume 5B*, an additional fishing location was identified on the Nicola River located more than 2 km from the proposed pipeline corridor.

Lower Nicola raised concerns with the Project's potential impacts relating to specific locations and access to freshwater fishing activities, specifically that Lower Nicola's access to TLU sites will be impacted by the project crossing their traditional territory. Project-related construction and routine maintenance activities are expected to cause short-term, temporary disruptions to Lower Nicola's access to fishing activities. If construction and reclamation occur during the fishing season, there could be a potential reduction in access to waterways, staging areas, and fishing sites for Lower Nicola community members. However, disruptions to access would largely be confined to the project footprint for the pipeline and associated facilities during construction and reclamation. NEB conditions, if the project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access to fishing sites (section 4.3.2 of this Report). With regards to specific concerns raised by Lower Nicola, the proponent would implement several mitigation measures to reduce potential effects to fishing sites important for Lower Nicola's fishing activities. As previously discussed, the proponent is committed to minimize disturbance to access to Lower Nicola's traditional lands, as described in the Access Management Plan. The proponent is committed to working with Lower Nicola to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Lower Nicola expressed concern with direct and indirect effects of the project on social, cultural, spiritual, and experiential aspects of its freshwater fishing activities, including cultural impacts associated with the potential loss of culture and loss of ability to practice traditional resource use. As described previously, the project construction and routine maintenance is expected to cause short-term, temporary disruptions to Lower Nicola's fishing activities. This temporary interruption could mean that community members alter their fishing activities during construction, which could affect their participation in the traditional activity. NEB conditions, if the project is approved, would either directly

or indirectly avoid or reduce potential impacts on social, cultural, spiritual or experiential aspects of fishing activities (section 4.3.2 of this Report).

In consideration of the information available to the Crown from the NEB process, consultation with Lower Nicola, Lower Nicola's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, project construction and routine maintenance during operation are expected to result in a minor-to-moderate impact on Lower Nicola's freshwater fishing activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Lower Nicola;
- Project-related pipeline and facility construction and routine maintenance activities within Lower Nicola's traditional territory are temporary and thus, likely to cause minor disruptions to Lower Nicola's community members accessing traditional fishing sites within the project footprint, and negligible disruptions for sites that are not within the project footprint; and
- Concerns identified by Lower Nicola regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their freshwater fishing activities.

Impacts on Other Traditional and Cultural Practices

In the Final Argument submitted to the NEB, Lower Nicola described how the cultural well-being of Aboriginal communities depends in large part on members' continued ability to access and use traditionally important places and resources on the land. The knowledge and practices of traditional land and resource use are often family-specific, meaning that certain families have specialized knowledge about, or near-exclusive use of, some areas on the territory.

As described in the TLRU, Lower Nicola community members lived in villages containing domed pithouses that consisted of a few families to several hundred individuals prior to European colonization. Community members dispersed during the summer and stayed at seasonal summer camps. Lower Nicola community members used trails and travelways throughout the Nicola Valley and beyond to practice traditional and other cultural activities. The use of trails and travelways was also important for trading with other First Nation communities along the Pacific Coast. Historically, locations where Lower Nicola community members created pictographs became important community gathering places.

Lower Nicola identified many concerns related to environmental effects of the project on other traditional and cultural practices, including the loss of access or damage to culturally sensitive sites. As described in section 4.3.4 of the Report, project-related activities are not likely to result in significant adverse effects on the ability of Aboriginal groups to use land, waters or resources for traditional purposes. NEB conditions, if the project is approved, would either directly or indirectly avoid or reduce potential environmental impacts on physical and cultural heritage resources important for Lower Nicola's traditional and cultural practices (section 4.3.4). With regards to specific concerns raised by Lower Nicola, the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources. The proponent has committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during right-of-way finalization, narrowing the right-of-way in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments.

During the TLRU study, Lower Nicola identified a total of 90 cultural sites, including trails/travelways, campsites, pithouses, village sites, burial sites, graveyards, pictograph sites, a cemetery and a mythological place. Sixteen of the cultural sites are within the proposed pipeline corridor: four trails/travelways including those along the Coldwater and Nicola Rivers; eight habitation sites including historic pithouses in Joeyaska IR No. 2; one community gathering place, and three burial sites or potential burial sites in Joeyaska IR No. 2 and Coldwater. Lower Nicola requested that the locations of the unrecorded historic pithouse sites located at the north end of Zoht IR No. 4 be left undisturbed. Lower Nicola also requested that a community Elder be consulted about the locations of the unrecorded pithouses. In *Volume 5B*, historical village locations in valley bottoms and beside lakes were identified near the Fraser River Canyon and Nicola Lake. Semi-subterranean pit houses in Nicola Village sites were also identified. The locations of these village and pit house sites are more than 2 km from the proposed pipeline corridor.

Lower Nicola raised concerns with the Project's potential impacts relating to specific locations and access to other cultural and traditional practices, including cultural ceremonial, traditional and historical sites will be impacted by the project crossing their traditional territory, in particular the impact to previously unrecorded pithouses located on the north end of Zoht IR #4. As described in section 4.3.4 of the Report, project-related activities are expected to cause short-term disruptions that temporarily affect the ability of Aboriginal groups to access land, waters or resources for traditional purposes. The Crown appreciates that Lower Nicola's opportunities for certain traditional and cultural activities will be temporarily interrupted during construction and routine operation, and there could be reduced access to travelways, habitation sites, gathering sites, and sacred areas. However, temporary disruptions to Lower Nicola's traditional and cultural practices would be largely confined to sites within the project footprint for the pipeline and associated facilities. NEB conditions, if the project is approved, would either directly or indirectly avoid or reduce potential impacts on specific sites and access to physical and cultural heritage resources (section 4.3.4 of this Report). The Crown notes the proponent's commitment to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the project.

Lower Nicola expressed concern with direct and indirect effects of the project on social, cultural, spiritual, and experiential aspects of its other traditional and cultural practices, including cultural impacts associated with the potential loss of culture and loss of ability to practice traditional resource use or ceremonial activities. As described previously, project-related activities may result in temporary interruptions to Lower Nicola's cultural and spiritual practices, or that their participation in the traditional activity is curtailed, during project construction and routine maintenance activities.

In consideration of the information available to the Crown from the NEB process, consultation with Lower Nicola, Lower Nicola's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued, project construction and routine maintenance during operation are expected to result in a minor-to-moderate impact on Lower Nicola's other traditional and cultural practices. In reaching this conclusion, the Crown has considered several factors that have been discussed about, which are summarized as follows:

- Project-related construction and operation activities are likely to have minor to moderate environmental effects on Lower Nicola's traditional and cultural practices;
- Project-related construction and routine maintenance activities within Lower Nicola's traditional territory are temporary and thus, likely to cause minor disruptions to Lower Nicola's community

members accessing traditional and cultural practice sites within the project footprint, and negligible disruptions for sites that are not within the project footprint; and

- Concerns identified by Lower Nicola regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their other cultural and traditional practices.

Impacts on Aboriginal Title

The Crown notes that the project would be located within an area of Lower Nicola's traditional territory assessed as having a strong *prima facie* claim to Aboriginal title, in the vicinity of Merritt Valley, which is within the area considered by ethnographers to be within Nlaka'pamux territory, and there are indications for several historic villages in proximity in the Nicola Valley that were likely occupied by the Nlaka'pamux at 1846. The Project would cross three Lower Nicola reserves: Joeyaska #2; Zoht #4; and Zoht #5.

The Crown has actively consulted with Lower Nicola throughout the NEB process and Crown consultation process at a deeper level in an attempt to better identify, understand, and resolve concerns relating to Aboriginal title. Concerns related to Aboriginal title raised by Lower Nicola throughout the NEB and Crown consultation process include:

- Impacts could impede or disrupt Lower Nicola's use of its asserted traditional territory;
- Activities could affect Lower Nicola's ability to manage and make decisions over the project area;
- Project could affect Lower Nicola's economic development aspirations for its asserted traditional territory, in particular, the Project crossing the intersection of Highway 5 and Highway 5A (i.e., Exit 286), which is fee simple land; and
- Lack of discussion around financial benefits, and compensation and accommodation of Lower Nicola's rights and interests.

The Crown provides a description of the potential impacts of the project on Aboriginal title in section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid/reduce project impacts associated with the degree of disturbance to terrestrial and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the project, as well as NEB conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the project is approved. The Crown understands that, in addition to NEB conditions that would require the proponent to report on heritage resources and traditional use investigations (NEB Conditions 97 and 100), the proponent has committed to meeting with Lower Nicola prior to the start of construction to discuss and address concerns, where possible. It is noted that Lower Nicola has not executed a Mutual Benefits Agreement with the proponent.

Given the potential impacts of the project on Aboriginal title and various measures to address those impacts, as described in section 4.3.5, it is the Crown's opinion that the project is expected to have minor-to-moderate impacts on Lower Nicola's asserted Aboriginal title to the proposed project area.

Impacts Associated with Accidental Spills

Lower Nicola expressed several concerns with direct and indirect effects of project-related pipeline spills on their Aboriginal Interests, particularly related to potential impacts related to low-level leakage from

the pipeline, as well as catastrophic pipeline failure leading to contamination of terrestrial and aquatic ecosystems and impacts on Aboriginal well-being (considering direct impacts on traditional and cultural activities, sacred places, food and water security, and indirect impacts due to risk perception, and mental and spiritual health). Concerns related to potential effects of an inland oil spill to community health and wellbeing, fish and fish habitat, particularly in the Coquihalla, Fraser and Thompson River Basins, and future land use plans for Lower Nicola Indian Band reserves and fee simple land were raised.

Lower Nicola is concerned regarding spills, and the potential for a spill to impact Lower Nicola's use and occupation of its asserted traditional territory, ability to make decisions over the area impacted, and the potential for a spill to adversely impact any economic development aspirations Lower Nicola has for its territory.

A discussion of the potential impacts of a pipeline spill on Aboriginal Interests is provided in Section 4.3.6 of this Report. The pipeline RoW is proposed to cross three Lower Nicola reserves: Zoht Reserve #4, Zoht Reserve #5, and Joeyaska Reserve #2. In consideration of this information and analysis, the proposed crossing of three Lower Nicola reserves, as well as information available to the Crown on Lower Nicola's Aboriginal Interests and concerns raised by Lower Nicola during the NEB process and Crown consultation process, a pipeline spill associated with the project could result in minor to serious impacts on Lower Nicola's Aboriginal Interests. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who live nearby and rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill⁶.

VI - Conclusions

The Crown understands the project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions, and the existing pipeline safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations, the Crown expects impacts of the project on the exercise of Lower Nicola's Aboriginal Interests would be up to moderate.

The Crown is also supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Lower Nicola's ongoing involvement and participation the proponent's detailed project planning, including the development of site-specific measures to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Lower Nicola in emergency response planning activities. The federal Crown is also considering incremental measures that would further accommodate the potential adverse impacts of the project on Lower Nicola, as discussed in Sections 4 and 5 of the main body of this Report.

⁶ Trans Mountain Final Argument, p. 85 and 207

Appendix B.12 – Nooaitch Indian Band

I – Background Information

Nooaitch Indian Band (Nooaitch) is part of the Nlaka’pamux (pronounced “*Ing-khla-kap-muh*”) Nation, whose asserted traditional territory encompasses part of south central British Columbia (BC) from the northern United States to north of Kamloops. Nooaitch has two reserves: Nooaitch Reserve no. 10 (903.1 hectares [ha]) and Nooaitch Grass Reserve no. 9 (790.3 ha). Its total registered population as of June 2016 is 233 (105 are living on their Reserve, 20 are living on other Reserves and 108 are living off Reserve). Nooaitch members historically spoke the Nlaka’pamux language. Nooaitch is a member of the Nicola Tribal Association which also includes: Siska Indian Band, Nicomen Indian Band, Coldwater Indian Band, Shacken Indian Band, Cook’s Ferry Indian Band and Upper Nicola Band.

Nooaitch is a party to the Nlaka’pamux Nation protective *Writ of Summons*, which was filed in the BC Supreme Court on December 10, 2003, asserting Aboriginal title to a territory identified in the writ. The *Writ* also includes Lower Nicola Indian Band, Ashcroft Indian Band, Boothroyd Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook’s Ferry Indian Band, Kanaka Bar Indian Band, Lytton First Nation, Nicomen Indian Band, Oregon Jack Creek Band, Shackan First Nation, Siska Indian Band, Skuppah Indian Band, and Spuzzum First Nation.

Nooaitch’s filings with the National Energy Board (NEB) state that its people have long relied on hunting and fishing for sustenance and for cultural fulfillment and that they have and continue to practice traditional activities. Nooaitch states that they historically fished in Nicola Lake and used the fish for food and for trade with other communities. Nooaitch notes that there are burial grounds located just outside Nooaitch Reserve no. 10.

II – Preliminary Strength of Claim Assessment

- Nooaitch is one of the Nlaka’pamux Nation bands. Approximately 226 kilometres (km) of the proposed pipeline right-of-way (RoW) and four pipeline facilities (i.e. Kamloops Terminal, Stump Station, Kingsvale Station and Hope Station) would be located within Nlaka’pamux’s asserted traditional territory. The RoW is approximately 18 km east of Nooaitch’s main reserve.
- The Crown’s preliminary assessment of the Nlaka’pamux Nation’s claim for Aboriginal rights, over the section of the Project that spans Kamloops to southwest of Hope, involves a range of a weak to strong *prima facie* claims. The areas assessed to have strong *prima facie* claims are in the vicinity of the Nicola Valley south towards the Coquihalla Lakes, which most available ethnographers indicate to be within the Nlaka’pamux territory, and there are some indications of Nlaka’pamux hunting, fishing, gathering uses in the Nicola valley area around the time of contact, with connecting trails. The claims diminish in the area north of Stump Lake, as it is unclear whether this falls within Nlaka’pamux territory, and there is indication of an ancestral connection between the Nlaka’pamux community who moved into the north end of Nicola Lake, intermarrying with the Stewix/Okanagan, which could support a moderate *prima facie* claim. The *prima facie* claim diminishes to weak in the vicinity of Hope as it is understood that area is outside the area ethnographers attribute to historic Nlaka’pamux use¹.

¹ Ministry of Justice, Aboriginal Research Division, Nlakapamux: Review of Ethnographic and Historical Sources (Revised November 20, 2013; Teit, James, “The Thompson Indians of British Columbia” in *Memoirs of the American Museum of Natural History*, Volume II, 1900.; Dawson, George M., “Notes on the Shuswap People of British

- The Crown's preliminary assessment of the Nlaka'pamux Nation's claim for Aboriginal title over the section of the Project that spans Kamloops to southwest of Hope, involves a range of a weak to strong *prima facie* claims. The area assessed to have a strong *prima facie* claim is in the vicinity of Merritt, which is within the area considered by ethnographers to be within Nlaka'pamux territory, and there are indications for several historic villages in proximity in the Nicola Valley that were likely occupied by the Nlaka'pamux at 1846. The areas with weaker claims include those outside the area ethnographers attribute to the Nlaka'pamux (e.g. north of Stump Lake to Kamloops, and in the vicinity of Hope) and there is no/limited indication of historic Nlaka'pamux use at 1846².

III – Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Nooaitch's Aboriginal Interests, the Crown is of the view that the legal duty to consult Nooaitch lies at the middle to deeper end of the *Haida* consultation spectrum. Nooaitch was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which affords Nooaitch opportunities to be consulted at a deeper level.

Nooaitch was an intervenor in the NEB review of the Project, providing oral traditional evidence [A4E9W3], information requests [A3W8Q1], written evidence [A4Q0F4 and A4Q0F6] and written argument-in-chief [A4X5J5]. Nooaitch responded to Natural Resource Canada's Issue Tracking Table Information Request [A71245] by further elaborating their concerns. In letters sent to the EAO in May and June of 2016, Nooaitch identified additional issues and concerns regarding the Project and consultation by the Crown. The Crown is also in receipt of an open letter dated June 15, 2016, sent to Prime Minister Justin Trudeau, Alberta Premier Rachel Notley, and British Columbia Premier Christy Clark from a collective of Aboriginal groups, including Nooaitch. This letter identifies interests and concerns related to Crown consultation and Indigenous consent for the Project and proposes a role for Indigenous groups in overseeing and monitoring the Project over its lifecycle if approved.

Nooaitch has been active throughout the Crown consultation process, and have communicated their thoughts on the Project and consultation process via emails, letters, and phone calls. Nooaitch met with the Crown consultation team on June 12, 2014, and April 6, May 5, and October 21, 2016, to discuss the Project.

Nooaitch received \$15,400 in participant funding from the NEB plus travel for three to the hearing. The Major Projects Management Office (MPMO) offered Nooaitch \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Nooaitch an additional \$14,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Nooaitch signed a contribution agreement with the MPMO in response to the first offer, receiving a total of \$12,000 in allocated funding. During the October 21, 2016 meeting, Nooaitch was offered \$5,000 in capacity funding by EAO to participate in consultation with the Crown.

Columbia" in Transactions of the Royal Society of Canada, Section II, 1891; Wyatt, David, "Thompson" in Handbook of North American Indians, Vol. 12, Washington: Smithsonian Institution, 1998.

² Ibid.

The proponent stated that they entered into a confidential LOU with the Nicola Tribal Associated in July, 2013, that involved the participation of Nooaitch Indian Band and provided capacity funding to support Project engagement. The proponent further notes that in January, 2015, they signed a confidential capacity funding agreement (CFA) with Nooaitch that included funding to support Project engagement. In May, 2015, a confidential letter of understanding (LOU) which included Project engagement capacity funding, was signed with the proponent and Esh-kn-am Investments Joint Venture, a partnership of several Aboriginal groups, including Nooaitch.

A first draft of this Consultation and Accommodation Report (CAR or the Report) was provided to Aboriginal groups for review and comment on August 17, 2016. No specific comments on the Report were provided by Nooaitch. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016 and Nooaitch provided comments on November 8, 2016.

IV – Summary of Key Nooaitch Issues and Concerns Raised

Nooaitch's key issues and concerns revolve around the NEB and Crown consultation for the Project, potential cultural and social impacts, environmental impacts to fish, wildlife, and water, spills and emergency response, and the cumulative environmental effects arising from this and other projects. The Crown has gained its understanding of Nooaitch's issues and concerns through Nooaitch's involvement in the NEB process, including the responses Nooaitch provided to Natural Resources Canada on its information request addressed to them, and through other engagement with the Crown.

This section offers a summary of the key issues raised by Nooaitch, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Nooaitch's key Project-related issues and concerns are summarized below:

NEB Project Review Process and Crown Consultation Process

- Nooaitch does not believe that the NEB review process has adequately considered the potential for Project impacts on their Aboriginal Rights and title, nor provided an accessible and appropriate process by which to undertake consultation. As such, Nooaitch believes that the Crown cannot rely on the NEB process to fulfill its duty to consult;
- Nooaitch has not been provided with adequate resources or time to effectively engage in the project review and that consultation thus far has been insufficient to meet legal requirements.
- Nooaitch evidence was not adequately considered in the NEB process, no oral cross examinations of the proponent were allowed, and they received inadequate responses from the proponent for Information Requests they submitted;
- Nooaitch noted the importance of the upstream greenhouse gas (GHG) emissions report for the Project and indicated a need for funding in order to review and comment on this Report;
- Disagree with the federal Crown's approach to determine strength of claim (SoC) based on proximity of reserve lands to the pipeline route, resulting in a 'medium' depth of consultation for Nooaitch while neighboring Aboriginal Groups (Coldwater Indian Band) were assigned a 'high' ranking;
- Omission of upstream and downstream effects of the Project and cumulative climate change effects in the NEB assessment of the Project;

- Nooaitch stated that the existing pipeline should have been included in the NEB assessment of the Project and it was not. As a result, Nooaitch expressed concern that impacts associated with the existing pipeline have not been addressed; and
- Nooaitch expressed concerns with the NEB Panel review process including, delegation of procedural aspects of consultation, perceived procedural issues and biases, lack of cross-examination to test the evidence, scoping of issues, as well as limited of definition of the “national interest” in the NEB filing manual.

Proponent Engagement, Assessment Methods and Planning

- Lack of meaningful engagement with the proponent and overrepresentation of the communications to date in the proponent’s engagement documentation;
- The proponent has failed to properly answer information requests, provide requested data or data analysis information, and answer Nooaitch’s questions;
- The Riparian Habitat Management Plan and Wetland Survey and Mitigation Plan are inadequate;
- The proponent’s proposed mitigation is general in nature and does not address broader environmental effects. As well, mitigation was developed without input from Nooaitch and does not take into account their specific concerns;
- Lack of Traditional Ecological Knowledge (TEK) incorporated into the proponent’s planning and assessments and improper TEK collection methods in the Black Pines to Hope segment of the Project. This included reference to a consultant’s report commissioned by the Lower Nicola that described deficiencies in the proponent’s TEK data collection methods and subsequent integration of TEK into the assessment of impacts;
- Methods and data used to assess the oil spill risk underestimate the risk and hazard from a spill. Reference to a consultant’s report outlining the deficiencies with the oil spill risk assessment that was conducted by the proponent;
- Deficiencies in the proponent’s hydrology studies, design criteria, and crossing designs, as described in their technical engineering report submitted as part of their written intervenor evidence; and
- Lack of capacity funding such that Nooaitch cannot carry out informed decision making.

Cultural and Social Impacts

- Potential adverse effects of the Project’s marine activities on the health of the fish stocks and species that pass through the marine terminal waters en route to spawning areas in Nooaitch territory. Nooaitch relies on fish for sustenance and for cultural purposes;
- A major focus on Nooaitch is food security and sustainability;
- Nooaitch noted that they have a higher level of risk exposure from the Project due to the location of their land in the floodplain of the Nicola River;
- Lack of benefits and appropriate compensation to the community from the Project given the potential impacts to community members, and uncertainty whether Nooaitch will receive any compensation or benefits from the proponent if they oppose the Project;
- Limited capacity for the community, including training and communications, to respond to a major spill and potential adverse social, cultural, and inter-generational effects should a major spill occur;
- Project’s potential impact on the ability of members to continue traditional practices, such as hunting and gathering berries, plants, tree bark and roots, on their reserves and in their traditional territory;
- Potential impacts to burial grounds located just outside of Nooaitch Reserve no. 10;

- Potential increased access into Nooaitch traditional territory as a result of the project and new access roads;
- Potential long-term cultural effects, including inter-generation effects, should a spill occur; and
- Potential impacts to Nooaitch lands from the pipeline that could affect their level of food security, self-sufficiency and sustainability.

Environmental Effects

- Potential environmental effects on the Nicola River, which Nooaitch considers an endangered watershed;
- Potential adverse effects of the Project on already low water levels in the Nicola River, specifically the effect this could have on salmon;
- Potential adverse effects on wildlife and wildlife habitat (e.g. deer, moose, rabbits, and grouse), including both direct and indirect effects;
- Potential adverse effects on fish and fish habitat, most especially for salmonids and the Interior Fraser Coho, in the Coldwater and Nicola watersheds;
- Potential adverse effects on underground aquifers and wells in their traditional territory;
- Potential adverse effects in the marine environment from Project activities and resulting impacts to fish stocks on which Nooaitch relies; and
- GHG emissions, including the enforceability of NEB conditions related to GHG emissions and the lack of conditions addressing GHG emissions during operation.

Cumulative Effects

- Historic and ongoing cumulative environmental effects in their asserted traditional territory, including impacts from pipelines, highways, agriculture, timber harvesting, utility corridors, and the transportation of dangerous goods, as well as the sustainability of the land-base;
- Inadequate assessment of cumulative effects by the proponent as it fails to consider existing development and Aboriginal Rights in Nooaitch traditional territory; and
- Cumulative effects on fish and fish habitat, including coho and SARA-listed species, as well as cumulative effects on wetlands.

Impacts on Aboriginal Rights and Title

- Impacts could impede or disrupt Nooaitch's use of its asserted traditional territory, including their level of food security, self-sufficiency and sustainability;
- Activities could affect Nooaitch's ability to manage and make decisions over the Project area, including land and resource management and the goal to maintain the longevity of food security for generations to come. In particular, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), including Free Prior and Informed Consent (FPIC) has not been implemented in Canada;
- Project-related activities that could affect Nooaitch's economic development aspirations for its asserted traditional territory;
- Lack of joint or shared decision making on projects within Nlaka'pamux title lands; and
- Potential Project-related and cumulative effects on Nlaka'pamux title as well as the weighing of the national interest against potential impacts on Nlaka'pamux rights and title.

Accidents and Malfunctions

- Significant concerns around spills, including the safety of the pipeline given other spills in the area and the proponent's ability to effectively respond to emergencies;

- Numerous potential adverse environmental, social, economic, and cultural impacts should a major spill occur; and
- Lack of testing and understanding of emergency spill response and fate and distribution of diluted bitumen as well as issues associated with spill modeling.

Access Management

- Concern about the potential for increased access as a result of construction activities and resulting impacts in their traditional territory. This includes concerns about how new access roads may increase traffic to previously inaccessible areas.

Additional Concerns

- Nooaitch expressed concerns related to the broader regulatory environment, including the federal government's review of environmental legislation, the timelines for these reviews, the timing of the TMX decision, and decision-making on major energy projects made by cabinet; and
- Nooaitch identified concerns related to the lack of a national energy strategy and climate change impacts associated with the energy sector.

Accommodation Proposals

Nooaitch has stated that a Certificate of Public Convenience and Necessity (CPCN) should not be issued for the Project until further conditions are met. Nooaitch desires to have an active role in managing Project related environmental effects to ensure mitigation is culturally appropriate and aligned with Nooaitch's Land Use Plan. As outlined in the *NEB Recommendation Report*, Nooaitch proposed a number of recommendations during the NEB review process related to the proponent's engagement, capacity funding, and potential impacts to Aboriginal rights and title. They also provided proposed revisions to the NEB proposed conditions related to fish, fish habitat, and wetlands to include specific reference to the Nicola and Coldwater watersheds. Other specific recommendations included:

- The proponent use the methods described in the *Technical Review of the ESA* (prepared by LGL Limited Environmental Research Associates for the Lower Nicola Band) to properly collect and consider TEK in the Black Pines to Hope segment of the Project;
- The proponent conduct further studies to determine potential Project effects on native plant species, including monitoring and data collection over five years to determine if re-planting is necessary;
- The proponent's Access Management Plan must specifically include all areas within Nlaka'pamux traditional territory and that access control measures are implemented in the Upper Coldwater watershed;
- The proponent conduct further assessments in the Nicola and Coldwater watersheds to determine the cumulative effects to date and examine what impacts a hydrocarbon spill could have on these watersheds;
- The offset measures plan that the proponent is required to prepare and file with the NEB should include Interior Fraser Coho and other salmonids;
- The proponent employ hydraulically isolated crossing methods at all crossings;
- The proponent provide a detailed spill Emergency Response Plan to Nooaitch that details how response times will be minimized, how Nooaitch will be notified and involved in the event of a spill, and that does not rely exclusively on automatic leak detection systems. Further, Nooaitch recommends that the proponent conduct a revised oil spill risk assessment based on a worst

case scenario and provide greater financial guarantees in its Financial Assurance Plan and compensation for losses experienced by Nooaitch in the event of a spill; and

- The proponent engage with Nooaitch in a meaningful way and provide financial capacity for Nooaitch to conduct a technical review and field investigations in order to better inform mitigation planning.

Additional recommendations that were brought up by Nooaitch in discussions and written submissions subsequent to the *NEB Recommendation Report* included:

- If the Project is approved, a fully equipped emergency response office must be located in Merritt, as travel times from Kamloops would be too great or not possible during the winter; and
- In terms of emergency response planning, Nooaitch requests that post-assessment reports are required to ensure continuous and constant improvements to planning, response and engagement with First Nations;

Nooaitch reiterated in its comments on the draft Crown Consultation and Accommodation Report submitted on November 8, 2016 that a CPCN should not be issued since more time is required to address the following outstanding issues:

- Meaningful consultation as defined and agreed to by all parties occurs with Nooaitch and the Nlaka'pamux Nation as defined in the June 15th and June 10th 2016 correspondence;
- FPIC by Nooaitch and Nlaka'pamux title holders is provided consistent with the UNDRIP and implementation without qualification;
- The Government of Canada makes best efforts to meet its Ministerial commitments as stated by Prime Minister Trudeau and as reiterated in Ministerial Mandate letters;
- Effective oversight of the CPCN and TMX have been established through development of an environmental and safety committee (referred to by Nooaitch as the Committee) with a defined agreed to Terms of Reference and long term revenue that has been allocated to support the operations of Committee;
- Effective oversight of the CPCN and TMX has been assessed through a follow up review of the Auditor General of Canada to assess the NEBs and the Committee track record;
- A more rigorous environmental assessment and regulatory regime has been developed through review of existing legislation;
- A full assessment of the cumulative impacts to the exercise of Aboriginal title and rights has been concluded;
- Compensation agreements have been developed (for impacts stemming from the existing line);
- Royalty Revenue sharing agreements are negotiated with all levels of government (for the life of the Project, TMX);
- The modernization of the NEB has been reviewed and social license of the NEB to operate has been re-established; and
- All conditions attached to the CPCN have been reviewed by the Committee.

In addition to the issues identified above, Nooaitch identified the following recommendations for additional accommodations in its November 8, 2016 correspondence:

- Joint meetings between First Nations Chiefs and Ministers (including Ministers Carr and Bennett) to discuss proposed federal authorizations, NEB Panel review and recommendations, conditions attached to the recommended CPCN, scoping issues, procedural issues, issues

outside of the NEB Panel review, national energy strategy, track record on climate change, recent federal approvals on other major energy projects;

- Joint meetings between First Nations Chiefs and Ministers to discuss the June 15, 2016 correspondence and issues of Indigenous consent, Indigenous oversight and consultation.
- Joint meetings between First Nations Chiefs and Ministers to discuss the federal decision on TMX and debrief First Nations Leadership;
- Full Identification and disclosure of long term revenue streams flowing to all levels of government from the project, stemming from 1953 to present. Revenue Sharing Agreements with Federal, Provincial and Municipal government based on the principles outlined in the Laurier Memorial (50% of gross revenue sharing with First Nations);
- Full Identification and disclosure of long term revenue streams flowing to all levels of government from the project, stemming from the date of construction of TMX to the life of the pipeline. Revenue Sharing Agreements with Federal, Provincial and Municipal government based on the principles outlined in the Laurier Memorial (50% of gross revenue sharing with First Nations);
- Development of an Environment and Safety Committee that has a defined and agreed to terms of reference and mandate - including a Nation to Nation component - and long term funding and political commitment (for the life of the pipeline);
- Requirements to have an emergency preparedness, spill response office in Merritt and emergency preparedness and response located in Merritt;
- Time to fully scope out an effective terms of reference and planning for an Environment and Safety Independent Committee with specific focus on pipeline safety, monitoring and oversight, review of spill detection and other safety systems, review of emergency preparedness planning and capacity, review and assessment of any spill event, risk assessment and spill prevention preparedness;
- Recognition that timelines for a federal decision on TMX are a self-imposed deadline and that timelines can be changed by Cabinet. Recognition that the most likely course of action if Cabinet proceeds with a Dec 19th, 2016 decision and federal approval of TMEP is litigation;
- In addition to NEB Conditions 132 and 133, the proponent should be required to continual monitoring and offsetting any expected significant effects to marine mammals for the life of the pipeline;
- In addition to NEB Conditions 132 and 133, the proponent should be required to report any deaths of marine mammals related to marine shipping for the life of the pipeline; and
- Implementation of meaningful consultation and accommodation. Implementation of best efforts to seek the consent of Nlaka'pamux Nation and Nooaitch title holders consistent with full implementation of UNDRIP without qualification.

Section 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Nooaitch that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

Nooaitch's Response to NEB Recommendation Report

In a letter dated May 31, 2016, to the BC EAO, Nooaitch outlined their concerns regarding the province's acceptance and use of the *NEB Recommendation Report* to inform their decisions and consultation. Nooaitch expressed the view that the scientific information provided by the proponent was not rigorous

enough to properly assess risk from the Project. Additionally, Nooaitch noted the lack of 'social licence' for both the NEB and the EAO and the deficiency in consultation and engagement on the Project to date.

V – Potential Impacts of the Project on Nooaitch's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests are provided in Sections 2.4.3 and Section 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering) by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Nooaitch's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Nooaitch's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Nooaitch's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Nooaitch, Nooaitch's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province.

Nicola Tribal Association led a joint third-party traditional land use/traditional ecological knowledge (TLRU) study with Shackan Indian Band, Nicomen Indian Band, and Nooaitch Indian Band. The study, titled *Final Report: Tmix^W Research Traditional Land Use/Traditional Knowledge Study* was completed in September 2014 and submitted to the proponent. Prior to this, an Interim Report *Tmix^W Research Traditional Land Use/Traditional Knowledge Study*, was summarized in a Supplemental Technical Report submitted to the NEB by the proponent on July 21, 2014 (Filing IDs A3Z4Z2 to A3Z4Z5). The study identifies traditional land uses in the segment of the Project from Black Pines to Hope. Traditional land uses identified by Nicola Tribal Association include hunting mammals and birds, gathering plants, information on fishing sites, sacred sites, trapping sites, habitation sites, gathering areas for community members and trails travelways. None of the Aboriginal Interests identified by Nicola Tribal Association in their TLRU study including fishing, hunting, trapping and gathering activities, habitation, trails and sacred sites, overlap with the proposed pipeline corridor. In its Supplemental Technical Report ([A4F5D1](#)), the proponent estimated approximate distances and directions from the pipeline corridor based on information in Nicola Tribal Association's report. Additional fishing locations are identified for Nooaitch in Volume 5B ([A3S1S0](#)) of the Project application. Nooaitch has expressed concerns that the proponent did not properly collect and consider Aboriginal traditional ecological knowledge in the Black Pines to Hope segment. In the oral traditional evidence Nooaitch Elders provided, they indicated that members exercise their Aboriginal rights throughout their traditional territory as well as in surrounding areas. Given this and Nooaitch's kinship ties to other Aboriginal groups in the area, they view their traditional territory as the entire Nlaka'pamux territory.

Impacts on Hunting, Trapping and Plant Gathering

As stated in Volume 5B, Nooaitch community members continue to practice traditional hunting and gather berries, plants, tree bark and roots throughout their asserted traditional territory. In their TLRU study for the Project, Nicola Tribal Association identified hunted species such as white-tailed and mule deer, moose, elk, beaver, marmot, rabbit, otter, brown and spruce grouse, geese, and duck. Nicola Tribal Association members also snare grouse and collect eggs from some migrating birds. In their TLRU study for the Project, Nicola Tribal Association identified 67 plants that are gathered, including: asparagus, bitter root, bull rush, cactus, cow parsnip, dandelion, Devil's club, fern, false box, hawthorn, horse tail, Indian celery, Indian hemp, Indian tea, kinnikinick, mint, mullen, penstemon, pineapple weed, showy milk weed, stinging nettle, sunflower, tiger lily, tule/cat tail, watercress, wild onion, wild potato, yarrow, cotton wood mushroom, lightening, pine mushroom, puff ball mushroom, sand wood mushroom, shaggy mane mushroom, buffalo sage, juniper, rose, sage, sage brush, green willow bush, red willow, silver willow, water hemlock, wild weeping willow, wolf willow, alder, black moss from Jack pine, cedar and roots, Douglas fir, fir tree, pine needles, larch, lodge pole pine, pine and pine pitch, Ponderosa pine, tamarack, trembling aspen, western tamarack, yellow cedar, avalanche lilies, nodding onion, chocolate lilies, balsamroot, lichen and cactus. Historically, roots and bulbs were an important part of the diet, partly because the availability of root crops was reliable. Plants, roots and fibre were made into tools, bows and arrows, spears, and nets and harpoons.

Nooaitch identified many concerns related to environmental effects of the Project on hunting, trapping, and plant gathering activities, particularly the ability of members to continue traditional practices, such as hunting and gathering berries, plants, tree bark and roots, on their reserves and in their traditional territory, and impacts on wildlife and wildlife habitat. A major focus for Nooaitch is food security and sustainability. Concerns related to cumulative environmental effects in Nooaitch asserted traditional territory, including the existing Trans Mountain pipeline, timber harvesting, agriculture, highways and urban development were also raised. As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, old growth forests, wetlands, and wildlife and wildlife habitat (including species at risk) listed species. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping, and gathering (section 4.3.1 of this Report). With regards to specific concerns raised by Nooaitch, the proponent would implement several mitigation measures to reduce potential effects to species important for Nooaitch's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP), and the vegetation and wildlife management plans. The proponent is also committed to meeting with Nooaitch to further discuss and address concerns, where possible, prior to the start of construction.

In their TLRU study for the Project, Nicola Tribal Association did not identify hunting or trapping sites. One plant gathering site was identified in the Coquihalla and Coldwater areas; however the approximate distance from the Project Area was not stated in the TLRU study. No hunting, trapping or plant gathering sites were identified in the proposed pipeline corridor.

Nooaitch raised concerns with the Project's potential impacts relating to specific locations and access on hunting, trapping, and plant gathering activities, particularly increased access as a result of Project, including concerns about how new access roads may increase traffic to previously inaccessible areas. Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Nooaitch's access to hunting, trapping and plant gathering activities, largely confined to the Project footprint for the pipeline and associated facilities. The Crown appreciates that with construction and reclamation activities disruptions to access may result in a loss of harvesting opportunities for Nooaitch. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access to hunting, trapping, and gathering sites (section 4.3.1 of this Report). With regards to specific concerns raised by Nooaitch, the proponent would implement several mitigation measures to reduce potential effects on TLRU sites, such as management plans that include access management, scheduling and notification of Project activities, and environmental monitoring programs that monitor access control measures. The Access Management Plan is intended to reduce disturbances caused by access, construction equipment and vehicle traffic, during and following construction in order to minimize disturbance to access to Nooaitch's traditional lands. The proponent is committed to minimizing the development of access routes, controlling public access along the construction right-of-way, selecting appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent will work with applicable resource managers, traditional land and resource users to define locations where access control is necessary, and what type(s) of access control will be implemented. In the event that hunting, trapping, and plant gathering sites are identified during ongoing engagement with Nooaitch prior to construction, the sites will be assessed, and appropriate mitigation measures will be determined. The proponent committed to working with Nooaitch to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Nooaitch expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities, including impacts on the ability of Nooaitch community members to continue traditional practices on their reserves and in their traditional territory. Concerns related to adverse effects to Nooaitch lands that could seriously affect their level of food security, self-sufficiency and sustainability. The Crown appreciates that this short-term disruption could temporarily alter the behavior of community members' hunting, trapping or plant gathering activities during construction, and that reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project, could have spiritual and cultural impacts on community members. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities (section 4.3.1). The proponent has also committed to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Nooaitch, Nooaitch's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor impact on Nooaitch's hunting, trapping, and plant gathering activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Nooaitch;
- Project-related pipeline and facility construction and routine maintenance activities within Nooaitch's traditional territory are temporary and thus, likely to cause minor disruptions to Nooaitch's community members accessing traditional hunting, trapping and plant gathering sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Nooaitch regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their hunting, trapping and plant gathering activities.

Impacts on Freshwater Fishing

Nicola Tribal Association members fish for numerous species including coho and Chinook salmon, trout, whitefish, sucker, and minnow. In their Final Argument Nooaitch details the importance of the Nicola River and Coldwater River for fishing. They outline the historical and current impacts to these two rivers, including forestry, agriculture, irrigation, highway maintenance, warming waters, erosion, contamination, and urban development. Nooaitch members have observed a decline in both the quality and quantity of fish and fish habitat in these rivers, stating their belief that the Nicola River is contaminated and the fish there are smaller, fewer, and no longer safe to eat. Nooaitch asserts that any further adverse effects in these watersheds, such as from a spill, would devastate fish populations.

Nooaitch identified many concerns related to environmental effects of the Project on freshwater fishing activities, including impacts to fish and fish habitat, especially for salmonids and the Interior Fraser Coho, in the Coldwater and Nicola watersheds, watercourse crossings, and ongoing cumulative environmental effects in Nooaitch asserted traditional territory. A major focus for Nooaitch is food security and sustainability. Concerns were also raised related to underground aquifers, wells, and to the already low water levels in the Nicola River. As described in the *NEB Recommendation Report*, Project-related construction and operation could result in low to moderate environmental effects on fish and fish habitat and surface water. Moderate effects to fish and fish habitat would be localized to individual watercourse crossings where any potential serious harm would be compensated by offset measures. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (section 4.3.2 of this Report). A number of recommended NEB conditions require the proponent to file reports that will monitor Project-related impacts to fish, fish habitat and riparian habitats. With regards to specific concerns raised by Nooaitch, the proponent would implement several mitigation measures to reduce potential effects to species important for Nooaitch's fishing activities. Further, the proponent has committed to time watercourse crossing construction activities to occur within the least risk biological windows in an attempt to avoid causing serious harm to fish, has committed to working with Aboriginal groups to identify the most appropriate means of offsetting serious harm to marine fish and fish habitat, and has proposed the implementation of channel and bank reclamation measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat. The NEB also considered the evidence Nooaitch provided regarding hydrological risk assessment and planning and is of the view that Nooaitch's concerns regarding this topic would be adequately addressed by the proponent's current and proposed future planning and studies including updated flood frequency estimate information for hydrologically significant watercourse crossings, noting that the proponent committed to conducting further

hydrological analysis and geotechnical investigations³. The NEB also added Conditions 65, 66 and 67 that relate to Nooaitch's submitted hydrological evidence. The proponent is also committed to continued consultation and engagement with Aboriginal groups during construction.

In their TLRU study for the Project, Nicola Tribal Association identified three fishing sites located more than 2 km from the Project Area or the approximate distance from the Project Area was not stated in the study. In Volume 5B, five additional traditional fishing locations were identified, including fishing for salmon (coho and Chinook), bull trout, and Dolly Varden char at Coldwater River and the Fraser River, which cross the proposed pipeline corridor. The three other fishing sites at Nicola Lake, Anderson River, Spius Creek were identified more than 2 km from the proposed pipeline corridor.

Nooaitch raised concerns with the Project's potential impacts relating to specific locations and access to freshwater fishing activities, specifically impacts on the Nicola River and Coldwater River for fishing. Project-related construction and routine maintenance activities are expected to cause short-term, temporary disruptions to Nooaitch's access to fishing activities. The Crown appreciates that if construction and reclamation occur during the fishing season, there could be a potential reduction in access to waterways, staging areas, and fishing sites for Nooaitch community members. However, disruptions to access would largely be confined to the Project footprint for the pipeline and associated facilities during construction and reclamation. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access to fishing sites (section 4.3.2 of this Report). With regards to specific concerns raised by Nooaitch, the proponent would implement several mitigation measures to reduce potential effects to fishing sites important for Nooaitch's fishing activities. As previously discussed, the proponent is committed to minimize disturbance to access to Nooaitch's traditional lands, as described in the Access Management Plan. The proponent is committed to working with Nooaitch to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Nooaitch expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its freshwater fishing activities, including the health of the fish stocks and species on which Nooaitch relies for sustenance and culture, food security, self-sufficiency and sustainability. As described previously, the Project construction and routine maintenance is expected to cause short-term, temporary disruptions to Nooaitch's fishing activities. The Crown appreciates that this temporary interruption could mean that community members alter their fishing activities during construction, which could affect their participation in the traditional activity. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on social, cultural, spiritual or experiential aspects of fishing activities (section 4.3.2 of this Report).

In consideration of the information available to the Crown from the NEB process, consultation with Nooaitch, Nooaitch's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor-to-moderate impact on Nooaitch's freshwater fishing activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

³ National Energy Board Report: Trans Mountain Expansion Project. May 2016. pp.70-71.

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Nooaitch;
- Project-related pipeline and facility construction and routine maintenance activities within Nooaitch's traditional territory are temporary and thus, likely to cause minor disruptions to Nooaitch's community members accessing traditional fishing sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Nooaitch regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their freshwater fishing activities.

Impacts on Other Traditional and Cultural Practices

Nicola Tribal Association reported that the Coquihalla is a spiritually and culturally important region. Nooaitch also stated in their Final Argument that the water and land in their traditional territory is of central importance to their cultural and spiritual identity. In the Crown consultation meeting on October 21, 2016, Nooaitch noted that there are six to eight historical sites close to the Project, of which two are within the proposed pipeline corridor.

Nooaitch identified many concerns related to environmental effects of the Project on other traditional and cultural practices, including ongoing cumulative environmental effects in Nooaitch asserted traditional territory, and health of the fish stocks and species on which Nooaitch relies for sustenance and culture. As described in section 4.3.4 of the Report, Project-related activities are not likely to result in significant adverse effects on the ability of Aboriginal groups to use land, waters or resources for traditional purposes. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental impacts on physical and cultural heritage resources important for Nooaitch's traditional and cultural practices (section 4.3.4). With regards to specific concerns raised by Nooaitch, the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources. The proponent has committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during right-of-way finalization, narrowing the right-of-way in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments.

Nicola Tribal Association identified a total of four trails and travelways in their TLRU study for the Project, none of which are within the proposed pipeline corridor. One trail/travelway from Coquihalla Lake to Boston Bar Creek is located within 2 km of the Project Area, while the remaining three sites identified by Nicola Tribal Association are located more than 2 km from the Project Area or the approximate distance from the Project Area was not stated in the TLRU study. Nicola Tribal Association also identified one sacred area in their TLRU study for the Project although the distance from the Project was not provided. From the Coldwater Valley to Hope, 45 ceremonial and spiritual sites were identified; however, the specific locations of these sites were not provided.

Nooaitch raised concerns with the Project's potential impacts relating to specific locations and access to other cultural and traditional practices, including impacts to burial grounds and waterways within their asserted traditional territory, specifically the Nicola and Coldwater Rivers which are culturally significant. Concerns related to increased access into Nooaitch traditional territory as a result of the Project were also raised. As described in section 4.3.4 of the Report, Project-related activities are expected to cause short-term disruptions that temporarily affect the ability of Aboriginal groups to access land, waters or resources for traditional purposes. The Crown appreciates that Nooaitch's opportunities for certain

traditional and cultural activities will be temporarily interrupted during construction and routine operation, and there could be reduced access to travelways, habitation sites, gathering sites, and sacred areas. However, temporary disruptions to Nooaitch's traditional and cultural practices would be largely confined to sites within the Project footprint for the pipeline and associated facilities. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific sites and access to physical and cultural heritage resources (section 4.3.4 of this Report). The Crown notes the proponent's commitment to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

Nooaitch expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its other traditional and cultural practices, particularly long-term cultural effects, including inter-generation effects. As described previously, the Crown appreciates that this may result in temporary interruptions to Nooaitch's cultural and spiritual practices, or that their participation in the traditional activity is curtailed, during Project construction and routine maintenance activities.

In consideration of the information available to the Crown from the NEB process, consultation with Nooaitch, Nooaitch's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued, Project construction and routine maintenance during operation are expected to result in a minor impact on Nooaitch's other traditional and cultural practices. In reaching this conclusion, the Crown has considered several factors that have been discussed about, which are summarized as follows:

- Project-related construction and operation activities are likely to have minor to moderate environmental effects on Nooaitch's traditional and cultural practices;
- Project-related construction and routine maintenance activities within Nooaitch's traditional territory are temporary and thus, likely to cause minor disruptions to Nooaitch's community members accessing traditional and cultural practice sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Nooaitch regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their other cultural and traditional practices.

Impacts on Aboriginal Title

The Crown notes that the Project would be located within an area of Nooaitch's traditional territory assessed as having strong *prima facie* claim to Aboriginal title, in the vicinity of Merritt, which is within the area considered by ethnographers to be within Nlaka'pamux territory, and there are indications for several historic villages in proximity in the Nicola Valley that were likely occupied by the Nlaka'pamux at 1846.

The Crown has actively consulted with Nooaitch throughout the NEB process and Crown consultation process at a deeper level in an attempt to better identify, understand, and resolve concerns relating to Aboriginal title. Concerns related to Aboriginal title raised by Nooaitch throughout the NEB and Crown consultation process include:

- Impacts could impede or disrupt Nooaitch's use of its asserted traditional territory, including their level of food security, self-sufficiency and sustainability;
- Activities could affect Nooaitch's ability to manage and make decisions over the Project area, including land and resource management and the goal to maintain the longevity of food security for generations to come; and

- Project-related activities that could affect Nooaitch’s economic development aspirations for its asserted traditional territory.

The Crown provides a description of the potential impacts of the Project on Aboriginal title in section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid or reduce Project impacts associated with the degree of disturbance to terrestrial and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as well as NEB Conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved. It is noted that Nooaitch has not executed a Mutual Benefits Agreement with the proponent.

Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in section 4.3.5, it is the Crown’s opinion, the Project is expected to have minor impacts on Nooaitch’s asserted Aboriginal title to the proposed Project area.

Impacts Associated with Accidental Spills

Nooaitch expressed several concerns with direct and indirect effects of Project-related pipeline spills on their Aboriginal Interests, particularly potential adverse environmental, social, economic, and cultural impacts should a major spill occur, impacts on underground aquifers and wells in their traditional territory, and the proponent’s ability to respond to emergencies in freshwater and marine environments.

The Crown also appreciates Nooaitch’s concerns regarding spills, and the potential for a spill to impact Nooaitch’s use and occupation of its asserted traditional territory, ability to make decisions over the area impacted, and the potential for a spill to adversely impact any economic development aspirations Nooaitch has for its territory.

A discussion of the potential impacts of a pipeline spill on Aboriginal Interests is provided in section 4.3.6 of this Report. In consideration of this information and analysis, as well as information available to the Crown on Nooaitch’s Aboriginal Interests and concerns raised by Nooaitch during the NEB process and Crown consultation process, a pipeline spill associated with the Project could result in minor to serious impacts on Nooaitch’s Aboriginal Interests. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who live nearby and rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill⁴.

VI – Conclusions

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments,

⁴ Trans Mountain Final Argument, p. 85 and 207

recommended NEB conditions and the existing pipeline safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations, the Crown expects impacts of the Project on the exercise of Nooaitch's Aboriginal Interests would be up to minor-to-moderate.

The Crown is also supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Nooaitch's ongoing involvement and participation the proponent's detailed Project planning, including the development of site-specific measures to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Nooaitch in emergency response planning activities. The federal Crown is also considering incremental measures that would further accommodate the potential adverse impacts of the Project on Nooaitch, as discussed in sections 4 and 5 of the main body of this Report.

Appendix B.15 – Adams Lake Indian Band

I - Background Information

Adams Lake Indian Band (Adams Lake) or Sexqeltqín is part of the Secwe'pemc (pronounced "Shi-HUEP-muh" or "She-KWE-pem") or Shuswap Nation.

Adams Lake has seven reserves on Shuswap Lake, Adams Lake and along the South Thompson River: Hustalen Reserve no. 1 (881.4 hectares [ha]), Squaam Reserve no. 2 (32.4 ha), Toops Reserve no. 3 (10.1 ha), Sahhalkum Reserve no. 4 (1,432.6 ha), Stequmwhulpa Reserve no. 5 (101 ha), Switsemalph Reserve no. 6 (319.7 ha), and Switsemalph Reserve no. 7 (131.6 ha). Adams Lake's total registered population is 795 (363 community members are living on Adams Lake's reserves, 59 are living on other reserves, and 373 are living off-reserve).

Adams Lake is a party to the Secwe'pemc Nation *Writ of Summons*, which was filed in the British Columbia (BC) Supreme Court on December 10, 2003, asserting Aboriginal title to a territory identified in the writ. The Secwe'pemc Nation *Writ of Summons* involves: Adams Lake Indian Band, Bonaparte Indian Band, High Bar First Nation, Kamloops Indian Band, Neskonlith Indian Band, Skeetchestn Indian Band, Spallumcheen Indian Band, and Whispering Pines/Clinton Indian Band.

The Project would see approximately 75 kilometres (km) of new right of way (RoW) constructed through the area identified in the Secwe'pemc Nation *Writ of Summons*.

There is ethno-historical information that suggests within the Secwe'pemc, there was a notion of traditional territories among different Secwe'pemc communities/divisions, territories that were subject to the stewardship and control of those communities/divisions. Adams Lake is understood to correspond with the historical Shuswap Lakes Division, along with other groups living on the South Thompson River, the Shuswap Lakes, and in the Spallumcheen area. Adams Lake signed a Forestry Consultation and Revenue Sharing Agreement with the Province of British Columbia in March 2012. However, a map included in this agreement [entitled "Map of Adams Lake Indian Band Area of Aboriginal Interest"] was crossed out in the agreement and labelled "incorrect".¹ Adams Lake subsequently provided a map of its asserted traditional territory to the Province in November 2012.

Historically the Secwe'pemc people spoke the Secwepemctsin language, which is part of the Interior Salish language group. It has been estimated that amongst the Secwe'pemc, 2% are fluent speakers, 12% have some ability with the language, and 11.5% are learners.

¹ http://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/frcsa_adams_lake.pdf

II - Preliminary Strength of Claim Assessment

- Approximately 175 km of the proposed pipeline and five pipeline facilities (Blue River Station, Finn Station, Darfield Station, McMurphy Station, and Black Pines Station) would be located within Adams Lake's asserted traditional territory. The distance from the nearest Adams Lake community to the RoW is approximately 29 km.
- The Crown understands that Adams Lake has an ancestral connection to the historical Shuswap Lakes Division. The Crown's preliminary assessment of the historical Shuswap Lakes Division's claims for Aboriginal rights, applies over the section of the Project that spans the area from north of Blue River along the North Thompson River to Kamloops, and south to Stump Lake, which overlaps with their asserted territories. That claim is assessed as a *weak prima facie* claim for Aboriginal rights as this area falls outside of the area ethnographers attribute to the historical Shuswap Lakes Division of Secwe'pemc, and there are no historical indications for Shuswap Lakes Division hunting, fishing, and gathering in this area around the time of contact².
- The Crown's preliminary assessment of the historical Shuswap Lakes Division's claims for Aboriginal Title applies over the section of the Project that spans the area from north of Blue River along the North Thompson River to Kamloops, and south to Stump Lake. The claim is assessed as a *weak prima facie* claim for Aboriginal Title as this area is outside of the area ethnographers historically attribute to the Shuswap Lakes Division and there are limited indications of historic Shuswap Lakes Division uses at 1846³.

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Adams Lake's Aboriginal Interests, the Crown is of the view that the legal duty to consult Adams Lake lies at the middle portion of the *Haida* consultation spectrum. Adams Lake was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which affords Adams Lake opportunities to be consulted at a deeper level.

Adams Lake was an intervenor in the National Energy Board (NEB) process and provided correspondence, information requests, oral traditional evidence, and written evidence. Adams Lake

² Ministry of Justice, Aboriginal Research Division, Secwepemc Nation: A Brief Ethnohistoric Overview of the Eastern Divisions (Revised August 2012); Ministry of Justice, Aboriginal Research Division Harper Creek Mine: Review of Ethnographic and Historical Sources (Revised June 2012); Sun Peaks Resort: A Review of the Historical and Ethnographic Sources Relating to Aboriginal Use and Occupation (Updated July 2011); Teit, James, The Shuswap, in Franz Boas ed., The Jesup North Pacific Expedition, Volume II, Ethnology and Archaeology of Southern British Columbia and Washington, New York: American Museum of Natural History, 1908; Dawson, George M., Notes on the Shuswap People of British Columbia, Transactions of the Royal Society of Canada, 1891; Palmer, Gary B., Cultural Ecology in the Canadian Plateau: Pre-Contact to the Early Contact Period in the Territory of the Southern Shuswap Indians of British Columbia, in Northwest Anthropological Research Notes, Vol. 9 No. 2, Fall 1975; Ignace, Marianne Boelscher, Shuswap in Deward E. Walker, Jr. ed., Handbook of North American Indians, Vol. 12, Washington: Smithsonian Institution, 1998; and, Ignace, Marianne and Ron Ignace, The Secwepemc: Traditional Resource Use and Rights to Land in Bruce Morrison and C. Roderick Wilson eds., Native Peoples, The Canadian Experience, Don Mills: Oxford University Press, 2004.

³ Ibid.

submitted written filings [Exhibits C198] including Oral Traditional Evidence [A64357 v.15], information requests [C198-02/04/06/10/11], and other documents with the NEB describing Adams Lake's asserted Aboriginal rights, customary law, governance objectives and the preservation of Aboriginal Title within its asserted traditional territory. Adams Lake responded to the Crown's Issues Tracking Table information request by further elaborating their concerns [A71220]. Adams Lake also provided a written final argument to the NEB Panel.

Adams Lake signed a contribution agreement with the NEB for travel for one to the hearing. The Major Projects Management Office (MPMO) offered Adams Lake \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Adams Lake an additional \$14,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Adams Lake signed contribution agreements with the MPMO in response to both of these offers, for a total of \$26,000 in allocated funding. EAO provided Adams Lake with \$5,000 in capacity funding to support participation in consultation with the Crown on July 26, 2016.

Adams Lake met with the Crown on July 23, 2014, and October 14, 2016.

A first draft of this Consultation and Accommodation Report (the Report) was provided to Aboriginal groups for review and comment on August 17, 2016. No comments were received from Adams Lake on the draft Report. A second draft of this Report was provided to Aboriginal Groups on November 1, 2016, and Adams Lake provided comments on November 16, 2016. Comments included disagreement with the Crown's preliminary strength of claim assessment, and failure to inform itself as to the potential impact of the Project of Adams Lake's Aboriginal Interests.

IV - Summary of Key Adams Lake Issues and Concerns Raised

The Crown has gained its understanding of Adams Lake's issues and concerns through the community's involvement in the NEB process, including submissions made through the NEB hearings process, the responses Adams Lake provided to the Crown on its Information Request (IR) addressed to them, and through other engagement with the Crown, including meetings. The Crown's understanding of Adams Lake's key Project-related issues and concerns are summarized in the sections below. This is a summary of the key issues raised by Adams Lake, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions.

Cultural and Social Impacts

Adams Lake stated in its response to the Natural Resources Canada information request that it is "...concerned about loss of opportunity to exercise its rights on its lands. The extent of Adams Lake's concerns include (but are not limited to): loss of language, loss of culture, and loss of economic opportunities" (A71220). Adams Lake noted strong concerns about the impact of a spill on their Aboriginal Interests. This was framed in particular on the food fishery (based on potential contamination by a spill) as it is an important food source and the community's culture is shaped by

their interaction with the salmon. Adams Lake states they are the Secwe'pemc Nation's steward of this salmon fishery and a spill would not only affect Adams Lake's traditional land and resource utilization but have consequence throughout Secwe'pemc territory. Adams Lake is concerned about potential impacts from the Project on their traditional way of life, including an erosion of culture and impacts to their oral traditions and knowledge. Adams Lake has stated that the proponent has not appropriately responded to its concerns in these areas.

Methodology, Process and Consultation

Adams Lake has both procedural and substantive concerns regarding consultation and communicated that they do not think the Crown adequately understands their key issues. They have indicated that as a result of a lack of information and capacity, including inadequate funding from both the proponent and the Crown, they have been unable to adequately participate in the regulatory review process, properly review the Project and engage in meaningful consultation. Other specific concerns include: the design and implementation of the regulatory and environmental review process; the lack of consultation on the development of the NEB review process; the lack of any input into proponent application development; the inability to cross-examine witnesses; the exclusion of climate change from the Project assessment and NEB conditions; the exclusion of recommended conditions in the *NEB Recommendation Report* specific to salmon; and, the alleged weakness of the proponent's information, including lack of baseline information. Adams Lake noted they did not receive funding to conduct a Traditional Land Use Study. Adams Lake also indicated that the hearing process cannot be relied upon to discharge the Crown's duty to consult as it does not constitute meaningful consultation and expressed concerns about how their issues have been captured by the Crown in its Issues Tracking Table, suggesting the Crown's understanding does not accurately characterize Adams Lake's oral history testimony.

The NEB Panel acknowledged Adams Lake's concerns regarding engagement and capacity funding, noting their specific concerns regarding Adams Lake's interactions with the proponent which they described as being "...impersonal, inaccurate and lacking sincerity..."⁴. In their findings, the NEB Panel found that the proponent met the consultation requirement as outlined in the Board's Filing Manual.

Adams Lake stated that the Crown has a duty to consult before the Governor-in-Council makes any decision, and the Crown cannot decide the matter without knowing how the Project may adversely impact Aboriginal rights. Adams Lake considers consultation, including proposed terms and conditions and accommodation, only to be meaningful if it takes places in advance of a decision, rather than during later operational decisions.

Adams Lake requests that the GIC dismiss the Project application at this time because of the lack of meaningful consultation and inadequate NEB conditions that are insufficient to address Adams Lake concerns about the impact of the Project on their Aboriginal rights and title. Alternatively, Adams Lake

⁴ National Energy Board Report. Trans Mountain Expansion Project. May 2016. pp. 34 – 35.

requests that the Governor-in-Council (GIC) order the NEB to reconsider and revise its terms and conditions after it has engaged in meaningful consultation with Adams Lake.

The Crown is in receipt of an open letter sent to Prime Minister Trudeau, Alberta Premier Rachel Notley, and British Columbia Premier Christy Clark from a collective of Aboriginal groups, including Adams Lake. This letter identifies interests and concerns related to Indigenous consent of the Project and the Project's consultation process.

Cumulative Effects

Adams Lake expressed concerns that resource extraction activities, industrial activities, and commercial and residential development throughout Adams Lake's asserted traditional territory made it difficult for Adams Lake to exercise Aboriginal rights and carry out traditional activities. They also expressed concern regarding the effects of climate change in conjunction with other stressors on salmon populations. Adams Lake would like to have capacity provided so that they can conduct a cumulative effects assessment.

Fish and Fish Habitat

Adams Lake indicated that potential Project effects on salmon were one of their main areas of concern, as salmon is a staple food for the Adams Lake community. It was noted that this year's returns of sockeye salmon were low in the Adams River and Eagle River. They stated that this was due to the effects of climate change and any further stresses as a result of this Project could have permanent impacts to salmon populations. Salmon, in particular Adams River Sockeye Salmon, forms a central part of their social, cultural, and economic foundation. They also expressed concerns regarding access to fishing areas and communicated historic issues with maintaining their Aboriginal right to fish due to fisheries closures. There were numerous concerns raised regarding potential Project effects on fish and fish habitat which could impact Adams Lake right to fish. This includes impacts to water, increased non-Aboriginal access, impacts from a spill and inadequate spill response, impacts from dredging in the marine environment, and cumulative impacts from this Project and other activities in the area.

Adams Lake has raised numerous concerns regarding potential impacts to fish and fish habitat, framed within the issue of having sustainable salmon runs. These concerns include:

- Potential effects on salmon from spills, including the risk of increased tanker traffic in the marine environment;
- Increased access by non-Aboriginal anglers and effects on fish populations including the risk of overharvesting;
- Potential effects from climate change in conjunction with other stressors, including possible effects to instream flows;
- Potential effects of acid rock drainage;
- Inadequate information provided on dredging and its effects on marine and estuarine environment; and

- Potential effects of the Project on the North Thompson River that, drains into the South Thompson and Fraser Rivers and then to the ocean.

Adams Lake commented that information necessary for consultation is lacking and that the terms and conditions as they presently stand do not adequately address their paramount concern about the welfare of the salmon, which is a cornerstone of their way of life.

Environmental Impacts

Several other concerns regarding environmental impacts were raised by Adams Lake, including:

- Proposed wetland reclamation methods may be unsuccessful;
- Possible habitat and wildlife loss as a result of construction and operational activities;
- Concerns regarding the success of proposed mitigation and monitoring programs;
- Concerns regarding the effectiveness of *Species at Risk Act* implementation;
- Risk of aquifer and surface water contamination;
- Potential effects to vegetation from off-highway vehicles accessing stream crossing locations for maintenance and operation; and
- Cumulative effects on grizzly bear mortality risk.

Adams Lake raised concerns about the impact of adverse weather conditions (e.g., torrential rains) on the proposed pipeline, particularly if a rainfall event occurred near the North Thompson Drainage.

Health and Human Safety

Adams Lake noted its concerns that the Project could affect the water in their territory, including both surface water and aquifers. This concern focused on the necessity for clean water to sustain healthy fish, and effects to the health of communities if there are impacts to salmon populations on which the community relies.

Accidents and Malfunctions (marine/terrestrial)

Adams Lake identified an increase in tanker traffic and an increased chance of spills as significant concern. Adams Lake has raised concerns about potential delays in responding to spills or other environmental risks at remote water crossings and indicated that flooding could increase the risk of a spill from the pipeline. They noted the challenges that may be associated with responding to a spill in remote locations or spills on ice. They also noted that the old pipeline is leaking and recommended that it be replaced. They had concern about the potential impacts to Kamloops Lake, and salmon rearing habitat in Adams and Quesnel Lakes should a spill occur and the possible long-term effects on salmon populations. They also expressed concern for spills in the marine environment and how this would impact fish and fish habitat. There was concern that the proponent's consideration of the effects of a spill did not adequately account for a spill into a large watercourse.

Access Management

Adams Lake is concerned that access to the South Thompson River may be restricted due to industry and Fishery Officers prohibiting community member from the area. In addition, Adams Lake is concerned that the Project will cause further land alienation. They are also concerned about increased access by non-Aboriginal anglers in their traditional territory.

Impacts on Aboriginal rights and Title Interests

Adams Lake is concerned about the loss of opportunity to exercise its rights on its lands, loss of language, culture, and economic opportunities. It is the view of Adams Lake that the Project could impact their ability to carry out their Aboriginal rights on their traditional lands. It was noted specifically, that the transportation of bitumen through their traditional territory in proximity to fish bearing waterways presents a significant risk of adverse effects to Adams Lake's rights and title. Adams Lake has indicated that they want 'informed consent' with respect to the Project and to better understand the potential benefits and impacts. They have indicated that given their strong strength of claim to areas that would be impacted by the Project and the lack of Crown consultation and accommodation to date, the Project should not be approved until appropriate consultation accommodation, and compensation is conducted and Adams Lake consent is obtained.

Proposed Mitigation and Accommodation

Adams Lake proposed several recommendations related to identifying further possible Project effects and consultation, engagement, accommodation, and compensation regarding the Project⁵. They also proposed the following Project specific measures:

- The proponent staff and/or contractors be required to park off highway vehicles 50 metres (m) from either stream bank's edge and walk into sites to minimize effects of stream crossing construction;
- The proponent collect sufficient baseline data to assess effects of the Project on Adams Lake sockeye salmon;
- Project approval be contingent upon a revised flood frequency estimates to ensure pipeline and water course crossing safety;
- The proponent recalculates the cumulative effects of instream disturbance;
- Adams Lake to utilize Federal, Provincial and proponent science to study cumulative effects of the Project;
- Funding to study extreme weather events and the impacts of these events on pipeline safety;
- Further studies on the interaction between bitumen and the quick moving Thompson River;
- Additional modeling to be conducted relating to spill response time; and
- A Terrestrial Spill Response Regime, which includes spill response resources, be established locally in order to minimize response times.

⁵ Trans Mountain Pipeline ULC Aboriginal Engagement Report. Trans Mountain Expansion Project July 2016. pp. 2-3 – 2-4, 2-7, 2-11.

Section 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Adams Lake that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

Adams Lake's Response to NEB Recommendation Report

Adams Lake expressed concern with the NEB Report during meetings, noting that the recommended conditions did discuss salmon in detail and that climate change was not considered as part of the NEB assessment. They also expressed their view that the NEB Act is 'short-sighted' and does not allow for an adequate assessment that includes cumulative effects.

V - Potential Impacts of the Project on Adams Lake's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests are provided in Sections 2.4.3 and Section 4.3 of this report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Adams Lake's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Adams Lake's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Adams Lake Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Adams Lake, Adams Lake's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province.

It is the Crown's understanding that Adams Lake did not participate in a traditional land and resource use (TLRU) study for the Project. Adams Lake indicated that they were not provided with funding to complete a TLRU study for the Project. The Crown has relied on available traditional land and resource use information, including submissions made by Adams Lake, to assess potential impacts of the Project on Adams Lake Aboriginal Interests.

In Oral Traditional Evidence and Written Evidence provided by Adams Lake, members spoke about the importance of the land to their way of life and their long history of relying on natural resources including salmon, deer, berries, and roots for food, medicine, spiritual, and cultural purposes. The impact that historic and existing development has already had in their traditional territory was communicated. Members spoke about restricted access to gathering sites as a result of industrial development and ski hills; about restricted fishing due to restrictions placed by Fisheries Officers, and impacts to fish habitat as a result of forestry operations and sawmills. The importance of being able to carry out their traditional Aboriginal rights and practices was communicated by all presenters and it was noted that Adams Lake has a full immersion, community run school where students have the opportunity to learn language, knowledge, and history relevant to their culture.

Impacts on Hunting, Trapping and Plant Gathering

Adams Lake identified many concerns related to environmental effects of the Project on hunting, trapping, and plant gathering activities, including loss of wildlife and wildlife habitat, effects to vegetation from off-highway vehicles, cumulative effects on grizzly bear mortality risk, the effectiveness of *Species at Risk Act*, and that mitigation methods proposed by the proponent may be unsuccessful (e.g., wetland reclamation) and that monitoring and reclamation (e.g., wetlands) may not be effective. In general, Adams Lake raised concerns with the cumulative effect of concurrent activities, including industrial, residential, and commercial developments, throughout their traditional territory making it difficult for them to exercise their Aboriginal rights and carry out traditional activities.

As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, old growth forests, wetlands, and wildlife and wildlife habitat (including species at risk) listed species. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping, and gathering (Section 4.3.1 of this Report). With regards to specific concerns raised by Adams Lake, the proponent would implement several mitigation measures to reduce potential effects to species important for Adams Lake's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP) and the vegetation and wildlife management plans. The proponent has committed to meeting with Adams Lake Indian Band to discuss their concerns, and to review the Trans Mountain EPP prior to the start of construction. Further, the proponent is committed to implementing weed management (as outlined in the Weed and Vegetation Management Plan) to reduce the potential for weed infestation following construction, and utilizing an Integrated Vegetation Management approach intended to reduce the use of herbicides and promote healthy ecosystems. The proponent will consult with Aboriginal groups regarding problem vegetation management and methods of treatment. Measures outlined in the proponent's Reclamation Management Plan are intended to

stabilize and revegetate affected lands to achieve land productivity along the construction RoW and footprint, equivalent to the adjacent land use.

The Crown also understands the proponent, in response to Adams Lake's specific concerns expressed related to cumulative effects on grizzly bear mortality risk, has committed to coordinating access and new clearing requirements with other industrial users in the area to minimize human activity in grizzly bear habitat and to control access where access cannot be avoided (in addition to the Project specific mitigation developed). The implementation of the Wildlife Conflict Management Plan and the Grizzly Bear Management Plan, as part of the environmental protection plans would be expected to prevent or reduce any direct bear mortalities associated with Project construction and operations. In addition, the proponent is committed to continued development and implementation of the mitigation strategy for the North Cascades, Grande Cache, and Yellowhead Grizzly Bear Population Units. The grizzly bear mitigation strategy includes objectives consistent with current regulatory guidelines and will be developed in consultation with the appropriate regulatory authorities and affected Aboriginal groups. As follow up to this commitment, the NEB required that the Grizzly Bear Mitigation Plan be prepared as a condition of Project approval and incorporate input from Aboriginal groups.

Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Adams Lake's access to hunting, trapping and plant gathering activities, largely confined to the Project footprint for the pipeline and associated facilities. The Crown appreciates that with construction and reclamation activities, disruptions to access may result in a loss of harvesting opportunities for Adams Lake. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access associated with hunting, trapping, and gathering sites (section 4.3.1 of this Report). The proponent would implement several mitigation measures to reduce potential effects on TLRU sites important for Adams Lake's hunting, trapping, and plant gathering activities, such as management plans that include access management, scheduling and notification of Project activities, and environmental monitoring programs that monitor access control measures. The Access Management Plan is intended to reduce disturbances caused by access, construction equipment and vehicle traffic, during and following construction in order to minimize disturbance to access to Adams Lake's traditional lands. The proponent has committed to minimizing the development of access routes, controlling public access along the construction RoW, selecting appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent has also committed to work with applicable resource managers, traditional land and resource users to define locations where access control is necessary, and what type(s) of access control will be implemented. In the event that hunting, trapping, and plant gathering sites are identified during ongoing engagement with Adams Lake prior to construction, the sites will be assessed, and appropriate mitigation measures will be determined. The proponent committed to working with Adams Lake to develop strategies to most effectively communicate the construction schedule and work areas to community members. Further, the proponent is committed to continued consultation and engagement with Aboriginal groups that are interested during construction.

Adams Lake expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities, particularly the impacts on their traditional way of life, including an erosion of culture and impacts to their oral traditions and knowledge. The Crown appreciates that short-term disruption could temporarily alter the behaviour of community members' hunting, trapping or plant gathering activities during construction, and that reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project, could have spiritual and cultural impacts on community members. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential social, cultural, spiritual, and experiential effects associated with hunting, trapping, and plant gathering activities (section 4.3.1 of this Report). With regards to specific concerns raised by Adams Lake, the proponent would implement several mitigation measures to reduce potential effects to Adams Lake's hunting, trapping, and plant gathering activities. The proponent has also committed to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Adams Lake, Adams Lake's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor impact on Adams Lake's hunting, trapping and plant gathering activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Adams Lake;
- Project-related pipeline and facility construction and routine maintenance activities within Adams Lake's traditional territory are temporary and thus, likely to cause minor disruptions to Adams Lake's community members accessing traditional hunting, trapping and plant gathering sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Adams Lake regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their hunting, trapping and plant gathering activities.

Impacts on Freshwater Fishing

Sockeye salmon is a key species that is central to Adams Lake culture and way of life. Adams Lake identified several concerns related to environmental effects of the Project on fishing activities, in particular impacts to fish and fish habitat, framed within the issue of having sustainable salmon runs. Concerns of the risk of aquifer and surface water contamination due to the Project and cumulative effects on fish and fish habitat were also raised.

As described in the NEB Recommendation Report, Project-related construction and operation could result in low to moderate magnitude effects on fish and fish habitat and surface water. Moderate effects

to fish and fish habitat would be localized to individual watercourse crossings where any potential serious harm would be compensated by offset measures. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Section 4.3.2 of this Report). A number of recommended NEB conditions require the proponent to file reports that will monitor Project-related impacts to fish, fish habitat and riparian habitats. With regards to specific concerns raised by Adams Lake, the proponent would implement several mitigation measures to reduce potential effects to species important for Adams Lake's fishing activities. The proponent has committed to time watercourse crossing construction activities to occur within the least risk biological windows in an attempt to avoid causing serious harm to fish, has committed to working with Aboriginal groups to identify the most appropriate means of offsetting serious harm to marine fish and fish habitat, and has proposed the implementation of channel and bank reclamation measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat. Additionally, water quality will be monitored during all instream activity. Each watercourse will be approached correctly so the cumulative effects of changes to all the crossings and the surrounding watershed will be limited. The Crown also understands the proponent, in response to Adams Lake's specific concerns regarding the potential for serious harm and offset plans and as part of the Project planning and development, provided the results of the serious harm self-assessment for all fish-bearing watercourses associated with the Project to the NEB.

To address Adams Lake's expressed concerns about the potential contamination of food fish in the event of a spill, the proponent committed to consulting with Fisheries and Oceans Canada and potentially affected Aboriginal groups to identify mutually acceptable in-kind or replacement measures to replace or offset impacts directly related to and caused by the spill. The proponent has committed to further engagement with the Adams Lake to discuss ideas regarding an offset plan, should it be required. Further, the proponent is committed to meeting with Adams Lake to discuss their concerns, and to review the Trans Mountain EPP prior to the start of construction.

Adams Lake raised concerns with the Project's potential impacts relating to specific locations and access to fishing activities, including impacts to salmon rearing habitat in Adams and Quesnel Lakes. Increased access by non-Aboriginal anglers and effects on fish populations were also raised. Project-related construction and routine maintenance activities are expected to cause short-term, temporary disruptions to Adams Lake's access to fishing activities. The Crown appreciates that if construction and reclamation occur during the fishing season, there could be a potential reduction in access to waterways, staging areas, and fishing sites for Adams Lake community members. However, disruptions to access would largely be confined to the Project footprint for the pipeline and associated facilities during construction and reclamation. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access to fishing sites important for Adams Lake (section 4.3.2 of this Report). With regards to specific concerns raised by Adams Lake, the proponent would implement several mitigation measures to reduce potential effects to fishing sites important for Adams Lake's fishing activities. As previously discussed, the proponent is committed to minimize disturbance to access to Adams Lake's traditional lands, as described in the Access

Management Plan. The proponent committed to working with Adams Lake to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Adams Lake expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its fishing activities, including potential impacts from the Project on their traditional way of life, including an erosion of culture and impacts to their oral traditions and knowledge. Adams Lake noted the necessity for clean water to sustain healthy fish, and effects to the health of communities if there are impacts to salmon populations on which the community relies. The community's ceremonial life is shaped by their interaction with the salmon. As described previously, the Project construction and routine maintenance is expected to cause short-term, temporary disruptions to Adams Lake's fishing activities. The Crown appreciates that this temporary interruption could mean that community members alter their fishing activities during construction, which could affect their participation in the traditional activity. NEB conditions, if the Project is approved, would either directly or indirectly reduce potential social, cultural, spiritual or experiential effects associated with fishing activities (Section 4.3.2 of this Report).

In consideration of the information available to the Crown from the NEB process, consultation with Adams Lake, Adams Lake's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor impact on Adams Lake's freshwater fishing activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Adams Lake;
- Project-related pipeline and facility construction and routine maintenance activities within Adams Lake's traditional territory are temporary and thus, likely to cause minor disruptions to Adams Lake's community members accessing traditional fishing sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Adams Lake regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their freshwater fishing activities.

Impacts on Other Traditional and Cultural Practices

Adams Lake identified many concerns related to environmental effects of the Project on other traditional and cultural practices, including the cumulative effect of concurrent activities, including industrial, residential, and commercial developments, throughout their traditional territory making it difficult for them to exercise their Aboriginal rights and carry out traditional activities. As described in Section 4.3.4 of this Report, Project-related activities are not likely to result in significant adverse effects on the ability of Aboriginal groups to use land, waters or resources for traditional purposes. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). With

regards to specific concerns raised by Adams Lake, the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources important for Adams Lake's traditional and cultural practices. The proponent has also committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during RoW finalization, narrowing the RoW in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments.

Project-related activities are expected to cause short-term disruptions that temporarily affect the ability of Aboriginal groups to access land, waters or resources for traditional purposes. The Crown appreciates that Adams Lake's opportunities for certain traditional and cultural activities will be temporarily interrupted during construction and routine operation, and there could be reduced access to travelways, habitation sites, gathering sites, and sacred areas. However, temporary disruptions to Adams Lake's traditional and cultural practices would be largely confined to sites within the Project footprint for the pipeline and associated facilities. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific sites and access to physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown notes the proponent's commitment to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

Adams Lake expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its other traditional and cultural practices, including potential impacts from the Project on their traditional way of life, including an erosion of culture and impacts to their oral traditions and knowledge. As described previously, the Crown appreciates that Project-related activities may result in temporary interruptions to Adams Lake's cultural and spiritual practices, or that their participation in the traditional activity is curtailed, during Project construction and routine maintenance activities.

In consideration of the information available to the Crown from the NEB process, consultation with Adams Lake, Adams Lake's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor impact on Adams Lake's other traditional and cultural practices. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on Adams Lake's traditional and cultural practices;
- Project-related construction and routine maintenance activities within Adams Lake's traditional territory are temporary and thus, likely to cause minor disruptions to Adams Lake's community members accessing traditional and cultural practice sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and

- Concerns regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their other cultural and traditional practices.

Impacts on Aboriginal Title

The Crown notes that the Project would be located within an area of Adams Lake's traditional territory assessed as having a weak *prima facie* claim for Aboriginal Title, as this area is outside of the area ethnographers historically attribute to the Shuswap Lakes Division and there are limited indications of historic Shuswap Lakes Division uses at 1846⁶.

The Crown has actively consulted with Adams Lake throughout the NEB process and Crown consultation process in an attempt to better identify, understand, and resolve concerns relating to Aboriginal title. Concerns related to Aboriginal title raised by Adams Lake throughout the NEB and Crown consultation process include:

- Impacts could impede or disrupt Adams Lake's use of its asserted traditional territory, including potential alienation of Adams Lake territory;
- Activities could affect Adams Lake's ability to manage and make decisions over the Project area, including loss of culture; and
- Project-related activities that could affect Adams Lake's economic opportunities in its asserted traditional territory.

The Crown provides a description of the potential impacts of the Project on Aboriginal title in section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. The Crown understands that, in addition to NEB conditions that would require the proponent to report on heritage resources and traditional use investigations (NEB Conditions 97 and 100), the proponent has committed to meeting with Adams Lake prior to the start of construction to discuss and address concerns, where possible. It is noted that Adams Lake has not executed a Mutual Benefits Agreement with the proponent.

The Crown also appreciates Adams Lake's concerns regarding spills, and the potential for a spill to impact Adams Lake's use and occupation of its asserted traditional territory, ability to make decisions over the area impacted, and the potential for a spill to adversely impact economic opportunities Adams Lake has for its territory. The Crown acknowledges the very low likelihood associated with a credible worst-case pipeline spill that could cause serious impacts to Adams Lake's Aboriginal Interests as they relate to title. The Crown also acknowledges the comprehensive set of mitigation measures committed to by the proponent to minimize the likelihood of a pipeline spill and reduce the magnitude of impacts in the event a spill occurs (Section 4.3.6 of this Report).

⁶ Ibid.

Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in Section 4.3.5 of this Report, it is the Crown's opinion that the Project is expected to have a negligible impact on Adams Lake's asserted Aboriginal title to the Project area.

Impacts Associated with Accidental Spills

Adams Lake expressed several concerns with direct and indirect effects of Project-related pipeline spills on their Aboriginal Interests, particularly related to potential effects on salmon from spills, including the risk of increased tanker traffic in the marine environment, potential delays in responding to spills or other environmental risks at remote water crossings, and flooding that could increase the risk of a spill from the pipeline.

A discussion of the potential impacts of a pipeline spill on Aboriginal Interests is provided in Section 4.3.6 of this Report. In consideration of this information and analysis, the proposed crossing of three Adams Lake reserves, as well as information available to the Crown on Adams Lake's Aboriginal Interests and concerns raised by Adams Lake during the NEB process and Crown consultation process, a pipeline spill associated with the Project could result in minor to serious impacts on Adams Lake's Aboriginal Interests. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who live nearby and rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill⁷.

The Crown also appreciates Adams Lake's concerns regarding spills, and the potential for a spill to impact Adams Lake's use and occupation of its asserted traditional territory, ability to make decisions over the area impacted, and the potential for a spill to adversely impact Adams Lake's economic opportunities for its territory.

A discussion of the potential impacts of a pipeline spill on Aboriginal Interests is provided in Section 4.3.6 of this Report. In consideration of this information and analysis, as well as information available to the Crown on Adams Lake's Aboriginal Interests and concerns raised by Adams Lake during the NEB process and Crown consultation process, a pipeline spill associated with the Project could result in minor to serious impacts on Adams Lake's Aboriginal Interests. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who live nearby and rely on subsistence foods and natural resources and are at greater risk for adverse effects from an oil spill⁸.

⁷ Trans Mountain Final Argument, p. 85 and 207

⁸ Trans Mountain Final Argument, p. 85 and 207

VI - Conclusions

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations, the Crown expects impacts of the Project on the exercise of Adams Lake's Aboriginal Interests would be up to minor.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Adams Lake's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Adams Lake in emergency response planning activities. The federal Crown is also considering incremental measures that would further accommodate the potential adverse impacts of the Project on Adams Lake, as discussed in Sections 4 and 5 of the main body of this report.

Appendix B.17 - Canim Lake Band (Tsq'escen)

I - Background Information

Canim Lake Band (Canim Lake), also known as Tsq'escen, is a Secwe'pemc (pronounced "Shi-HUEP-muh" or "She-KWE-pem") or Shuswap Nation. Canim Lake holds six reserves between Lac la Hache and Canim Lake, approximately 130 kilometres (km) north of Kamloops, British Columbia (BC) in the Cariboo-Chilcotin region. As of July 2016, Canim Lake had 607 registered members, of which 420 live on reserves.

A small group of Canim Lake members, or Tsq'escenemc, speak the traditional language; Secwepemcstin. The Tsq'escenemc, meaning "people of broken rock", are ethnographically recognized as part of the 'Lake Division' of the Secwe'pemc or Shuswap people, using the vast number of lakes in the region for sustenance. The Secwe'pemc are part of the Interior Salish People, who were considered historically as a semi-nomadic trading society, gathering berries in the summer, hunting and fishing throughout the year. In the winter, Secwe'pemc traditionally built pithouses. Canim Lake signed a Forest and Range Consultation and Revenue Sharing Agreement with the Province of British Columbia in March 2015, within which Canim Lake's identifies its asserted traditional territory.¹

Canim Lake is a member of the Northern Secwepemc te Qelmucw Nation and Northern Shuswap Tribal Council. The Northern Secwe'pemc te Qelmucw Nation is in Stage 4 negotiations within the BC Treaty Commission Process, and has also filed a protective writ in 2003 in BC Supreme Court, seeking a declaration of Aboriginal title within the area identified in the writ.

II - Preliminary Strength of Claim Assessment

- The pipeline right of way (RoW) follows along the north-eastern and south-eastern edges of Canim Lake's asserted traditional territory near Valemount and Clearwater for a total of approximately 59 km. The Blackpool and Albreda Pump Stations appear to fall within this area. Canim Lake's closest reserve is located approximately 46 km from the right of way (RoW).
- The Crown's preliminary assessment of Canim Lake's claim for Aboriginal rights over the section of the Project that spans Valemount to Clearwater is a weak *prima facie* claim as this area was generally considered outside the historic traditional territory of the Secwepemc Lake Division. The section of the Project south of Clearwater, overlapping Canim Lake's asserted territory is assessed as a moderate *prima*.
- *Prima facie* claim of Aboriginal rights in this area as this area was generally considered within the historic traditional territory of the Secwepemc Lake Division².

¹ http://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/canim_lake_fcrsa_executed_may4_2015.pdf

² (NSTQ EHR) NORTHERN SECWEPEMC TE QELMUCW, CANIM LAKE, CANOE CREEK, SODA CREEK AND WILLIAMS LAKE FIRST NATIONS, Review of Ethnographic and Historical Sources, Ministry of Justice, Legal Services Branch, Aboriginal Research Division, 22 February 2012; Teit, James. 1909. "The Shuswap" The Jesup North Pacific Expedition: Memoir of the American Museum of Natural History, New York. Volume II: Ethnology and Archaeology of Southern British Columbia and Washington. Franz Boas (ed.) New York: G. E. Steichert, 1909. 443-789; and

- The Crown's preliminary assessment of Canim Lake's claim for Aboriginal title over the section from Valemount to Clearwater is a weak *prima facie* claim as this area of the Project is depicted by ethnographers as outside the area of the historic traditional territory of the Secwepemc Lake Division or far removed from areas of known habitation or other historic use at 1846. The section of the Project south of Clearwater overlapping Canim Lake's asserted territory is assessed as a weak *prima facie* claim of Aboriginal title in this area; although this area is generally considered within the area ethnographers attribute to the Secwe'pemc Lake Division, the area is not in proximity to areas of known historic use³.

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Canim Lake's Aboriginal Interests, the Crown is of the view that the legal duty to consult Canim Lake lies at the low portion of the *Haida* consultation spectrum. In consideration of the Project intersecting with Canim Lake's asserted traditional territory, Canim Lake was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which affords Canim Lake opportunities to be consulted at a deeper level.

Canim Lake participated as a commenter in the National Energy Board (NEB) review process. Canim Lake signed a letter of support for the Project with the proponent on October 20, 2014, in which they withdrew objection to the Project and acknowledged their satisfaction with the proponent's mitigation measures and consultation.

The Major Projects Management Office (MPMO) offered Canim Lake \$6,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Canim Lake an additional \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Canim Lake did not use these funding opportunities. On September 23, 2016, Canim Lake was issued \$5,000 in capacity funding by EAO to assist with participation in consultation. Canim Lake met with Crown officials on August 30, 2016, to discuss the Project.

The Crown provided a first draft of this Report to Canim Lake for review and comment on August 17, 2016. The Crown did not receive comments from Canim Lake on the draft Report. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016. The Crown has not received comments from Canim Lake.

IV - Summary of Key Canim Lake Issues and Concerns Raised

The Crown has gained its understanding of Canim Lake's issues and concerns through the community's involvement in the NEB process, and through other engagement with the Crown. This section offers a summary of the key issues raised by Canim Lake, and does not present the views of the Crown as to

Tsq'escenem'c, The People of Broken Rock, The Canim Lake Band, Snine Forest, Stewardship Plan, Version 2.0.
April 15, 2016

³ Ibid

whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Canim Lake's key Project-related issues and concerns are summarized below:

Cultural and Social Impacts

Canim Lake raised concerns about potential Project-related impacts on fish, wildlife, vegetation that might result in a loss of community members' access to important harvesting areas and/or increased travel time to harvest important species. During construction, Canim Lake is concerned about potential Project-related impacts to sacred sites, burial grounds, archaeological sites and artifacts. Concerns about increased access for non-Aboriginal hunters to Canim Lake's traditional territory were also raised.

Canim Lake also noted the temporary closing of the North Thompson Park during Project construction and potential areas of impact in the Raft River and Clearwater areas.

Environmental Impacts

Canim Lake noted concerns about current water quality and the potential effect that the Project might have on worsening water quality, including siltation, spawning habitat for fish, and water availability in the region. Community members are specifically concerned about moose, caribou and medicinal plants, migratory patterns of animals in the area, migratory birds, and the reclamation of vegetation and habitat along the right of way (RoW). In relation to reclamation activities, Canim Lake noted importance of using traditional plants could be used to reclaim the disturbed land.

Canim Lake have concerns about effects of the Project outside of its territory, inside its territory, and how these effects may impact their community overall.

Economic Impacts

Canim Lake raised concerns about employment and opportunities for the involvement of local people on the Project.

Accidents and Malfunctions

Canim Lake noted concerns of the potential for a spill and resulting effects on fish and fish habitat, and wildlife and natural resources, which are considered the lifeblood of the Canim Lake people. Concerns were also raised of potential effects of a spill along water crossings on the food chain and on human health, and control structures for repairs and spills in the completed pipeline. Handling of contaminated materials in the event of a spill, in the river system in particular, remains a concern to Canim Lake.

Canim Lake remain uncertain understanding what a spill would look like, what measures would be taken to deal with spill on land, river, or ocean, what pipeline monitoring looks like, and what will be done to protect animals, wildlife, waterways, and lands in event of the spill, and what measures would be taken to prevent the pipeline from being dug up and/or exposed.

Health and Human Safety

Canim Lake community members are concerned about safety protocols for the Project.

Methodology, Process and Consultation

Canim Lake expressed concerns about the communications with the proponent and lack of confidentiality.

Accommodation Proposals

Canim Lake provided the federal and provincial crown with proposed accommodation measures to consider in relation to accommodating potential impacts of the Project on Canim Lake's Aboriginal Interests:

- The proponent will contact Canim Lake immediately should any environmental, archaeological, or other issues that require mitigation occur, so that they can work collaboratively to mitigate the effects;
- Use of traditional plants to revegetate disturbed RoW, and use Canim Lake community members to replant the RoW area with indigenous species;
- Canim Lake would like to participate in any visual monitoring of the pipeline RoW; and
- Development of a cultural protocol with the proponent.

Section 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Canim Lake that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

Canim Lake's Response to NEB Recommendation Report

No specific comments were received from Canim Lake on the *NEB Recommendation Report*.

V - Potential Impacts of the Project on Canim Lake's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests are provided in Sections 2.4.3 and Section 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted or established traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Canim Lake's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Canim Lake's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;

- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Canim Lake's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Canim Lake, Canim Lake's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate (EAC) issued by the Province.

Canim Lake completed a traditional land use (TLU) study in 2013 titled "Trans Mountain Expansion Project Consultation and Information Gathering: Report of Consultation between Canim Lake Band and Kinder Morgan Canada". The focus of the study was on Crown lands within the asserted territory of Canim Lake crossed by the segment of the proposed pipeline from Hope to Burnaby. TLUs identified by Canim Lake include hunting, gathering plants, information on fishing sites, sacred sites, trapping sites, habitation sites, gathering areas for community members, and trails and travelways. The results of the TLU are summarized in the Project Application ([A3S2H1](#)). During the August 30, 2016 meeting with the Crown, Canim Lake explained that the TLU only provided information from the individuals interviewed for the TLU as people in their community only speak about their own personal experiences and sites, and will typically not speak for others.

Impacts on Hunting, Trapping, and Plant Gathering

Canim Lake community members hunt moose, deer, elk and bears, primarily in the autumn when animals have fattened up for the winter. Trapped species include marten, lynx, mink, weasel, squirrel, wolverine, badger, cougar, fox, muskrat, beaver, rabbit and grouse. Canim Lake reported that edible plants and berries are important food sources for community members. Cow parsnip, wild rhubarb, wild cranberries, wild blueberries, huckleberries and mushrooms are gathered, and pine, spruce and birch trees are also used.

Canim Lake identified many concerns related to environmental effects of the Project on hunting, trapping, and plant gathering activities, specifically moose, caribou and medicinal plants, migratory patterns of animals in the area, migratory birds, and the reclamation of vegetation and habitat along the RoW. As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, old growth forests, wetlands, and wildlife and wildlife habitat. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping, and gathering (Section 4.3.1 of this Report). With regards to specific concerns raised by Canim Lake, the proponent would implement several mitigation measures to reduce potential effects to species important for Canim Lake's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of

clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP), and the vegetation and wildlife management plans. The proponent is also committed to meeting with Canim Lake to further discuss and address concerns, where possible, prior to the start of construction.

Canim Lake elders and community members identified seven hunting sites, three trap lines and 10 plant gathering sites during the TLU study for the Project. One hunting site near Blue River is located within the proposed pipeline corridor, and six hunting sites are more than 3 km from the Project. The nearest trapping site is located approximately 4.3 km north of the proposed pipeline corridor, and two trappings sites are more than 21 km from the proposed pipeline corridor. Two plant gathering sites are located within the proposed pipeline corridor, three plant gathering sites are located within 2 km of the proposed pipeline corridor, and five sites are more than 7.6 km from the proposed pipeline corridor.

Canim Lake raised concerns with the Project's potential impacts relating to specific locations and access to hunting, trapping, and plant gathering activities, including losing access to important harvesting areas or having to travel further to harvest important species, and increased access for non-Aboriginal hunters to Canim Lake's asserted traditional territory. Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Canim Lake's access to hunting, trapping and plant gathering activities, largely confined to the Project footprint for the pipeline and associated facilities. Canim Lake suggested that traditional plants could be used to reclaim the areas that would be disturbed. The Crown appreciates that with construction and reclamation activities disruptions to access may result in a loss of harvesting opportunities for Canim Lake. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access to hunting, trapping, and gathering sites (Section 4.3.1 of this Report). With regards to specific concerns raised by Canim Lake, the proponent would implement several mitigation measures to reduce potential effects on traditional land resource use (TLRU) sites, such as management plans that include access management, scheduling and notification of Project activities, and environmental monitoring programs that monitor access control measures. The Access Management Plan is intended to reduce disturbances caused by access, construction equipment and vehicle traffic, during and following construction in order to minimize disturbance to access to Canim Lake's traditional lands. The proponent is committed to minimizing the development of access routes, controlling public access along the construction RoW, selecting appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent will work with applicable resource managers, traditional land and resource users to define locations where access control is necessary, and what type(s) of access control will be implemented. In the event that hunting, trapping, and plant gathering sites are identified during ongoing engagement with Canim Lake prior to construction, the sites will be assessed, and appropriate mitigation measures will be determined. The proponent committed to working with Canim Lake to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Canim Lake expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities, including impacts on wildlife and natural resources because they are considered the life-blood of Canim Lake Band people. Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Canim Lake's hunting, trapping, and plant gathering activities. The Crown appreciates that this short-term disruption could temporarily alter the behavior of community members' hunting, trapping or plant gathering activities during construction, and that reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project, could have spiritual and cultural impacts on community members. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities (Section 4.3.1). The proponent has also committed to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Canim Lake, Canim Lake's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor impact on Canim Lake's hunting, trapping and plant gathering activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Canim Lake;
- Project-related pipeline and facility construction and routine maintenance activities within Canim Lake's traditional territory are temporary and thus, likely to cause minor disruptions to Canim Lake's community members accessing traditional hunting, trapping and plant gathering sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Canim Lake regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their hunting, trapping and plant gathering activities.

Impacts on Freshwater Fishing

Canim Lake community members fish trout, kokanee, burbot and whitefish in several lakes in the region, salmon and trout in larger rivers and creeks.

Canim Lake identified many concerns related to environmental effects of the Project on fishing activities, including potential Project-related impacts on fish and fish habitat (including spawning habitat), current water quality and the potential effect that the Project might have on worsening water quality, including siltation, fish habitat and water availability in the region. As described in the *NEB Recommendation Report*, Project-related construction and operation could result in low to moderate magnitude effects on fish and fish habitat and surface water. Moderate effects to fish and fish habitat

would be localized to individual watercourse crossings where any potential serious harm would be compensated by offset measures. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Section 4.3.2 of this Report). A number of recommended NEB conditions require the proponent to file reports that will monitor Project-related impacts to fish, fish habitat and riparian habitats. With regards to specific concerns raised by Canim Lake, the proponent would implement several mitigation measures to reduce potential effects to species important for Canim Lake's fishing activities. The proponent has committed to time watercourse crossing construction activities to occur within the least risk biological windows in an attempt to avoid causing serious harm to fish, has committed to working with Aboriginal groups to identify the most appropriate means of offsetting serious harm to marine fish and fish habitat, and has proposed the implementation of channel and bank reclamation measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat.

Canim Lake Elders and community members identified six fishing sites during the TLU study for the Project, of which two fishing sites on the North Thompson River and Raft River are located within the proposed pipeline corridor. Four fishing sites are located more than 11 km from the proposed pipeline corridor.

Canim Lake raised concerns with the Project's potential impacts relating to specific locations and access to fishing activities, including the temporary closing of the North Thompson Park during Project construction and potential areas of impact in the Raft River and Clearwater areas, and community members losing access to important harvesting areas or having to travel further to harvest important species. Project-related construction and routine maintenance activities are expected to cause short-term, temporary disruptions to Canim Lake's access to fishing activities. The Crown appreciates that if construction and reclamation occur during the fishing season there could be a potential reduction in access to waterways, staging areas, and fishing sites for Canim Lake community members. However, disruptions to access would largely be confined to the Project footprint for the pipeline and associated facilities during construction and reclamation. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access to fishing sites important for Canim Lake (Section 4.3.2 of this Report). With regards to specific concerns raised by Canim Lake, the proponent would implement several mitigation measures to reduce potential effects to fishing sites important for Canim Lake's fishing activities. As previously discussed, the proponent is committed to minimize disturbance to access to Canim Lake's traditional lands, as described in the Access Management Plan. The proponent committed to working with Canim Lake to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Canim Lake expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its fishing activities, including impacts on fish because they are considered the lifeblood of Canim Lake people. As described previously, the Project construction and routine maintenance is expected to cause short-term, temporary disruptions to Canim Lake's fishing activities. The Crown appreciates that this temporary interruption could mean that community members alter their fishing activities during construction, which could affect their participation in the traditional

activity. NEB conditions, if the Project is approved, would either directly or indirectly reduce the potential social, cultural, spiritual or experiential effects associated with fishing activities (Section 4.3.2 of this Report).

In consideration of the information available to the Crown from the NEB process, consultation with Canim Lake, Canim Lake's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor impact on Canim Lake's freshwater fishing activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Canim Lake;
- Project-related pipeline and facility construction and routine maintenance within Canim Lake's traditional territory are temporary and thus, likely to cause minor disruptions to Canim Lake's community members accessing traditional fishing sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Canim Lake regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their freshwater fishing activities.

Impacts on Other Traditional and Cultural Practices

Other traditional and cultural practices sites include trails and travelways, habitation sites, gathering places, and sacred areas. Peeled birch bark trees can be found along many of the historic trails in the Canim Lake traditional territory. Historically, Green Lake was used as a gathering place for the 17 Shuswap nations where there are many burial sites. Annual gatherings are currently held at Little Fort.

Canim Lake identified many concerns related to environmental effects of the Project on other traditional and cultural practices, in particular, impacts to sacred sites, burial grounds, archaeological sites and artifacts. As described in Section 4.3.4 of the Report, Project-related activities are not likely to result in significant adverse effects on the ability of Aboriginal groups to use land, waters or resources for traditional purposes. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental impacts on physical and cultural heritage resources important for Canim Lake's traditional and cultural practices (Section 4.3.4). With regards to specific concerns raised by Canim Lake, the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources. The proponent has committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during right-of-way finalization, narrowing the RoW in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments. During the meeting with the Crown on

August 30, 2016, Canim Lake expressed that they are satisfied with protocols and procedures in place to guide the proponent if they come across archaeological sites during construction.

Canim Lake elders and community members identified five historic trails, nine habitation sites, four gathering places during the TLU for the Project. There are no habitation sites, gathering places or sacred areas within the proposed pipeline corridor. One trail from Canim Lake I.R. 1 to Boulder on the North Thompson River is within the proposed pipeline corridor, and four trails are more than 2.5 km from the proposed pipeline corridor. Four habitation sites are within 2 km of the proposed pipeline corridor, including an old swing bridge site, pit house and cache pits at North Thompson River Provincial Park, and historic and currently used cabins near Lemieux Creek and Mount Ollie. Five habitation sites are located more than 27 km from the Project. The nearest gathering place is at Little Fork approximately 1.5 km from the proposed pipeline corridor, and three sites are located more than 70 km from the proposed pipeline corridor. The nearest sacred area is an archaeological site 1 km east of the proposed pipeline corridor, and three (burial) sites are located more than 10 km from the proposed pipeline corridor.

As described in Section 4.3.4 of the Report, Project-related activities are expected to cause short-term disruptions that temporarily affect the ability of Aboriginal groups to access land, waters or resources for traditional purposes. The Crown appreciates that Canim Lake's opportunities for certain traditional and cultural activities will be temporarily interrupted during construction and routine operation, and there could be reduced access to travelways, habitation sites, gathering sites, and sacred areas. However, temporary disruptions to Canim Lake's traditional and cultural practices would be largely confined to sites within the Project footprint for the pipeline and associated facilities. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific sites and access to physical and cultural heritage resources (Section 4.3.4 of this Report). Canim Lake expressed concern that the community remain informed and involved in the Project so that the community can be assured of activities and any environmental impacts. Canim Lake also noted to the Crown that they would be interested in engaging in a cultural protocol with the proponent. The Crown notes the proponent's commitment to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

As described previously, the Crown appreciates that Project-related activities may result in temporary interruptions to Canim Lake's cultural and spiritual practices, or that their participation in the traditional activity is curtailed, during Project construction and routine maintenance activities.

In consideration of the information available to the Crown from the NEB process, consultation with Canim Lake, Canim Lake's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued, Project construction and routine maintenance during operation are expected to result in a negligible-to-minor impact on Canim Lake's other traditional and cultural practices. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and operation activities are likely to have a minor to moderate environmental effect on Canim Lake's traditional and cultural practices;
- Project-related construction and routine maintenance within Canim Lake's traditional territory are temporary and thus, likely to cause minor disruptions to Canim Lake's community members accessing traditional and cultural practice sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their other cultural and traditional practices.

Impacts on Aboriginal Title

The Crown notes that the Project would be located within an area of Canim Lake's asserted traditional territory assessed as having a weak *prima facie* claim for Aboriginal title as this area of the Project is depicted by ethnographers as outside the area of the historic traditional territory of the Secwepemc Lake Division or far removed from areas of known habitation or other historic use at 1846. The section of the Project south of Clearwater overlapping Canim Lake's asserted territory is assessed as a weak *prima facie* claim; although this area is generally considered within the area ethnographers attribute to the Secwe'pemc Lake Division, the area is not in proximity to areas of known historic use

The Crown has actively consulted with Canim Lake throughout the NEB process and Crown consultation process in an attempt to better identify, understand, and resolve concerns relating to Aboriginal title.

Concerns related to Aboriginal title raised throughout the NEB and Crown consultation process include:

- Impacts could impede or disrupt Canim Lake's use of its asserted traditional territory;
- Activities could affect Canim Lake's ability to manage and make decisions over the Project area; and
- Project-related activities that could affect Canim Lake's economic benefit of the lands and resources in their asserted traditional territory.

The Crown provides a description of the potential impacts of the Project on Aboriginal title in Section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid/reduce Project impacts associated with the degree of disturbance to terrestrial and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as well as NEB Conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved.

The Crown notes that Canim Lake executed a Mutual Benefits Agreement with the proponent. Although these agreements are confidential, the Crown understands they may contain provisions for financial, environmental and training benefits that could further reduce or accommodate impacts to Aboriginal title claims if the Project proceeds.

Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in Section 4.3.5, it is the Crown's opinion, that the Project is expected to have negligible impacts on Canim Lake's asserted Aboriginal title to the proposed Project area.

Impacts Associated with Accidental Pipeline Spills

Canim Lake expressed several concerns with direct and indirect effects of Project-related pipeline spills on their Aboriginal Interests, particularly potential effects of a spill on fish and fish habitat, and wildlife and natural resources, which are considered the lifeblood of the Canim Lake people, and along water crossings on the food chain and on human health.

The Crown also appreciates Canim Lake's concerns regarding spills, and the potential for a spill to impact Canim Lake's use and occupation of its asserted traditional territory, ability to make decisions over the area impacted, and the potential for a spill to adversely impact any economic development aspirations Canim Lake has for its territory.

A discussion of the potential impacts of a pipeline spill on Aboriginal Interests is provided in Section 4.3.6 of this Report. In consideration of this information and analysis, as well as information available to the Crown on Canim Lake's Aboriginal Interests and concerns raised by Canim Lake during the NEB process and Crown consultation process, a pipeline spill associated with the Project could result in minor to serious impacts on Canim Lake's Aboriginal Interests. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who live nearby and rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill⁴.

VI - Conclusions

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations, the Crown expects impacts of the Project on the exercise of Canim Lake's Aboriginal Interests would be up to minor.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Canim Lake's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Canim Lake in emergency response planning activities. The federal Crown is also considering incremental

⁴ Trans Mountain Final Argument, p. 85 and 207

measures that would further accommodate the potential adverse impacts of the Project on Canim Lake, as discussed in Sections 4 and 5 of the main body of this report.

In addition, the Crown is aware that the proponent has entered into a Mutual Benefits Agreement with Canim Lake in an attempt to offset potential impacts, should the Project proceed.

Appendix B.18 – Little Shuswap Lake Indian Band

I - Background Information

Little Shuswap Lake Indian Band (Little Shuswap Lake) is a Secwe'pemc (pronounced "Shi-HUEP-muh" or "She-KWE-pem") or Shuswap Nation Aboriginal group located in south-central British Columbia (BC) along the shores of Little Shuswap Lake. Their traditional name is Skwlax, which translates to 'black bear' in their traditional language, Secwepemcstin. Little Shuswap Lake holds four reserves: *Quaaout No. 1*, *Chum Creek No. 2*, *Meadow Creek No. 3*, *Scotch Creek No.4*, and *North Bay No. 5*. As of July 2016, there are 349 registered Little Shuswap Lake members, of whom 196 live on Little Shuswap Lake reserves, 41 live on other reserves, and 112 live off reserve.

There is ethno-historical information that suggests that within the Secwe'pemc Nation, there was a notion of traditional territories among different Secwe'pemc communities or divisions; territories that were subject to the stewardship and control of those communities or divisions. The Crown understands that the historical Shuswap Lakes Division consisted of a number of bands, and that Little Shuswap Lake is a modern-day descendant of the Shuswap Lakes Division.

Little Shuswap Lake submitted a protective *Writ of Summons* in the BC Supreme Court on December 10, 2003. Little Shuswap Lake's *Writ* is independent of the *Writ of Summons* filed by the Secwe'pemc Nation. Little Shuswap Lake signed a Forest and Range Agreement in 2004 within which an area is identified as its asserted traditional territory¹.

II - Preliminary Strength of Claim Assessment

- Approximately 27 kilometres (km) of the proposed pipeline right-of-way (RoW) would be located within Little Shuswap Lake's asserted traditional territory and the closest Little Shuswap Lake reserve to the RoW is 41 km.
- The Crown's preliminary assessment of the Little Shuswap Band/historical Shuswap Lakes Division's claims for Aboriginal rights applies over the section of the Project that spans the area from north of Blue River along the North Thompson River to Kamloops, and south to Stump Lake, which overlaps with their asserted territories. That claim is assessed as a weak *prima facie* claim for Aboriginal rights as this area falls outside of the area ethnographers attribute to the historical Shuswap Lake Division of Secwe'pemc, and there are no historical indications for Shuswap Lake division hunting, fishing, and gathering in this area around the time of contact².

¹ https://www.for.gov.bc.ca/haa/Docs/little_shuswap_fra.pdf

² Ministry of Justice, Aboriginal Research Division, Secwepemc Nation: A Brief Ethnohistoric Overview of the Eastern Divisions (Revised August 2012); Ministry of Justice, Aboriginal Research Division Harper Creek Mine: Review of Ethnographic and Historical Sources (Revised June 2012); Sun Peaks Resort: A Review of the Historical and Ethnographic Sources Relating to Aboriginal Use and Occupation (Updated July 2011); Teit, James, The Shuswap, in Franz Boas ed., The Jesup North Pacific Expedition, Volume II, Ethnology and Archaeology of Southern British Columbia and Washington, New York: American Museum of Natural History, 1908; Dawson, George M., Notes on the Shuswap People of British Columbia, Transactions of the Royal Society of Canada, 1891; Palmer, Gary B., Cultural Ecology in the Canadian Plateau: Pre-Contact to the Early Contact Period in the Territory of the Southern Shuswap Indians of British Columbia, in Northwest Anthropological Research Notes, Vol. 9 No. 2, Fall 1975; Ignace, Marianne Boelscher, Shuswap in Deward E. Walker, Jr. ed., Handbook of North American Indians, Vol. 12, Washington: Smithsonian Institution, 1998; and, Ignace, Marianne and Ron Ignace, The Secwepemc:

- The Crown's preliminary assessment of Little Shuswap Band/historical Shuswap Lakes Division's claims for Aboriginal title applies over the section of the Project that spans the area from north of Blue River along the North Thompson River to Kamloops, and south to Stump Lake. The claim is assessed as a weak *prima facie* claim for Aboriginal title as this area is outside of the area ethnographers historically attribute to the Shuswap Lake Division and there are limited indications of historic Shuswap Lake division uses at 1846³.

III - Little Shuswap Lake's Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Little Shuswap Lake's Aboriginal Interests, the Crown is of the view that the legal duty to consult Little Shuswap Lake lies at the low portion of the *Haida* consultation spectrum. In consideration of the Project intersecting with Little Shuswap Lake's asserted traditional territory, Little Shuswap Lake was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which affords Little Shuswap Lake opportunities to be consulted at a deeper level.

Little Shuswap Lake did not participate in the National Energy Board (NEB) review process, and did not submit an application for funding to the NEB. However, Little Shuswap Lake has been engaged in the Crown consultation process and met with the Crown consultation team on September 20, 2016.

The Major Projects Management Office (MPMO) offered Little Shuswap Lake \$6,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Little Shuswap Lake an additional \$7,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Little Shuswap Lake signed contribution agreements with the MPMO in response to both of these offers, for a total of \$13,000 in allocated funding.

EAO provided Little Shuswap Lake with \$5,000 in capacity funding to assist with the Crown consultation process on September 27, 2016.

The Crown provided a first draft of this Report to Little Shuswap Lake for review and comment on August 17, 2016. The Crown did not receive comment from Little Shuswap Lake on the draft Report. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2106. The Crown has not received comments from Little Shuswap Lake.

IV - Summary of Key Little Shuswap Lake Issues and Concerns Raised

The Crown has gained its understanding of the issues and concerns of Little Shuswap Lake based on information brought forward at the September 20, 2016 meeting. The following concerns were raised during Crown consultation:

Environmental Impacts

- Concerns with the Project's stream crossings in Little Shuswap Lake's watershed.
- Concern regarding Project-related effects to the salmon run; Little Shuswap Lake notes that there is already a declining number of salmon.
- Concern regarding cumulative environmental effects.

Traditional Resource Use and Rights to Land in Bruce Morrison and C. Roderick Wilson eds., *Native Peoples, The Canadian Experience*, Don Mills: Oxford University Press, 2004.

³ Ibid.

Impacts on Aboriginal Rights and Title

- Concern that further effects to salmon populations would impact Little Shuswap Lake's ability to fish, and could affect vulnerable members of their community, especially elders.
- General concern of the potential effects to wildlife, and the impacts on Little Shuswap Lake's ability to hunt in the area.

Other Concerns

- General concerns on marine shipping and safety.
- Lake Shuswap Lake will be building a new reserve in 5-15 years, and it will likely be close to the Project's RoW. There is concern that Lake Shuswap Lake will not be able to get accommodation for this.

Accommodation Measures Proposed by Little Shuswap Lake

During the September 20, 2016 meeting, Little Shuswap Lake noted some accommodation measures to address potential impacts of the Project on Little Shuswap Lake's Aboriginal Interests. This includes:

- Employment opportunities;
- Revenue sharing (set number of barrels of oil per day providing the financial basis);
- Fish hatchery in the area (have DFO consider reintroducing stocks through hatcheries);
- Economic diversification activities;
- Involve Aboriginal Groups in wildlife studies (e.g. moose population studies); and
- Develop a First Nations economic development trust that could be in the hands of Aboriginal leadership, which could be used for economic diversification, social and environmental programs.

Section 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Little Shuswap Lake that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

Little Shuswap Lake's Response to NEB Recommendation Report

No specific comments received on the *NEB Recommendation Report*.

V - Potential Impacts of the Project on Little Shuswap Lake's Aboriginal Interests

A discussion of the Crown's approach to assessing Project impacts on Aboriginal Interests is provided in Section 2.4.3 of this Report. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

It is the Crown's understanding that Little Shuswap Lake did not participate in the NEB process and did not complete a traditional land and resource use study for the Project. As a result, the Crown has limited information on the specific sites and resources used by Little Shuswap Lake for traditional purposes that could be impacted by the Project. Little Shuswap Lake identified concerns during the Crown consultation process, which the Crown has taken into consideration in its assessment of potential impacts on Little Shuswap Lake's Aboriginal Interests.

The general direct and indirect effects of the Project on Aboriginal Interests, along with key mitigation measures, are described in Section 4.3 of the main body of this Report. As described in that section, routine Project-related activities are likely to result in low to moderate impacts on the lands, waters and resources that Aboriginal groups use to exercise their hunting, trapping, plant gathering, fishing, and other traditional activities. Short-term, temporary access disruptions to traditional activities are expected, which would be localized within the Project footprint for the pipeline and associated facilities. In consideration of the information available to the Crown from the NEB process, Crown consultation with Little Shuswap Lake, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province, the Project is expected to result in a negligible-to-minor impact on Little Shuswap Lake's Aboriginal Interests.

The Crown provides a description of the potential impacts of the Project on Aboriginal title in Section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid/reduce Project impacts associated with the degree of disturbance to terrestrial and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as well as NEB Conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved. Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in Section 4.3.5, it is the Crown's opinion that the Project is expected to have negligible impacts on Little Shuswap Lake's asserted Aboriginal title to the proposed Project area.

A discussion of the potential impacts of a pipeline spill on Aboriginal Interests is provided in Section 4.3.6 of this Report. In consideration of this information and analysis, as well as information available to the Crown on Little Shuswap Lake's Aboriginal Interests, and concerns raised by Little Shuswap Lake during the Crown consultation process, a pipeline spill associated with the Project could result in minor to serious impacts on Little Shuswap Lake's exercise of Aboriginal Interests, depending on the characteristics and severity of the spill. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty.

VI - Conclusions

The Crown understands that the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline safety regime would only partially address ongoing burdens and risks associated with the Project. Under the typical conditions for construction and operations, the Crown expects impacts of the Project on the exercise of Little Shuswap Lake's Aboriginal Interests would be up to negligible-to-minor.

The Crown is also supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Little Shuswap Lake's ongoing involvement and participation the proponent's detailed project planning, including the development of site-specific measures to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Little Shuswap Lake in emergency response planning activities. The federal Crown is also considering incremental

measures that would further accommodate the potential adverse impacts of the Project on Little Shuswap Lake, as discussed in Sections 4 and 5 of this Report.

Appendix C.1 - Kwikwetlem First Nation

I – Background Information

The Kwikwetlem First Nation (Kwikwetlem) is part of the Downriver Halkomelem dialect subdivision of the Central Coast Salish community, centred in the municipalities of Coquitlam and Port Coquitlam, British Columbia (BC) on the north shore of the Fraser River. There are two Kwikwetlem reserves, with the principle being Coquitlam Indian Reserve #2. As of January 2016, Kwikwetlem has a registered population of 96 people, of which 36 individuals live on reserve. Kwikwetlem members historically spoke hə́ŋqəmiŋə́mə́ŋqəwnriver dialect of the Halkomelem Salishan language.

Kwikwetlem signed a 2015 Forest and Range Consultation and Revenue Sharing Agreement, identifying a defined area as its traditional territory.¹ The reserves lie within Kwikwetlem Core Territory, which is defined by Kwikwetlem as “those lands, waters, and resources centred on the Coquitlam watershed and within which the Nation asserts title and rights. An adjoining Area of Use and Interest marks the region of regular ancient and ongoing travel, resource use, and social interaction surrounding the core territory and in which the Nation asserts resource and heritage management interests” ([A4S9A7](#)). Together, these areas are referred to as “Kwikwetlem territory”.

Kwikwetlem is not currently involved in negotiations with the BC Treaty Commission, but did file a Statement of Intent (SOI) map in 1999.

II – Preliminary Strength of Claim Assessment

- The Project corridor transects approximately 26 kilometers (km) of Kwikwetlem’s asserted traditional territory from Fort Langley to the east of the pipeline’s crossing under the Fraser River through to Burnaby Mountain and the terminus of the pipeline. The distance from the Right of Way (RoW) to the nearest Kwikwetlem community is estimated to be 0.6 km. Less than 1 km of the marine shipping route would pass within Kwikwetlem’s asserted traditional territory.
- The Crown's preliminary assessment of Kwikwetlem's claim for rights over the area associated with the terminus of the Project to Fort Langley ranges from weak to strong. The portion of proposed pipeline that runs parallel to the Fraser River to the mouth of the Coquitlam River and the section between this and the Pitt River is within an area ethnographers considered to be part of the historical territory of the Kwikwetlem people. The Coquitlam watershed area was used for sustenance activities prior to contact with European settlers, which would support a strong claim. For portions of the proposed RoW to the east and west of this area, the claim weakens as these areas were considered by ethnographers to be outside the historical territory of the Kwikwetlem people. There is limited information of their historical use of these areas.

¹ http://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/kwikwetlem_fcrsa_executed_april_30_2015.pdf

- The Crown's preliminary assessment of Kwikwetlem's claim for title over the area associated with the terminus of the Trans Mountain pipeline to Fort Langley ranges from weak to strong. The portion of proposed pipeline that runs parallel to the Fraser River to the mouth of the Coquitlam River on the north side of the Fraser is within an area ethnographers considered to be part of the historical territory of the Kwikwetlem people. The Kwikwetlem were present and utilizing the Coquitlam watershed at 1846, particularly the Coquitlam River, which would support a strong claim. For portions of the pipeline to the east and west of this area, the claim weakens as these areas were considered by ethnographers to be outside the historical territory of the Kwikwetlem people with limited information of their historical use at 1846.
- The Crown's preliminary assessment of Kwikwetlem's claims for Aboriginal rights to harvest marine resources within the shipping route of the Project near the terminus of the pipeline in Burnaby is that it appears to be weak. This area is considered by ethnographers to be outside of the Kwikwetlem traditional territory and there is limited information of their historical use of this area. Kwikwetlem maintains that it has a strong claim for Aboriginal rights to harvest marine resources within the shipping route.
- The Crown's preliminary assessment of Kwikwetlem's *prima facie* claim of Aboriginal title to the upland area of the shipping route of the Project near the terminus of the pipeline in Burnaby is considered weak. Kwikwetlem core territory is associated with the Coquitlam River and watershed with some village sites on the Fraser River and in Port Moody connected by overland trails. Port Moody is proximal to the marine shipping route; however, information of Kwikwetlem use of the area is minimal and indicates seasonal use rather than sufficient and exclusive occupation at 1846. Kwikwetlem believes that it has a strong claim for Aboriginal title in this upland area, since there are resource sites and connecting trails subject to regular use on a seasonal basis.

III – Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Kwikwetlem's Aboriginal Interests, the Crown is of the view that the legal duty to consult Kwikwetlem lies at the deeper end of the *Haida* consultation spectrum. Kwikwetlem was placed on Schedule B of the section 11 order issued by the Environmental Assessment Office (EAO), which afforded Kwikwetlem opportunities to be consulted at a deeper level.

Kwikwetlem registered as an intervenor in the National Energy Board (NEB) hearing process. Their involvement included an Application to Participate, Late Evidence Filing (August 21, 2015) which was denied by the NEB, and a written final argument. The Late Evidence Filing included a Kwikwetlem Interests Report including a Heritage and Traditional Knowledge study, a Fraser River Area Eulachon Study and a Re-Establishment Plan for the Coquitlam Reservoir Sockeye. Although Kwikwetlem's late evidence was not considered formally by the NEB in its review of the Project, the Crown received the late evidence and confirmed to Kwikwetlem that this material will be considered by the Crown as part of the consultation process.

Kwikwetlem filed a written argument in chief with the NEB, including several comments on the draft NEB conditions, several of which were adopted by the NEB in its May 19, 2016 Report. Kwikwetlem's comments were with respect to the requirements placed on the proponent to engage potentially affected First Nations in the development of draft plans to be filed with the NEB as part of detailed Project planning and operation.

In August 2015, Kwikwetlem wrote to the Major Projects Management Office (MPMO) to express concern over a perceived lack of Crown consultation. Follow-up was conducted via phone calls, emails and by letter dated February 18, 2016, which set out the details of the government's transition plan for the Project, including the key remaining steps of the consultation process.

The Crown consultation team met with Kwikwetlem representatives on March 2, 2016 to discuss the Project, federal government's interim measures for the Project, and the ongoing consultation process. Kwikwetlem raised their concerns over the First Nation's strained relationship with the proponent and at the request of Kwikwetlem, MPMO shared the record of this meeting with the proponent as an encouragement for more in depth engagement. A second meeting between the Crown consultation team and Kwikwetlem representatives was held on September 15, 2016 to identify key concerns, receive feedback, and discuss impacts of the Project on the Kwikwetlem. The key topic of discussion was to identify outstanding issues and concerns which haven't been fully dealt with through the conditions in the NEB report. Kwikwetlem's concerns centered on what they viewed as an inadequate assessment of the adverse impacts of the Project on its Aboriginal rights due primarily to insufficient information in the possession of the Crown, as well as a lack of attention to the need to obtain Kwikwetlem's consent to the Project in an area over which it claims title.

Kwikwetlem signed a contribution agreement with the NEB for \$5,550 in participant funding plus travel for one to the hearing. According to NEB records, Kwikwetlem have fully invoiced the NEB for expenses, with the full \$5,500 paid out to the group. Kwikwetlem received \$11,980 from the MPMO in participant funding to facilitate participation in consultation with the Crown following the close of the NEB hearing record. Kwikwetlem also received an additional \$14,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Kwikwetlem signed contribution agreements with the MPMO in response to both of these offers, for a total of \$25,980 in allocated funding. On July 26, 2016 Kwikwetlem was issued \$5,000 in capacity funding from EAO to participate in consultation with the Crown.

The Crown provided a first draft of the Consultation and Accommodation Report (the Report) to Kwikwetlem for review and comment on August 17, 2016. Kwikwetlem provided comments on the draft Report to the Crown on September 23, 2016. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016. The Crown has not received comments from Kwikwetlem.

Kwikwetlem provided a separate Aboriginal group submission to the Crown on November 15, 2016.

IV – Summary of Key Kwikwetlem Issues and Concerns Raised

Kwikwetlem, in their filing to the NEB, noted their Aboriginal interest as follows: “to enact and exercise Aboriginal rights and title in our relations with other governments and stakeholders within our traditional territory including all matters related to impacts to and management of lands, waters and heritage”(A3U2J6).

As a key procedural concern, Kwikwetlem have noted that the Crown must consider and address impacts to Kwikwetlem’s Aboriginal title from the Project, including by seeking Kwikwetlem’s consent if that is what is required. Kwikwetlem wants to be involved in this assessment, and are seeking a consent-based consultation process related to their title claim.

Kwikwetlem have also written correspondence to highlight their concerns with the proponent’s consultation efforts as well as Crown consultation efforts.

In the May 2, 2016 meeting with the Crown consultation team, Kwikwetlem explained that the NEB process was viewed as not open to them. Kwikwetlem noted it is a small First Nation with limited capacity, and the NEB process is a significant administrative burden. Kwikwetlem noted that they are disengaged from the NEB process not due to a lack of interest, but because the NEB feels like a “wall.”

In the September 15, 2016 meeting with the Crown consultation team and subsequent submission to the Crown on September 19, 2016, Kwikwetlem emphasized a number of outstanding issues related to Strength of Claim preliminary assessment outcomes related to exercise of its Aboriginal rights and title; lack of appropriate detail on the Projects adverse impacts on its Aboriginal rights, title and Interests; disagreement with the Crown’s reliance on the NEB process to fulfill its legal duty to consult, to the fullest extent possible; and, that consultation has been inadequate.

In addition, Kwikwetlem have noted their view that they received insufficient participant funding to enable the First Nation to have the opportunity to conduct its own assessment of the risks of a spill from the Project or the ability of the proponent to adequately respond to an accident or malfunction leading to a spill.

This section offers a summary of the key issues raised by Kwikwetlem, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown’s assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown’s views and conclusions. The Crown’s understanding of Kwikwetlem’s key Project-related issues and concerns are summarized below:

Environmental Impacts

- Effects of large construction projects on the health of the Fraser River fishery as well as the potential for the Project to have adverse effects on Kwikwetlem lands and water; and
- Conservation of species including eulachon, heron and sturgeon was also raised as a key concern.

Pipeline Safety

- Pipeline spill prevention through pipeline design features;
- Leak detection;
- Particular challenges in responding to a pipeline spill;
- Pipeline spill preparedness and spill response planning; and
- Marine spill preparedness and response.

Cumulative Effects

- Cumulative effects on traditional use areas across Kwikwetlem territory;
- Alteration of traditional lands and landscape, and access restrictions that limit opportunities to engage in traditional activities represent a profound cultural loss to the Kwikwetlem community; and
- Displacement of Kwikwetlem members due to the industrialization, urbanization and privatization of lands in Kwikwetlem traditional territory.

Impacts on Archaeological Sites and Sites of Cultural Importance

- Kwikwetlem indicated that a number of known archaeological sites have been located as part of small-scale development-based surveys. Intensive and long-term use of the area and the close proximity of the Project area to known Kwikwetlem villages suggest that unrecorded place names and archaeological sites should be anticipated.

The following areas within the Project footprint and adjacent areas are considered to be of high or profound cultural sensitivity to Kwikwetlem:

- Fraser Heights / Surrey Bend;
- Fraser River Crossing (Colony Farm / Cape Horn) – used for hunting, fishing, plant gathering, settlements, spiritual uses, ceremonial activities, technological production; and
- Fraser Mills / Brunette River.

In Kwikwetlem's Final Written Argument to the NEB ([A75112](#)), Kwikwetlem indicated that:

- The proposed pipeline route goes through “the heart of [Kwikwetlem] traditional territory, crossing lands, waterways, and culturally significant sites that have supported and helped to define [Kwikwetlem's] distinct culture for millennia.” Moreover, they expressed concerns that construction for additional infrastructure on Kwikwetlem lands may result in restricted access to parts of Kwikwetlem territory.
- “...further assessment of the impacts to [Kwikwetlem's] Aboriginal rights and interests is required before any recommendation can be made.”
- “The loss of this species [sockeye salmon] as both a food source and a hallmark of [Kwikwetlem's] distinct culture has provided [Kwikwetlem] with direct experience of the devastating impact of unmitigated development within their territory.”

At the March 2, 2016 meeting with the Crown, Kwikwetlem expressed interest in conducting a more comprehensive use and occupation study and is seeking funding to support this work. Councillor Hulbert discussed various changes to the ecosystem in Kwikwetlem territory, including silt in the river, which impacts fish and how urbanization has impacted their ability to hunt. He noted that impacts have already taken away a huge part of who Kwikwetlem are and what they are about. He highlighted that decisions that happen today are going to affect their great-grandchildren, and they are trying to alleviate those effects as much as possible. He said, “We’re here and we want to keep it going.”

In letters sent to the EAO in April and May 2016, Kwikwetlem identified the following issues and concerns:

- The Project crosses lands, waterways, and culturally significant sites in Kwikwetlem’s asserted traditional territory;
- Potential impacts of the Project RoW on the Fraser River, which supports key cultural and spiritual activities and provides critical habitat for fish species relied upon by Kwikwetlem;
- Potential impacts from construction, operation, and spills on Kwikwetlem’s Aboriginal title, rights, and Interests; and
- Perceived process-related concerns, including a narrow scope of consultation, discretionary nature of supplemental information, insufficient detail in the Report, and discretionary nature of the consultation process and a lack of meaningfulness.

V – Potential Impacts of the Project on Kwikwetlem’s Aboriginal Interests

A discussion of the Crown’s assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and Section 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group, including areas within the vicinity of marine shipping related to the Project, may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Kwikwetlem’s Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Kwikwetlem’s ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown’s conclusion on the seriousness of Project impacts on Kwikwetlem’s Aboriginal Interests considers information available to the Crown from the NEB process,

consultation with Kwikwetlem, Kwikwetlem's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province.

Kwikwetlem completed a traditional land use (TLU) study in 2014 entitled "*Respect and Care for Our Lands, Water, and Heritage: Report on Kwikwetlem Interests as Related to Kinder Morgan Canada's Proposed Trans Mountain Pipeline Expansion Project*" ([A4S9A7](#)). The report included identification of traditional land uses in the segment of the proposed pipeline from Burnaby to Westridge. Traditional land uses identified by Kwikwetlem include hunting, gathering plants, information on fishing sites, sacred sites, trapping sites, habitation sites, gathering areas for community members, and trails and travelways. Kwikwetlem's TLU information is also summarized in the Project Application ([A3S1S0](#), [A4F5D1](#)).

Impacts on Hunting, Trapping and Plant Gathering

TLU information describes Kwikwetlem community members' historical travel over a large region to hunt for large and small game. Presently, Kwikwetlem community members hunt large and small mammals, waterfowl and birds. Small animals are trapped using snares, nets and trap lines. Hunted species include bear, cougar, wolverine, coyote, wolf, lynx, deer, mountain goat, elk, rabbit, mink, marten, fisher, beaver and muskrat. Birds hunted include pheasant, grouse, geese, duck and swan. The south side of the Fraser River between the Pattulo and Golden Ears bridges is used for hunting deer, and the north Fraser River shoreline from the Pitt River to New Westminster is used for hunting deer, lynx, duck, beaver, geese, grouse, pheasant, mink, rabbit and bear. Plants, berries and roots gathered are used for food and medicinal purposes. Wood and bark are harvested for both ritual and utilitarian objects, such as canoes, nets, baskets and masks. Community members gather red cedar wood, bark and root, yellow cedar, cascara bark, yew wood and bark, Douglas fir, birch, cottonwood, cherry bark, crabapple, alder, sap, balsam, stinging nettle, cattail, salal, devil's club, Labrador tea, "frog leaf", salmon berries and shoots, huckleberry, cranberry, blueberry, blackberry, Saskatoon berry and wood, hazelnut, big leaf maple, Oregon grape, and wapato. Most of these plants are collected from sloughs, riverbanks and upland environments.

Kwikwetlem identified many concerns related to the impacts of the Project on hunting (of large and small game), plant gathering activities including berries, traditional medicine and harvesting opportunities. As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, old growth forests, wetlands, and wildlife and wildlife habitat (including species at risk) listed species. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping, and gathering (Section 4.3.1 of this Report). With regards to specific concerns raised by Kwikwetlem the proponent would implement several mitigation measures to reduce potential effects to species important for Kwikwetlem's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the

immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan and the vegetation and wildlife management plans.

Kwikwetlem identified five hunting sites during the TLU study for the Project, of which one was identified within the proposed pipeline corridor at Fraser Crossing. Two hunting sites are located within 500 metres (m) of the proposed pipeline corridor at Fraser River/Surrey Bend Park and Brunette River, respectively. The location of two hunting sites was not specified. Kwikwetlem identified three trapping sites during the TLU study for the Project. One trapping site at Fraser River/Surrey Bend Park is located approximately 128 m northeast of the proposed pipeline corridor. Two trapping sites are located at Fraser Crossing; however the distances from the proposed pipeline corridor were not specified. Kwikwetlem identified five plant gathering sites during the TLU study for the Project, of which one plant gathering site was identified within the proposed pipeline corridor at the Fraser Mills/Brunette River area. Four plant gathering sites are located within 2 km of the proposed pipeline corridor, with the nearest 128 m northeast of the proposed pipeline corridor at Fraser Heights/Surrey Bend Park.

Kwikwetlem raised concerns with the Project's potential impacts relating to specific locations and access to hunting, trapping and plant gathering activities, including areas of high sensitivity such as Fraser Heights/Surrey Bend, Fraser Mills/Brunette River, and the Fraser River Crossing (Colony Farm / Cape Horn), which are used for hunting and plant gathering. Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Kwikwetlem's access to hunting, trapping and plant gathering activities, largely confined to the Project footprint for the pipeline and associated facilities. The Crown appreciates that with construction and reclamation activities disruptions to access may result in a loss of harvesting opportunities for Kwikwetlem. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access associated with hunting, trapping, and gathering sites (Section 4.3.1 of this Report). With regards to specific concerns raised by Kwikwetlem the proponent would implement several mitigation measures to reduce potential effects on TLRU sites important for Kwikwetlem's hunting, trapping, and plant gathering activities, such as management plans that include access management, scheduling and notification of Project activities, and environmental monitoring programs that monitor access control measures. The Access Management Plan is intended to reduce disturbances caused by access, construction equipment and vehicle traffic, during and following construction in order to minimize disturbance to access to Kwikwetlem's traditional lands. The proponent has committed to minimizing the development of access routes, controlling public access along the construction right-of-way, selecting appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent has also committed to work with applicable resource managers, traditional land and resource users to define locations where access control is necessary, and what type(s) of access control will be implemented. In the event that hunting, trapping, and plant gathering sites are identified during ongoing engagement with Kwikwetlem prior to construction, the sites will be assessed, and appropriate mitigation measures will be determined. The proponent committed to working with Kwikwetlem to

develop strategies to most effectively communicate the construction schedule and work areas to community members.

Kwikwetlem expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities, including cultural loss to the Kwikwetlem community and displacement of Kwikwetlem members. Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Kwikwetlem's hunting, trapping, and plant gathering activities. The Crown appreciates that this short-term disruption could temporarily alter the behaviour of community members' hunting, trapping or plant gathering activities during construction, and that reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project, could have spiritual and cultural impacts on community members. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential social, cultural, spiritual, and experiential effects associated with hunting, trapping, and plant gathering activities (Section 4.3.1 of this Report). With regards to specific concerns raised by Kwikwetlem, the proponent has committed to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Kwikwetlem, Kwikwetlem's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor impact on Kwikwetlem's hunting, trapping and plant gathering activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Kwikwetlem;
- Project-related pipeline and facility construction and routine maintenance activities within Kwikwetlem's traditional territory are temporary and thus, likely to cause minor disruptions to Kwikwetlem's community members accessing traditional hunting, trapping and plant gathering sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Kwikwetlem regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their hunting, trapping and plant gathering activities.

Impacts on Freshwater Fishing

TLU information describes the connection of Kwikwetlem community members to the Fraser River and its resources. Historically, the Kwikwetlem caught salmon, sturgeon, eucalon, trout, catfish and carp in the Coquitlam, Fraser and Pitt rivers. Currently, the south side of the Fraser River, between Pattulo and Golden Ears bridges, and the north Fraser River shoreline, from the Pitt River to New Westminster, are used for fishing for salmon, eucalon, and sturgeon. Many Kwikwetlem families have specific fishing

spots along the shoreline of the south Fraser River. Specific fishing sites used by community members cluster around the mouths of the Coquitlam and Pitt rivers, at Tree Island and also extending from Barnston Island downstream to the Pattullo Bridge. Community members fish sockeye, chum and Coho salmon, steelhead, eulachon, sturgeon, Jack spring, cutthroat trout, brook trout, rainbow trout, carp, catfish, red-sided shiner, three-spine stickleback and crayfish. Marine and freshwater shellfish gathered include freshwater clams and scallops. Drift nets, gills nets, dip nets, and hook and line are typically used for fishing.

Kwikwetlem identified many concerns related to environmental effects of the Project on fishing activities, particularly the fishing and conservation of salmon, eulachon, and sturgeon, the health of the Fraser River fishery, and potential for the Project to have adverse effects on Kwikwetlem water. As described in the *NEB Recommendation Report*, Project-related construction and operation could result in low to moderate magnitude effects on fish and fish habitat and surface water. Moderate effects to fish and fish habitat would be localized to individual watercourse crossings where any potential serious harm would be compensated by offset measures. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Section 4.3.2 of this Report). A number of recommended NEB conditions require the proponent to file reports that will monitor Project-related impacts to fish, fish habitat and riparian habitats. With regards to specific concerns raised by Kwikwetlem the proponent would implement several mitigation measures to reduce potential effects to species important for Kwikwetlem's fishing activities. The proponent has committed to time watercourse crossing construction activities to occur within the least risk biological windows in an attempt to avoid causing serious harm to fish, has committed to working with Aboriginal groups to identify the most appropriate means of offsetting serious harm to marine fish and fish habitat, and has proposed the implementation of channel and bank reclamation measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat.

Kwikwetlem community members identified nine fishing sites during the TLU for the Project. Five fishing sites are located within 2 km of the proposed pipeline corridor, of which the nearest is at Fraser Heights/Surrey Bend Park, approximately 128 m northeast of the proposed pipeline corridor. Two fishing sites are located more than 2 km from the proposed pipeline corridor. The location of two fishing sites were not specified.

Kwikwetlem raised concerns with the Project's potential impacts relating to specific locations and access to fishing activities, particularly areas of high sensitivity including Fraser Heights/Surrey Bend, Fraser Mills/Brunette River, and the Fraser River Crossing (Colony Farm / Cape Horn). Project-related construction and routine maintenance activities are expected to cause short-term, temporary disruptions to Kwikwetlem's access to fishing activities. The Crown appreciates that if construction and reclamation occur during the fishing season there could be a potential reduction in access to waterways, staging areas, and fishing sites for Kwikwetlem's community members. However, disruptions to access would largely be confined to the Project footprint for the pipeline and associated facilities during construction and reclamation. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access to fishing sites important for

Kwikwetlem (Section 4.3.2 of this Report). With regards to the Surrey Bend Regional Park, NEB Condition 7 requires the proponent to file an environmental and socio-economic assessment for the route re-alignment that must include, among other things, potential residual effects, mitigation measures, and a summary of consultations with potentially affected Aboriginal groups. With regards to specific concerns raised by Kwikwetlem, the proponent would implement several mitigation measures to reduce potential effects to fishing sites important for Kwikwetlem's fishing activities. As previously discussed, the proponent is committed to minimize disturbance to access to Kwikwetlem's traditional lands, as described in the Access Management Plan. The proponent committed to working with Kwikwetlem to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Kwikwetlem expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its fishing activities, including the deep cultural importance of salmon. The name "Kwikwetlem" refers to a variety of sockeye salmon that used to run through the Coquitlam River and Coquitlam Lake. The construction of the Coquitlam Dam in 1914 drove the species to extinction. Currently, Kwikwetlem are involved in a number of environmental stewardship projects in order to restore critical habitat for fish. Kwikwetlem identified the loss of sockeye salmon as a food source and distinct cultural hallmark. As described previously, the Project construction and routine maintenance is expected to cause short-term, temporary disruptions to Kwikwetlem's fishing activities. The Crown appreciates that this temporary interruption could mean that community members alter their fishing activities during construction, which could affect their participation in the traditional activity. NEB conditions, if the Project is approved, would either directly or indirectly reduce potential social, cultural, spiritual or experiential effects associated with fishing activities (Section 4.3.2 of this Report).

In consideration of the information available to the Crown from the NEB process, consultation with Kwikwetlem, Kwikwetlem's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor impact on Kwikwetlem's freshwater fishing activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Kwikwetlem;
- Project-related pipeline and facility construction and routine maintenance activities within Kwikwetlem's traditional territory are temporary and thus, likely to cause minor disruptions to Kwikwetlem's community members accessing traditional fishing sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Kwikwetlem regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their freshwater fishing activities.

Impacts on Other Traditional and Cultural Practices

Sites for traditional and cultural practices such as trails and travelways, habitation sites, gathering places, and sacred areas are described in Kwikwetlem's TLU information. A well-established network of land and water routes is located in Kwikwetlem asserted traditional territory. Many of the trails are now the roads used by Kwikwetlem community members. Historically, rivers were used for travel, and overland routes were used where travel by canoe was not possible. Habitation sites include settlements such as villages, resource camps and refuge locations. River drainages, such as Barker Creek, Como Creek, Bon Accord Creek, Cape Horn Creek and Mundy Creek, serve as gathering places for cultural activities, both past and present. The mouth of Brunette River was also identified as an area of important cultural use. Kwikwetlem asserted traditional territory was historically a fishing area and gathering place, where neighboring groups would come to fish and gather plant foods. Sacred areas may also include features such as promontories, pools and rocks, and land forms marking travel.

Kwikwetlem identified many concerns related to environmental effects of the Project on other traditional and cultural practices, including spiritually and culturally important sites for traditional and cultural practices such as trails and travelways, habitation sites, gathering places, and sacred areas. Sites used for cultural events include Barker Creek, Como Creek, Bon Accord Creek, Cape Horn Creek and Mundy Creek. As described in Section 4.3.4 of the Report, Project-related activities are not likely to result in significant adverse effects on the ability of Aboriginal groups to use land, waters or resources for traditional purposes. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). With regards to specific concerns raised by Kwikwetlem the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources important for Kwikwetlem's traditional and cultural practices. The proponent has also committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during RoW finalisation, narrowing the RoW in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments.

Kwikwetlem identified nine trails and travelways during the TLU study for the Project, of which one trail was identified within the proposed pipeline corridor on Fraser River Heights. Four trails and travelways are located within 2 km of the proposed pipeline corridor. Four are located more than 5 km from the proposed pipeline corridor. Kwikwetlem identified 8 habitation sites during the TLU study for the Project, one of which is within the proposed pipeline corridor at Fraser River Heights/Surrey Bend. Three habitation sites were identified within 2 km of the proposed pipeline corridor. Three habitation sites are located more than 3.7 km from the proposed pipeline corridor, and the location of one habitation site was not specified. One gathering place was identified approximately 470 m southwest of the proposed pipeline corridor at Brunette River. Kwikwetlem community members reported intercommunity meeting sites, named spirit sites, and pictographs located along the North Fraser River shoreline from the Pitt River to New Westminster; however specific locations in relation to the proposed pipeline corridor were not provided. Kwikwetlem identified five sacred areas during the TLU study for the Project, of which two

are located within the proposed pipeline corridor at Fraser Mills / Brunette River. Two sacred areas are located at Colony Farm and in the Coquitlam River, 840 m east and 1.3 km northeast, respectively, of the proposed pipeline corridor. The location of the other sacred site was not identified.

Kwikwetlem raised concerns with the Project's potential impacts relating to specific locations and access to other cultural and traditional practices, including archaeological sites and sites of cultural importance, known Kwikwetlem villages, areas of high sensitivity (e.g., Fraser Heights/Surrey Bend, Fraser Mills/Brunette River, and the Fraser River Crossing [Colony Farm/Cape Horn]), and access restrictions that limit opportunities to engage in traditional activities represent a profound cultural loss. Project-related activities are expected to cause short-term disruptions that temporarily affect the ability of Aboriginal groups to access land, waters or resources for traditional purposes. The Crown appreciates that Kwikwetlem's opportunities for certain traditional and cultural activities will be temporarily interrupted during construction and routine operation, and there could be reduced access to travelways, habitation sites, gathering sites, and sacred areas. However, temporary disruptions to Kwikwetlem's traditional and cultural practices would be largely confined to sites within the Project footprint for the pipeline and associated facilities. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific sites and access to physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown notes the proponent's commitment to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project.

Kwikwetlem expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its other traditional and cultural practices. Throughout the NEB process and Crown consultation process, Kwikwetlem raised specific concerns with potential Project impacts relating to their traditional and cultural activities, particularly the cumulative effects on traditional use areas across Kwikwetlem territory, as well as alteration of traditional land and landscapes and access restrictions that limit opportunities to engage in traditional activities. As described previously, the Crown appreciates that Project-related activities may result in temporary interruptions to Kwikwetlem's cultural and spiritual practices, or that their participation in the traditional activity is curtailed, during Project construction and routine maintenance activities.

In consideration of the information available to the Crown from the NEB process, consultation with Kwikwetlem, Kwikwetlem's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor impact on Kwikwetlem's other traditional and cultural practices. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on Kwikwetlem's traditional and cultural practices;
- Project-related construction and routine maintenance activities within Kwikwetlem's traditional territory are temporary and thus, likely to cause minor disruptions to Kwikwetlem community

members accessing traditional and cultural practice sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and

- Concerns identified by Kwikwetlem regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their other cultural and traditional practices.

Impacts on Aboriginal Title

The Crown has actively consulted with Kwikwetlem throughout the NEB process and Crown consultation process at a deeper level in an attempt to better identify, understand, and resolve concerns relating to Aboriginal title. Concerns related to Aboriginal title raised by Kwikwetlem throughout the NEB and Crown consultation process include:

- Impacts that could impede or disrupt Kwikwetlem's use of its asserted traditional territory, including access restrictions that limit opportunities to engage in traditional activities, and displacement of Kwikwetlem members; and
- Activities that affect Kwikwetlem's ability to manage and make decisions over the Project area, including construction and operation of the Project in the heart of Kwikwetlem's traditional territory.

Kwikwetlem asserts an inherent right to govern all lands, waters and resources within Kwikwetlem territory:

"Like all Salish Nations, we recognize our own leaders, hold sacred hereditary knowledge, host community gatherings, value traditional customs of esteemed behaviour, and recognize stories and legends that link us to the natural places and cultural landscapes of our territory. As in the past, we sustain our community and territory by hunting, fishing, gathering, and caring for all the resources of our territory²".

Kwikwetlem's Heritage Policy (2013) states:

"Kwikwetlem asserts an inherent right to govern all lands, waters and resources within Kwikwetlem territory. The Nation seeks to protect, manage and preserve heritage sites, heritage objects, heritage places and resources in our territory, according to traditional values and practices. We are stewards of generations to come and hold a responsibility to protect, promote and enhance Kwikwetlem lands, resources and culture in perpetuity".

The Crown provides a description of the potential impacts of the Project on Aboriginal title in Section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid/reduce Project impacts associated with the degree of disturbance to terrestrial and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as

² <http://www.kwikwetlem.com/our-people.htm>

well as NEB Conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved.

Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in Section 4.3.5, it is the Crown's opinion that the Project is expected to have a minor-to-moderate impact on Kwikwetlem's asserted Aboriginal title to the proposed Project area.

Impacts Associated with Accidental Pipeline, Tanker, or Terminal Spill

Kwikwetlem expressed several concerns about the direct and indirect effects of Project-related pipeline spills on their Aboriginal Interests, particularly the potential impacts of a spill on fish and fish habitat in the Fraser River that are of cultural, spiritual and economic significance to Kwikwetlem.

The Crown also appreciates Kwikwetlem's concerns regarding spills, and the potential for a spill to impact Kwikwetlem's use and occupation of its asserted traditional territory, ability to make decisions over the area impacted, and the potential for a spill to adversely impact any economic development aspirations Kwikwetlem has for its territory.

A discussion of the potential impacts of a pipeline spill on Aboriginal Interests is provided in Section 4.3.6 of this Report. In consideration of this information and analysis, as well as information available to the Crown on Kwikwetlem's Aboriginal Interests and concerns raised by Kwikwetlem during the NEB process and Crown consultation process, a pipeline spill associated with the Project could result in minor to serious impacts on Kwikwetlem's Aboriginal Interests. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who live nearby and rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.³

VI – Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations, the Crown expects impacts of the Project on the exercise of Kwikwetlem's Aboriginal Interests would be up to minor-to-moderate.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Kwikwetlem's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline

³ Trans Mountain Final Argument, p. 85 and 207

routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Kwikwetlem in emergency response planning activities. The federal Crown is also considering incremental measures that would further accommodate the potential adverse impacts of the Project on Kwikwetlem, as discussed in Sections 4 and 5 of the main body of this Report.

Appendix C.2 – Musqueam Indian Band

I - Background Information

Musqueam Indian Band (Musqueam) is a traditional hə́ŋqəmiŋəhə́ŋqəmiŋəmnal hwho have descended from the cultural group known as the Coast Salish. Musqueam identified their asserted traditional territory in their 1976 Musqueam Declaration and Statement of Intent, submitted as part of the British Columbia (BC) Treaty process. Musqueam is currently in Stage 4 of the BC Treaty process (i.e., Agreement-in-Principle). Musqueam’s asserted traditional territory encompasses what is now Vancouver and surrounding areas including parts of the municipalities of New Westminster, Burnaby, Port Coquitlam, Port Moody, Coquitlam and North Vancouver.

Musqueam has an established Aboriginal right to fish for food and social and ceremonial purposes as set out in the Supreme Court of Canada’s *Sparrow* decision from 1990.

Musqueam’s registered population as of June 2016 is 1389, of whom 675 live on Musqueam reserve lands. Musqueam has three reserves: *Musqueam 2*, *Musqueam 4*, and *Sea Island 3*.

II - Preliminary Strength of Claim Assessment

- Approximately 44 kilometres (km) of the marine shipping route would pass within the northwestern part of Musqueam’s traditional territory. The Crown’s preliminary assessment of Musqueam’s claims for Aboriginal rights to harvest marine resources within the marine shipping corridor of the Project, abutting the coastline of the Burrard Inlet in the north to within the Strait of Georgia proximal to the southern arm of the Fraser River in the south, is assessed as a range from weak to strong *prima facie* Aboriginal rights claims. Areas of strong *prima facie* claims include areas along the western section of the Burrard Inlet and along the portion of the Strait of Georgia overlapping Musqueam’s asserted territory, areas that many ethnographers identify as falling within the traditional territory of the Musqueam, where there is information supporting their historic use of the area for resource gathering, and habitation sites. Areas of weak *prima facie* claims are at the eastern end of the Burrard Inlet where it appears to fall outside of the area considered as Musqueam traditional territory and where there is no information indicating Musqueam historic use.¹
- The Crown’s preliminary assessment of Musqueam’s *prima facie* claim to Aboriginal title within the marine shipping corridor of the Project, abutting the coastline of the Burrard Inlet in the north to within the Strait of Georgia proximal to the southern arm of the Fraser River in the south, is assessed as a range from weak to strong. The area of a strong *prima facie* claim is particularly around the north arm of the Fraser River and diminishing as the route travels south through the Strait of Georgia. By 1846, Musqueam territory had contracted due to population loss as a result of epidemics and raids. Musqueam population became concentrated around the north arm of the Fraser, where there is information supporting their historic use of the area for resource gathering, and habitation sites. Within Burrard Inlet, the claim diminishes with increasing distance from the western end, as information indicates that these areas may fall outside of what was considered Musqueam traditional territory at 1846.²

¹ Ministry of Attorney General, *Musqueam First Nation: Review of Anthropological and Historical Sources Relating to the Use of Land* (revised June 2010).

² *Ibid*

- The Project terminus and approximately 15 km of the proposed right of way (RoW) for the Project pipeline overlaps with Musqueam's asserted traditional territory. The Crown's assessment of Musqueam's claims for Aboriginal rights over the section of land that spans the terminus of the pipeline at the Burnaby holding facility to the south bank of the Fraser River is assessed as a range from weak-to-moderate to moderate-to-strong *prima facie* Aboriginal rights claims. Musqueam is assessed as having a moderate-to-strong *prima facie* Aboriginal rights claim in proximity to the terminus, and the claim weakens to weak-to-moderate along the portion of the pipeline that is parallel to the Fraser River.³
- The Crown's preliminary assessment is that Musqueam has a *prima facie* claim for Aboriginal title ranging from weak-to-moderate to weak over the section of the Project pipeline that spans the area from the terminus of the pipeline at the Burnaby holding facility and along the eastern span to Fort Langley, with the weak-to-moderate claims in proximity to the terminus where there is information indicating a seasonal village used by Musqueam at Port Moody, but there is information indicating that in 1846 this areas was considered by ethnographers to be controlled by a neighbouring group.⁴

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Musqueam's Aboriginal Interests, the Crown is of the view that the legal duty to consult Musqueam lies at the deeper end of the *Haida* consultation spectrum. Musqueam was placed on Schedule B of the section 11 order issued by the BC Environmental Assessment Office (EAO), which affords Musqueam opportunities to be consulted at a deeper level.

Musqueam participated in the National Energy Board (NEB) review process as an intervenor and filed written evidence, submitted a written final argument, provided an oral summary argument, corresponded with NEB, and responded to the Major Project Management Office (MPMO)'s Issues Tracking Table Information Request by further elaborating their concerns [\[A71228\]](#).

Musqueam submitted detailed correspondence, both with the NEB and with the Crown (including Ministers). The Crown has exchanged numerous pieces of correspondence with Musqueam in respect of the Crown's proposed approach to consultation on the Project, and the Crown consultation team met with Musqueam officials on July 16, 2014, March 3, 2016, July 18, 2016, and October 13, 2016. Musqueam provided 48 questions relating to the consultation process to the Crown both during the meeting held July 18, 2016, and via email on the same day. In each exchange with the Crown, including a meeting with the Minister of Natural Resources, Musqueam communicated opposition to the Project.

Musqueam signed a contribution agreement with the NEB for \$22,000 in participant funding plus travel for two to the hearing. The Major Projects Management Office (MPMO) offered Musqueam \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Musqueam an additional \$14,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Musqueam signed contribution agreements with the MPMO in response to both of these offers, for a total of \$26,000 in allocated funding.

On September 21, 2016 Musqueam was provided \$5,000 in capacity funding by the EAO to assist with the consultation process.

³ Ibid

⁴ Ibid

The Crown provided a first draft of the Consultation and Accommodation Report (the Report) on August 17, 2016. Musqueam sent the Crown a letter on August 31, 2016, which also included the 48 questions Musqueam had about the Crown consultation process, initially circulated at the July 18, 2016 meeting between Musqueam and the Crown. The Crown answered Musqueam's questions on September 23, 2016.

A second draft of this Report was provided to Aboriginal groups for review and comment on November 03, 2016, and Musqueam provided comments on November 14, 2016.

Musqueam provided a separate Aboriginal group submission to the Crown on November 18, 2016.

IV - Summary of Key Musqueam Issues and Concerns Raised

The Crown has gained its understanding of Musqueam's issues and concerns through Musqueam's involvement in the NEB process, including Musqueam's written evidence ([A4Q2F9](#)), written argument ([A4X3U3](#)) and oral traditional evidence ([A4D4G7](#)), as well as the responses provided to the MPMO through the Information Request addressed to them during a series of Crown-Musqueam meetings and exchange of correspondence. In addition, the Crown has considered information regarding the proponent's engagement with Musqueam, as described in the proponent's Aboriginal Engagement Report (July 2016).

This section offers a summary of the key issues raised by Musqueam, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understand of Musqueam's key Project-related issues and concerns are summarized below:

Increased Tanker Traffic

- Increased tanker traffic in and out of Burrard Inlet and the Strait of Georgia, which limits community members' access to fishing areas, and results in corresponding economic, sustenance, cultural, and "intellectual" impacts such as the impacts to intergenerational knowledge transfer and cultural experience;
- Increased tanker traffic increases safety hazards for Musqueam's fishing vessels and fishers, particularly smaller vessels that may not have access to radar or sonar equipment; and
- Potential cumulative effects to aquatic environments and resources including fish and seafood in Burrard Inlet and the Strait of Georgia from increased tanker ship traffic, including potential impacts related to increased air pollution, noise pollution, wake energy, habitat fragmentation, bilge water releases, and fuel spills;
- Potential for collisions with small vessels;
- Wake from ships causing damage to shoreline, particularly at low tide; and
- Impacts of a spill on marine habitat and wildlife.

Potential Impacts to Aboriginal Rights and Title

- Reduction in cultural expression and teaching opportunities for Musqueam youth arising from reduced access to fishing sites;
- Restricted access to harvesting sites impairs exercise of rights;
- Disrupting travel ways used by Musqueam members;
- Impaired ability to harvest marine resources in order to provide food for the community;

- Reduced viability of fishing-based economy;
- Concern that the Crown has not justified potential infringement of Musqueam's *Sparrow* rights relating to fish;
- Lack of fish to trade with neighbouring nations and protecting their ability to fish; and
- Impeding movement to a self-governing and self-sustaining economy.

Process

- Concern about the NEB process and the joint federal and provincial Crown consultation approach and whether consultation is at a level sufficient to fulfill the Crown's legal duty to consult;
- Ensure that overlapping interests of other Aboriginal groups into Musqueam territory are not treated as rights;
- Truncated timelines do not provide adequate time for review and comment on documentation;
- Enforce accountability on decision-makers; and
- Meaningfully hear and understand evidence from Aboriginal people and communities.

Potential Accidents and Malfunctions

- Potential for shoreline oiling in the event of a spill, particularly in undeveloped estuaries, sensitive habitats, sandbanks, marshlands, and mudflats. These areas provide habitats for migratory birds, wildfowl, juvenile salmon, crab, prawns, eucalyp, and species at risk, among other species. Shoreline oiling could setback current efforts undertaken to rehabilitate habitat and species;
- Potential toxicological effects of a diluted bitumen spill to fish, invertebrates, mammals, and other aquatic species in the Fraser River estuary and adjacent marine environment;
- Limited knowledge and uncertainty associated with the chronic toxicological effects of heavy oil spills, including unknown effects of naphthenic acids contained in bitumen;
- Potential effects of chemicals used to clean-up spills, such as dispersants, that may have the ability to cause aquatic toxicity;
- Lack of focus and emphasis of the spill risk analysis for diluted bitumen spills in the Fraser River and Strait of Georgia on potential effects to aquatic species, species at risk, and resources that have cultural and economic importance to Musqueam;
- Uncertainty of non-toxic effects of stranded oil, substrate coating, and/or the presence of "tarballs" on shoreline ecosystems and fish-spawning habitats. This uncertainty includes oil spill recovery efforts that could result in disturbance of sensitive shoreline habitat and vegetation;
- Inhalation of vapours in the event of a spill and the exposure of these vapours to human populations and wildlife;
- The potential for pipeline failures within the Fraser River watershed, and the potential impacts on groundwater; and
- Potential for inefficiencies and slow response times in the event of a spill.

Musqueam has expressed the view that the Project as proposed would lead to further negative environmental, economic, cultural, social and spiritual impacts on Musqueam members and to a reduction in their ability to pursue long-term governance and preservation objectives.

The Crown understands that, from a legal and procedural standpoint, Musqueam is concerned that Ministers will not take Musqueam views about impacts on their established right to fish seriously when making a decision on the Project. In particular, as stated and discussed in detail in Musqueam's written

argument at the conclusion of the NEB review process, Musqueam's view is that the Project constitutes an infringement on its proven Aboriginal right to fish requiring the Crown to meet the justification test as set out in *Sparrow*, of which consultation is a part. Musqueam has requested a justification from the Crown for any infringements to their Aboriginal right to fish posed by the Project, or the provision of information demonstrating such justification should the Project be approved. The Crown understands Musqueam's view that a Project approval will necessitate the Crown to justify any infringements on Musqueam's *Sparrow* rights to fish. Musqueam also holds that approving the Project would be at odds with the Government's commitment to implement the United Nations Declaration on the Rights of Indigenous Peoples, which sets out an obligation on states to "consult and cooperate in good faith" with Indigenous peoples "in order to obtain their free, prior and informed consent prior to approval of any project affecting their lands or territories and other resources".

In a July 2016 meeting with the Crown, Musqueam identified the following Project-related issues and concerns:

- Potential impacts on Musqueam's *Sparrow* rights to fish and the requirement for justification of the possible infringement of these rights;
- Concerns that the Crown consultation process has not undergone changes following the recent Federal Court of Appeal (*Gitxaala Nation v. Canada, 2016*) decision in the case of the Northern Gateway Project;
- Unrealistic timelines associated with the Crown consultation process as well as timelines that conflict with Musqueam's fishing activities in the summer; and
- Likelihood and consequences of a potential spill on Musqueam's way of life.

At an October 13, 2016 meeting with the Crown consultation team, Musqueam emphasized the following Project-related issues and concerns:

- The role of the Crown in the consultation process; the Crown consultation team confirmed that no procedural aspects of the Crown's consultation duty have been delegated to the proponent;
- The importance of a justification analysis prior to a decision that would enable an infringement on the *Sparrow* right to fish; Musqueam reiterated infringements on fishing rights as a primary concern; and
- Cumulative impacts as a result of the Project and other industrial activity that impact Musqueam, particularly members' ability to fish, and a lack of Musqueam-specific studies completed to assess cumulative impacts.

Musqueam has articulated its disagreement with the Crown's assessment of Musqueam's preliminary strength of claim. Furthermore, Musqueam expressed disagreement with the Crown's assessment of Project impacts on Musqueam's Aboriginal Interests.

Section 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Musqueam that the Crown has not responded to directly will be otherwise actively considered by decision-makers weighing the Project cost and benefits with the impacts on Aboriginal Interests.

Musqueam's Response to NEB Recommendation Report

Musqueam stated that, based on the *Gitxaala v Canada* Federal Court of Appeal decision, it is Musqueam's view that the *NEB Recommendation Report* is a guidance document only for the Crown in

reaching its decision on the Project. The Crown's consultation and justification process must independently address Musqueam's concerns, outside of the *NEB Recommendation Report*. It is Musqueam's view that the *NEB Recommendation Report* is not on its own sufficient, and does not address the concerns of Musqueam.

Musqueam does not accept the validity of the analysis of the probability and risk of a spill included in the *NEB Recommendation Report*. Musqueam has conveyed their view that the magnitude of the potential impact must be examined as well, and in Musqueam's case, the consequences of a significant spill are so severe that they would alter their way of life. Musqueam does not believe it is clear that this magnitude of impact is addressed.

Musqueam has also stated that the generality of the *NEB Recommendation Report* does not provide a justification for any detailed and Aboriginal group-specific issues and concerns. Musqueam, for instance, is entitled to a justification from the Crown for infringements to Musqueam's *Sparrow* rights to fish.

V - Potential Impacts of the Project on Musqueam's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests are provided in Sections 2.4.3 and Section 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Musqueam's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Musqueam's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Musqueam's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Musqueam, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province.

The Crown understands that Musqueam did not complete traditional land and resource use or traditional marine resource use studies for the Project. *Volume 5B* of the Project Application ([A3S1S0](#)) provides public information on Musqueam's traditional uses. Musqueam also submitted written evidence to the NEB in May 2015 titled "*Preliminary Report – Written Evidence*" ([A4Q2F9](#)) that contains traditional use information. The written evidence does not provide approximate distances or directions from the marine shipping lanes or pipeline corridor. Richard Sparrow and Leona Marie Sparrow provided oral traditional evidence to the NEB ([A4D4G7](#)). Morgan Guerin also provided evidence to the NEB (A75228). The Musqueam witnesses gave evidence that the impacts of the Project would be seen as significant by their community, including changes to Musqueam's ability to fish and to exercise their preferred way of fishing that are protected by the *Sparrow* case. Musqueam's evidence states that the

impacts of the Project threaten the Musqueam way of life that has existed since time immemorial, and that Musqueam is especially concerned with the impact of increased tanker traffic and the risk of a spill in a confined area. The Musqueam witnesses indicated that the impacts on their interests and rights posed by the Project are more than trivial in nature.

According to Musqueam's written evidence, Musqueam places the utmost importance and value on all resources in the terrestrial and aquatic environments. The Fraser River and Strait of Georgia are two important aquatic environments on which the Musqueam rely for many species of wildlife, finfish, shellfish, and plants. Musqueam rely on these resources for sustenance and to support their economy and culture. Musqueam also places primary importance on healthy ecosystems that support all life, including the species on which the Musqueam people rely. Musqueam view themselves as protectors of the Fraser River ([A4X3U3](#)).

Impacts on Hunting, Trapping and Plant Gathering

According to Musqueam's written evidence, community members traditionally relied on resources from terrestrial areas. Musqueam community members have expressed that they currently do not have access to upland areas in their traditional territory to hunt game such as deer and elk. *Volume 5B* in the Application identifies the following species hunted and trapped by Musqueam in upland areas: moose, white-tail deer, and mule deer, beaver, muskrat, rabbit, porcupine, black bear and mountain goat. Musqueam continues to hunt birds in the Fraser River estuary and adjacent marine areas. Musqueam identified the following traditional and contemporary valued aquatic species in their written evidence: harbor seal, stellar sea lion, mallard, blue-winged teal, northern pintail, white-wing scoter, surf scoter, American scoter, snow goose, Canada goose, brant, cattail, bulrush or tule, sedges, rushes, silverweed cinquefoil, and wapato. *Volume 5B* in the Application identifies the following species of vegetation harvested by Musqueam: huckleberries, salmonberries, blueberries, cranberries, strawberries, thimbleberries, currants, salal, wild onion, horsetail rush, devil's club and skunk cabbage. Community members used Western Red Cedar for wooden utensils and ceremonial objects, and also used pine, cottonwood, buckthorn, dogwood, willow, and vine maple.

Musqueam identified many concerns related to environmental effects of the Project on hunting, trapping, and plant gathering activities, including loss of berries, traditional medicines, and harvesting opportunities, impacts on a wide variety of wildlife species, and cumulative impacts from increased tanker ship traffic, including potential impacts related to habitat fragmentation and reduced ecological productivity of the shoreline. As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, old growth forests, wetlands, terrestrial wildlife and wildlife habitat (including species at risk), marine mammals, and marine birds. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping, and gathering activities (Section 4.3.1 of this Report) and the proponent would implement several mitigation measures to reduce potential effects to species important for Musqueam's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction of wildlife to the work site, minimize sensory disturbance and protect site-specific habitat features are outlined in the Project Environmental Protection Plan (EPP) and the Wildlife Management Plans (including a marine mammal protection program [NEB Condition 132]). The NEB imposed Condition 81 that requires the proponent to

develop a Westridge Marine Terminal (WMT)-specific EPP, including mitigation and monitoring plans, to be finalized in consultation with Fisheries and Oceans Canada (DFO) and potentially affected Aboriginal groups. The proponent is also required to conduct a post-construction monitoring program for marine mammals from the expansion of the WMT and post-construction monitoring reports. The proponent has committed to various mitigation measures to reduce effects of construction and operation of the WMT on marine birds and has committed to compile information regarding marine bird mortality and collision events and to include that information in post-construction monitoring reports. For the marine shipping component of the Project, the proponent will also develop plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups. The Crown notes the proponent's commitment to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge relating to the location and construction of the Project.

Musqueam raised concerns with the Project's potential impacts relating to access to hunting, trapping, and plant gathering activities including the oral traditional evidence provided by Richard Sparrow and Leona Sparrow which described how Musqueam no longer has access to wild meats such as deer and elk. Today, any reduced access to aquatic resources could inhibit Musqueam's hunting activities, because Musqueam currently has protocols with neighbouring Aboriginal groups to trade aquatic resources (e.g., salmon) in exchange for access to their traditional territory for hunting purposes. Project-related pipeline construction and routine maintenance is expected to cause short-term, temporary disruptions to Musqueam's access to hunting, trapping and plant gathering activities, largely confined to the Project footprint for the pipeline and associated facilities. The Crown understands that with pipeline construction and reclamation activities, disruptions to access may result in a loss of harvesting opportunities for Musqueam. For traditional activities directly affected by the construction and operation of the WMT, these activities are not likely to occur within the expanded water lease boundaries during the operational life of the Project. Project-related marine shipping is expected to disrupt Musqueam's marine vessels and harvesters, and this could disrupt activities or access to hunting, trapping, and plant gathering sites. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential access-related impacts associated with hunting, trapping, and gathering sites (Section 4.3.1 of this Report) and the proponent would implement several mitigation measures to reduce potential effects on Musqueam's hunting, trapping, and plant gathering activities. These mitigations include management plans that include access management, scheduling and notification of Project activities, and environmental monitoring programs. The Access Management Plan is intended to reduce disturbances caused by access, construction equipment and vehicle traffic, during and following construction in order to minimize disturbance to access to Musqueam's traditional lands. The proponent has committed to minimizing the development of access routes, controlling public access along the construction right-of-way, selecting appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent has also committed to work with applicable resource managers, traditional land and resource users to define locations where access control is necessary, and what type(s) of access control will be implemented. In the event that hunting, trapping, and plant gathering sites are identified during ongoing engagement with Musqueam prior to construction, the sites will be assessed, and appropriate mitigation measures will be implemented. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Musqueam community members to take measures to reduce potential disruptions from tankers and allow planning for hunting, trapping and plant gathering activities to take place that minimizes disturbance from Project-related tankers. Reduced harvests, while not expected to occur from temporary access restrictions, could impact Musqueam cultural activities and sharing of

marine food with the community. The proponent committed to working with Musqueam to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Musqueam expressed concern with direct and indirect effects of the Project on social, cultural, spiritual and experiential aspects of its hunting, trapping, and plant gathering activities, including reduced access to cedar wood for the creation of ceremonial objects. Short-term, temporary disruptions to Musqueam's hunting, trapping, and plant gathering activities from Project-related construction and routine maintenance activities could temporarily alter the behaviour of community members' during construction. Reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project, could have spiritual and cultural impacts on community members. The Crown understands that Musqueam may experience noise disturbances and interruptions to traditional activities due to the WMT and Project-related marine shipping activities, and community members could be discouraged from travelling to hunting, trapping, and plant gathering sites that require these members to cross shipping lanes. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential social, cultural, spiritual, and experiential effects associated with hunting, trapping, and plant gathering activities (Section 4.3.1 of this Report) and the proponent would implement several mitigation measures to reduce potential effects to Musqueam's hunting, trapping, and plant gathering activities. The proponent is committed to utilizing an Integrated Vegetation Management approach intended to reduce the use of herbicides and promote healthy ecosystems. Measures outlined in the proponent's Reclamation Management Plan are intended to stabilize and revegetate affected lands to achieve land productivity along the construction ROW and footprint, equivalent to the adjacent land use. The proponent has also committed to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project and will communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program.

The Crown has considered available information from the NEB process, consultation with Musqueam, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province. In consideration of this information, the Crown expects impacts of Project construction and operation, and Project-related marine shipping activities on Musqueam's hunting, trapping and plant gathering activities would range from negligible to minor. The Crown expects minor impacts as a result of the pipeline, and these effects would primarily occur during construction. The Crown expects negligible impacts as a result of the WMT and Project-related vessels, and these effects would occur during construction and operations. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related pipeline, facility, and WMT construction and operation, and marine shipping activities are likely to have low to moderate magnitude environmental effects on terrestrial, aquatic, and marine species harvested by Musqueam;
- Construction of WMT, the pipeline and associated facilities are likely to cause short-term temporary disruptions to Musqueam' community members accessing traditional hunting, trapping and plant gathering sites within the Project footprint; Project-related marine shipping activities are likely to cause temporary disruptions to activities or access to sites during the period of time Project-related tankers are in transit through Musqueam's traditional territory; and
- Concerns identified by Musqueam's regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their hunting, trapping and plant gathering activities.

Impacts on Freshwater Fishing, and Marine Fishing and Harvesting

Musqueam self-identifies as a fishing community and describes fishing as integral to their economy, culture, and survival ([A4X3U3](#)). As described in their written evidence, Musqueam currently relies on resources within or near aquatic environments. Historically, Musqueam community members obtained aquatic resources from both fresh- and salt-water aquatic environments of the Burrard Inlet, Strait of Georgia, and Fraser River estuary. Presently, Musqueam fish in the Fraser River estuary and adjacent marine areas, and in the Strait of Georgia to Howe Sound. Fraser River populations of Pacific salmon are of primary importance to Musqueam as community members rely on salmon for sustenance and for economic and cultural purposes.

The Crown acknowledges that Musqueam has a proven Aboriginal right to fish as established by the Supreme Court of Canada Decision in *R v. Sparrow*.

Musqueam identified the following traditional and contemporary valued aquatic species in their written evidence related to fishing and marine harvesting: salmon (sockeye, pink, spring, coho, chum), steelhead, cutthroat trout, Dolly Carden char, Starry flounder, White sturgeon, eulachon, Pacific herring, octopus, urchin, sea cucumber, spotted ratfish, spiny dogfish, bivalve shellfish, shrimp and prawn, bay ghost shrimp, Dungeness crab, and kelp. Musqueam also identified indirect valued resources such as eelgrass beds, benthic invertebrates, and forage fish that serve as habitat and forage food for species.

Musqueam identified many concerns related to the environmental effects of the Project on fishing activities, in particular impacts on the aquatic environments and resources including fish and seafood in Burrard Inlet and the Strait of Georgia from increased tanker ship traffic, potential impacts related to increased air pollution, noise pollution, wake energy, habitat fragmentation, bilge water releases, and fuel spills. Additional concerns were raised regarding impacts from increased marine traffic, including effects on marine resources, and the wake from ships potentially causing damage to the shoreline. As described in the *NEB Recommendation Report*, Project-related activities could result in low to moderate magnitude effects on freshwater and marine fish and fish habitat, surface water and marine water quality. Moderate effects to fish and fish habitat in the terrestrial and aquatic environments would be localized to individual watercourse crossings, and effects to marine fish and fish habitat would be limited to a few or many individuals, where any potential serious harm would be compensated by offset measures. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Sections 4.3.2 and 4.3.3 of this Report). A number of recommended NEB conditions require the proponent to file reports that will monitor Project-related impacts to freshwater fish and fish habitat, marine fish and fish habitat, and riparian habitats (NEB Conditions 71, 75, 92, 151, and 154). The proponent would implement several mitigation measures to reduce potential effects to species important for Musqueam's fishing activities. The proponent has committed to time watercourse crossing construction activities to occur within the least risk biological windows in an attempt to avoid causing serious harm to fish, has committed to working with Aboriginal groups to identify the most appropriate means of offsetting serious harm to marine fish and fish habitat, and has proposed the implementation of channel and bank reclamation measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat. Further, the proponent has completed a preliminary offsetting plan for impacts on fish and fish habitat associated with construction and operation of the WMT. For Project-related marine shipping activities, the proponent will require all tankers to process and empty their bilges prior to arrival and lock the discharge valve of the bilge water while in Canadian waters.

Although the Crown understands that Musqueam's written evidence does not provide approximate distances or directions of fishing sites from the marine shipping lanes or pipeline corridor, Musqueam's oral traditional evidence asserts that Project tankers will go directly through Musqueam's fishing area ([A4D4G7](#)). In this evidence, Musqueam also describes the importance of Musqueam Creek, which runs through Musqueam Indian Reserve Number 2, as the last wild salmon-bearing stream in Vancouver.

Musqueam raised concerns with the Project's potential impacts relating to specific locations and access to fishing activities, including restricted access to harvesting sites, impaired ability to harvest marine resources in order to provide food for the community, and concern around impacts to areas identified as Musqueam's traditional fishing areas. Project-related pipeline construction and routine maintenance activities are expected to cause short-term, temporary disruptions to Musqueam's access to freshwater fishing activities. If construction and reclamation occur during the fishing season, there could be a potential reduction in access to waterways, staging areas, and fishing sites for Musqueam community members. However, disruptions to access would largely be confined to the Project footprint for the pipeline and associated facilities during construction and reclamation. The Crown understands that Musqueam Creek is located in Pacific Spirit Regional Park and would not be located in the Project footprint. Fishing and harvesting activities directly affected by the construction and operation of the WMT are not likely to occur within the expanded water lease boundaries during the operational life of the Project. Impacts on navigation, specifically in eastern Burrard Inlet, would exist for the lifetime of the Project, and would occur daily. Project-related marine vessels are expected to cause temporary disruptions to Musqueam's marine fishing and harvesting activities. Community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes. Disruptions to Musqueam's marine fishing and harvesting activities are likely to be temporary when accessing fishing sites in the Burrard Inlet that require crossing shipping lanes, as community members would be able to continue their movements shortly after the tanker passes.

NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential access-related impacts associated with freshwater and marine fishing and harvesting areas (Section 4.3.2 and 4.3.3 of this Report) and the proponent would implement several mitigation measures to reduce potential effects on freshwater and marine fishing and harvesting activities. These mitigations include access management plans, scheduling and notification of Project activities including Project-related marine vessel traffic, and environmental monitoring programs. As previously discussed, the proponent is committed to minimize disturbance to access to Musqueam's traditional lands, as described in the Access Management Plan. The Crown understands the proponent has committed to working with Musqueam to develop strategies to most effectively communicate the construction schedule and work areas to community members. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a marine public outreach program (NEB Condition 131). This communication would allow Musqueam community members to take measures to reduce potential disruptions from tankers and allow planning for marine fishing and harvesting activities to take place that minimizes disturbance from Project-related tankers.

Musqueam expressed concern with the direct and indirect effects of the Project on social, cultural, and experiential aspects of its fishing activities, particularly the importance of salmon to the Musqueam culture. Musqueam expressed that there could be cultural, and intellectual impacts such as the impacts to intergenerational knowledge transfer and cultural experience from increased Project-related tanker traffic; and a lack of fish to trade with neighbouring nations and protecting their ability to fish.

As described previously, the Project pipeline and facility construction and routine maintenance is expected to cause short-term, temporary disruptions to Musqueam's fishing activities. The Crown understands that this temporary interruption could mean that community members alter their fishing activities during construction, which could affect their participation in the traditional activity. Through the construction and operation of the WMT, the Crown understands that Musqueam may experience noise disturbances and interruptions to cultural ceremonies along the shoreline, and loss or damage to visual quality of the Burrard Inlet. Project-related marine vessels are expected to cause temporary disruptions to Musqueam's marine fishing and harvesting activities. The Crown understands that community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Musqueam community members to take measures to reduce potential disruptions from tankers and allow planning for cultural events to take place that minimizes disturbance from Project-related tankers.

The Crown has considered available information from the NEB process, consultation with Musqueam, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province. In consideration of this information, the Crown expects impacts of Project construction and operation, and Project-related marine shipping activities on Musqueam's freshwater fishing and marine fishing and harvesting activities would be up to minor-to-moderate. The Crown expects minor impacts to fishing and marine harvesting as a result of the pipeline, and these effects would primarily occur during construction. The Crown expects minor-to-moderate impacts as a result of WMT construction, operations and Project-related marine vessels. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related pipeline, facility, and WMT construction and operation, and marine shipping activities are likely to have low to moderate magnitude environmental effects on freshwater and marine species harvested by Musqueam;
- Construction of WMT, the pipeline and associated facilities are likely to cause short-term temporary disruptions to Musqueam's community members accessing traditional freshwater fishing and marine fishing and harvesting sites within the Project footprint; Project-related marine shipping activities are likely to cause temporary disruptions to activities or access to sites during the period of time Project-related tankers are in transit through Musqueam's traditional territory; and
- Concerns identified by Musqueam regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their freshwater fishing activities.

Impacts on Other Traditional and Cultural Practices

Additional information on Musqueam's cultural and traditional practices is provided in the Project Application. As described in *Volume 5B* of the Project Application, extensive shell and bone middens served as burial sites for the Musqueam. The Musqueam people recall up to 40 separate historical village sites that represented their movement throughout the Lower Fraser delta for fishing, hunting, trapping and gathering, and to maintain their livelihood through trade with other aboriginal communities. Musqueam provided comments that the Project corridor passes multiple named sites and village sites on the Burrard Inlet side as identified in the 1976 Musqueam Declaration; however, as these sites have not been mapped, the Crown is not able to confirm whether these villages that overlap or are in close proximity to the Project corridor.

Musqueam is of the view that their cultural persistence is underpinned by the transmission of knowledge within and across generations. To Musqueam, their territory is comprised not only of named and unmanned settlements (seasonal and winter), landscape features, and transformer sites, to name a few, but mnemonic devices for both social and idiosyncratic oral traditions, oral histories and social and cultural practices. Current oral histories and practices on the landscape carry these traditions forward and layer on a continuity of Musqueam history, culture, and use of their lands and resources. Musqueam's language, *hə́ŋqəmińəhə́ŋqəmińəh* histories and practices on the landscape carry these tr

Together, the transmission of Musqueam's cultural knowledge and language is called Cultural Continuity. All other Musqueam values (e.g. fishing, hunting, arts and crafts) are dependent on the reliable and successful transmission of knowledge among Musqueam members, and thus central to the integrity of Musqueam's culture.

Musqueam's sense of place and spirituality are intrinsically linked to cultural continuity and identity. They encompass foundational intangible and tangible Musqueam values and activities including: ontological and epistemic frameworks; multi-sensory experiences of place (auditory, visual, tactile, kinesthetic); members' attachment and affinity to place (i.e., sense of place); spirituality, ceremonies, and gatherings, including practices and sacred places; arts and crafting; heritage and burial sites. The environment, place, and spirituality precipitate and reinforce social relationships (both kin and non-kin). These relationships create an identity linked to history, community, worldviews, ethics, and beliefs.

Musqueam identified many concerns related to environmental effects of the Project on other traditional and cultural practices. In Musqueam's oral traditional evidence, Richard Sparrow and Leona Marie Sparrow described many other traditional and cultural activities undertaken by community members. Morgan Guerin also provided evidence on impacts to traditional and cultural practices including the intergenerational transfer of traditional knowledge, particularly knowledge relating to fishing, such as Elders teaching youth how to mend nets, where and when to fish, and the types of species to fish at various times throughout the year. Morgan Guerin also described Musqueam's cultural and historical connection to their role as protectors of the Fraser.

As described in Section 4.3.4 of the Report, Project-related activities are not likely to result in significant adverse effects on the ability of Aboriginal groups to use land, waters or resources for traditional purposes. If the Project is approved, the NEB conditions would either directly or indirectly avoid or reduce potential environmental impacts on physical and cultural heritage resources (Section 4.3.1 of this Report) and the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources important for Musqueam's traditional and cultural practices. The proponent has also committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during RoW finalisation, narrowing the RoW in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments.

Musqueam raised concerns with the Project's potential impacts relating to specific locations and access to other cultural and traditional resources and sites, including: impacts on travelways, particularly in the marine environment, that Musqueam community members use to access fishing sites in their asserted traditional territory. Musqueam also identified concerns related to impacts on community gathering areas, summer camps, and settlement areas throughout Musqueam's asserted traditional territory.

Project-related activities are expected to cause short-term disruptions that temporarily affect the ability of Aboriginal groups to access land, waters or resources for traditional purposes. The Crown appreciates that Musqueam's opportunities for certain traditional and cultural activities would be temporarily interrupted during construction and routine operation, and there could be reduced access to travelways, habitation sites, gathering sites, and sacred areas. However, temporary disruptions to Musqueam's traditional and cultural practices would be largely confined to sites within the Project footprint for the pipeline and associated facilities. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on access to physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown notes the proponent's commitment to ongoing engagement with Aboriginal groups regarding the integration of traditional knowledge related to the location and construction of the Project.

Musqueam identified concerns with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its other traditional and cultural practices, including impacts on traditional trade and barter economies as exemplified by Richard Sparrow and Leona Sparrow's accounts of Musqueam's protocols with neighbouring First Nations to trade aquatic resources in exchange for hunting access to their traditional territories, and impacts on ceremonial events and community events throughout the year where salmon and other species are provided to community members as a main source of members' diets. Project construction and operation activities, as well as Project-related marine vessels in transit through Musqueam's traditional territory would cause temporary interruptions to Musqueam's cultural and spiritual practices that occur within the Project footprint and those activities that require Musqueam community member's to cross marine shipping lanes.

The Crown has considered available information from the NEB process, consultation with Musqueam, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province. In consideration of this information, the Crown expects impacts of Project construction and operation and Project-related marine shipping activities on Musqueam's other traditional and cultural practices would range from minor to minor-to-moderate. The Crown expects minor impacts as a result of the pipeline, and these effects would primarily occur during construction. The Crown expects minor-to-moderate impacts as a result of the WMT and Project-related vessels, and these effects would occur during construction and operations. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related pipeline, facility, and WMT construction and operation, and marine shipping activities are likely to have low to moderate magnitude environmental effects on traditional and cultural resources;
- Construction of WMT, the pipeline and associated facilities are likely to cause short-term temporary disruptions to Musqueam's community members accessing traditional and cultural practice sites within the Project footprint; Project-related marine shipping activities are likely to cause temporary disruptions to activities or access to sites during the period of time Project-related tankers are in transit through Musqueam's traditional territory; and
- Concerns identified by Musqueam regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their other cultural and traditional practices.

Impacts on Aboriginal Title

The Crown notes that the Project would be located within an area of Musqueam's traditional territory assessed as having a strong *prima facie* claim to Aboriginal title around the north arm of the Fraser River and that within Burrard Inlet, the claim diminishes with increasing distance from the western end.

The Crown has actively consulted with Musqueam through the NEB process and Crown consultation process as a deeper level in an attempt to better identify, understand and resolve concerns relating to Aboriginal title. Musqueam raised concerns related to the impacts of the Project on its Aboriginal title claims, including:

- Impacts that could impede or disrupt Musqueam's use of its asserted traditional territory, including access restrictions to resources and disruption of traditional activities resulting from cumulative effects to marine resources associated with increased vessel traffic;
- Activities that affect Musqueam's ability to manage and make decisions over the Project area, including reduced ability to pursue preservation objectives and vessel wake causing damage to the shoreline in Musqueam traditional territory; and
- Project-related activities that affect Musqueam's economic development aspirations for its asserted traditional territory, including reduced viability of fishing-based economy and impediments to a self-sustaining economy.

The Crown provides a description of the potential impacts of the Project on Aboriginal title in Section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid/reduce Project impacts associated with the degree of disturbance to terrestrial, marine and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as well as NEB Conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved. It is noted that Musqueam has not executed a Mutual Benefits Agreement with the proponent.

Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in Section 4.3.5, it is the Crown's opinion that the Project is expected to have minor impacts on Musqueam's asserted Aboriginal title to the Project area.

Impacts Associated with Accidental Pipeline, Terminal, and Tanker Spills

Musqueam expressed several concerns with direct and indirect effects of Project-related tanker spills on their Aboriginal interests including impacts of a spill on marine habitat and species, including shoreline oiling in estuaries and sensitive habitats, potential toxicological effects to fish and other aquatic species in the Fraser River estuary, non-toxic effects of stranded oil on fish-spawning habitats, potential effects of chemicals used to clean-up spills, and vapour inhalation.

The Crown understands Musqueam's concerns regarding spills, and the potential for a spill to impact Musqueam's use and occupation of its traditional territory, ability to make governance decisions over the area impacted, and the potential for a spill to adversely impact environmental integrity, community health and economic development aspirations Musqueam has for its territory. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty.

A discussion of the potential impacts of accidental spills on Aboriginal Interests is provided in Section 4.3.6 of this Report. In consideration of this information and analysis, as well as information available to the Crown on Musqueam's Aboriginal Interests and concerns raised by Musqueam during the NEB process and Crown consultation process, an oil spill associated with the Project could result in minor to

serious impacts on Musqueam's Aboriginal Interests. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline, terminal or tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. In making this general conclusion, the Crown acknowledges Aboriginal peoples who live nearby and rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.⁵

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline and marine safety regimes would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations of the pipeline and WMT, as well as for marine vessel use of the area between the WMT and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the Project on the exercise of Musqueam's Aboriginal Interests would be up to minor-to-moderate.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Musqueam's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Musqueam in emergency response planning activities. The federal Crown is considering additional responsive measures that would further accommodate the potential adverse impacts of the Project on Musqueam, as discussed in Sections 4 and 5 of the main body of this Report.

⁵ Trans Mountain Final Argument, p. 85 and 207

Appendix C.4 – Squamish Nation

I - Background Information

The Squamish Nation (Squamish) is a Coast Salish First Nation located on the southwestern coast of British Columbia (BC) near Vancouver Island, Gibson's Landing, and the Squamish River watershed. Squamish's traditional territory extends from the Lower Mainland to Howe Sound and the Squamish Valley watershed. Squamish has stated that they rely on their asserted traditional territory to support their way of life and for the meaningful exercise of their Aboriginal rights.

Squamish has 24 reserves and 4,163 registered members, 60% of whom live on reserve. Their main reserves are near the town of Squamish, BC and around the mouths of the Capilano River, Mosquito Creek, and Seymour River and on the north shore of Burrard Inlet in North Vancouver. The ancestral language of the Squamish People is the Squamish language, *Skwxwú7mesh Sníchim*. The language is considered nearly extinct today.

The Squamish filed a protective *Writ of Summons* in the BC Supreme Court on December 10, 2003, asserting Aboriginal title on behalf of the Squamish Indian People to a territory identified in the writ. Squamish also filed a Statement of Intent to negotiate a treaty, which was accepted by the British Columbia Treaty Commission in December 1993. Presently, Squamish is in the third stage of the treaty process, which is the negotiation of a framework agreement.

II - Preliminary Strength of Claim Assessment

- The components of the Project which intersect with Squamish's identified traditional territory include approximately 15 kilometres (km) of the pipeline routing, the Burnaby Terminal and Westridge Marine Terminal (WMT), as well as the marine shipping activities. It is estimated that 35 km of the marine shipping route would pass within the southern portion of Squamish's identified traditional territory.
- The Crown's preliminary assessment of Squamish's claim for Aboriginal rights over the area which spans the terminus located at the Burnaby holding facility to the Fraser River is assessed as ranging from a weak to moderate *prima facie* Aboriginal rights claim. The claim appears strongest (i.e. moderate) at the terminus of the pipeline in Burnaby, and diminishes as the pipeline travels inland and towards the Fraser River¹.
- The Crown's preliminary assessment is that Squamish has a weak *prima facie* claim to Aboriginal title over the portion of the Project that spans the terminus in Burnaby to the Fraser River².
- The Crown's preliminary assessment of Squamish's *prima facie* claim for Aboriginal rights to harvest marine resources within the marine shipping corridor of the Project that spans from the terminus of the pipeline in Burnaby to the portion of the Strait of Georgia that is proximal to the South Arm of the Fraser River is assessed as ranging from moderate to weak. Areas of moderate

¹ Squamish First Nation: Review of Anthropological and Historical Sources (revised December 2010).

² Ibid.

prima facie claims include the portion of the shipping route that is proximal to the western shore of Point Grey and includes areas along the shipping route within the western section of Burrard Inlet, an area that ethnographers consider to fall within the secondary territory for the Squamish and where there is evidence to support historic use of the area for seasonal camping and resource gathering.

- The Crown's preliminary assessment of Squamish's *prima facie* claim for Aboriginal title over the upland areas that roughly parallel the marine shipping corridor of the Project ranges from weak to weak-to-moderate. Squamish's core territory is identified as Howe Sound and the Squamish River watershed. Ethnographers consider Point Atkinson as the boundary of Squamish core territory. Squamish movement into Burrard Inlet east of the Lion's Gate Bridge on a more permanent basis probably occurred in the 1860s, following the opening of the saw mills and associated employment. The stronger claims may occur in western Burrard Inlet, given its relative proximity to areas of known Squamish habitation in 1846 in Howe Sound, and increasing year round use of this area in the mid-1800s.

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Squamish's Aboriginal Interests, the Crown is of the view that the legal duty to consult Squamish lies at the deeper end of the *Haida* consultation spectrum. Squamish was placed on Schedule B of the Section 11 order issued by the BC Environmental Assessment Office (EAO), which affords Squamish opportunities to be consulted at a deeper level.

Squamish was an active participant in the National Energy Board (NEB) hearings, contributing significantly to the NEB review of the Project as an intervenor. Squamish submitted written evidence, including a final written argument ([A4X5E7](#)) and oral traditional evidence, including an oral summary argument, with the NEB describing their asserted rights, customary law, and concerns regarding the Project. Squamish provided responses to information requests ([A4R4D7](#)) and has filed multiple rounds of information requests and responses to information requests by other intervenors including the Government of Canada.

Squamish has been, and remains, actively engaged with the Crown with respect to Project review and the consultation process. Squamish has submitted detailed correspondences with the Crown (including Ministers). The Crown exchanged numerous pieces of correspondence with Squamish regarding the Crown's proposed approach to consultation on the Project, and met with Squamish officials on September 11, 2015, November 27, 2015, and on October 18, 2016.

Squamish Chief Ian Campbell met with the Minister of Natural Resources on February 8, 2016, June 7, 2016, and July 5, 2016.

In exchanges with the Crown, including with the Minister of Natural Resources directly, Squamish has communicated that it is opposed to the Project.

Squamish has filed an application for Judicial Review of the *NEB Recommendation Report* for the Project in the Federal Court of Appeal.

Squamish was awarded \$44,270 including travel for 1 to hearing from the NEB to support participation in the NEB process. The Major Projects Management Office (MPMO) offered Squamish \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Squamish an additional \$14,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Squamish signed contribution agreements with the MPMO in response to both of these offers, for a total of \$26,000 in allocated funding.

On October 19, 2016 EAO offered Squamish \$5,000 in capacity funding to participate in consultation with the Crown.

The Crown provided a first draft of this Consultation and Accommodation Report (the Report) to Squamish for review and comment on August 17, 2016. Squamish provided comments on the draft Report to the Crown on September 19, 2016.

In comments provided to the Crown, Squamish indicated that they believe the draft Report only offers general conclusions and did not provide an adequate assessment of the Project's impacts on Squamish. It was further proposed by Squamish that a protocol between the Crown and Squamish is a practicable step towards the development of a Report which is acceptable to Squamish. These comments have been considered and addressed in this version of the Report.

A second draft of this report was provided to Aboriginal groups for review and comment on November 3, 2016. The Crown has not received comments from Squamish on the second draft.

Squamish provided a separate Aboriginal group submission to the Crown on November 17, 2016, which included comments on Provincial conditions.

IV - Summary of Key Squamish Issues and Concerns Raised

The Crown has gained its understanding of Squamish's issues and concerns through the NEB hearing process, and through correspondences and meetings with the Crown consultation team. In addition, the Crown has considered information regarding the proponent's engagement with Squamish, as described in the proponent's Aboriginal Engagement Report (July 2016).

This section offers a summary of the key issues raised by Squamish, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Squamish's key Project-related issues and concerns are summarized below:

Review Process and Methodology

Squamish has stated that the NEB process was fundamentally flawed. Squamish identified several concerns related to the NEB and Crown consultation processes, including: (i) Crown's duty to consult; (ii) reliance on the NEB process; (iii) Crown's failure to consult; (iv) inadequate or not yet provided Participant Funding Program (PFP) funding for full participation in the NEB process; (v) quasi-judicial process is not an adequate means to consider Aboriginal rights and interests due to insufficient information to review impacts NEB's ability to draw conclusions on potential Project impacts on Aboriginal Interests; (vi) procedural fairness questioned given the lack of cross-examination opportunities on evidence given and 'inadequate' proponent responses; (vii) no timeline extensions, inadequate time to respond; and (viii) inability to provide Oral Traditional Evidence commentary on new route.

In the Final Argument submitted to the NEB, Squamish indicated that the NEB's quasi-judicial process is adversarial and viewed as contrary to the purpose of consultation and reconciliation. Squamish indicated that their participation in the NEB process was further restricted by short timelines for reviewing large volumes of information, and responses to Squamish's information requests were incomplete and delayed. In addition, Squamish stated that they were not engaged on a "government to government" basis during the NEB process and that the NEB did not recognize Squamish's manner of managing its lands and waters or any of Squamish's cultural values.

In a letter sent to the EAO on May 24, 2016, Squamish identified issues and concerns with the consultation process including the failure of the Province to consult Squamish on the EAO-NEB Environmental Equivalency Agreement for the Project, and Squamish's disagreement with the reliance of the Province on the NEB report as the provincial assessment report.

In a letter to the Crown on September 19, 2016, Squamish raised concerns with the Crown's use of biophysical indicators as a proxy for impacts on Aboriginal rights, expressed a desire for a Squamish specific consultation process, an assessment of the nature and scope of Squamish's rights and title potentially impacted by the Project, studies examining how exactly Squamish's rights and title would be impacted by a variety of spill scenarios, information about the fate and behaviour of diluted bitumen and the risks to Squamish's rights and title, an assessment of alternative marine terminal locations, an assessment of the Westridge Marine Terminal expansion and its impacts on Squamish's rights and title, a comprehensive risk assessment of the Project, and an assessment of the seismic risks to the Project. Squamish stated that unless these requests are fulfilled they do not have enough information to fully understand how the Project will impact their rights and title, and therefore are unable to discuss appropriate accommodation proposals.

In meetings with the federal Crown on September 11, 2015 and November 27, 2015, and in a meeting with the joint Crowns on October 18, 2016, Squamish expressed a desire to engage in a Squamish specific Project review and consultation process. During the 2015 meetings, Squamish suggested that the Project could be reviewed using a similar process to the one Squamish undertook when reviewing the Woodfibre LNG project.

Cultural, Social, and Spiritual Impacts

Squamish stated that the whole of Squamish's traditional territory is of cultural and spiritual importance to Squamish. Water is of particular spiritual and cultural importance to Squamish, and plays a vital role in spiritual stories and cultural practices: "water is sacred, it is life giving, it has a spirit" ([A4X5E7](#)). Squamish is critically concerned about the significant impacts of the Project on their territory, including the people, land, resources, sites and waters throughout that territory, and would like to see it protected. Squamish stated that it does not have the capacity to do an inventory of all the cultural and spiritual places potentially impacted by the Project, or of all the potential impacts of the Project generally. Squamish stated that without such an assessment having been undertaken, the extent of the impacts on Squamish culture and society cannot be fully understood at this time.

Squamish also has concerns that the Project has the potential to interrupt traditional land and resource use activities, particularly in regards to access to and movement through sacred waters (including wetlands and underground aquifers) in their traditional territory, and salmon and seafood harvesting activities. The following areas within Squamish's asserted traditional territory were noted as being of particular concern: Xépxpayay (East Vancouver), Skwachýs region that connects to Temtemíxwtn (waterbody), Howe Sound, Burrard Inlet, Deer Lake, Burnaby Lake, and Buntzen Lake.

Squamish believes that Burnaby and Deer Lake connect to Buntzen Lake, which they believe connects to the spirit realm through underground aquifers. In response to the Crown's Information Request, Squamish clarified: "The issue as expressed encapsulates a concern of Squamish about the interconnectedness of the waterways within Squamish territory from an environmental perspective and a spiritual perspective and the impacts of the Project on those waterways. However, the issue as expressed does not encapsulate the breadth of Squamish's concern about the impacts of the Project on these waterways, particularly of a spill associated with the Project, or on the cultural and spiritual practices and harvesting practices of Squamish generally. Squamish is greatly concerned about the impacts of the Project, including any accidents or malfunctions associated with the Project, on the waterways and marine environment within Squamish territory" ([A71223](#)).

Squamish is also concerned about loss of access to Squamish territory (e.g., ancestral village sites in Howe Sound, burial grounds on Keats Island) and navigable waters from increased shipping from the Project (Burrard Inlet). The ability to move freely over the waters of Squamish's asserted traditional territory is considered by Squamish to be integral to their culture and identity.

Squamish expressed concerns about burial sites not being protected by the Archaeological Branch or by the *Graveyard and Cemetery Act* and that the Project may affect their long house tradition and the interrelated use of land, waters and streams for cultural and spiritual purposes.

Environmental Effects

The Project has the potential to extensively impact the key areas that Squamish relies on for harvesting resources, and further industrialize areas that Squamish has historically relied on to harvest resources, removing any chance of rehabilitation. Squamish identified concerns about the direct and indirect

impacts on fish and fish-bearing waterbodies that will result from the Project, including critical concerns about the impact of increased tanker traffic in the Marine RSA on the practice of Squamish rights, and on the ability of Squamish to access places of importance within their territory such as salmon harvesting areas. Squamish believes that the information made available during the NEB review process was not sufficient to give them satisfaction about the adequacy of the marine shipping safety regime.

Squamish is concerned that the interaction of Project-related marine vessel traffic with land-based activities was not considered. Squamish believes this fails to consider the profound connections between land, sea, and culture of the Squamish people that are potentially affected by the Project.

Cumulative Effects

Squamish is concerned about the contribution of the Project to the cumulative effects of industrial development in Squamish's territory. One of the Squamish's key concerns is about the potential cumulative effects impacts to marine mammals, particularly killer whales.

Squamish is concerned about further industrialization, and the effect that this will have on the ability to revitalize Burrard Inlet and Howe Sound, and regain the meaningful exercise of their Aboriginal rights in certain areas.

Squamish has stated that revitalization efforts and development are not mutually exclusive concepts and that, in order for development to not compromise territory and culture it must be done responsibly in partnership with First Nations.

Impacts on Aboriginal Rights and Title

Squamish identified concerns about impacts on Squamish fishing activity (herring, herring roe, crabs, urchins) in Burrard Inlet and Squamish efforts to rebuild fish stocks and habitat. Squamish has concerns regarding impacts on rebuilding killer whale populations in Howe Sound and the herring stocks on which the whales depend. Squamish has undertaken (or is in the process of undertaking) habitat restoration efforts and revitalization of the spawning grounds in respect of McKay Creek and Mosquito Creek. Squamish also plans to undertake habitat restoration efforts and revitalization of the spawning grounds in respect of Lynn Creek, Seymour River, and Capilano River.

In response to the Crown's Information Request, Squamish clarified: "Squamish is concerned about the impacts of the Project on a wide variety of species, and the environment on which they depend. The species listed represent some of the species of concern to Squamish, but do not represent an exhaustive list of the species of concern to Squamish. The issue as expressed further does not capture the level of Squamish restoration efforts and the concerns about the impacts of the Project on those efforts. Impacts to fish and fish habitat within Squamish territory by the Project have consequent impacts on the practice of Squamish rights, cultural and spiritual practices and the health and well-being of Squamish people. The degree of potential impacts to the practice of Squamish's rights and title as a result of the impacts of the Project to fish and fish habitat is not represented in the issues as described. Project impacts on fish and fish habitat cannot be used as a biophysical proxy for impacts on corresponding

rights and title interests that depend on these resources, given the complex and unique relationship that Squamish has with the fish and fish habitat within Squamish territory” ([A71223](#)).

Squamish raised concerns about the interruption of travel through their territory and emphasized the importance of the water ways in and around Burrard Inlet, Southern Howe Sound, and the lower Fraser River as Squamish traditional and current transportation corridors.

Squamish expressed concerns about loss or threat to its marine based economic interests and business properties from the Project, and limitations to other development opportunities on Squamish’s asserted traditional territory.

In a letter sent to the MPMO on September 19, 2016, Squamish indicated that the scope of Squamish’s Aboriginal rights and Interests that stand to be impacted by the Project are not yet known and have not been adequately assessed.

Human Health and Safety

Squamish has stated that the assessment of the Project on human health effects was incomplete and underrepresented, and that the Project would increase risks to human health due to its proximity to densely populated areas. Squamish is particularly concerned about the consumption of contaminated traditional foods within their territory.

Accidents or Malfunctions

Squamish identified concern regarding the impact of an oil spill and spill response with respect to environment, water, fish, wildlife, marine resources including plants and micro-organisms within Squamish traditional territory, including the Burrard Inlet and the Fraser River Estuary. The potential impacts of a diluted bitumen spill on fish and fish habitat is of significant concern to Squamish. Squamish stated that the spill response procedures and protocols were insufficiently defined to safeguard their waters and resources, and that the residual or mitigated impacts of accidents and malfunctions cannot yet be adequately assessed. Squamish expressed concern with the lack of commitment from Trans Mountain to provide suitable drinking water for Squamish in the event of contamination, or the identification where surplus capacity could come from.

Squamish is worried that there are not adequately defined roles and responsibilities in the event of a spill or sufficient resources to respond to, and compensate for loss arising from, a spill. This is based on Squamish’s experience with the proponent’s response to past spills from the existing Trans Mountain pipeline.

Squamish also identified as a concern potential adverse effects due to accidents or malfunctions related to possible seismic activity that may impact Squamish Aboriginal rights. Squamish is concerned about the impact of seismic activity on all aspects of the Project, the event of Project equipment failure due to seismic activity, including failure at the Burnaby Mountain Terminal, the pipeline and the WMT, and any resulting impacts to Squamish, including our rights and title.

Squamish's Response to NEB Recommendation Report

In a letter to the MPMO dated September 19, 2016, Squamish indicated that deficiencies in the NEB process – particularly the inadequacy of participant funding to fully participate in the NEB process, and the notion that a quasi-judicial process is not an adequate means to consider Aboriginal Interests – contributed to the subsequent inadequacy of the *NEB Recommendation Report*. Furthermore, Squamish indicates that concerns that were raised with the NEB have not been addressed in the *NEB Recommendation Report*.

V - Potential Impacts of the Project on Squamish's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Section 2.4.3 and Section 4.3 of this report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. There are areas that may also be used for traditional harvesting activities (e.g., harvesting, trapping, fishing and gathering), including by individual members of families.

The discussion of this section focuses on the potential impacts of the Project on Squamish's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Squamish's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g. fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Squamish's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Squamish, Squamish's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province.

The Crown understands that Squamish completed a third-party Traditional Use and Occupancy Study (TUOS), titled *Squamish Traditional Use and Occupancy Study: Final Report*, which was submitted as confidential written evidence to the NEB in May 2015. Redacted versions of the report ([A4L7E3](#), [A4L7E4](#)) and written evidence ([A4X5E7](#)) were filed with the NEB. The TUOS summarizes Squamish's traditional knowledge, values, and potential effects and mitigation as related to the Project. Approximately 501 traditional use and occupancy sites were identified in Southern Howe Sound, Burrard Inlet and Indian Arm, and the lower Fraser River. For confidentiality reasons, specific locations of traditional land and resource use activities and sites were not provided by Squamish in their TUOS. Squamish did not request any site-specific mitigation measures related to Project effects to their Aboriginal Interests.

The Crown understands that Squamish has a desire to keep its traditional use information confidential but hopes to discuss mechanisms through which information regarding any traditional use of the Project area can be shared with the Crown to inform the Crown's assessment of Project impacts on its Aboriginal Interests.

Impacts on Hunting, Trapping and Plant Gathering

Although the TUOS for the Project was filed confidentially with the NEB, the Crown acknowledges that the Project has the potential to impact Squamish's Aboriginal rights to hunt, trap and gather plants. As described in the redacted TUOS, harvesting resources within Squamish territory is a key expression and component of Squamish people's cultural identity and their heritage, and is part of what makes one Squamish. As summarized in the written evidence, Squamish community members continue to practice seasonal rounds travelling throughout their traditional territory. Hunted species include duck, pheasant, grouse, deer, elk, seals and sea lions. Community members also collect seagull eggs, and gather cultural and medicinal plants, clay, berries, broadleaf maple and cedar.

Squamish identified many concerns related to environmental effects of the Project on hunting, trapping, and plant gathering activities, in particular, significant impacts of the Project on Squamish territory, including the people, land, resources, sites and waters throughout that territory, and the desire to see it protected. Concerns regarding use of chemical dispersants and negative impacts on the environment, and the contribution of the Project to the cumulative effects to its territory were also raised. As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants, lichens and vegetation communities of concern, old growth forests, wetlands, and terrestrial wildlife and wildlife habitat (including species at risk-listed species), marine mammals, and marine birds.

NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping, and gathering activities (Section 4.3.1 of this Report) and the proponent would implement several mitigation measures to reduce potential effects to species important for Squamish's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP) and the vegetation and wildlife management plans (including a marine mammal protection program). The NEB imposed Condition 81 that requires the proponent to develop a WMT-specific EPP, including mitigation and monitoring plans, to be finalized in consultation with Fisheries and Oceans Canada (DFO) and potentially affected Aboriginal groups. The proponent is also required to conduct a post-construction monitoring program for marine mammals from the expansion of the WMT and post-construction monitoring reports. The proponent has committed to various mitigation measures to reduce effects of construction and operation of the WMT on marine birds and has committed to compile information regarding marine bird mortality and collision events

and to include that information in post-construction monitoring reports. For the marine shipping component of the Project, the proponent will also develop plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups.

Squamish raised concerns with potential Project-related impacts to specific locations and access to hunting, trapping, and plant gathering activities, including concerns related to the Project's potential impacts on their ability to practice seasonal rounds in their traditional territory. Project-related pipeline construction and routine maintenance is expected to cause short-term, temporary disruptions to Squamish's access to hunting, trapping and plant gathering activities, largely confined to the Project footprint for the pipeline and associated facilities.

The Crown understands that with pipeline construction and reclamation activities, disruptions to access may result in a loss of harvesting opportunities for Squamish. For traditional activities directly affected by the construction and operation of the WMT, these activities are not likely to occur within the expanded water lease boundaries during the operational life of the Project. Project-related marine shipping is expected to disrupt Squamish's marine vessels and harvesters, and this could disrupt activities or access to hunting, trapping, and plant gathering sites. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential access-related impacts associated with hunting, trapping, and gathering sites (Section 4.3.1 and 4.33 of this Report) and the proponent would implement several mitigation measures to reduce potential effects on Squamish's hunting, trapping, and plant gathering activities. These mitigations include management plans that include access management, scheduling and notification of Project activities, and environmental monitoring programs.

The Access Management Plan is intended to reduce disturbances caused by access, construction equipment and vehicle traffic, during and following construction in order to minimize disturbance to access to Squamish's traditional lands. The proponent has committed to minimizing the development of access routes, controlling public access along the construction ROW, selecting appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent has also committed to work with applicable resource managers, traditional land and resource users to define locations where access control is necessary, and what type(s) of access control will be implemented. In the event that hunting, trapping, and plant gathering sites are identified during ongoing engagement with Squamish prior to construction, the sites will be assessed, and appropriate mitigation measures will be implemented. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Squamish community members to take measures to reduce potential disruptions from tankers and allow planning for hunting, trapping and plant gathering activities to take place that minimizes disturbance from Project-related tankers. Reduced harvests, while not expected to occur from temporary access restrictions, could impact Squamish cultural activities and sharing of marine food with the community. The proponent committed to working with Squamish to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Squamish expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities, including impacts to human health from the use of chemical dispersants and contribution of the Project to existing cumulative effects. Short-term, temporary disruptions to Squamish's hunting, trapping, and plant gathering activities from Project-related construction and routine maintenance activities could temporarily alter the behaviour of community members' during construction. Reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project, could have spiritual and cultural impacts on community members.

The Crown understands that Squamish may experience noise disturbances and interruptions to traditional activities due to the WMT and Project-related marine shipping activities, and community members could be discouraged from travelling to hunting, trapping, and plant gathering sites that require these members to cross shipping lanes. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential social, cultural, spiritual, and experiential effects associated with hunting, trapping, and plant gathering activities (Section 4.3.1 of this Report) and the proponent would implement several mitigation measures to reduce potential effects to Squamish's hunting, trapping, and plant gathering activities. The proponent is committed to implementing weed management (as outlined in the Weed and Vegetation Management Plan) to reduce the potential for weed infestation following construction, and utilizing an Integrated Vegetation Management approach intended to reduce the use of herbicides and promote healthy ecosystems. Measures outlined in the proponent's Reclamation Management Plan are intended to stabilize and revegetate affected lands to achieve land productivity along the construction ROW and footprint, equivalent to the adjacent land use. The Crown notes the proponent's commitment to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project. The proponent will also communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program.

The Crown has considered available information from the NEB process, consultation with Squamish, Squamish engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province. In consideration of this information, the Crown expects impacts of Project construction and operation, and Project-related marine shipping activities on Squamish's hunting, trapping and plant gathering activities would be negligible-to-minor. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related pipeline, facility, and WMT construction and operation, and marine shipping activities are likely to have low to moderate magnitude environmental effects on terrestrial, aquatic, and marine species harvested by Squamish;
- Construction of WMT, the pipeline and associated facilities are likely to cause short-term temporary disruptions to Squamish's community members accessing traditional hunting, trapping and plant gathering sites within the Project footprint;

- Project-related marine shipping activities are likely to cause temporary disruptions to activities or access to sites during the period of time Project-related tankers are in transit through Squamish's traditional territory;
- Concerns identified by Squamish regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their hunting, trapping and plant gathering activities.

Impacts on Fishing and Marine Harvesting

Although the TUOS for the Project was filed confidentially to the NEB, the Crown acknowledges that the Project has the potential to impact Squamish's Aboriginal rights to fish. As described in the TUOS and written evidence, Squamish traditionally harvested marine and aquatic resources for sustenance, ceremonial and commercial purposes, including trade. Presently, salmonid species are critical to Squamish people as a staple food and economic resource, and are an important component of identity and spiritual connection to the environment. The rivers and streams entering into Burrard Inlet have also served as important harvesting, transport, and cultural locations for Squamish, including, but not limited to, Lynn Creek, Mackay Creek, Mosquito Creek, Mahon Creek, Sister Creek, Seymour River and the Capilano River.

Squamish identified many concerns related to environmental effects of the Project on fishing activities, including impacts on fish and fish-bearing waterbodies, marine mammals and species at risk, in particular impacts on herring, herring roe, crabs, and urchins in Burrard Inlet. Squamish also expressed concern of the effects of dredging around the WMT for fish and fish habitat, and potential impacts on efforts to rebuild stocks, habitat restoration efforts, and revitalization of the spawning grounds. Concerns related to the use of chemical dispersants and the contribution of the Project to cumulative effects in Squamish territory were also raised.

As described in the *NEB Recommendation Report*, Project-related activities could result in low to moderate magnitude effects on freshwater and marine fish and fish habitat, surface water and marine water quality. Moderate effects to fish and fish habitat in the terrestrial and aquatic environments would be localized to individual watercourse crossings, and effects to marine fish and fish habitat would be limited to a few or many individuals, where any potential serious harm would be compensated by offset measures. NEB conditions would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Section 4.3.2 and 4.3.3 of this Report). A number of recommended NEB conditions require the proponent to file reports that will monitor Project-related impacts to freshwater fish and fish habitat, marine fish and fish habitat, and riparian habitats (NEB Conditions 71, 75, 92, 151, and 154).

With regards to specific concerns raised by Squamish, the proponent would implement several mitigation measures to reduce potential effects to species important for Squamish's fishing activities. The proponent has committed to time watercourse crossing construction activities to occur within the least risk biological windows in an attempt to avoid causing serious harm to fish, has committed to working with Aboriginal groups to identify the most appropriate means of offsetting serious harm to marine fish and fish habitat, and has proposed the implementation of channel and bank reclamation

measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat. Further, the proponent has completed a preliminary offsetting plan for impacts on fish and fish habitat associated with construction and operation of the WMT. For Project-related marine shipping activities, the proponent will require all tankers to process and empty their bilges prior to arrival and lock the discharge valve of the bilge water while in Canadian waters.

Squamish identified Burrard Inlet and the rivers and streams entering into Burrard Inlet as important harvesting, transport, and cultural locations for Squamish, including, but not limited to, Lynn Creek, Mackay Creek, Mosquito Creek, Mahon Creek, Sister Creek, Seymour River and the Capilano River.

Squamish raised concerns with potential Project-related impacts to specific locations and access to freshwater fishing and marine fishing and harvesting activities, including the interconnectedness of the waterways, for example Burnaby and Deer Lake connection to Buntzen Lake to the east within Squamish territory, and disruptions to traditional activities, particularly in regards to salmon harvesting activities. Project-related pipeline construction and routine maintenance activities are expected to cause short-term, temporary disruptions to Squamish's access to freshwater fishing activities. If construction and reclamation occur during the fishing season, there could be a potential reduction in access to waterways, staging areas, and fishing sites for Squamish community members. However, disruptions to access would largely be confined to the Project footprint for the pipeline and associated facilities during construction and reclamation.

The Crown understands that fishing and harvesting activities directly affected by the construction and operation of the WMT are not likely to occur within the expanded water lease boundaries during the operational life of the Project. Impacts on navigation, specifically in eastern Burrard Inlet, would exist for the lifetime of the Project, and would occur daily. Project-related marine vessels are expected to cause temporary disruptions to Squamish's marine fishing and harvesting activities. Community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes. Disruptions to Squamish's marine fishing and harvesting activities are likely to be temporary when accessing fishing sites in the Burrard Inlet that require crossing shipping lanes, as community members would be able to continue their movements shortly after the tanker passes.

NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential access-related impacts associated with freshwater and marine fishing and harvesting sites important for Squamish (Section 4.3.2 and 4.3.3 of this Report) and the proponent would implement several mitigation measures to reduce potential effects on freshwater and marine fishing and harvesting activities. These mitigations include access management plans, scheduling and notification of Project activities including Project-related marine vessel traffic, and environmental monitoring programs. As previously discussed, the proponent is committed to minimize disturbance to access to Squamish's traditional lands, as described in the Access Management Plan. The proponent committed to working with Squamish to develop strategies to most effectively communicate the construction schedule and work areas to community members. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a marine public

outreach program (NEB Condition 131). This communication would allow Squamish community members to take measures to reduce potential disruptions from tankers and allow planning for marine fishing and harvesting activities to take place that minimizes disturbance from Project-related tankers.

Squamish expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its fishing and harvesting activities, including loss of traditional resources, interconnectedness of the waterways, ability to practice traditional activities, impacts on the practice of Squamish rights, cultural and spiritual activities, and the health and well-being of Squamish people. As described previously, the Project pipeline and facility construction and routine maintenance is expected to cause short-term, temporary disruptions to Squamish's fishing activities.

The Crown understands that this temporary interruption could mean that community members alter their fishing activities during construction, which could affect their participation in the traditional activity. Through the construction and operation of the WMT, the Crown understands that Squamish may experience noise disturbances and interruptions to cultural ceremonies along the shoreline, and loss or damage to visual quality of the Burrard Inlet. Project-related marine vessels are expected to cause temporary disruptions to Squamish's marine fishing and harvesting activities. The Crown understands that community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Squamish community members to take measures to reduce potential disruptions from tankers and allow planning for cultural events to take place that minimizes disturbance from Project-related tankers.

The Crown has considered available information from the NEB process, consultation with Squamish, Squamish engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province. In consideration of this information, the Crown expects impacts of Project construction and operation, and Project-related marine shipping activities on Squamish's freshwater fishing and marine fishing and harvesting activities would be up to minor. The Crown expects negligible-to-minor impacts as a result of the pipeline, and these effects would primarily occur during construction. The Crown expects minor impacts as a result of WMT and Project-related vessels, and these effects would occur during construction and operations. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related pipeline, facility, and WMT construction and operation, and marine shipping activities are likely to have low to moderate magnitude environmental effects on freshwater and marine species harvested by Squamish;
- Construction of WMT, the pipeline and associated facilities are likely to cause short-term temporary disruptions to Squamish's community members accessing traditional freshwater fishing and marine fishing and harvesting sites within the Project footprint;

- Project-related marine shipping activities are likely to cause temporary disruptions to activities or access to sites during the period of time Project-related tankers are in transit through Squamish’s traditional territory; and
- Concerns identified by Squamish regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their freshwater fishing and marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

Although the TUOS for the Project was filed confidentially to the NEB, the Crown acknowledges that the Project has the potential to impact Squamish’s traditional and cultural practices. As described in the redacted TUOS, Squamish oral history and the archaeological record document longstanding patterns of trade between Squamish villages and with other Aboriginal peoples. Prior to the arrival of Europeans, trading took place via water and overland trails. Trade expanded to include new markets with the arrival of Europeans. Travel between Squamish and other Coast Salish communities was, and remains, significant to the maintenance of family ties.

Archaeological sites are important to present day Squamish community members, as they are considered time capsules that contain centuries of Squamish history, and are important “markers” of Squamish TUOS activities both past and present. Stories associated with sacred places and practices are still passed on within Squamish families and communities today. The rivers and creeks within Squamish territory have been, and continue to be, important sites for spiritual training and bathing. The longhouse is considered the hub of Squamish culture, religion, beliefs, and practices.

Squamish identified many concerns related to environmental effects of the Project on other traditional and cultural practices, including protection of burial and other sites of cultural and spiritual sites of importance, impacts on fish and fish habitat affecting cultural and spiritual practices, use of chemical dispersants, and the contribution of the Project to the cumulative effects to its territory. Squamish also expressed concern that burial sites are not being protected by the BC Archaeology Branch or under the *Graveyard and Cemetery Act*.

As described in Section 4.3.4 of the Report, Project-related activities are not likely to result in significant adverse effects on the ability of Aboriginal groups to use land, waters or resources for traditional purposes. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental impacts on physical and cultural heritage resources (Section 4.3.4 of this Report) and the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources important for Squamish’s traditional and cultural practices. An environmental education program will be developed and implemented to ensure that all personnel working on the Project are informed of the location of known sacred sites and burial sites. The proponent has also committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during RoW finalization, narrowing the RoW in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments.

There are two longhouses located on Squamish traditional territory, at the Capilano and Seymour reserves. As summarized in the written evidence, numerous ancestral seasonal villages are located in the Burrard Inlet region, located close to important harvesting sites. The locations reflect the Squamish seasonal round, which was used to efficiently access the resources in traditional territory throughout the year. Most villages remained, at least partly, occupied throughout the year; however many people moved between winter villages on the Squamish and Cheakamus Rivers to sites on Howe Sound, Burrard Inlet, and the Fraser River.

Squamish raised concerns with potential Project-related impacts to specific locations and access to other cultural and traditional practices, including impacts of increased marine traffic on the traditional use of waterways for canoeing, and increased vessel traffic affecting the ability of Squamish to access places of importance within their territory. Squamish expressed that the whole of Squamish traditional territory is of cultural and spiritual importance to Squamish, cultural and spiritual sites are not confined to the areas along the North shore and Howe Sound. Project-related pipeline and facilities activities are expected to cause short-term disruptions that temporarily affect the ability of Aboriginal groups to access land, waters or resources for traditional purposes.

The Crown understands that Squamish's opportunities for certain traditional and cultural activities will be temporarily interrupted, and there could be reduced access to travelways, habitation sites, gathering sites, and sacred areas. However, temporary disruptions to Squamish's traditional and cultural practices would be largely confined to sites within the Project footprint for the pipeline and associated facilities. The Crown understands that there will be temporary interruptions to Squamish's traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities. The expansion of WMT could impose restraints on Squamish's ability to use the water and surrounding lands for traditional activities, given the acoustic and visual disturbance of WMT construction. Particularly, the Crown recognizes the location of Squamish's traditional territory with emphasis that its main reserve is located directly across the inlet from WMT. However, the Crown notes that effects of construction on cultural activities would be temporary until completion of the WMT.

As outlined in Section 4.3.4 of this Report, the NEB concluded that Project construction and operation would result in temporary impacts on Squamish's use of water and water-based resources for traditional purposes. Project-related marine shipping activities could potentially disrupt traditional activities, travelways and cultural tourism (e.g. when tours can enter the water given the passing of tankers up the inlet). Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The proponent will be required to manage access to culturally sensitive sites along with an access management plan, and that the proponent has committed to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project. The Crown notes that tankers will remain within existing shipping lanes and the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131).

Squamish expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its other traditional and cultural practices, including the traditional use of waterways for canoeing, the interconnectedness of the waterways within Squamish territory from a spiritual perspective, and social impacts of the Project. Temporary interruptions may occur to Squamish's cultural and spiritual practices, which could alter their participation in these activities during Project construction and operation activities, as well as during the transit of marine vessels associated with the Project.

The Crown has considered available information from the NEB process, consultation with Squamish, Squamish engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province. In consideration of this information, the Crown expects impacts of Project construction and operation, and Project-related marine shipping activities, on Squamish's other traditional and cultural practices would range from negligible-to-minor to minor. The Crown expects negligible-to-minor impacts as a result of the pipeline, and these effects would primarily occur during construction. The Crown expects minor impacts as a result of the WMT and Project-related vessels, and these effects would occur during construction and operations. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related pipeline, facility, and WMT construction and operation, and marine shipping activities are likely to have low to moderate magnitude environmental effects on traditional and cultural resources;
- Construction of WMT, the pipeline and associated facilities are likely to cause short-term temporary disruptions to Squamish's community members accessing traditional and cultural practice sites within the Project footprint;
- Project-related marine shipping activities are likely to cause temporary disruptions to activities or access to sites during the period of time Project-related tankers are in transit through Squamish's traditional territory; and
- Concerns identified by Squamish regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their other cultural and traditional practices.

Impacts on Aboriginal Title

The Crown notes that portions of the Project would be located within areas of Squamish's traditional territory assessed as having moderate *prima facie* claim to Aboriginal title, in western Burrard Inlet, given its relative proximity to areas of known Squamish habitation in 1846 in Howe Sound, and increasing year round use of this area in the mid-1800s.

The Crown has actively consulted with Squamish throughout the NEB process and Crown consultation process at a deeper level in an attempt to better identify, understand, and resolve concerns relating to Aboriginal title. Concerns related to Aboriginal title raised by Squamish throughout the NEB and Crown consultation process include:

- Significant impacts of the Project on Squamish territory, including the people, land, resources, sites and waters throughout the territory, and Squamish would like to see it protected;
- Protection of Squamish traditional territory and the ability to self-govern, including the regulation of the activities within that territory, is integral to the practice of Squamish Aboriginal rights;
- Loss or threat to its marine-based economic interests and business properties from the Project, and limitations to other development opportunities on Squamish's asserted traditional territory;
- Squamish marine dependent businesses and properties may be severely impacted in the event of a spill from the Project;
- Concerns about the NEB process, the development of that process, and the resulting inability of that process to meaningfully or adequately assess Project impacts on Squamish Aboriginal Interests, or develop appropriate measures to avoid, mitigate, or accommodate impacts on the same;
- Squamish has not had the capacity to do an inventory of all the potential cultural and spiritual places potentially impacted by the Project (or of all the potential impacts of the Project generally); and
- Impacts of seismic activity on the Project, in particular any resulting impacts on Squamish Aboriginal Interests.

The Crown provides a description of the potential impacts of the Project on Aboriginal title in Section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on Aboriginal title. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid/reduce Project impacts associated with the degree of disturbance to terrestrial, marine and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as well as NEB Conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved. It is noted that Squamish has not executed a Mutual Benefits Agreement with the proponent.

Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in Section 4.3.5, it is the Crown's opinion that the Project is expected to have minor impacts on Squamish's asserted Aboriginal title to the Project area.

Impacts Associated with Accidental Pipeline, Terminal or Tanker Spills

Squamish expressed concerns related to direct and indirect effects of Project-related spills from both marine vessels and pipeline facilities on their Aboriginal Interests, including impact of an oil spill and spill response with respect to environment, water, fish, wildlife, marine resources including plants and micro-organisms within Squamish traditional territory. Specific concerns include impacts on the waterways and marine environment within Squamish territory, fish and fish-bearing waterbodies, and cultural, spiritual,

and harvesting practices. Squamish stated that the impacts remain unknown and that they have not received sufficient information to appropriately assess the impact of a spill.

The Crown understands Squamish's concerns regarding spills, and the potential for a spill to impact Squamish's use and occupation of its asserted traditional territory, ability to make decisions over the area impacted, and the potential for a spill to adversely impact any economic development aspirations Squamish has for its territory.

A discussion of the potential impacts of accidental spills on Aboriginal Interests is provided in Section 4.3.6 of this Report. In consideration of this information and analysis, as well as information available to the Crown about Squamish's Aboriginal Interests and concerns raised by Squamish during the NEB process and Crown consultation process, a spill associated with the Project could result in minor to serious impacts on Squamish's Aboriginal Interests. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline, terminal, or tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who live nearby and rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill³.

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline and marine safety regimes would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations of the pipeline and WMT, as well as for Project-related marine shipping activities between the WMT and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the Project on the exercise of Squamish's Aboriginal Interests would be up to minor.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Squamish's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Squamish in emergency response planning activities. The federal Crown is considering incremental measures that would further accommodate the potential adverse impacts of the Project on Squamish, as discussed in Sections 4 and 5 of the main body of this Report.

³ Trans Mountain Final Argument, p. 85 and 207

Appendix C.5 – Tsawwassen First Nation

I – Background Information

Tsawwassen First Nation (Tsawwassen) is located in southwestern British Columbia (BC). Tsawwassen entered into the Tsawwassen First Nation Final Agreement (Final Agreement), a modern comprehensive land claim agreement concluded with Canada and British Columbia under the BC Treaty Commission process that took effect April 3, 2009. The Final Agreement includes treaty settlement lands (i.e., Tsawwassen Lands) located near Roberts Bank Superport and the BC Ferries Terminal in Delta, BC. Tsawwassen’s Fishing Area and Intertidal Bivalve Area are set out in the Final Agreement, along with other marine harvesting areas within the Salish Sea. The Final Agreement outlines provisions for the management of Tsawwassen Lands, natural resources, culture, governance, and finances.

The Tsawwassen are Coast Salish people and belong to the Hun’qum’i’num linguistic group. Fishing plays a central role in the diet, culture, and traditional lifestyle of the Tsawwassen, with salmon, crab, eulachon, and sturgeon serving as traditional food resources. Harvesting activities respect stewardship principles. The First Salmon ceremony, for example, recognizes that the salmon are “supernatural beings who [come] every year to give their flesh to the people who were obliged to treat them properly.”¹ As part of this ceremony, the salmon are prepared in a special way and their bones are returned to the water.

II – Tsawwassen First Nation Treaty Rights

- The shipping component of the Project would transect approximately 10 kilometres (km) of Tsawwassen’s Fishing Area and Intertidal Bivalve Area, areas where the Tsawwassen has the right to harvest fish and intertidal bivalves for food, social and ceremonial purposes, as set out in the Final Agreement.
- The pipeline right-of-way (RoW) would transect approximately 11 km of the Tsawwassen Migratory Bird Harvest Area and Tsawwassen Wildlife Harvest Area, areas where the Tsawwassen has the right to harvest migratory birds and wildlife for food, social and ceremonial purposes, as set out in the Final Agreement.
- The Project does not intersect areas where the Tsawwassen have the right to gather plants, nor any Tsawwassen treaty settlement lands as defined under the Final Agreement.
- Tsawwassen’s Treaty rights include the right to harvest fish and wildlife (including migratory birds) within Tsawwassen territory for food, social, and ceremonial purposes. The Final Agreement articulates treaty rights to harvest sockeye, chum, and chinook salmon, with allocations varying each year depending on species abundance. The Final Agreement also provides an opportunity for Tsawwassen to participate in new commercial fisheries established in Pacific Fishery Management Areas 14 – 20, 28, and 29.

¹ <http://tsawwassenfirstnation.com/general-info/tfn-history-and-timeline/tsawwassen-culture/>

III – Involvement in the NEB and Crown Consultation Process

The Tsawwassen First Nation Final Agreement is a treaty and land claims agreement within the meaning of s.25 and s.35 of the *Constitution Act, 1982* and guarantees Tsawwassen consultation rights with Canada, including the right to participate in federal and provincial environmental assessment processes, as defined within Chapter 15 of the Final Agreement. Specifically, it commits the federal government to providing Tsawwassen with an opportunity to comment on the scope, environmental effects, mitigation measures, and any follow-up programs associated with an environmental assessment of a federal project. For provincial environmental assessments, Final Agreement specifies that BC will ensure that Tsawwassen: receives timely notice of, and relevant available information on, the project and the potential adverse environmental effects; is consulted regarding the environmental effects of the project; and, receives an opportunity to participate in any environmental assessment of that project. It is noted that pursuant to the Final Agreement, British Columbia has no obligation to consult with Tsawwassen in respect of authorized uses that may affect the methods, times and locations of Tsawwassen harvesting of fish, intertidal bivalves and wildlife, where such authorized uses may result in Tsawwassen having no meaningful opportunity to harvest such resources. The term “consult” is defined in Chapter 1 and the consultation obligations under the Final Agreement are defined in Chapter 2, ss. 45-46.

Given the nature and location of the Project, including the potential impacts of increased marine vessel traffic within Tsawwassen’s Fishing Area and Intertidal Bivalve Area and the potential impacts of a new pipeline RoW within the Tsawwassen Migratory Bird Harvest Area and Wildlife Harvest Area, the Crown is of the view that the federal and provincial environmental assessment provisions of Chapter 15 of the Final Agreement were triggered and that the legal duty to consult Tsawwassen lies at the deeper end of the *Haida* consultation spectrum. Tsawwassen was placed on Schedule B of the section 11 order issued by the BC Environmental Assessment Office (EAO), which afforded Tsawwassen opportunities to be consulted at a deeper level.

In order to fulfill the obligations for consultation under the Final Agreement, through the National Energy Board (NEB) process, Tsawwassen had the opportunity to comment on the scope, environmental effects, mitigation measures proposed by the proponent, and the NEB’s recommended conditions. If the Project receives approval to proceed, the proponent would be required to consult with Tsawwassen on many of the management plans, including follow up programs, set out in NEB conditions, and in any relevant EAO proposed conditions. EAO provided Tsawwassen with the opportunity to comment on the draft referral materials, including the draft proposed conditions.

Tsawwassen was an active intervenor in the NEB hearings, filed written evidence, participated in two rounds of information requests, and submitted a written final argument. Tsawwassen also responded to the Crown’s Issues Tracking Table Information Request by further elaborating their concerns [[A71215](#)].

The NEB provided \$40,000 in participant funding, plus travel for one individual to the hearing. The Major Projects Management Office (MPMO) offered Tsawwassen \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Tsawwassen an additional \$14,000 to support their participation in consultations following the release of the *NEB*

Recommendation Report. Tsawwassen signed a contribution agreement with the MPMO in response to the first of these offers, receiving a total of \$11,904 in allocated funding.

On September 12, 2016, Tsawwassen was provided \$5,000 in capacity funding by the EAO to assist with participation in consultation.

The Crown consultation team made efforts to meet with Tsawwassen during the period in advance of the release of the *NEB Recommendation Report* (February 2016 – May 2016), but were not successful in meeting. The Crown met with Tsawwassen on September 14, 2016. Additionally, Tsawwassen's Chief Bryce Williams met with the Minister of Natural Resources on July 5, 2016.

The Crown provided a first draft of the Consultation and Accommodation Report (Report) to Tsawwassen for review and comment on August 17, 2016. Tsawwassen provided comments on the first draft of this Report on October 5, 2016. Those comments have been considered and addressed in this Report. A second draft of this Report was provided to Tsawwassen for review and comment on November 3, 2016. The Crown has not received comments from Tsawwassen.

IV – Summary of Key Tsawwassen Issues and Concerns Raised

The Crown has gained its understanding of how Tsawwassen currently exercises its Treaty rights and its Project-related concerns through the nation's involvement in the NEB process (including Tsawwassen's submissions to the NEB and responses to the Crown's Information Request) as well as through correspondence and a consultation meeting with the Crown. In addition, the Crown has considered information regarding the proponent's engagement with Tsawwassen, as described in the proponent's [Aboriginal Engagement Report](#) (July 2016).

This section offers a summary of the key issues raised by Tsawwassen and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Tsawwassen's key Project-related issues and concerns are summarized below:

Impacts on Treaty Rights

Tsawwassen's Application to Participate notes that the physical pipeline component transect a portion of Tsawwassen's territory, over which Tsawwassen members have a Treaty right to hunt and gather. In addition, the marine traffic plans associated with the proposed Project traverse Tsawwassen's marine-based territory (the southwest corner of the Tsawwassen Fishing Area), over which Tsawwassen has a Treaty right to fish for cultural and commercial purposes. Tsawwassen is concerned about the potential impacts of the proposed Project infringing on their treaty rights, particularly their rights related to harvesting, governance and culture. Particular concerns include effects on current and future commercial fishing interests and opportunities, aquaculture opportunities, and marine resource harvesting rights.

Tsawwassen noted that the proponent has not adequately assessed Tsawwassen's Treaty rights, and the impacts the Project may have on those rights.

Methodology, Process and Consultation

Tsawwassen expressed concerns with the NEB review process. Notably, Tsawwassen filed two Information Requests and follow-up Motions to Compel full and adequate responses from the proponent. Tsawwassen deemed many of the responses it received to be inadequate, though the NEB was generally satisfied. Tsawwassen believes that because adequate responses were not provided to its information requests, Tsawwassen, the NEB Panel, and the Crown do not fully understand the potential impacts of the Project on Tsawwassen's Treaty rights.

Tsawwassen raised concerns about the scope of the NEB's review of the Project, suggesting that consideration of environmental effects may have been limited. Tsawwassen believes that there is a fundamental difference between the Eurocentric worldview that underpins the scientific and economic analysis of the NEB review process and Tsawwassen's Indigenous worldview that places a greater emphasis on conservation. Tsawwassen believes the differences between these worldviews create a practical divide that is difficult to overcome.

Tsawwassen is concerned about the model the proponent used to assess the economic impacts of the proposed Project, particularly with respect to recent changes in the economic climate and production decisions in the Canadian oil sands. Tsawwassen specifically noted the assumption in the model that there are no supply constraints on the economy.

Tsawwassen believes that the NEB process and the Crown consultation process have not adequately fulfilled the Final Agreement's consultation requirements.

Cumulative Effects

Tsawwassen is also participating in the regulatory process for the Roberts Bank Terminal 2 Project and has raised concerns regarding the cumulative impact from known and reasonably foreseeable shipping activities off of the west coast. Tsawwassen has stated that increased vessel traffic amplifies the probability of accidents occurring.

Tsawwassen is concerned about potential and cumulative impacts (including underwater noise and ship-strike mortality) that the Project could have on the southern resident killer whale, a listed species under the *Species at Risk Act* (SARA). Tsawwassen has strong cultural ties to the southern resident killer whale and has suggested that regulatory action is required to attenuate underwater noise levels in the Salish Sea.

Marine Impacts

Tsawwassen notes that routine shipping could adversely impact marine organisms (plants and animals) of critical importance to Tsawwassen members through the accidental release of chemicals, the spread of invasive species, and the cumulative impacts of underwater shipping noise. Tsawwassen also

indicated that routine shipping could affect Tsawwassen members' use of and access to those organisms.

Accidents and Malfunctions (marine/terrestrial)

Tsawwassen is concerned about the potential release of diluted bitumen into the environment as a result of a spill or malfunction from the proposed pipeline or a tanker. The community anticipates that this would impact Treaty rights to harvest fish, aquatic plants and migratory birds under the Final Agreement. In particular, the pipeline crossing of the Fraser River near the Port Mann Bridge, the transit of ships through the Tsawwassen Fishing Area and Tsawwassen Intertidal Bivalve Harvest Area, and the brackish marshes in the Fraser River Delta adjacent to Tsawwassen Lands, are of great concern.

Tsawwassen also highlighted how a potential spill or malfunction could reduce Tsawwassen's ability to pass down traditional ecological knowledge from elders and experienced harvesters to younger generations. Tsawwassen notes that fewer opportunities for experiential teaching and learning can reduce members' quality of life.

In terms of regulations and compliance, Tsawwassen is concerned that current regulations do not eliminate the possibility that accidents (or illegal actions) will occur, and that screening efforts at the Westridge Marine Terminal do not identify steps that will be taken if/when a docking vessel does not meet regulatory standards. In the event of marine emergency involving oil tankers in the Salish Sea, Tsawwassen is concerned about the rescue tug fleet's current response capabilities.

Health and Human Safety

Tsawwassen continues to rely on and value access to country foods (e.g. salmon, bivalves, crab, and eulachon). Not only do these species provide sustenance to Tsawwassen members, they also have great cultural and economic importance to Tsawwassen. One central concern is that a spill or malfunction could impact their ability to access country foods, which in turn could lead to health repercussions and impacts on Treaty right to harvest fish and wildlife (including migratory birds) for food, social, and ceremonial purposes. The Final Agreement articulates treaty rights to harvest sockeye, chum, and chinook salmon, with allocations varying each year depending on species abundance.

The potential impacts of routine, marine shipping on Tsawwassen's access to and use of country foods was highlighted in Tsawwassen's Application to Participate. Specifically, it stated that risks include accidental releases of chemicals (e.g. through the discharge of ballast water), the spread of invasive species transported via hull fouling or ballast water, and underwater shipping noise and related cumulative impacts on marine life.

Cultural and Social Impacts

Tsawwassen indicated that the proposed Project may affect Tsawwassen's heritage and cultural interests (both known and unknown) as a result of construction, ongoing operations, and potential pipeline malfunctions. Tsawwassen noted that the Project Application does not make reference to cultural and historic sites of significance set out in the Final Agreement. Tsawwassen expressed concerns

that impacts to marine species, especially salmon, Dungeness crab and eulachon, could have a cultural, spiritual, social and economic impact to Tsawwassen members. Tsawwassen also expressed concerns about the impact of increased marine tanker traffic on the Southern resident killer whale.

Environmental Impacts

Tsawwassen is concerned about impacts of climate change, particularly with regards to greenhouse gas (GHG) emissions from operations in connection with the Project. Tsawwassen also raised concerns related to potential vibrations and noise introduced to the aquatic environment of the Fraser River during horizontal directional drilling (HDD) of the watercourse crossing.

Tsawwassen's Response to NEB Recommendation Report

Tsawwassen expressed concerns about the scope of the NEB review and by extension the limitations this places on the information contained in the *NEB Recommendation Report*. Tsawwassen conveyed their view that the Crown should be aware that the information contained in the *NEB Recommendation Report* does not contain all of the relevant information that they believe is necessary for the Governor in Council to make a decision on the Project. Tsawwassen also expressed their belief that the NEB's findings about the frequency and probability of spills are inaccurate and understate the true degree of risk.

Tsawwassen commented that while the NEB found there will be adverse impacts from the Project, the NEB assessed those impacts against the lowest denominator, and downplayed the potential for more serious impacts beyond a small spill. Tsawwassen expressed their belief that the NEB did not clearly define what is meant by "temporary", "reversible" or "low magnitude" when making findings in respect to adverse impacts on resources, mammals and birds. Tsawwassen have a low level of confidence in these NEB conclusions as, in Tsawwassen's view, they were developed by entities who do not live adjacent to and subsist from marine waters, where all of these adverse effects have the potential to significantly – and in some cases, irretrievably – impact Tsawwassen's Treaty rights.

V – Potential Impacts of the Project on Tsawwassen's Treaty Rights

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests are provided in Sections 2.4.3 and Section 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted or established traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Tsawwassen's Treaty rights. These potential impacts are characterized by considering how the Project could affect several factors that may inform Tsawwassen's ability to practice Treaty rights:

- Biophysical effects to values linked to Tsawwassen's Treaty rights (e.g., fish, migratory birds, wildlife) that were assessed by the NEB;
- Impacts on the areas set out in the Final Agreement; and

- Impacts on social, cultural, spiritual, and experiential aspects of exercising Treaty rights.

The ways in which the Project would more generally impact various types of Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Tsawwassen's Treaty rights considers information available to the Crown from the NEB process, consultation with Tsawwassen, Tsawwassen's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province.

It is the Crown's understanding that Tsawwassen completed a traditional land and resource use (TLRU) study in 1998 entitled: "*Reconstructing Culture: A Traditional Use Study of the Tsawwassen First Nation*" ([A4Q1W3](#)). The Report is based on secondary sources and primary ethnographic interviews conducted with Elders and community members with knowledge of the Tsawwassen First Nation territory. In comments provided to the Crown on the first draft of this Report and at the meeting with the Crown consultation team on September 14, 2016, Tsawwassen stated that it believes that overreliance on the TLRU study could lead to false conclusions about the potential impacts of the Project because Tsawwassen's cultural practices and activities have changed over time. Tsawwassen also stated that it believes that relying solely on the TLRU studies can be misleading because Tsawwassen's Treaty rights are broader than the context in which the TLRU study presented them.

The Tsawwassen First Nation Final Agreement (2009) was filed to the NEB as part of an Information Request ([A3W8G0](#), [A3W8G1](#), [A3W8G2](#)). In its Supplemental Technical Report ([A4A0W1](#), [A4S7I7](#), [A4S7I8](#)), the proponent estimated approximate distances and directions from the marine shipping lanes based on information in Tsawwassen's report. Additional information for Tsawwassen was presented in *Volume 5B* ([A3S1S0](#)) and *Volume 8B* ([A3S4K3](#)) of the Project application. Traditional uses identified by Tsawwassen include hunting, gathering plants, and access to fishing sites, sacred sites, habitation sites, gathering areas for community members, and trails and travelways. Tsawwassen people rely on the Salish Sea for food, social and ceremonial purposes, and have a deep cultural connection to the Salish Sea and to surrounding areas.

Impacts on Treaty Rights to Harvest Wildlife and Migratory Birds and Gather Plants

The extent of the Tsawwassen Wildlife Harvest Area and Tsawwassen Migratory Bird Harvest Area is the same as the Tsawwassen Territory, which the Project crosses. Specific species and harvesting sites (except Burns Bog for wildlife) are not identified in the Final Agreement.

Wildlife, as defined under the Final Agreement, includes all vertebrate and invertebrate animals, including mammals, birds, reptiles, and amphibians, and the eggs, juvenile stages, and adult stages of these animals. The definition excludes fish, as defined under the Final Agreement, and migratory birds. Migratory birds, under the Final Agreement, means birds, as defined under federal law enacted further to international conventions, and includes their eggs.

Tsawwassen's rights to harvest wildlife and migratory birds includes harvesting for domestic purposes and to trade or barter wildlife, wildlife parts, and migratory birds among themselves or with other Aboriginal people resident in BC. Harvested wildlife, wildlife parts (including meat and furs), migratory birds, and inedible migratory bird by-products (including down) may also be sold if the sale is permitted by federal, provincial, and Tsawwassen law. Wildlife and migratory bird harvesting rights may be exercised on private land (with the owner's permission) and, in the case of migratory birds, within National Wildlife Areas (with Canada's permission). With respect to wildlife harvesting specifically, the Final Agreement acknowledges there is "limited existing opportunity to harvest Wildlife and [there is] the likely future diminution or loss of any meaningful opportunity to harvest Wildlife in the Tsawwassen Wildlife Harvest Area".

Under the Final Agreement BC may authorize uses or dispositions of provincial Crown land that may affect the methods, times and locations of the Tsawwassen Right to Harvest Migratory Birds provided that BC ensures that those uses or dispositions do not deny Tsawwassen a reasonable opportunity to harvest under the Tsawwassen Right to Harvest Migratory Birds.

At present, Tsawwassen is not harvesting any wildlife or migratory bird species for which a conservation risk has been identified. Harvesting of migratory birds is permitted throughout the year.

Tsawwassen hunters have previously described locations throughout their traditional territory as preferred harvesting areas for wildfowl, including all of what are now Tsawwassen Lands and nearby fields, the shoreline from west of the Roberts Bank causeway up to and including Brunswick Point, and areas in and around Westham Island. Species harvested in the past include mallards, snow geese, and brant along the foreshore, and pintails, teals and widgeons in the back fields. Pheasants were previously taken "all over", and quail was also eaten. Other species identified as valuable are gadwall, goldeneye, bufflehead, and canvasback ducks; as well as Canada geese, gulls, and songbirds.

Tsawwassen explain that birds are no longer as abundant as they once were, with some species, such as the pheasant, now scarcely found and others, such as geese, preferring Boundary Bay over Roberts Bank. Ducks and geese remain an important winter food and source of feathers, used for ceremonial purposes. Tsawwassen report the number of hunters has diminished and along with it the opportunities for transference of knowledge to youth.

Plants, as defined under the Final Agreement, includes all flora and fungi but does not include aquatic plants (included in the definition for fish) or trees except for their bark, branches and roots.

Tsawwassen's right to harvest plants allows members to harvest plants for domestic purposes and includes the right to trade or barter plants among themselves or with other Aboriginal people resident in BC, as well as to exchange regalia or traditional or artistic objects made of plants among themselves or with other Coast Salish people for ceremonial purposes. There are four Tsawwassen Plant Gathering Areas designated under the Final Agreement

As described in the TLRU study, their Final Argument ([A4X5L0](#)), Written Evidence ([A4L7T2](#)), and in the proponent's [Aboriginal Engagement Report](#) (July 2016), Tsawwassen community members hunt elk, deer, black bear, beaver, ducks, mallards and loons; however, fishing remains the staple of subsistence harvesting. Traditionally, Tsawwassen hunted seafaring mammals, such as porpoises, seals and sea lions. Nets, bows and arrows, pitfall traps, concealed nets and two-pronged spears were traditional hunting instruments, although today Tsawwassen members utilize modern technology. Tsawwassen notes plants such as camas, bog blueberries and wild cranberries as being important, as well as an additional 34 plants, not specifically identified. Traditionally, western red cedar was used to fashion rope and canoes, and create clothing; Douglas-fir was used to make tools and the bark was used medicinally; and maple and red alder were used for preserving and preparing fish.

Tsawwassen identified six hunting sites and two plant gathering sites in the TLRU study, none of which are located within the pipeline corridor. The nearest hunting and plant gathering sites are approximately 17 km and 20 km, respectively, from the proposed pipeline corridor. No specific trapping sites were identified by Tsawwassen in the TLRU. In *Volume 8B* ([A3S4K3](#)) of the Project application, Westham Island was identified as a marine bird hunting site within the Marine RSA²; however, shipping lanes are not crossed to access the site.

Tsawwassen raised the following issues and concerns related to potential Project impacts on their Treaty rights to harvest wildlife, migratory birds and to gather plants:

- Cumulative impact from known and reasonably foreseeable shipping activities off the west coast;
- The physical pipeline component bisects a portion of Tsawwassen's territory, over which Tsawwassen members have Treaty rights to hunt and gather;
- Potential release of diluted bitumen into the environment as result of a spill or malfunction from the proposed pipeline or a tanker; and
- A spill or malfunction from the proposed pipeline or a tanker would impact their Treaty rights to hunt migratory birds.

Tsawwassen identified many concerns related to the environmental effects of the Project on their Treaty rights to harvest wildlife and migratory birds, and gather plants. As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on rare plants and lichens and vegetation communities of concern, , wetlands, and wildlife and wildlife habitat (including species at risk) listed species. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping, and gathering (Section 4.3 of this Report). With regards to specific concerns raised by

² The area extending beyond the LSA boundary (i.e. the zone of influence or area where the element and associated indicators are most likely to be affected by Project-related marine vessel traffic.) where the direct and indirect influence of other activities could overlap with Project-specific effects and cause cumulative effects on the environmental or socio-economic indicator.

Tsawwassen, the proponent would implement several mitigation measures to reduce potential effects to species important for Tsawwassen's hunting, trapping, and gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP) and the Wildlife Management Plans.

Tsawwassen raised concerns with the Project's potential impacts relating to specific locations and access to hunting, trapping, and plant gathering activities, including their harvesting grounds along the Fraser River near the Port Mann Bridge (Site FR).

Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Tsawwassen's access to hunting, trapping and plant gathering activities, largely confined to the Project footprint for the pipeline and associated facilities. The Crown understands that with construction and reclamation activities disruptions to access may result in a loss of harvesting opportunities for Tsawwassen. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access associated with hunting, trapping, and gathering sites (Section 4.3.1 of this Report). With regards to specific concerns raised by Tsawwassen, the proponent would implement several mitigation measures to reduce potential effects on TLRU sites important for Tsawwassen's hunting, trapping, and plant gathering activities, such as management plans that include access management, scheduling and notification of Project activities, and environmental monitoring programs that monitor access control measures. The Access Management Plan is intended to reduce disturbances caused by access, construction equipment and vehicle traffic, during and following construction in order to minimize disturbance to access to Tsawwassen's traditional lands. The proponent has committed to minimizing the development of access routes, controlling public access along the construction right-of-way, selecting appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent has also committed to work with applicable resource managers, traditional land and resource users to define locations where access control is necessary, and what type(s) of access control will be implemented. In the event that hunting, trapping, and plant gathering sites are identified during ongoing engagement with Tsawwassen prior to construction, the sites will be assessed, and appropriate mitigation measures will be determined. The proponent committed to working with Tsawwassen to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Tsawwassen expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities, including particular concerns about the adverse impacts of the Project on their ability to exercise their Treaty right to harvest migratory birds.

Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Tsawwassen's hunting, trapping, and plant gathering activities. The Crown understands that this short-term disruption could temporarily alter the behaviour of community members' hunting, trapping or plant gathering activities during construction, and that reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project, could impact the practices of community members. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential social, cultural, spiritual, and experiential effects associated with hunting, trapping, and plant gathering activities (Section 4.3.1 of this Report). With regards to specific concerns raised by Tsawwassen, the proponent would implement several mitigation measures to reduce potential effects to Tsawwassen hunting, trapping, and plant gathering activities. The proponent is committed to implementing weed management (as outlined in the Weed and Vegetation Management Plan) to reduce the potential for weed infestation following construction, and utilizing an Integrated Vegetation Management approach intended to reduce the use of herbicides and promote healthy ecosystems. The proponent would consult with Aboriginal groups regarding problem vegetation management and methods of treatment. Measures outlined in the proponent's Reclamation Management Plan are intended to stabilize and revegetate affected lands to achieve land productivity along the construction ROW and footprint, equivalent to the adjacent land use. The Crown notes the proponent's commitment to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Tsawwassen, Tsawwassen's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation and Project-related marine shipping activities are expected to result in a negligible-to-minor impact on Tsawwassen's Treaty rights to harvest wildlife and migratory birds, and gather plants.

Impacts on Treaty Rights to Fish and Harvesting Aquatic Plants

Chapter 9 of the Tsawwassen First Nation Final Agreement establishes rights to fish, which also includes intertidal bivalves and other shellfish, crustaceans, and marine animals (excluding cetaceans), the parts of these fish, as well as their eggs, sperm, spawn, larvae, spat, juvenile stages and adult stages. The right to harvest fish under the Final Agreement includes the right to fish for domestic purposes and to trade or barter those fish among Tsawwassen members or with other Aboriginal people resident in BC.

The Tsawwassen Fishing Area, which applies to fish and aquatic plants but excludes intertidal bivalves, includes the waters of the Main Arm of the Fraser River westerly of the power lines downstream of the Port Mann Bridge, the waters of the North Arm of the Fraser River from the junction of the Main Arm downstream to the Arthur Laing Bridge, the Middle Arm of the Fraser River, the South Arm of the Fraser River, and parts of the waters of the Strait of Georgia and Boundary Bay. This area would be crossed by Project-related vessels in the Strait of Georgia.

Under the Final Agreement BC may authorize uses or dispositions of provincial Crown land that may affect the methods, times and locations of the harvest of Fish and Aquatic Plants under the Tsawwassen Fishing Right, provided that BC ensures that those uses or dispositions do not deny Tsawwassen a reasonable opportunity to harvest Fish and Aquatic Plants in the Tsawwassen Fishing Area.

Domestic allocations for sockeye, chum pink, chinook, and Coho salmon, which are centrally important to Tsawwassen, are calculated using formulas described in the Final Agreement. Salmon are fished in accordance with Tsawwassen Harvest Documents as set out in the Final Agreement and salmon fishing may occur between April to November, though more commonly salmon fishing occurs between May and October.

In addition to fishing for domestic purposes, the Tsawwassen Harvest Agreement, which is a separate contractual arrangement between the parties to the Final Agreement, is intended to increase commercial fishing capacity for Tsawwassen. The Tsawwassen Harvest Agreement provides for an annual commercial allocation of Fraser River sockeye, chum, and pink salmon (odd years only).

Aquatic plants (including attached and detached kelp and seaweeds) may be harvested for domestic purposes in the Tsawwassen Fishing Area at any time of day or year. These plants are specifically defined in the Final Agreement as all benthic and detached algae, brown algae, red algae, green algae, golden algae and phytoplankton, and all marine and freshwater flowing plants, ferns and mosses, growing in water or soils that are saturated during most of the growing season.

Marine mammals, including porpoise, seals, and sea lions, were once harvested by the Tsawwassen. These marine animals (with the exception of porpoise, a cetacean) fall within the meaning of fish under the Final Agreement. Tsawwassen have indicated that the community does not currently harvest marine mammals and that there is no desire to harvest marine mammals; however, marine mammals, including killer whale, remain culturally important to the community.

Tsawwassen's TLRU study ([A4Q1W3](#)), Written Evidence ([A4L7T2](#)), Final Argument ([A75121](#)), and the proponent's [Aboriginal Engagement Report](#) (July 2016), all discussed that Tsawwassen members are a fishing people and they consider fishing to be the most important subsistence harvesting activity available. In their written evidence, Tsawwassen highlighted the nutritional, economic, and cultural importance of salmon and Dungeness crab, which they harvest in large quantities, and eulachon, which they are only able harvest in small quantities because of its COSEWIC endangered status. According to their written evidence ([A4L7T2](#)), the importance of these three species "to the Tsawwassen people cannot be overstated" (p. 7).

Salmon fishing is concentrated at New Westminster, Lulu Island, Cannery Point at the southeastern shore of the Point Roberts peninsula and various sites along the Fraser River. Sturgeon is also an important aquatic resource for Tsawwassen. Historically, sturgeon were caught using tidal traps, gaff-hooking, sack nets and harpoons and are currently caught at Roberts Bank, Canoe Pass, Lulu Island and along the Fraser River. Other marine resources harvested include flounder, herring, clams, cockles, blue

mussels, crabs and mollusks. Historically, porpoises, sea lions and whales were also harvested. In addition, several cannery sites were identified as being involved in traditional use activities.

In their TLRU study, Tsawwassen identified two salmon and sturgeon fishing sites, Fraser River and New Westminster, within the proposed pipeline corridor. Six marine fishing sites within the Marine RSA were identified, of which shipping lanes are crossed to access five fishing sites in the New Westminster, Lulu Island, Roberts Bank, Canoe Pass and Point Roberts. As summarized in the Supplemental Reports, seven marine harvesting and fishing sites were identified in the Marine RSA during the desktop study and literature review conducted for the Project: Galiano Island, Mayne Island, Samuel Island, Saturna Island, Tumbo Island, Gulf Islands and Strait of Georgia. Shipping lanes are crossed to access these seven sites. According to Tsawwassen, members use modern technologies when fishing at these sites, which generally results in larger yields relative to effort invested.

Tsawwassen raised specific concerns regarding potential Project impacts on their freshwater fishing, marine fishing, and harvesting activities, including that:

- A spill or malfunction from the proposed pipeline or a tanker would impact Treaty rights to fish. The two Project works/activities of greatest concern are (a) the crossing of the Fraser River near the Port Mann Bridge; and (b) the transit of ships through the Tsawwassen Fishing Area and Tsawwassen Intertidal Bivalve Harvest Area;
- Effects on current and future commercial fishing interests and opportunities, aquaculture opportunities, and marine resource harvesting rights;
- Concerns related to potential vibrations and noise introduced to the aquatic environment of the Fraser River during horizontal directional drilling (HDD) of the watercourse crossing;
- Cumulative impact from shipping activities off the west coast;
- Potential impacts of routine marine shipping on country food (e.g., accidental releases of chemicals, including discharge of ballast water; impacts of invasive species transported via hull fouling or ballast water; underwater shipping noise and cumulative impacts thereof) and potential resulting health impacts on Tsawwassen; and
- A spill or malfunction could impact the ability to access country food, which in turn could have health implications.

The general direct and indirect effects of the Project on the Treaty rights to fish and harvest aquatic plants, along with key mitigation measures, are described in Sections 4.3.2 and 4.3.3 of the main body of this Report. The conditions in the NEB Report would either directly or indirectly avoid or reduce potential impacts on specific locations associated with freshwater fishing and marine fishing and harvesting sites (Section 4.3.3 of this Report). With regards to specific concerns raised by Tsawwassen, the proponent would implement a range of mitigation measures to reduce potential effects on TLRU/TMRU sites important for Tsawwassen's freshwater and marine fishing and harvesting activities, such as access management plans, scheduling and notification of Project activities including Project-related marine vessel traffic, and environmental monitoring programs.

In consideration of the information available to the Crown from the NEB process, consultation with Tsawwassen, Tsawwassen's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation and Project-related marine shipping activities are expected to result in minor impacts on Tsawwassen's Treaty rights to fish and harvest aquatic plants.

Impacts on Treaty Rights to Culture and Heritage

Tsawwassen's right to practice their culture, as well as use of the Hənq̓əmiṇəm language, is identified in the Final Agreement Chapter 14.

Tsawwassen emphasize the importance of the Fraser River to their members for fishing, transportation, recreation, and cultural purposes. Tsawwassen stress the importance of their continued ability to fish, along with and the significance of fishing and associated activities to their community's culture and economy. Participation in fishing, an integral element of Tsawwassen culture, is decreasing, due to diminishing stocks, increasing harvesting restrictions and higher costs related to having to travel farther to harvest traditional resources.

The TLRU study indicated that Tsawwassen community members would historically leave their semi-permanent winter homes to travel to sites along the Fraser River from spring until late summer before moving back to their wintering grounds as plant and animal resource availability decreased. Village and campsites associated with fishing activities are the most common type of habitation site, of which many are found on or near the Fraser River. Historically, shared camp sites were located along the Fraser River, shared between Tsawwassen people and other nearby communities due to intermarriage. Burial sites, primarily ground burials, were reported in the TLRU study; however, many of the names or locations of ceremonial and religious sites were confidential. Tsawwassen did not identify any gathering specific trails or travelways, habitation sites, gathering places, or sacred areas in the TLRU study.

In their written evidence and final argument, Tsawwassen expressed concerns about the potential impacts of the Project on southern resident killer whales, with which they have strong cultural ties. Historically, Tsawwassen adorned their ocean-going canoes with images of the *kwulhmulucun* (killer whales) and *kwulhmulucun* feature prominently in many of their stories. Given those close cultural ties, Tsawwassen is deeply concerned about the impact of Project related tanker traffic, in particular the impacts of an increase in marine noise, will have on this endangered species. Tsawwassen raised other specific concerns regarding potential Project impacts on their other traditional and cultural practices, including:

- Cumulative impacts (including underwater noise and ship-strike mortality) to the southern resident killer whale, a SARA-listed species with which the Tsawwassen have strong cultural ties;
- The proposed Project may adversely impact Tsawwassen's heritage and cultural interests (both known and unknown), which are of importance to Tsawwassen, as a result of construction, ongoing operations, and potential malfunctions of the pipeline;

- The Project application does not make reference to cultural and historic sites of significance set out the Final Agreement;
- Potential spill or malfunction could reduce Tsawwassen’s ability to pass down traditional ecological knowledge from elders and experienced harvesters to younger generations; and
- Fewer opportunities for experiential teaching and learning can reduce members’ quality of life.

The general direct and indirect effects of the Project on Treaty rights to culture and heritage, along with key mitigation measures, are described in Section 4.3.4 of the main body of this Report. Tsawwassen identified cultural use of or concerns regarding southern resident killer whales during the NEB and Crown consultation processes. The *NEB Recommendation Report* concluded that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Aboriginal use associated with the southern resident killer whale. The Crown understands that the southern resident killer whale population is in decline, and that additional adverse environmental effects from Project-related marine shipping would be considered significant.

The Crown understands that there will be temporary interruptions to Tsawwassen’s cultural and spiritual practices, or that their participation traditional activities is curtailed during Project construction and routine maintenance activities. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Tsawwassen, Tsawwassen’s engagement with the proponent, the proponent’s proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation and Project-related marine shipping activities are expected to result in minor to moderate impacts on Tsawwassen’s Treaty rights to culture and heritage. The moderate impacts on Tsawwassen’s culture and heritage would arise from Project-related marine shipping activities on traditional Aboriginal use associated with the Southern resident killer whale.

Impacts Associated with Accidental Tanker or Pipeline Spills

Tsawwassen expressed concern with direct and indirect effects of a pipeline spill or a Project-related tanker spill on their Treaty rights, in particular spills at Salish Sea (Site D) and Salish Sea, Archane Reef (Site E) and at the pipeline’s Fraser River Crossing near the Port Mann Bridge (Site FR). These concerns include:

- Impact of a spill on Treaty rights to harvest fish, aquatic plants and migratory birds under the Final Agreement. In particular, the pipeline crossing of the Fraser River near the Port Mann Bridge, the transit of ships through the Tsawwassen Fishing Area and Tsawwassen Intertidal Bivalve Harvest Area, and the brackish marshes in the Fraser River Delta adjacent to Tsawwassen Lands, are of great concern;

- Reduction of Tsawwassen’s ability to pass down traditional ecological knowledge from elders and experienced harvesters to younger generations;
- Impact of a spill on Tsawwassen’s ability to access country foods, which in turn could lead to health repercussions and impacts on Treaty right to harvest fish and wildlife (including migratory birds) for food, social, and ceremonial purposes;
- Lack of a full understanding of the risks and effects of a potential marine or terrestrial oil spill;
- An oil spill in Tsawwassen’s territory would be extremely traumatic to community members;
- Releases of crude oil would adversely impact marine ecosystems, which would hinder Tsawwassen’s conservation and habitat restoration efforts; and
- A major spill could destroy Tsawwassen’s way of life, including shoreline of reserve land, culture, domestic harvesting, as well as commercial harvesting.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a tanker or pipeline spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Tsawwassen’s Treaty rights has a high degree of uncertainty. A discussion of the potential impacts of an accidental tanker spill or pipeline spill is provided in Section 4.3.6 of this Report. In consideration of this information and analysis, as well as information available to the Crown on Tsawwassen’s Treaty rights raised by Tsawwassen during the NEB process and Crown consultation process, a tanker or pipeline spill associated with the Project could result in minor to serious impacts on Tsawwassen’s Treaty rights. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.³

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline and marine safety regimes would only partially address these ongoing burdens and risks.

Under the typical conditions for pipeline construction and operations and for marine vessel use of the area between the WMT and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of Project-related activities on the exercise of Tsawwassen’s Treaty rights would be up to moderate.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Tsawwassen’s ongoing involvement and participation in the proponent’s detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Treaty rights, as well as the involvement of the Tsawwassen First Nation in emergency response planning activities. The federal Crown is considering

³ Trans Mountain Final Argument, p. 85 and 207

incremental measures that would further accommodate the potential adverse impacts of the Project on Tsawwassen First Nation, as discussed in Sections 4 and 5 of the main body of this Report.

Appendix C.6 – Tsleil-Waututh Nation

I - Background Information

Tsleil-Waututh Nation (Tsleil-Waututh or TWN) is a Central Coast Salish community of 578 members that asserts a traditional territory as identified in their Tsleil-Waututh's [2009 Stewardship Policy](#). The traditional territory includes areas across the Lower Mainland of British Columbia (BC), including sections of the Lower Fraser River, Howe Sound, Burrard Inlet and Indian Arm.

There are three Tsleil-Waututh reserves with approximately 250 members living on the main reserve in North Vancouver. Tsleil-Waututh is currently in Stage 4, Agreement in Principle (AIP), of the BC Treaty Commission six-stage process.

Tsleil-Waututh traditionally spoke the dialect of Halkomelem, with Tsleil-Waututh meaning “people of the Inlet” in the traditional language. Creation stories and stewardship of lands and resources are central to Tsleil-Waututh's expression of its culture, spirituality and goals for the future, including economic independence.

Members hunt, gather, fish and engage in cultural activities such as traditional teaching and Potlaches. Tsleil-Waututh's community vision is to be able to eat marine food from their territory and practice ceremonies in clear water. Long term stewardship goals include restoration of Burrard Inlet in an effort to achieve this community vision.

Tsleil-Waututh's Marine Stewardship Program is an effort to restore the Burrard Inlet to its pre-contact status. The program has two key goals, both involving restoring Burrard Inlet to a condition where:

- a) Wild marine foods are abundant and safe to eat and a subsistence economy may be re-established; and
- b) Cultural work may occur in clean water, without exposure to contaminated sediment, at sites that are physically intact and free from impaired views, violations of privacy, and noise intrusions.

II - Preliminary Strength of Claim Assessment

- Tsleil-Waututh's traditional territory encompasses the proposed marine terminal and fuel storage facility expansion, and approximately 18 kilometres (km) of pipeline right-of-way (RoW). Approximately 45 km of marine shipping route would pass within Tsleil-Waututh's asserted traditional territory.
- The Crown's preliminary assessment of Tsleil-Waututh's claims for Aboriginal rights over the section of the Project that spans the terminus of the pipeline at the Burnaby holding facility to the Fraser River Crossing is assessed as a range from strong to moderate-to-strong *prima facie* Aboriginal rights claims as the pipeline gets closer to the Fraser River.
- The Crown's preliminary assessment is that Tsleil-Waututh has a *prima facie* Aboriginal title claim ranging from weak-to-moderate to strong over the section of the Trans Mountain pipeline

that spans the area from the terminus of the pipeline at the Burnaby holding facility to the area in and around the travel corridor to the Fraser River. The claim is strong in proximity to the terminus of the pipeline, which is in proximity to known Tsleil-Waututh village sites, and diminishes fairly rapidly as the pipeline stretches south towards the Fraser River crossing.

- The Crown’s preliminary assessment of Tsleil-Waututh’s *prima facie* claim for Aboriginal rights to harvest marine resources within the marine shipping corridor of the Project that spans from the terminus of the pipeline in Burnaby to the portion of the Strait of Georgia that is proximal to the South Arm of the Fraser River is assessed as ranging from strong to weak. The claim appears strong in the eastern portion of Burrard Inlet from the Belcarra area to the terminus in Burnaby, as this is an area that is in close proximity to a known Tsleil-Waututh village site. The claim is assessed as moderate within the central portion of the Burrard Inlet and weakens towards the Strait of Georgia.
- The Crown’s preliminary assessment of Tsleil-Waututh’s *prima facie* claim for Aboriginal title over the upland areas that roughly parallel the marine shipping corridor of the Project ranges from weak to strong. The stronger claims are in the middle portion of Burrard Inlet, particularly in proximity to Indian Arm. As the shipping route travels into western Burrard Inlet, the claim diminishes as this area was considered by ethnographers to be outside Tsleil-Waututh’s core territory.¹

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and its potential impact on Tsleil-Waututh’s Aboriginal Interests, the Crown is of the view that the legal duty to consult Tsleil-Waututh lies at the deeper end of the *Haida* consultation spectrum. Tsleil-Waututh was placed on Schedule B of the section 11 order issued by the BC Environmental Assessment Office (EAO), which afforded Tsleil-Waututh opportunities to be consulted at a deeper level.

Tsleil-Waututh participated in the National Energy Board (NEB) review of the Project as an intervenor. Tsleil-Waututh conducted an independent assessment of the Project, which formed the majority of its written evidence provided during the NEB hearing process, and also informed the Tsleil-Waututh leadership’s own decision whether to support or oppose the Project. Tsleil-Waututh filed written evidence with the NEB describing Tsleil-Waututh’s asserted rights, customary law and stewardship objectives within its asserted traditional territory. Tsleil-Waututh also provided oral traditional evidence,

¹ Ministry of Justice, Aboriginal Research Division, Tsleil-Waututh First Nation: Review of Anthropological Sources, August 2010 (updated 2016); Jesse Morin for Tsleil-Waututh Nation, A Brief Critique of “Tsleil-Waututh Nation: A Review of Anthropological and Historical Sources” Ministry of Attorney General, 2010 (October 2014); Tsleil-Waututh Treaty, Lands and Resources, A Brief Summary of Additional Evidence Pertaining to Tsleil-Waututh’s Aboriginal Interests in the Indian River Watershed and the Investigative Use Licence Proposed for Hixon Creek, June 2013; Tsleil-Waututh First Nation for Ministry of Forests, Tsleil-Waututh First Nation Traditional Use Study 1998-2000, June 2000; First Nations Oral History: Say Nuth Khaw Yum –Indian Arm Provincial Heritage Park, prepared by Tsleil-Waututh First Nation for BC Parks, March 2000; Ralph Drew, Native Legends of the Indian Arm Area; Jesse Morin, Tsleil-Waututh Nation’s History, Culture and Aboriginal Interests in Eastern Burrard Inlet, May 25, 2015.

filed multiple rounds of information requests and responses to information requests by other intervenors including the Government of Canada [A71210], and provided a written summary argument and oral summary argument.

Tsleil-Waututh submitted detailed correspondence, both with the NEB and with the Crown (including Ministers). The Crown exchanged numerous pieces of correspondence with Tsleil-Waututh during 2015 regarding the Crown's proposed approach to consultation on the Project, and met with Tsleil-Waututh officials on August 12, 2015 (during the NEB hearing stage) to discuss these issues in person. At that meeting, the Crown noted that it would consider Tsleil-Waututh's own assessment findings in the documentation of potential Project impacts, including information found in *Tsleil-Waututh Nation's History, Culture, and Aboriginal Interest in Eastern Burrard Inlet*.

In 2015, Tsleil-Waututh initiated a Court action regarding the Project. At issue in the suit filed in 2014 was whether the Crown and NEB had failed in their constitutional duty to consult the Tsleil-Waututh as a First Nation. On January 22, 2016, Department of Justice sought and obtained a three-month adjournment in the litigation. As a result, Crown officials met with the Tsleil-Waututh on February 26 and April 5, 2016 to explore, without prejudice, the potential for alternative paths forward in resolving Tsleil-Waututh's concerns. At the April 5, 2016 meeting, Tsleil-Waututh's legal counsel and the Director of Lands and Resources indicated that they were only interested in an outcome that involved the Crown reversing its current position before the Court and therefore urged the Crown to remove any further suspension of the Court proceedings. On September 8, 2016, the Federal Court of Appeal dismissed Tsleil-Waututh's legal challenge, noting the lawsuit was premature as consultations on the Project were ongoing and that no decision had been made on the Project.

Tsleil-Waututh has met with the Ministers of Natural Resources and Transport on a number of occasions, and with senior federal officials throughout the spring and summer of 2016. Tsleil-Waututh indicated that the only means by which they would discuss the Project with the federal government would be through an engagement protocol. What followed was a four month period during which negotiations took place between the Crown and Tsleil-Waututh legal counsel and advisors to finalize a protocol that would be satisfactory to both sides. Tsleil-Waututh and the Crown signed an engagement protocol agreement on September 14, 2016. Chief Maureen Thomas of Tsleil-Waututh and the Minister of Natural Resources Canada, the Honourable Jim Carr, signed the protocol agreement.

Tsleil-Waututh maintains the following: "TWN possesses Aboriginal title and rights, including a stewardship right, in and throughout its traditional territory ("Territory"). The decision-making elements of TWN's rights provide it with, *inter alia*, the jurisdiction and authority to govern and manage the lands, waters, marine foreshore, air and resources in the Territory, and determine the uses to which they will be put. This jurisdiction and authority includes determining whether the Project should be permitted to proceed in the Territory, based on Tsleil-Waututh laws".² Canada states that: "Canada's authority to

² Crown- Tsleil-Waututh Engagement Protocol (signed 14th of September, 2016)

approve the Project is grounded in federal legislation... authority to undertake the Project is subject to the approval of the Governor in Council, which approval may only be given once Canada fulfills its constitutional duty to consult, and where appropriate, accommodate Aboriginal peoples.”

Pursuant to the engagement protocol’s workplan, twelve meetings were scheduled between September and November 2016 involving Crown officials and Tsleil-Waututh’s technical team. The Crown and Tsleil-Waututh leadership parties are scheduled to meet on November 28, 2016 in lieu of the final technical team meeting.

On November 17, 2016, Tsleil-Waututh sent a letter to Prime Minister Trudeau which outlines its disappointment with the protocol engagement on issues of marine shipping, economic need and the NEB process. Outside of discussions on climate change, Tsleil-Waututh does not feel that a nation-to-nation dialogue has been achieved within the engagement process. Tsleil-Waututh advised that it has decided to prepare a separate submission for Minister Carr and the GIC, which will be presented at the final protocol leadership meeting on November 28, 2016. Tsleil-Waututh extended an invitation to the Prime Minister to attend this meeting.

Both Natural Resources Canada’s Major Projects Management Office (MPMO) and EAO made several requests to Tsleil-Waututh for EAO’s participation in the Crown-Tsleil-Waututh engagement protocol meetings from September to November 2016, but Tsleil-Waututh indicated that they did not want EAO to participate. The reason for this involved Tsleil-Waututh’s position that the EAO-NEB Equivalency Agreement was enabling EAO to accept the NEB process, which Tsleil-Waututh view as fundamentally flawed. The MPMO noted that federal officials were jointly conducting consultation with the province of BC, and that the MPMO and EAO had a shared consultation record.

Tsleil-Waututh signed a contribution agreement with the NEB for \$40,000 in participant funding, plus costs to cover travel of two people to attend the hearing. The MPMO offered Tsleil-Waututh \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Tsleil-Waututh an additional \$14,000 to support its participation in consultations following the release of the *NEB Recommendation Report*. Tsleil-Waututh signed contribution agreements with the MPMO in response to both of these offers, for a total of \$26,000 in allocated funding. EAO has provided Tsleil-Waututh \$5,000 in capacity funding to support participation in consultation with the Crown.

As laid out in the protocol agreement, the Crown has agreed to pay for Tsleil-Waututh’s costs, expenses, and disbursements associated with the engagement protocol, up to a maximum of \$400,000.

The Crown provided a first draft of this Report to Tsleil-Waututh for review and comment on September 28, 2016. A second draft of this Report was provided to Tsleil-Waututh for review and comment on November 4, 2016. Tsleil-Waututh provided a letter on November 7, 2016 where Tsleil-Waututh raised concern with the contents of the Report.

IV - Summary of Key Tsleil-Waututh Issues and Concerns Raised

This section offers a summary of the key issues raised by Tsleil-Waututh, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Tsleil-Waututh's key Project-related issues and concerns are summarized below:

The Crown has gained its understanding of Tsleil-Waututh's issues and concerns through Tsleil-Waututh's involvement in the NEB process, including the responses Tsleil-Waututh provided to Natural Resources Canada on its Information Request (IR) addressed to them, through written and oral evidence, through continued participation within the Crown-Tsleil-Waututh engagement protocol, and through other consultation and correspondence with the Crown. The Crown's understanding of Tsleil-Waututh's key Project-related concerns is summarized below. This is a summary of issues raised by Tsleil-Waututh, and does not present the views of the Crown as to whether it agrees or not with the positions of Tsleil-Waututh. The Crown's assessment of the potential impacts of the Project, as presented in the subsequent section, incorporates a consideration of these issues and includes the Crown's views and conclusions.

Pursuant to its Stewardship Policy, Tsleil-Waututh conducted an assessment of the Project, through which Tsleil-Waututh concluded that the Project: "(i) will deprive past, current, and future generations of TWN people of the control and benefit of the water, land, air, and resources in TWN's Territory; and (ii) does not represent the best use of TWN's Territory and more particularly the waters, lands, air, and resources to satisfy the needs of TWN's ancestors, or present and future generations of Tsleil-Waututh people".³ Based on these findings, Tsleil-Waututh Chief and Council decided to reject the Project, to not grant Trans Mountain authorization under Tsleil-Waututh law for the Project to proceed, and to withhold its consent to the Project proceeding in Tsleil-Waututh's territory.

Additionally, Tsleil-Waututh's assessment of the Project filed as evidence with the NEB sets out Tsleil-Waututh's views of the consequences of the Project proceeding to construction and operation. In particular, Table 7 of the Tsleil-Waututh Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal⁴ (presented as Figure 1 below) identifies the potential impacts from the Tsleil-Waututh perspective.

³ Crown- Tsleil-Waututh Engagement Protocol (September 14, 2016).

⁴ See NEB filing reference [A4L6A5](#) (Tsleil-Waututh Treaty, Lands & Resources Department, May 2015)

Figure 1: Summary of Tsleil-Waututh Title, Rights, and Interests and of Proposed Effects and Consequences

TSLEIL-WAUTUTH TITLE RIGHTS, AND INTERESTS	MARINE SHIPPING DIRECT EFFECTS	OIL SPILL EFFECTS	CONSEQUENCES	CUMULATIVE EFFECTS	DURATION	EFFECTS ON TSLEIL-WAUTUTH COMMUNITY
<i>Archaeological and Cultural Heritage Sites</i>	Shoreline erosion	Water and air pollution; sediment contamination; shoreline cleanup damage	Loss, damage, or contamination of important places and archaeological resources; loss of the knowledge and wisdom of the ancestors	More physical damage to sites already harmed by past development; setback to Tsleil-Waututh cultural renaissance	Irreversible, permanent effects of great impact on Tsleil-Waututh community	Disturbance of our ancestors will harm our community cohesion; without the knowledge and wisdom of the ancestors, we cannot recover from the residential school era nor carry out our environmental stewardship responsibilities
<i>Contemporary Economy</i>	On-water hazards; perceived pollution; physical obstruction; disturbances to views	Water and air pollution; sediment contamination	Loss of business or economic opportunities and revenues; drop in property values (including Tsleil-Waututh's commercial real estate development on our reserve)	Further negative economic impacts on Tsleil-Waututh Nation and its members	Effects for the duration of the project or longer in the case of an oil spill	Diminished ability to participate in the contemporary economy and corresponding adverse impacts on Tsleil-Waututh Nation and its members
<i>Cultural or Spiritual Practices and Places</i>	Perceived pollution; physical obstruction; loss of quiet or privacy; shoreline erosion; disturbances to views	Water and air pollution; sediment contamination; shoreline cleanup damage	Loss, damage, or contamination of important places; hindrance of and failure to provide conditions for cultural work; interference with ceremonies for our ancestors; loss of the knowledge and wisdom of the ancestors; loss of connection to our waters and lands; risk to the health and safety of our cultural practitioners	More physical damage to sites already harmed by past developments; further interruption of our obligations to our ancestors; setback to Tsleil-Waututh cultural renaissance	Places = irreversible, permanent effects of great impact on Tsleil-Waututh community Practices = effects of great impact on Tsleil-Waututh community for the duration of the project or longer in the case of an oil spill	Without the knowledge and wisdom of the ancestors and the spirit world, we cannot recover from the residential school era nor carry out our environmental stewardship responsibilities; important gains we have achieved in enhancing our culture would be lost or substantially reduced
<i>Cultural Transmission</i>	Perceived pollution; physical obstruction; loss of quiet or privacy; disturbances to views	Water and air pollution; sediment contamination	Loss of traditional knowledge; hindrance of and failure to provide conditions for cultural work; loss of language skills; loss of connection to our waters and lands; opportunities for cultural transmission reduced or eliminated	Further alienation of Tsleil-Waututh youth from Tsleil-Waututh elders and their knowledge of history, traditional ways and skills; setback to Tsleil-Waututh cultural renaissance	Irreversible, permanent effects of great impact on Tsleil-Waututh community	Failure to care for and educate our youth will deny Tsleil-Waututh a healthy and prosperous future; a reduction in the number of family or community gatherings will leave individuals feeling isolated and the community without cohesion
<i>Cultural Travel</i>	On-water hazards; perceived pollution; physical obstruction	Water and air pollution; sediment contamination	Hindrance of and failure to provide conditions for cultural work; loss of connection to our waters and lands; risk to the health and safety of our cultural practitioners	Additional obstacles to free movement throughout Burrard Inlet; reduced access to harvest and cultural sites; reduced connection to our waters and lands	Effects for the duration of the project	Activities such as our canoe races are very important to our community, and having even more tankers parked in the way will seriously detract from our cultural work
<i>Environmental Integrity and Stewardship Responsibility</i>	Acoustic disturbance; on-water hazards; perceived pollution; physical obstruction; loss of quiet or privacy; shoreline erosion; disturbances to views	Water and air pollution; sediment contamination; loss, harm, or contamination of habitat or species; shoreline cleanup damage	Disruption of biophysical processes and food-web dynamics; loss of connection to our waters and lands	Further exceedance of Burrard Inlet's environmental carrying capacity and greater delay in achieving Tsleil-Waututh stewardship objectives; additional impediments to the restoration of our subsistence economy; setback to Tsleil-Waututh culture renaissance	Effects for the duration of the project as well as irreversible, permanent effects of great impact on Tsleil-Waututh	Failure to care for our waters and lands will deny future generations the benefit of our territory and of the wisdom of our ancestors
<i>Individual and Community Health</i>	On-water hazards; physical obstruction; loss of quiet or privacy; disturbances to views	Water and air pollution; sediment contamination; loss, harm, or contamination of habitat or species	Dietary change and health effects from lack of resources, including traditional staple foods; hindrance of and failure to provide conditions for cultural work	Additional risk of disease or illness; further reduction in quality of life	Effects for the duration of the project of great impact on Tsleil-Waututh	Diabetes and cancer rates are high in the community and the proposal will only make them worse; the proposal threatens many elements of community health—natural resources, security, community cohesion and well-being, and self-determination
<i>Marine Fish and Wildlife Habitat and Species; Resource Access and Harvest or Use; Subsistence Economy</i>	Acoustic disturbance; perceived pollution; physical obstruction; shoreline erosion	Water and air pollution; sediment contamination; loss, harm, or contamination of habitat or species; shoreline cleanup damage	Decrease in habitat quality or quantity and in species abundance; local extinction of culturally important species; change in species composition and behaviour; fewer available resources and traditional staple foods, leading to dietary change, health problems, and fewer opportunities to trade or sell harvested resources; forced transition to a wage-based economy; loss of livelihood options; interference with ceremonies for our ancestors; loss of the knowledge and wisdom of the ancestors; loss of connection to our waters and lands	Further delay in achieving Tsleil-Waututh stewardship objectives; additional impediments to restoration of our subsistence economy and to our livelihood options; further interruption of obligations to the ancestors	Effects for the duration of the project as well as irreversible, permanent effects of great impact on Tsleil-Waututh	Failure to care for our waters and lands will deny future generations the benefit of our territory and the wisdom of our ancestors
<i>Title, Governance, and Future Benefit</i>	Violation of Tsleil-Waututh law	Violation of Tsleil-Waututh law	If implemented without Tsleil-Waututh consent, the TMEX proposal denies the right of current and future generations to control and benefit from our waters and land	Further compromises Tsleil-Waututh's ability to uphold our stewardship obligations in Burrard Inlet	Irreversible, permanent effects of great impact on Tsleil-Waututh community	Failure to care for our waters and lands will deny future generations the benefit of our territory and the wisdom of our ancestors
<i>Tsleil-Waututh Reserve</i>	Shoreline erosion, perceived pollution; disturbances to views	Water and air pollution; sediment contamination; shoreline cleanup damage	Damage to infrastructure and to visual quality; loss of land base; loss of business or economic opportunities or revenues	More physical damage to sites already harmed by past development	Effects for the duration of the project as well as irreversible, permanent effects of great impact on Tsleil-Waututh and its community	
<i>Water</i>	Perceived pollution	Water or air pollution; sediment contamination	Hindrance of and failure to provide proper conditions for cultural work; risk to the health or safety of cultural practitioners	More contamination of already polluted water, making it even more hazardous	Effects for the duration of the project (and potentially beyond) of great impact on Tsleil-Waututh	Clean water is the foundation of our community and culture, and we cannot accept a proposal that will make it dirtier

Key concerns identified in Tsleil-Waututh's assessment include the risk of marine spills and increased industrialization of Burrard Inlet including from marine vessel traffic and disturbance from the expansion of the Westridge Marine Terminal (WMT). Concerns are that the Project will lead to further negative environmental, economic, cultural, social and spiritual impacts on Tsleil-Waututh members and a reduction in their ability to pursue long-term stewardship objectives. Other concerns identified include:

- Impacts on cultural transmission and community cohesion;
- Impacts on subsistence travel and restrictions on movement within Burrard Inlet;
- The loss or reduced availability of traditional foods and the potential effects on cultural and ceremonial activities;
- Potential damages to infrastructure and visual quality;
- Potential contamination of sacred areas including ancient village sites and cemeteries;
- Noise disturbance;
- Loss of economic opportunities and revenues, as well as a reduction in property values; and
- Potential impacts to community and individual health, as well as security issues and risks to safety.

Methodology, Process and Consultation

In addition to the substantive issues raised are procedural concerns about the consultation and NEB regulatory review and environmental assessment, which was seen by the Tsleil-Waututh as disrespectful of their asserted governance rights in Burrard Inlet and Indian Arm. Tsleil-Waututh's legal challenge of the NEB process outlines a series of arguments reflecting procedural concerns, including a lack of adequate consultation on the scope of the environmental assessment and the list of issues to be examined by the NEB in the hearing process. In addition, Tsleil-Waututh has indicated its view that the Crown must receive the consent of Tsleil-Waututh prior to issuing any approvals for the Project.

In February and April 2016, Tsleil-Waututh corresponded with BC to express concerns about the EAO-NEB Equivalency Agreement, and to express the view that the Province should terminate the Equivalency Agreement for the Project. Following written correspondence from EAO, senior provincial officials met with Tsleil-Waututh and Squamish Nation in June 2016 to discuss the nations' questions and concerns regarding the provincial environmental assessment process for this Project. Tsleil-Waututh and Squamish Nation wrote to EAO on August 24, 2016 to clarify their concerns and proposed next steps regarding: the need to consult on and terminate the Equivalency Agreement; the need to amend the Section 11 Order to address several aspects, including the potential for Squamish Nation to undertake its own EA and to account for the assessment already undertaken by Tsleil-Waututh; and, to clarify any limits on provincial decision-making authority.

In numerous NEB filings, correspondence and meetings with the Crown, including a July 22, 2016 meeting with the federal government, Tsleil-Waututh identified additional Project-related and procedural concerns as follows:

- The high risk and severe consequences of shipping diluted bitumen;

- The nature of consultation between Tsleil-Waututh and government decision-makers was not seen as leading to a joint decision-making process based on achieving consent;
- Inadequate Crown consultation with Tsleil-Waututh; and
- The view that the NEB did not consider the evidence that the Tsleil-Waututh put forward as part of the review.

At an engagement protocol meeting on October 20, 2016, Tsleil-Waututh questioned the relevance of participating in the NEB process as, in their perspective, the Project will be approved regardless of consultation with Aboriginal groups. Tsleil-Waututh noted that the Project review and consultation process appears to be more about politics than stewardship of the Earth.

At an engagement protocol meeting on October 21, 2016, Tsleil-Waututh asserted that in the case of a strong claim, such as Tsleil-Waututh's, it is of the view that consent of the Project would be required.

Tsleil-Waututh has articulated its disagreement with the Crown's assessment of Tsleil-Waututh's preliminary strength of claim. Furthermore, Tsleil-Waututh expressed disagreement with the Crown's assessment of Project impacts on Tsleil-Waututh's Aboriginal Interests. In a letter dated November 7, 2016, Tsleil-Waututh outlined its dissatisfaction with the Crown's strength of claim assessment, which, in Tsleil-Waututh's perspective, ignores its expert assessment entitled *Tsleil-Waututh Nation History, Culture and Aboriginal Interests in Eastern Burrard Inlet* as well as other traditional evidence it filed with the NEB. Tsleil-Waututh maintains that it proved Aboriginal title and rights over Eastern Burrard Inlet during the NEB review process.

Cultural and Social Impacts

On July 5, 2015, the MPMO wrote to Tsleil-Waututh describing the Crown's preliminary understanding of the potential adverse impacts of the Project on Tsleil-Waututh's Aboriginal Interests within the Project area. The following potential impacts were described:

- Construction of new pipeline segments including delivery lines from the Burnaby storage facility to the WMT could temporarily affect fishing, hunting, trapping and harvesting, as well as access to culturally important sites.
- Construction and operation of an expanded WMT could involve long-term changes to the foreshore area at the terminal site, potentially displacing fishing and other marine harvesting activities, as well as certain cultural or spiritual practices resulting from:
 - Direct loss or alteration of marine aquatic and bird habitat;
 - Temporary changes to water and sediment quality;
 - Ongoing sensory disturbance to marine species and birds including indirect effects from increased underwater noise; and
 - Impeded access, movement and activity within the marine environment due to marine vessel traffic.

Other cultural and social impacts that Tsleil-Waututh has communicated to the Crown during in-person engagement protocol meetings include:

- Tsleil-Waututh's limited ability to use local beaches for cultural practices, traditional knowledge sharing, spiritual ceremonies and activities associated with shellfish harvesting;
- Acoustic disturbances to southern resident killer whale populations; and
- Diminished community access to traditional foods, such as salmon.

In an engagement protocol meeting on September 15, 2016, Tsleil-Waututh emphasized that its traditional territory along Burrard Inlet is enjoyed by all people, not just their community. Tsleil-Waututh noted the different activities that people do around the territory, such as fishing, canoeing, kayaking and paddle-boarding. Being close to downtown Vancouver, people appreciate this area for its multi-use purposes, which Tsleil-Waututh fears will be compromised by the increase in tanker traffic.

Environmental Impacts

Tsleil-Waututh explained that its main consultation area encompasses Mount Garibaldi in the north and the 49th parallel in the south, west to Gibsons and east to Coquitlam Lake. In terms of environmental effects, Tsleil-Waututh emphasized that its main focus is the degradation of Burrard Inlet.

Tsleil-Waututh described that it does not wish for Burrard Inlet to be considered a lost cause. Over the past 30 years, Tsleil-Waututh has taken extensive remediation action to improve the health of the Inlet. There is significant concern that these efforts will be reversed if the Project is approved as Burrard Inlet is seen by Tsleil-Waututh as beyond the threshold of what it can endure due to other industrial activities.

At a protocol engagement meeting on September 27, 2016, Tsleil-Waututh asked the Crown to consider the proximity of their territory to the WMT (2 km across the inlet from Tsleil-Waututh's main reserve), which they fear will result in: physical obstruction and disturbance to views; acoustic disturbance; perceived pollution; on-water hazards; and, loss of quiet and privacy. Tsleil-Waututh explained that it has seen numerous changes on its lands and waters over the course of 125 years of industrialization. Tsleil-Waututh indicated that prior to contact with Europeans, their lands were naturally abundant with plentiful fisheries, beaches lined with kelp and seaweed, availability of five different types of clams and easy access to berries and roots along Burrard Inlet (the community has a saying "when the tide went out, the table was set"). In the wintertime, community members would live together and survive off food that had been preserved, such as smoked salmon, which marked an important time for the passing of oral histories to younger generations. Following contact, Tsleil-Waututh began to see many changes within their community, emphasizing that any further development to Burrard Inlet could result in irreversible damage. Tsleil-Waututh pinpointed that the current volume of pollutants in the inlet is 25 times greater than in 1950.

Another concern Tsleil-Waututh has raised is the continued pollution of Burrard Inlet and its impacts on activities of cultural importance within the community. In 1972, Fisheries and Oceans Canada closed clam harvesting along Burrard Inlet due to high volumes of pathogens within the water. According to

Tsleil-Waututh, these harvests were critical for community livelihoods and sustenance, as well as for cultural transmission and the maintenance of ancestral connections. Tsleil-Waututh noted that this October marked the first year that the clam harvest was re-opened in the community and, as a result, a community celebration and feast will be held in November 2016. There is fear that further damage and degradation of Burrard Inlet will result in the permanent closure of clam harvesting, and thus a loss of spiritual relationships between future generations and ancestors.

Tsleil-Waututh is also concerned about negative environmental effects on salmon populations in Burrard Inlet and the Fraser River. Prior to contact, Tsleil-Waututh noted that it had access to 1 kilogram (kg) of salmon per day. However, due to diminished salmon flows in recent years, Tsleil-Waututh now has access to 1 kg of salmon per week. As far back as Tsleil-Waututh people can remember they have been allocated 7,000 salmon from the Fraser River annually; however, every year the population and the amount that can be harvested diminishes. Elders and community members rely on the salmon for their own sustenance, their health, their connection to the water and to their ancestors, and the strength to pass through the winter stages. The community fears that an oil spill in the Fraser River or in Burrard Inlet could eliminate the entirety of the salmon population. As such, Tsleil-Waututh raised serious concerns regarding the adverse environmental effects from the Project on Tsleil-Waututh's salmon restoration efforts, as well as the impact that a major oil spill would have on an already depleted salmon population. From Tsleil-Waututh's perspective, these represent consequences that are immeasurable for the community and its culture.

Tsleil-Waututh added that there was no quantitative analysis in the NEB report to address the vulnerability of the salmon stocks. Based on this, Tsleil-Waututh finds that the NEB provided too narrow a view on the effects of the Project on marine wildlife, and lacked a full understanding of the resilience of the salmon population to withstand an oil spill.

Tsleil-Waututh shared with the Crown the significant spiritual importance of the killer whale ("black fish"), as they are known to enter nearby waters during sensitive periods for the community and during cultural events. However, Tsleil-Waututh was not expressly noted by the NEB as an Aboriginal group that identified the social and cultural importance of the killer whale. Tsleil-Waututh has voiced concern that increased underwater noise from the proposed WMT expansion and increased tanker traffic could disturb the killer whale population within Burrard Inlet. Tsleil-Waututh further highlighted that this risk cannot be quantified due to the fact there are no underwater noise studies for Burrard Inlet. Tsleil-Waututh's main concern is that underwater noise could permanently drive the killer whale population away from the community. Building on this, Tsleil-Waututh referenced the long-term effects of the Exxon Valdez oil spill in Prince William Sound, Alaska in 1989, on local orcas and the surrounding ecosystem. Two decades later, Tsleil-Waututh referenced data that indicated the orca population had still not fully recovered. From Tsleil-Waututh's perspective, this is not acceptable as it will unquestionably lead to a loss of culture if future generations do not have the opportunity to experience killer whales in local waterways.

Given the cultural value of killer whales, Tsleil-Waututh raised concern that there are no mitigation measures proposed by either the proponent or the NEB to mitigate impacts on the southern resident killer whale population. As such, Tsleil-Waututh would like to see Canada attempt to fill in these knowledge gaps to ensure that killer whales will be protected during Project construction and operation.

Tsleil-Waututh highlighted that they have been part of the land around Burrard Inlet since time immemorial. Over the last few decades, Tsleil-Waututh has noticed a change along the shorelines, which they attribute to the strength of tides, the increase in tanker traffic and rising sea levels. As a result, Tsleil-Waututh identified that numerous community members have experienced a loss of property and shoreline due to erosion (see page 77 of Tsleil-Waututh assessment for pictures). One community member in particular has had to build a wall around his house to prevent water from entering his basement, which has already been redone once. Additionally, Tsleil-Waututh noted that another community member's property has lost 50 to 60 feet of land in certain areas since the 1950s. Given that Project approval would mean the increase of tanker traffic (from one laden tanker per week to one laden tanker per day passing through the Inlet), Tsleil-Waututh fears that it will lose more of its territory, including burial sites (some of which date back 6,000 years) and that future generations will not be able to enjoy the land in the same way that their ancestors had.

Tsleil-Waututh noted that armoring has been completed along certain areas of the shoreline to minimize erosion; however, as of yet, nothing has been put in place around the east end of the Tsleil-Waututh reserve. Where armoring has been conducted, Tsleil-Waututh pinpointed that there has been noticeable adverse effects. For instance, Elders are no longer able to access certain beaches due to potential danger that boulder-based rip raps pose. In Tsleil-Waututh's perspective, the mitigation measures that had to be instituted are an impediment to cultural exchanges with Elders along the beach front and shoreline. Tsleil-Waututh feel that the potential for erosion was inadequately addressed by the NEB, and, as a result, would like to ensure that the risk of erosion is well-documented along with the adverse effects of potential mitigation measures on Tsleil-Waututh culture.

Economic Impacts

At an engagement meeting on September 28, 2016, Tsleil-Waututh highlighted its park management and cultural tourism activities which Tsleil-Waututh believe will be adversely impacted by the WMT and an increase in tanker traffic. Takaya Tours, a Tsleil-Waututh-owned environmental and cultural tourism company, uses the waters and lands around Burrard Inlet and Indian Arm for hiking expeditions, canoe and kayaking tours, and outdoor equipment rentals. In 2015, 3,000 people participated on Takaya kayak trips and over 5,000 kayaks rentals were documented. Tsleil-Waututh explained that an increase in tanker traffic could inhibit its ability to conduct tours on the water, citing what they believe will be a constant battle with tankers and their wake for space on the water. Further, Tsleil-Waututh views the expansion of the WMT and increased tanker traffic as a threat to the eco-tourism industry which depends on the cleanliness of Burrard Inlet.

In 1993, Tsleil-Waututh opened the first phase of Raven Woods developments, which are luxury condos built and sold on Tsleil-Waututh reserve land. Operated by Takaya, Tsleil-Waututh's majority-owned real

estate development company, Raven Woods houses over 2,000 individuals who pay property tax directly to the Tsleil-Waututh government. In 2001, Tsleil-Waututh acquired an additional 800 acres of land surrounding the Indian River (which constitutes the majority of the valley floor). In 2014, Tsleil-Waututh, along with Squamish and Musqueam, signed a historic protocol outlining how the three parties will share economic benefits stemming from Crown land sales. This agreement also provides equity ownership to over 200 acres of land in the metro Vancouver area. Around this time, Tsleil-Waututh also purchased Willingdon Lands in Burnaby and the Liquor Distribution Branch warehouse site in Vancouver.

In relation to its real estate investments, Tsleil-Waututh emphasized that expansion of the WMT and increased tanker traffic could heavily impact its property assets and economic viability. It was noted that Tsleil-Waututh property sales in Metro Vancouver are of particular value as they offer ocean views and are in close proximity to hiking trails and forested areas. As such, Tsleil-Waututh believes that expansion of the WMT and increased tanker traffic could infringe upon the value of their real estate.

In Tsleil-Waututh's perspective, a healthy environment underlines a healthy economy. As such, Tsleil-Waututh believes that the Project will challenge the sustainable vision that it has set out in its environmental stewardship policy, something that Tsleil-Waututh has been working on for over 30 years. Tsleil-Waututh noted that the work they have undertaken associated with the proposed Project has been a significant drain on human and financial resources, which could otherwise have been used to further their growing industries.

Health and Human Safety

Tsleil-Waututh has raised the potential for effects to individual and community health and to the enjoyment of the area adjacent to the WMT as a result of the Project. According to Tsleil-Waututh, these effects may result from: changes to air quality; noise and visual disturbance both from the WMT and marine vessels transiting through or anchored in eastern Burrard Inlet; risk of disease; contamination of wild foods; loss or harm to species' habitats significant to Tsleil-Waututh; dietary changes and health effects from lack of adequate resources, including traditional staple foods; inability to provide conditions suitable for cultural work and work within the community; and other negative impacts on quality of life.

In terms of the effects of marine shipping on community health, within their assessment of the Project, Tsleil-Waututh identified the danger of on-water hazards and physical obstructions, loss of quiet or privacy, and overall disturbances to views. Relating to the potential of oil spills, Tsleil-Waututh highlighted adverse impacts including water and air pollution, sediment contamination, and harm to marine and shoreline-based habitats for culturally significant animals. Tsleil-Waututh has raised serious concerns regarding the adequacy of oil spill response and the potential adverse effects of a spill on the health of the community and surrounding ecosystems. In Tsleil-Waututh's perspective, the health of the community and the health of the Inlet are synonymous; as such, impacts on one will adversely impact the other and vice versa.

Additionally, Tsleil-Waututh noted that a number of community members who continued to harvest clams along the Burrard Inlet (post-1972 closure) have developed cancer. As it is not certain whether the two incidents are directly related, Tsleil-Waututh has asked that this link be studied. Due to increased levels of pollutants in the Inlet, Tsleil-Waututh would like to see more resources devoted to understanding the effects of water pollution on those who live along the shoreline and on those who use the Inlet as a main source of livelihood. Tsleil-Waututh has deemed this study essential to help ensure that it is able to maintain the health of its community and its culture; Tsleil-Waututh noted that this study should be undertaken before the Project is approved, to understand whether and to what effect it would cause increased level of pollutants within the Burrard Inlet.

Accidents and Malfunctions (marine/terrestrial)

One of the major concerns raised by Tsleil-Waututh is the potential threat of an oil spill. In Tsleil-Waututh's perspective, both the risk and likelihood of a spill are too high, particularly given that crude oil will be transported through a city of nearly 1.3 million people. Early in 2016, Tsleil-Waututh published a preparedness plan for oil spills. Compared to the findings of the proponent, one of the fundamental points of disagreement within Tsleil-Waututh's plan is the likelihood of an oil spill. As noted by Tsleil-Waututh, Tsleil-Waututh and the proponent agree on the consequences of a spill; however, they do not agree on the probability that a spill will occur. Tsleil-Waututh concludes that there is 65% probability of a spill, small or large, in 35 years; and 85% probability of a spill, small or large, in 50 years.

Further, at an engagement protocol meeting held on September 27, 2016, Tsleil-Waututh referenced Dr. Thomas Gunton's findings that a Project-related oil spill is inevitable, which Tsleil-Waututh noted deviates from the conclusions of the NEB report:

- 58 to 98% likelihood of a tanker spill, small or large, over the course of 50 years;
- 83% likelihood of a spill of any size at WMT; and
- 37% likelihood of a major spill.

Tsleil-Waututh noted they have limited confidence in emergency preparedness and response at all levels of government. Referencing the accidental oil products delivery line rupture (that took place in Burnaby on July 24, 2007), Tsleil-Waututh felt that the response time was immensely inadequate and was hindered by confusion over jurisdiction: the spill began on land and moved to the water. Tsleil-Waututh expressed frustration as it felt that the right parties did not take sufficient responsibility for the spill clean-up causing further delays and jeopardizing the state of Burrard Inlet. Additionally, Tsleil-Waututh said that the knowledge of their Elders, who predicted where the oil would go, was largely ignored in the wake of the spill and as a result, response efforts were focused in the wrong direction.

Given the currents of the Burrard Inlet, Tsleil-Waututh highlighted that oil stranding is a serious threat with long-lasting adverse effects. Following the accidental oil supply pipeline rupture of 2007, Tsleil-Waututh explained that a large portion of the spilled oil stranded along the north shore of Vancouver, and was not adequately managed due to different views relating to the severity of the spill.

Tsleil-Waututh added that it was not until a representative from Environment Canada came to its territory that anyone realized how far the oil had travelled and where exactly it was stranded.

Tsleil-Waututh is concerned about the response time required for a spill at the WMT. Tsleil-Waututh noted that there are many factors which affect the efficiency of spill response, notably weather, time of day and time of year. As seen with the recent diesel spill in Bella, Bella, Tsleil-Waututh is of the view that crews were less effective in collecting the diesel in the evening compared to the day. Tsleil-Waututh explained that it does not feel there is adequate technology to effectively clean up an oil spill. In Tsleil-Waututh's perspective, if clean-up cannot retrieve 100% of the spilled oil, then it poses too great a threat to water quality and surrounding ecosystems.

Based on work done by Nuka Research within the Salish Sea, Tsleil-Waututh concluded that the best case scenario for spill clean-up is in the summer and in Central Harbor where it is estimated that even then, only approximately 75% of spill oil could be retrieved. Tsleil-Waututh explained that this does not give them comfort regarding the expansion of the WMT and increased tanker traffic. In its view, there is too much risk associated with this Project. Tsleil-Waututh expressed that it is unfair that they take all of the risk without garnering any of the benefit.

Tsleil-Waututh also raised issues with projected oil spill compensation. Tsleil-Waututh is of the view that there is not adequate funding available to address damages caused by a worst case oil spill scenario. Tsleil-Waututh cited that a worst case spill would exceed the international and domestic compensation fund ceilings by \$2.9 billion and that current programs do not include compensation for cultural loss.

Tsleil-Waututh noted that smaller spills frequently occur during tanker loading whose impacts accumulate in the local environment. Further, Tsleil-Waututh emphasized that a spill of any size would inevitably strand and compile along the shorelines of Burrard Inlet, which could not be cleaned up effectively. Tsleil-Waututh concluded that any spills, regardless of the size, could have major consequences on various environmental and cultural aspects of Burrard Inlet including:

- Traditional clam harvests;
- Traditional water-based activities, such as canoeing and kayaking;
- Sustenance and livelihood based activities, such as fishing for crab, prawns and salmon within Indian Arm and the Burrard Inlet;
- Cultural ceremonies which take place on the beaches of the Burrard Inlet;
- Culturally and spiritually significant community visits from southern resident killer whales;
- Transportation routes for forestry products;
- Infrastructure and visual quality of Burrard Inlet;
- Water tourism activities offered by Takaya Tours; and
- Real estate initiatives, property assets and economic viability, given that many of Tsleil-Waututh condominiums offer waterfront views.

Tsleil-Waututh's Response to NEB Recommendation Report

Throughout the engagement protocol, Tsleil-Waututh emphasized its view that the NEB review represented a flawed and deficient process as it did not provide an adequate assessment of potential Project impacts on the community and its surrounding lands and waters. Tsleil-Waututh noted concern that the information it submitted during the NEB hearing process was largely ignored or overlooked, which included its independent assessment of the Project entitled *Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal*, its expert report entitled *Tsleil-Waututh Nation's History, Culture and Aboriginal Interests in Eastern Burrard Inlet*, its oral traditional evidence, its views on oil spills and the recognition of its rights and title. Tsleil-Waututh expressed frustration that the NEB did not have a mandate to consider rights and title issues. On June 20, 2016, Tsleil-Waututh filed a judicial review (FCA Court File No. A-232-16) to challenge perceived legal errors associated with the NEB process.

Tsleil-Waututh is dissatisfied that only 56 of the 157 NEB conditions relate to Burrard Inlet, and that those 56 focus predominantly on standards and not on mitigation or emergency preparedness planning and response. Tsleil-Waututh identified that 151 of the conditions involved further planning processes, and were not, in its view, relevant to the determination of impacts or outcomes. Tsleil-Waututh expressed the view that the conditions were not clear on whether Aboriginal groups would be involved. Within its assessment of the Project, Tsleil-Waututh considered all of the NEB conditions and concluded that there is nothing in the conditions that will tangibly reduce the risk of an oil spill and the effects of marine shipping. In Tsleil-Waututh's perspective, having one condition that relates to oil spill clean-up is not sufficient, and demonstrates that the NEB did not fully consider its submission. Tsleil-Waututh also feels that the conditions overlooked concerns relating to air quality and diluted bitumen submergence. Tsleil-Waututh proposed that the GIC refer conditions back to the NEB to be better defined, such as which Aboriginal groups will be affected by each condition.

Another issue Tsleil-Waututh raised was the lack of specificity within the NEB conditions, which they fear will lead to a lack of accountability of the proponent. For instance, Tsleil-Waututh noted that condition 109 is insufficient to mitigate any risk as it is too vague regarding which permits will need to be issued for the Project to move forward. Tsleil-Waututh highlighted its overall frustration with the NEB process as they felt that their evidence and issues were not fully considered due to the NEB's narrow scoping of the assessment, lack of integration of assessment factors of importance to Aboriginal groups into the assessment and the inadequacy of mitigation as a result of this narrow scope of review. As such, Tsleil-Waututh concluded that a GIC decision would be based on ill-informed information.

At an engagement protocol meeting on November 9, 2016, Tsleil-Waututh raised concern that the proponent will take one billion dollars in cash flow from the Canadian economy if the Project is approved. Tsleil-Waututh explained that this will benefit partners of the proponent who are primarily not Canadian and questioned whether this was a sound investment of Canadian infrastructure. Tsleil-Waututh noted that this issue was placed on the NEB record but was not adequately considered.

Tsleil-Waututh also noted that the NEB panel did not consider Trans Mountain's shipping contracts, signed in 2012, during the review phase of the Project. Within the contracts, Tsleil-Waututh identified a clause which states that shippers must speak well of the Project until Kinder Morgan receives the Certificate of Public Convenience and Necessity. Based on this, Tsleil-Waututh questioned the authenticity of support that has been shown for the Project.

Tsleil-Waututh also questioned the evidence and figures that the NEB relied on as part of their economic analysis. Tsleil-Waututh noted that the NEB used \$5.4 billion as the capital cost of the Project, while the proponent used \$6.8 billion. Within the NEB report, Tsleil-Waututh advised that \$5.4 billion was the only figure considered. As such, Tsleil-Waututh feels that the NEB omitted the actual capital cost of the Project and its accompanying tolls rates from its analysis and subsequent conclusions, which in Tsleil-Waututh's perspective signifies a faulty and unreliable process.

Tsleil-Waututh also challenged the existence of foreign markets as current markets are primarily based between Washington State and California. In its view, the NEB overemphasized the presence of offshore and accessible markets to present the Project as more viable and cost-beneficial. Tsleil-Waututh noted that the volume of non-US exports has fallen significantly in recent years, and cited Shell who predicted a decline in the demand for oil in five years. Additionally, Tsleil-Waututh noted that the NEB report relied heavily on the Canadian Association of Petroleum Producers' (CAPP) 2015 forecast. In Tsleil-Waututh's view, CAPP 2015 represents a survey of intentions through which companies have the ability to overestimate the amount of oil they can realistically produce. Tsleil-Waututh added that the NEB overlooked Energy Futures 2016, released following the close of the NEB hearing, which provides a forecast based on lower production and supply figures. Tsleil-Waututh feels that the NEB report did not integrate the most up-to-date information on Canadian oil production, which makes it appear that there is excess demand for oil when there is not.

Proposals for Crown Action

At an engagement protocol meeting on September 15, 2016, Tsleil-Waututh indicated that it would be open to a discussion on alternative "means" to the Project, such as the refinement of oil in Alberta. Tsleil-Waututh noted that alternative means to the Project were not adequately canvassed within the NEB assessment. As such, Tsleil-Waututh concluded that it was the Crown's duty to consider all possible Project alternatives, as well as alternative means of carrying out the Project.

At an engagement protocol meeting on October 20, 2016, Tsleil-Waututh questioned how Project approval could be incorporated into the Paris climate change agreement reductions, and how a GIC decision could be made with imperfect information relating to GHG emissions. Tsleil-Waututh stated that consultation on the methods for calculating upstream GHG emissions should have occurred before findings were finalized and used to provide input for the Project assessment, which, in Tsleil-Waututh's view, falls short of nation-to-nation relations and requirements of deep consultation on the *Haida* spectrum. Currently, Tsleil-Waututh is seeking a climate change impact study to better understand the GHG effects of the Project, and how emissions affect cumulative climate change projections. Tsleil-Waututh added that this study should also address whether environmental effects could be justified,

and whether the Pan-Canadian emission reduction targets can be met with the Project in place. In Tsleil-Waututh's perspective, the NEB report excludes the current GHG emissions methodology and the projected effects of GHG emissions on climate change. Tsleil-Waututh recommends that the GIC refer the Project back to the NEB for re-examination under CEAA 2012 as Project approval is dependent on a public interest justification of environmental impacts. In Tsleil-Waututh's view, an environmental assessment under CEAA 2012 determines the significance of environmental effects, likelihood of occurrence, and whether effects are justifiable. In contrast, Tsleil-Waututh's view is that the NEB review process was narrower in scope and did not consider whether significant effects would be justifiable. Tsleil-Waututh expressed the view that under the NEB Act, the NEB pursues a public interest justification based on a cost benefit analysis and overlooks the environmental protection piece.

Tsleil-Waututh described their view that none of the CEAA s.19 factors for marine shipping were adequately considered in the NEB review. With reference to Table 7 of Tsleil-Waututh's environment assessment, Tsleil-Waututh noted that the NEB did not effectively consider marine shipping related impacts on their community, including a lack of determination of likely effects as well as justification of such effects. Tsleil-Waututh noted their view that section 6 of CEAA 2012 would prohibit any responsible authority from authorizing any federal legislation if a significant effects justification test failed. Tsleil-Waututh concluded that current levels of marine shipping are already too high, and, in response, proposed a joint recommendation be sent to the GIC requiring a further assessment of marine shipping by the proponent. Tsleil-Waututh also proposed that an additional recommendation be sent to the GIC to require a re-determination of Aboriginal rights and title for purposes of Project review.

At engagement protocol meetings on October 27, 2016 and November 9, 2016, Tsleil-Waututh elaborated on its dissatisfaction with the consultation and decision-making processes. In order for Tsleil-Waututh to have confidence in the process and given its view of Tsleil-Waututh jurisdiction, rights and title, it explained that a joint recommendation report on behalf of Tsleil-Waututh and the Crown should be sent up to the GIC. In Tsleil-Waututh's perspective, it is insufficient for the Crown to draft a report that assesses the issues of its community through the current Crown consultation process. Tsleil-Waututh indicated their understanding that a joint submission to the GIC would require a revised mandate which is not provided for in the protocol. Tsleil-Waututh sent a letter detailing a new engagement protocol mandate on November 3, 2016 and a proposal for joint recommendations on November 7, 2016 to the federal Crown. On November 10, 2016, the Crown met with Tsleil-Waututh to further discuss the joint recommendation. It was explained that a joint recommendation could not fit within the framework of the existing protocol agreement. In a letter dated November 17, 2016, Tsleil-Waututh detailed that it will present a separate submission as a substitute to the Crown's Report to Minister Carr at the final leadership protocol meeting on November 28, 2016.

At the protocol engagement meeting held on October 28, 2016, Tsleil-Waututh provided a list of further research and work required by the Crown, which it feels is currently deficient and should result in the process not being approved. Summarized below, these represent topics that Tsleil-Waututh wishes to be further consulted on:

- Accommodation of title and governance rights;

- Likelihood of adverse impacts of spills and shipping;
- New technologies or innovations to address likelihood and consequences of spills;
- Climate change impacts on reserve;
- Designated Project (in terms of marine shipping and lack of conditions thereof);
- NEB consultation;
- Polluter pays principle review and spill compensation:
 - Tsleil-Waututh sees deficiencies within this principle, and would like Canada to provide a re-evaluation for improvement;
- Spill clean-up end points based on net environmental improvements;
- Underwater noise and cumulative effects (specifically in Burrard Inlet);
- Cumulative impacts on physical health of individuals; and
- Potential consequences of an oil spill on an already vulnerable and depleted salmon population.

In addition, to ensure confidence in emergency preparedness, Tsleil-Waututh proposed that it would need to jointly make decisions with the Canadian Coast Guard related to emergency response and marine shipping safety. Tsleil-Waututh explained that a tripartite system of response planning would be most effective, which would include representation from the federal government, provincial government and First Nations governments. Tsleil-Waututh emphasized that its governance rights must be recognized on a nation-to-nation level. In association with their environmental stewardship policy, Tsleil-Waututh also explained that for the Project to infringe on its territory they would need to receive net environmental benefits; for Tsleil-Waututh, industry-based projects need to contribute to the upward trajectory of the Burrard Inlet environment.

At an engagement protocol meeting on October 21, Tsleil-Waututh stated that as matters now stand Tsleil-Waututh would reject the Project. However, there could be a reconsideration if certain factors change, including the development of adequate measures to monitor and rehabilitate the Inlet (including current conditions and harvesting limitations), amelioration of oil spill cleanup capacity and the Crown's agreement to a joint-decision making capacity. Tsleil-Waututh added that a different commodity being transported in the pipeline and in ships would change the perception of risk.

Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Tsleil-Waututh that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

V - Potential Impacts of the Project on Tsleil-Waututh's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests are provided in Sections 2.4.3 and Section 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or

spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Tsleil-Waututh's Aboriginal Interests. These potential impacts are assessed by considering how the Project could affect several factors important to Tsleil-Waututh's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Tsleil-Waututh's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Tsleil-Waututh, Tsleil-Waututh's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province.

The Crown understands that Tsleil-Waututh conducted a third-party study titled *Tsleil-Waututh Nation's History, Culture, and Aboriginal Interest in Eastern Burrard Inlet*. In May 2015, the complete study was filed confidentially as written evidence and a redacted version was filed publicly⁵. Tsleil-Waututh also completed an assessment report titled *Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal*⁶. In its Supplemental Technical Reports ([A4S717](#), [A4S718](#)), the proponent estimated approximate distances and directions from the pipeline corridor, WMT, and marine shipping lanes based on traditional land and marine resource use (TLRU/TMRU) information in Tsleil-Waututh's reports.

Impacts on Hunting, Trapping and Plant Gathering

According to Tsleil-Waututh's written evidence, community members historically hunted waterfowl, marine and terrestrial mammals within terrestrial environments adjacent to rivers, streams and lakes in the North Shore Mountains on a regular basis. Species hunted include deer, elk, swans, ducks, geese, grebes, grouse, rabbits, squirrels, bears, cougars, eagle, seals and sea lions. Tsleil-Waututh community members also hunted game such as mountain goats in high elevation regions. Bird hunting is currently not allowed by community members on or around Tsleil-Waututh I.R. Burrard Inlet #3 due to firearm regulations. In terms of plant gathering activities, Tsleil-Waututh community members historically harvested crab apples, berries (blueberry, salmon berry, salal, huckleberry red elderberry, thimble berry and black caps), kelp, and nettles. These species were harvested along the near-shore area of Burrard Inlet within 8 km of villages and camps, as well as in terrestrial environments near rivers, streams, and lakes in the North Shore Mountains. Currently, community members gather salmon berry, salal, cascara,

⁵ NEB Filings: [A4L5Z4](#), [A4L5Z5](#), [A4L5Z6](#), [A4L5Z7](#)

⁶ NEB Filings: [A4L5Z9](#), [A4L6A0](#), [A4L6A1](#), [A4L6A2](#), [A4L6A3](#), [A4L6A4](#), [A4L6A5](#)

licorice root and devil's club on Burrard Inlet I.R. #3. Tsleil-Waututh members no longer harvest plants in the intertidal zone.

Tsleil-Waututh identified many concerns related to environmental effects of the Project on hunting, trapping, and plant gathering activities, including: loss of berries, other traditional foods and medicines, and harvesting opportunities; contamination of traditional foods and surrounding ecosystems; changes in air quality; sediment contamination; and, reduction in Tsleil-Waututh's environmental stewardship capability. Tsleil-Waututh also raised concerns about the loss or alteration of bird and marine habitat, as well as sensory disturbance to marine and bird species, and potential cumulative effects to wildlife habitat and species.

As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, old growth forests, wetlands, terrestrial wildlife and wildlife habitat (including species at risk), marine mammals, and marine birds. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping, and gathering activities (see Section 4.3.1 and 4.3.3 of this Report). In addition, the proponent would implement several mitigation measures to reduce potential effects to species important for Tsleil-Waututh's hunting, trapping, and plant gathering activities. The proponent has stated that it is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing.

Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP) and the vegetation and wildlife management plans (including a marine mammal protection program [NEB Condition 132]). The NEB imposed Condition 81 that requires the proponent to develop a WMT-specific EPP, including mitigation and monitoring plans, to be finalized in consultation with Fisheries and Oceans Canada (DFO) and potentially affected Aboriginal groups. The proponent is also required to conduct a post-construction monitoring program for marine mammals from the expansion of the WMT and post-construction monitoring reports. The proponent has committed to various mitigation measures to reduce effects of construction and operation of the WMT on marine birds and has committed to compile information regarding marine bird mortality and collision events and to include that information in post-construction monitoring reports. For the marine shipping component of the Project, the proponent will also develop plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups.

Tsleil-Waututh identified a total of 11 hunting and plant gathering sites in their TLRU/TMRU studies. None of the sites identified are within the proposed pipeline corridor, although three hunting sites and one plant gathering site are within 2 km of the pipeline corridor and/or WMT. Tsleil-Waututh did not identify trapping sites.

Tsleil-Waututh raised concerns with potential Project-related impacts on specific locations and access to hunting, trapping, and plant gathering activities, including adverse impacts on subsistence travel and restrictions of movement within Burrard Inlet. Project-related pipeline construction and routine maintenance is expected to cause short-term, temporary disruptions to Tsleil-Waututh's access to hunting, trapping and plant gathering activities, largely confined to the Project footprint for the pipeline and associated facilities.

The Crown understands that with pipeline construction and reclamation activities, disruptions to access may result in a loss of harvesting opportunities for Tsleil-Waututh. For traditional activities directly affected by the construction and operation of the WMT, these activities are not likely to occur within the expanded water lease boundaries during the operational life of the Project. Project-related marine shipping including increased use of available anchorage sites on the eastern side of Burrard Inlet is expected to disrupt Tsleil-Waututh's marine vessels and harvesters, and this could disrupt activities or access to hunting, trapping, and plant gathering sites. NEB conditions, if the Project is approved, may either directly or indirectly avoid or reduce potential access-related impacts associated with hunting, trapping, and gathering sites (see Section 4.3.1 and 4.33 of this Report) and the proponent would implement several mitigation measures to reduce potential effects on Tsleil-Waututh's hunting, trapping, and plant gathering activities.

These mitigations include management plans that include access management, scheduling and notification of Project activities, and environmental monitoring programs. The Access Management Plan is intended to reduce disturbances caused by access, construction equipment and vehicle traffic, during and following construction in order to minimize disturbance to access to Tsleil-Waututh's traditional lands. The proponent has committed to minimizing the development of access routes, controlling public access along the construction right-of-way, selecting appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent has also committed to work with applicable resource managers, traditional land and resource users to define locations where access control is necessary, and what type(s) of access control will be implemented. In the event that hunting, trapping, and plant gathering sites are identified during ongoing engagement with Tsleil-Waututh prior to construction, the sites will be assessed, and appropriate mitigation measures will be implemented.

As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Tsleil-Waututh community members to take measures to reduce potential disruptions from tankers and allow planning for hunting, trapping and plant gathering activities to take place that minimizes disturbance from Project-related tankers. Reduced harvests, while not expected to occur from temporary access restrictions, could impact Tsleil-Waututh cultural activities and sharing of marine food with the community. The proponent committed to working with Tsleil-Waututh to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Tsleil-Waututh expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities, including: the loss or reduced availability of traditional foods; contamination of wild foods and dietary changes; health effects from lack of adequate and culturally sensitive resources; the permanent closure of clam harvests and other harvesting activities; loss of spiritual connections between ancestors and future generations; diminished quality of health; potential effects on cultural and ceremonial activities (particularly along the shorelines of Burrard Inlet); and, loss of community cohesion and cultural transmission. Short-term, temporary disruptions to Tsleil-Waututh's hunting, trapping, and plant gathering activities from Project-related construction and routine maintenance activities could temporarily alter the behaviour of community members during construction. Reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project, could have spiritual and cultural impacts on community members.

The Crown understands that Tsleil-Waututh may experience noise disturbances and interruptions to traditional activities due to the WMT and Project-related marine shipping activities, and community members could be discouraged from travelling to hunting, trapping, and plant gathering sites that require these members to cross shipping lanes or navigate through marine areas occupied by anchored vessels. NEB conditions, if the Project is approved, may either directly or indirectly avoid or reduce potential social, cultural, spiritual, and experiential effects associated with hunting, trapping, and plant gathering activities (see Section 4.3.1 and 4.33 of this Report) and the proponent would implement several mitigation measures to reduce potential effects to Tsleil-Waututh's hunting, trapping, and plant gathering activities. The proponent is committed to using an Integrated Vegetation Management approach intended to reduce the use of herbicides and promote healthy ecosystems. Measures outlined in the proponent's Reclamation Management Plan are intended to stabilize and revegetate affected lands to achieve land productivity along the construction RoW and footprint, equivalent to the adjacent land use. The proponent has also committed to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project and will communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program.

The Crown has considered available information from the NEB process, consultation with Tsleil-Waututh, Tsleil-Waututh engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province. In consideration of this information, the Crown expects that the impacts of Project construction and operation, and Project-related marine shipping activities on Tsleil-Waututh's hunting, trapping and plant gathering activities would be negligible to minor. The Crown expects minor impacts as a result of the pipeline, and these effects would primarily occur during construction. The Crown expects negligible impacts as a result of the WMT and Project-related vessels, and these effects would occur during construction and operations. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related pipeline, facility, and WMT construction and operation, and marine shipping activities are likely to have low to moderate magnitude environmental effects on terrestrial, aquatic, and marine species harvested by Tsleil-Waututh;
- Construction of WMT, the pipeline and associated facilities are likely to cause short-term temporary disruptions to Tsleil-Waututh's community members accessing traditional hunting, trapping and plant gathering sites within the Project footprint; Project-related marine shipping activities are likely to cause temporary disruptions to activities or access to sites during the period of time Project-related tankers are in transit through Tsleil-Waututh's traditional territory; and
- Concerns identified by Tsleil-Waututh regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their hunting, trapping and plant gathering activities.

Impacts on Freshwater Fishing, and Marine Fishing and Harvesting

According to Tsleil-Waututh's written evidence, community members historically harvested and fished numerous species along the near-shore of Burrard Inlet and within rivers, streams and lakes in the North Shore Mountains north of Burrard Inlet on a regular basis. These species include anchovy, clam, eulachon, herring, lingcod, mussel, oyster, rockfish, salmon, trout, cod, flounder, sole, sea urchin, crab, shrimp, smelt and sole. In the 1960s, most community members stopped harvesting shellfish along Burrard Inlet beaches as a result of pollution, although some members still harvest shellfish along the beach on Indian Reserve No. #3. Fisheries and Oceans Canada closed shellfish harvesting in Burrard Inlet in 1972, although a limited opening took place in October 2016. Currently, community members harvest crabs and prawns in Burrard Inlet and fish sockeye and Chinook salmon along multiple rivers and creeks. The Fraser River is still actively used for fishing sockeye in August, with the Indian River accessed later in the summer months for chum. Other important species for Tsleil-Waututh include chinook, prawn, crab, bivalves and marine birds. Historically, eulachon, sturgeon and herring were harvested. A common Tsleil-Waututh teaching by Elders is that "when the tide went out, the table was set."⁷

Tsleil-Waututh identified many concerns related to environmental effects of the Project on fishing activities, in particular: the loss of traditional resources such as salmon, prawns and clams; loss or reduction to marine aquatic and bird habitat; temporary changes to water and sediment quality; disruption of increased tanker traffic on traditional fishing areas and reduction in subsistence travel; contamination of fishing areas and wild foods; loss of economic opportunities and revenues; and sensory disturbance to marine species. Concerns related to potential cumulative effects to marine fish and wildlife habitat and species were also raised. As described in the *NEB Recommendation Report*, Project-related activities could result in low to moderate magnitude effects on freshwater and marine fish and fish habitat, surface water and marine water quality. Moderate effects to fish and fish habitat in the terrestrial and aquatic environments would be localized to individual watercourse crossings, and effects to marine fish and fish habitat would be limited to a few or many individuals, where any potential serious harm would be compensated by offset measures.

⁷ <http://www.twnation.ca/About%20TWN/Our%20Territory.aspx>

NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Section 4.3.2 and 4.3.3 of this Report). A number of recommended NEB conditions require the proponent to file reports that will monitor Project-related impacts on freshwater fish and fish habitat, marine fish and fish habitat, and riparian habitats (NEB Conditions 71, 75, 92, 151, and 154). With regard to specific concerns raised by Tsleil-Waututh, the proponent would implement several mitigation measures to reduce potential effects to species important for Tsleil-Waututh's fishing activities. The proponent has committed to time watercourse crossing construction activities to occur within the least risk biological windows in an attempt to avoid causing serious harm to fish, has committed to working with Aboriginal groups to identify the most appropriate means of offsetting serious harm to marine fish and fish habitat, and has proposed the implementation of channel and bank reclamation measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat. Further, the proponent has completed a preliminary offsetting plan for impacts on fish and fish habitat associated with construction and operation of the WMT. For Project-related marine shipping activities, the proponent will require all tankers to process and empty their bilges prior to arrival and lock the discharge valve of the bilge water while in Canadian waters.

Tsleil-Waututh identified six marine and six freshwater fishing sites in their TLRU/TMRU studies. Four of the marine fishing sites are within the Marine RSA⁸ and one of the sites (i.e. commercial fishing, crab and prawn harvesting in Burrard Inlet) would require community members to cross the marine shipping lanes to access the fishing site. One of the freshwater fishing sites (i.e. food, social and ceremonial harvesting of Sockeye Salmon in the Fraser River) is located within the proposed pipeline corridor, while the remaining five sites are more than 2 km from the Project area.

Tsleil-Waututh raised concerns with potential Project-related impacts on specific locations and access to freshwater fishing and marine fishing and harvesting activities, including erosion and the loss of land, direct loss or modification to marine aquatic and bird habitats, changes to water and sediment quality, sensory disturbances to marine environment and species, reversal of Tsleil-Waututh remediation efforts within the Burrard Inlet, and reversal of Tsleil-Waututh remediation efforts to salmon populations in the Fraser River. Project-related pipeline construction and routine maintenance activities are expected to cause short-term, temporary disruptions to Tsleil-Waututh's access to freshwater fishing activities. If construction and reclamation occur during the fishing season, there could be a potential reduction in access to waterways, staging areas, and fishing sites for Tsleil-Waututh community members. However, disruptions to access would largely be confined to the Project footprint for the pipeline and associated facilities during construction and reclamation.

⁸ The area extending beyond the LSA boundary (i.e. the zone of influence or area where the element and associated indicators are most likely to be affected by Project-related marine vessel traffic.) where the direct and indirect influence of other activities could overlap with project-specific effects and cause cumulative effects on the environmental or socio-economic indicator.

The Crown understands that fishing and harvesting activities directly affected by the construction and operation of the WMT are not likely to occur within the expanded water lease boundaries during the operational life of the Project (NEB Report p. 279). Impacts on navigation, specifically in eastern Burrard Inlet, would exist for the lifetime of the Project, and would occur daily for varying amounts of time depending on the transiting vessels and anchored vessels. Project-related marine vessels are expected to cause temporary disruptions to Tsleil-Waututh's marine fishing and harvesting activities. Community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes or navigate through marine areas occupied by anchored vessels. Disruptions to Tsleil-Waututh's marine fishing and harvesting activities are likely to be temporary when accessing fishing sites in the Burrard Inlet that require crossing shipping lanes, as community members would be able to continue their movements shortly after the tanker passes. Disruptions would be more frequent as a result of anchored tankers within the eastern arm of Burrard Inlet.

NEB conditions, if the Project is approved, may either directly or indirectly avoid or reduce potential access-related impacts associated with freshwater and marine fishing and harvesting sites important for Tsleil-Waututh (Section 4.3.2 and 4.3.3 of this Report) and the proponent would implement several mitigation measures to reduce potential effects on freshwater and marine fishing and harvesting activities. These mitigations include access management plans, scheduling and notification of Project activities including Project-related marine vessel traffic, and environmental monitoring programs. As previously discussed, the proponent is committed to minimize disturbance to access by Tsleil-Waututh of its traditional lands, as described in the Access Management Plan. The proponent committed to working with Tsleil-Waututh to develop strategies to most effectively communicate the construction schedule and work areas to community members. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a marine public outreach program (NEB Condition 131). This communication would allow Tsleil-Waututh community members to take measures to reduce potential disruptions from tankers and allow planning for marine fishing and harvesting activities to take place that minimizes disturbance from Project-related tankers.

Tsleil-Waututh expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its fishing and harvesting activities, including impacts on cultural transmission and community connections to ancestry, limited use of beaches for knowledge sharing activities, impeded access to movement within Burrard Inlet due to increased marine vessel traffic, loss or reduced ability to maintain traditional foods within local diets, dietary changes and health effects from lack of traditional staple foods, and potential contamination of sacred sites including fishing areas along the Burrard Inlet and Indian Arm.

As described previously, the Project pipeline and facility construction and routine maintenance is expected to cause short-term, temporary disruptions to Tsleil-Waututh's fishing activities. The Crown understands that this temporary interruption could mean that community members alter their fishing activities during construction, which could affect their participation in the traditional activity. Through the construction and operation of the WMT, the Crown understands that Tsleil-Waututh may

experience noise disturbances and interruptions to cultural ceremonies along the shoreline, and loss or damage to visual quality of the Burrard Inlet. Project-related marine vessels are expected to cause temporary disruptions to Tsleil-Waututh's marine fishing and harvesting activities whereas increased use of anchorage sites by Project-related marine vessels may cause more frequent disruptions in eastern Burrard Inlet. The Crown understands that community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes or to travel through or around established anchorage sites. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Tsleil-Waututh community members to take measures to reduce potential disruptions from tankers and allow planning for cultural events to take place that minimizes disturbance from Project-related tankers.

The Crown has considered available information from the NEB process, consultation with Tsleil-Waututh, Tsleil-Waututh engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province. In consideration of this information, the Crown expects that Project construction and operation, and Project-related marine shipping activities would have up to moderate impacts on Tsleil-Waututh's freshwater fishing and marine fishing and harvesting activities. The Crown expects minor-to-moderate impacts to fishing and marine harvesting as a result of the pipeline, and these effects would primarily occur during construction. The Crown expects moderate impacts as a result of WMT construction, operations and Project-related marine vessels. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related pipeline, facility, and WMT construction and operation, and marine shipping activities are likely to have low to moderate magnitude environmental effects on freshwater and marine species harvested by Tsleil-Waututh;
- Construction of WMT, the pipeline and associated facilities are likely to cause short-term temporary disruptions to Tsleil-Waututh's community members accessing traditional freshwater fishing and marine fishing and harvesting sites within the Project footprint; Project-related marine shipping activities are likely to cause temporary disruptions to activities or access to sites during the period of time Project-related tankers are in transit through Tsleil-Waututh's traditional territory and frequent disruption at anchorage sites; and
- Concerns identified by Tsleil-Waututh regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their freshwater fishing and marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

According to Tsleil-Waututh's written evidence, community members historically used marine waters as travelways from villages and camps, as well as for travel to outer Burrard Inlet. Community members also conducted resource harvesting activities on these historical travelways. Currently, Tsleil-Waututh community members use traditional canoe travelways for cultural tourism and traditional activities such

as canoe racing. Community members currently maintain racing canoes, war canoes, and kayaks for daily use on travelways throughout the Project's Marine RSA, including the eastern area of Burrard Inlet and Indian Arm. Tsleil-Waututh Elders stated in their written evidence that sacred areas within the Marine RSA are used for ritual bathing activities. Community members partake in ritual bathing in isolated creeks and rivers along Burrard Inlet where they perceive the water is pure. Bathing practices in Burrard Inlet do not occur regularly as a result of increased marine vessel traffic and pollution.

In the terrestrial environment, Tsleil-Waututh community members historically gathered in areas along the near-shore of Burrard Inlet to seek habitation in villages and camps and to build canoes. Salmon is very important to ceremonial events and social gatherings. In its written evidence, Tsleil-Waututh stated the existence of several archaeological sites such as historical resource harvesting camps and occupied villages within the study area. Historically, Tsleil-Waututh community members travelled to cliffs or rock shelters for spiritual and ceremonial purposes. Pictographs were located close to waterbodies or waterfalls and spiritual practice and training was conducted within remote sacred areas.

Tsleil-Waututh identified many concerns related to environmental effects of the Project on other traditional and cultural practices, including impacts on archaeological and cultural heritage sites, such as the loss, damage, or contamination of places of importance, archaeological resources, and/or sacred areas including ancient village sites and cemeteries; loss of traditional land through erosion; adverse cultural effects of armoring as a tool to erosion mitigation; and, loss of connections between ancestors, current generations and future generations. Tsleil-Waututh also raised concerns about impacts on their subsistence economy, such as fewer opportunities to trade or sell harvested resources, forced transition to a wage-based economy, loss of livelihood options, and inability to provide cultural work and work within the community and on the reserve.

The Crown acknowledges the high cultural value of killer whales to the Tsleil-Waututh, and the lack of mitigation measures proposed by either the proponent or the NEB to mitigate impacts on the Southern resident killer whale population. The Crown further acknowledges that Tsleil-Waututh would like to see Canada attempt to fill any knowledge gaps with respect to the effects of underwater noise or marine shipping on killer whales within Burrard Inlet, to ensure that the species can be afforded adequate protection during Project construction and operation. Sections 4.3.3 and 4.3.4 of this report discuss the adverse impacts of Project-related marine shipping on the Southern resident killer whale which is applicable to Tsleil-Waututh's concerns.

Concerns regarding potential effects on Tsleil-Waututh's ability pursue its environmental stewardship policy and its restoration efforts within the Burrard Inlet were also expressed. As described in Section 4.3.4 of this Report, Project-related activities are not likely to result in significant adverse effects on the ability of Aboriginal groups to use land, waters or resources for traditional purposes. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental impacts on physical and cultural heritage resources and the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources important for Tsleil-Waututh's traditional and cultural practices. An environmental education program

will be developed and implemented to ensure that all personnel working on the Project are informed of the location of known sacred sites and burial sites. The proponent has also committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during RoW finalisation, narrowing the RoW in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other on-going consultation and engagement with local and Aboriginal governments.

Tsleil-Waututh identified a total of 18 cultural sites in the marine and terrestrial environments in their TLRU/TMRU studies⁹. Within the Marine RSA, Tsleil-Waututh identified four cultural sites including two trails/travelways and two sacred areas. Two of the cultural sites would require crossing the marine shipping lanes: canoeing and kayaking travelways in Burrard Inlet; and accessing ritual bathing activities and pictographs. In terms of land uses, Tsleil-Waututh identified 14 cultural sites including 11 habitation sites and three sacred areas. One sacred area (i.e. pictographs in the Fraser Valley) was identified within the proposed pipeline corridor. Tsleil-Waututh identified no habitation sites within the proposed pipeline corridor although one site was identified within 2 km of the WMT. No community gathering places were identified within the Marine RSA.

Tsleil-Waututh raised concerns with potential Project-related impacts to specific locations and access to other cultural and traditional practices, including impacts on cultural or spiritual practices and places, and cultural travel and restriction of access, movement and activity within Burrard Inlet, such as the interference of ceremonies and loss of connection to waters and lands. Project-related pipeline and facilities activities are expected to cause short-term disruptions that temporarily affect the ability of Aboriginal groups to access land, waters or resources for traditional purposes. The Crown understands that Tsleil-Waututh's opportunities for certain traditional and cultural activities will be temporarily interrupted, and there could be reduced access to travelways, habitation sites, gathering sites, and sacred areas. However, temporary disruptions to Tsleil-Waututh's traditional and cultural practices would be largely confined to sites within the Project footprint for the pipeline and associated facilities.

The Crown understands that there will be temporary interruptions to Tsleil-Waututh's traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities. The expansion of WMT could impose restrictions on Tsleil-Waututh's ability to use the water and surrounding lands for traditional activities, given the acoustic and visual disturbance of WMT construction. Particularly, the Crown recognizes the location of Tsleil-Waututh's traditional territory with emphasis that its main reserve is located directly across the Inlet from WMT. However, the Crown notes that effects of construction on cultural activities would be temporary, lasting until the completion of the WMT expansion. As outlined in Section 4.3.4 of this Report, the NEB concluded that

⁹ The previous version of this appendix indicated 29 cultural sites in the marine and terrestrial environments. Upon further review of the proponent's Supplemental Technical Reports, the 11 historical villages identified as gathering places in [A4S718](#) are the same as the 11 historical villages identified as habitation sites in [A4S717](#).

Project construction and operation would result in temporary impacts on Tsleil-Waututh's use of water and water-based resources for traditional purposes. Project-related marine shipping activities and increased use of available anchorage sites for vessels could potentially disrupt traditional activities, travelways and cultural tourism (e.g. when tours can enter the water given the passing of tankers up the inlet) and navigation across parts of eastern Burrard Inlet.

Conditions in the *NEB Recommendation Report*, if the Project is approved, may either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The proponent will be required to manage access to culturally sensitive sites and implement an access management plan, and the proponent has committed to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project. The Crown notes that tankers will remain within existing shipping lanes and anchorages, and the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131).

Tsleil-Waututh expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its other traditional and cultural practices, including impacts on cultural transmission and community cohesion, such as the loss of traditional knowledge, loss of language skills, and reduction or elimination of opportunities for cultural transmission. Tsleil-Waututh also raised concerns about the risk to the health and safety of cultural practitioners, individual and community health, such as dietary and health effects from a lack of resources such as traditional foods, as well as the hindrance of and failure to provide conditions for cultural work. Temporary interruptions may occur to Tsleil-Waututh's cultural and spiritual practices, which could alter their participation in these activities during Project construction and operation activities, as well as during the transit of marine vessels associated with the Project.

The Crown has considered available information from the NEB process, consultation with Tsleil-Waututh, Tsleil-Waututh engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province. In consideration of this information, the Crown expects that Project construction and operation, and Project-related marine shipping activities, would have up to moderate impacts on Tsleil-Waututh's other traditional and cultural practices. The Crown expects minor-to-moderate impacts as a result of the pipeline, and these effects would primarily occur during construction. The Crown expects moderate impacts as a result of the WMT and Project-related vessels, and these effects would occur during construction and operations. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related pipeline, facility, WMT construction and operation, and marine shipping activities are likely to have low to moderate magnitude environmental effects on traditional and cultural resources;
- Construction of the WMT, pipeline and associated facilities are likely to cause short-term temporary disruptions to Tsleil-Waututh's community members accessing traditional and

cultural practice sites within the Project footprint; Project-related marine shipping activities are likely to cause temporary to ongoing disruptions to activities or access to sites during the period of time Project-related tankers are in transit through or at anchor within Tsleil-Waututh's traditional territory; and

- Concerns identified by Tsleil-Waututh regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their other cultural and traditional practices.

Impacts on Aboriginal Title

The Crown notes that portions of the Project would be located within areas of Tsleil-Waututh's traditional territory assessed as having strong *prima facie* claim to Aboriginal title, in the vicinity of the terminus of the pipeline and in the middle portion of Burrard Inlet, particularly in proximity to Indian Arm.

Within the area of the proposed WMT expansion and fuel storage facility expansion, in addition to a section of pipeline RoW and the marine shipping component and anchorages within eastern Burrard Inlet, the Crown understands that Tsleil-Waututh assert responsibilities for management and governance. Tsleil-Waututh also asserts that others are to observe and follow Tsleil-Waututh protocols when accessing lands, waters and resources within this area.

The Crown has actively consulted with Tsleil-Waututh throughout the NEB process and Crown consultation process at a deeper level in an attempt to better identify, understand, and resolve concerns relating to Aboriginal title. Concerns related to Aboriginal title raised by Tsleil-Waututh throughout the NEB and Crown consultation process include:

- Impacts that could impede or disrupt Tsleil-Waututh's use of its asserted traditional territory, including effects from potential spills, marine shipping, and construction and operation of the WMT;
- Activities that could affect Tsleil-Waututh's ability to manage and make decisions over the Project area, including impacts to infrastructure, effects on the land base, and delays to Tsleil-Waututh achieving their environmental stewardship objectives; and
- Project-related impacts that could affect Tsleil-Waututh's economic development aspirations for its asserted traditional territory, such as the reduction or elimination of current and future generations to control and benefit from their waters and lands, the impediment to cultural and environmental tourism based activities, and the loss of business or economic opportunities or revenues, land investments and property sales.

The Crown provides a description of the potential impacts of the Project on Aboriginal title in Section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid/reduce Project impacts associated with the degree of disturbance to terrestrial, marine and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on

the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as well as NEB Conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved. It is noted that Tsleil-Waututh has not executed a Mutual Benefits Agreement with the proponent.

Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in Section 4.3.5, it is the Crown's opinion that the Project is expected to have minor-to-moderate impacts on Tsleil-Waututh's asserted Aboriginal title within the Project area.

Impacts Associated with Accidental Pipeline, Terminal, and Tanker Spills

Tsleil-Waututh has consistently expressed concerns related to direct and indirect effects of Project-related oil spills from marine vessels, the WMT, pipeline and facilities on their Aboriginal Interests. Specific concerns about potential adverse impacts in the event of an oil spill include water and air pollution, sediment contamination, loss, harm, or contamination of habitat or species, reduction in property values and real estate investment, security risks and issues to safety, inadequate emergency preparedness and response, issues of jurisdiction, impact of oil stranding on shorelines, insufficient domestic and international compensation funds, adverse effects on sustenance and livelihoods, impacts on forestry transportation routes, poor visual quality, diminishment of eco-tourism industry, and shoreline cleanup damage. The consequences of accidental oil spills on key Tsleil-Waututh Aboriginal Interests such as archaeological and cultural sites as well as marine fish and wildlife habitat species are presented in the summary table below taken from Tsleil-Waututh's assessment of the Project (Figure 1).

The Crown understands Tsleil-Waututh's concerns regarding spills, and the potential for a spill to impact Tsleil-Waututh's use and occupation of its traditional territory, ability to make governance decisions over the area impacted, and the potential for a spill to adversely impact environmental integrity, community health and the economic development aspirations that Tsleil-Waututh have within its territory.

A discussion of the potential impacts of accidental spills on Aboriginal Interests is provided in Section 4.3.6 of this Report. In consideration of this information and analysis, as well as information available to the Crown on Tsleil-Waututh's Aboriginal Interests and concerns raised by Tsleil-Waututh during the NEB process and Crown consultation process, an oil spill associated with the Project could result in minor to serious impacts on Tsleil-Waututh's Aboriginal Interests, depending on the magnitude of the spill. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline, terminal or tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. In making this general conclusion, the Crown acknowledges Aboriginal peoples who live nearby and rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.¹⁰

¹⁰ Trans Mountain Final Argument, p. 85 and 207

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline and marine safety regimes would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations of the pipeline and WMT, as well as Project-related marine shipping activities between the WMT and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the Project on the exercise of Tsleil-Waututh Nation's Aboriginal Interests would be up to moderate.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Tsleil-Waututh Nation's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Tsleil-Waututh Nation in emergency response planning activities. The federal Crown is considering additional responsive measures that would further accommodate the potential adverse impacts of the Project on Tsleil-Waututh Nation, as discussed in Sections 4 and 5 of the main body of this Report.

Appendix C.7 – Chawathil First Nation

I – Background Information

Chawathil First Nation (Chawathil) is a Stó:lō community whose asserted traditional territory (in conjunction with other Stó:lō communities) encompasses a large section within the Fraser Valley, British Columbia (BC). The community is found in the Hope area of the Upper Fraser Valley. No certain translation of Chawathil (pronounced “*Shi-wath-il*”) has been located, but the proper orthographic rendering appears to be Chowéthel. It appears to refer to a prominent gravel bar near the Katz Reserve.

Chawathil has five reserves: Chawathil Reserve no.4 (551.6 hectares [ha]), Greenwood Island Reserve no.3 (4 ha), Hope Reserve no.1 (3.9 ha), Schkam Reserve No.2 (54.3 ha), Tunnel Reserve no.6 (1.1 ha), and the shared Pekw'Xe:yles Reserve (10.3 ha), held in common with several other Stó:lō groups, in the eastern Fraser Valley. Chawathil's total registered population is 614 (304 members are living on Chawathil's reserves, 81 are living on other reserves, and 229 are living off-reserve).

Chawathil members historically spoke Halq'eméylem, the language of the Upriver Stó:lō communities, which falls into the Coastal Salish language group. Chawathil is understood to be a modern descendant of the group ethnographically identified as the Tait [Tít] Tribe. The Tait are one of several groups classified as Upper Stó:lō. Though similar language and customs appear to have been shared between the Upper Stó:lō groups, the Tait spoke a unique dialect. The Tait occupied a distinct territory, though there appears to have been some overlap in territorial use with other Upper Stó:lō groups.

Chawathil is a member of the Stó:lō Tribal Council, a political union of eight Stó:lō communities (including Chawathil). The Stó:lō often refer to *S'olh Temexw*, which is the name used by the Stó:lō people for their traditional territory. Chawathil is a party to the Stó:lō Nation protective *Writ of Summons*, which was filed in the BC Supreme Court on December 9, 2003, asserting Aboriginal title to a territory identified in the writ. Chawathil assert a traditional territory as identified in a Band Council Resolution dated March 28, 2014.

II – Preliminary Strength of Claim Assessment

- The Project corridor transects Chawathil's asserted traditional territory. Approximately 78 kilometres (km) of the proposed pipeline and two pipeline facilities (Hope Station and Wahleach Station) would be located within Chawathil's asserted traditional territory.
- Chawathil is understood to be a modern descendant of the group ethnographically identified as the Tait Tribe. The Crown's preliminary assessment of Tait's *prima facie* claim for rights over the area associated with the Project ranges from weak to strong. The portion that spans the

asserted territory falls within the area ethnographers attributed to the historic Tait territory and would support a strong *prima facie* claim.¹

- The Crown's preliminary assessment of Tait's *prima facie* claim for title over the area from Agassiz to Hope is considered moderate to strong, and the claim is strong for the portion of the Project in proximity to Hope. This is supported by the number of historic Tait village sites scattered from Popkum up through to Ruby Creek and on towards Hope, including the historic site of *C'Kals*, a large village site where Hope is now located. The stretch of territory northwest of Hope is assessed as having a moderate claim, and is considered an area likely utilized for resource gathering activities by those who occupied the Tait villages in and near Hope and northwards.

III – Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Chawathil's Aboriginal Interests, the Crown is of the view that the legal duty to consult Chawathil lies at the deeper end of the *Haida* consultation spectrum. Chawathil was placed on Schedule B of the section 11 order issued by the BC Environmental Assessment Office (EAO), which afforded Chawathil opportunities to be consulted at a deeper level.

Chawathil participated in the National Energy Board (NEB) review process jointly with Cheam First Nation (Cheam) as intervenors and provided correspondence, information requests, written evidence during the hearing, as well as an oral summary argument on January 22, 2016 in Burnaby, BC. Cheam and Chawathil also responded to an Issues Tracking Table Information Request filed by the Crown ([A4R4Q2](#)).

Cheam and Chawathil together signed a contribution agreement with the NEB for \$36,920 in participating funding plus travel for two to the hearing. The Major Projects Management Office (MPMO) offered Chawathil \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Chawathil an additional \$14,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Chawathil signed a contribution agreement with the MPMO in response to the first of these offers, for a total of \$12,000 in allocated funding. EAO provided Chawathil with \$5,000 in capacity funding on October 24, 2016.

Cheam and Chawathil jointly met with the Crown on April 28, 2016 to discuss the Project. Chawathil met again with the Crown on October 17, 2016.

The Crown provided a first draft of the Consultation and Accommodation Report (the Report) to Chawathil for review and comment on August 17, 2016. A second draft of this Report was provided to

¹ Stó:lō First Nations: Traditional Territories of the "Upriver" Halkomelem or "Upper Stó:lō" – Review of Ethnographic and Historical Sources (Nov 18, 2013); A Stó:lō-Coast Salish Historical Atlas (2001); Stó:lō Nation Traditional Use Study (Jan 30, 1998).

Aboriginal groups for review and comment on November 1, 2016 and Chawathil provided comments on both the first and second draft of this Report on November 15, 2016.

Chawathil provided a separate Aboriginal group submission to the Crown on November 15, 2016.

IV – Summary of Key Chawathil Issues and Concerns Raised

The Crown gained its understanding of Chawathil's issues and concerns through Cheam and Chawathil's joint intervention in the NEB hearing process and through consultation, which included a meeting in Chilliwack on April 28, 2016 and a meeting on October 17, 2016. In addition, the Crown has considered information regarding the proponent's engagement with Cheam and Chawathil, as described in the proponent's Aboriginal Engagement Report (July 2016). Cheam and Chawathil also responded to an Issues Tracking Table Information Request submitted to them by the Crown by further elaborating their procedural concerns. The Crown is also in receipt of an open letter sent to Prime Minister Justin Trudeau, Alberta Premier Rachel Notley, and BC Premier Christy Clark from a collective of Aboriginal groups, including Chawathil. This letter identifies interests and concerns related to Indigenous consent of the Project and the Project's consultation process.

This section offers a summary of the key issues raised by Chawathil, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Chawathil's key Project-related issues and concerns are summarized below:

Methodology, Process and Consultation

Chawathil stated they do not accept the Crown's reliance on the NEB process as an appropriate approach to discharge its legal duty to consult. Chawathil believes that their consent is required in order for the Project to proceed, and that Chawathil has a right to manage their lands as holders of Aboriginal title.

Chawathil also found the amount of available funding to be insufficient to enable their meaningful participation. A letter received from Cheam and Chawathil in October 10, 2014 states that they are unable to provide the NEB panel with Oral Traditional Evidence due to a lack of funding. In their meeting of April 28, 2016, Cheam and Chawathil drew attention once more to concerns surrounding funding; specifically, the restrictive conditions on funding, the inability to access funding for traditional land use studies or hire technical experts, and a lack of opportunity to engage directly with the NEB. Cheam and Chawathil expressed concern that there is a gap in the information they would have liked to provide to the NEB (e.g., Oral Traditional Evidence) as linked to restrictions in available funds, which has not allowed them to comment or assess gaps in the NEB conditions. In a meeting on October 17, 2016, with the Crown consultation team, Chawathil indicated that it did not receive funding to hire an expert to advise them on the NEB's terms and conditions and stated their view that the funding process is disproportionate and unfair.

Chawathil has also noted that their interaction with the proponent to date has been unsatisfactory.

Cultural and Social Impacts

Chawathil raised concerns about potential impacts to archaeological artifacts, as well as potential impacts on known sacred and ceremonial sites, including recreational areas, historic trail systems, and culturally modified trees. It was mentioned in the April 28, 2016 meeting that Cheam and Chawathil have documented 20,000 site-specific land use areas through their land use studies. Loss of the spiritual connection with their land is concerning to Chawathil, especially for the youth and future generations. Access to Mount Hope Lookout Trail was also raised, in particular a disruption to access and construction during the hiking season.

Environmental Impacts

Chawathil stated they have a number of environmental concerns, including: potential environmental and cumulative environmental effects involving degradation of protected areas, wildlife and wildlife habitat (such as bear, deer, elk, beaver and cougar habitat), fish and other aquatic species in their habitat (especially impacts to spawning), water quality, air quality and greenhouse gas emissions, land erosion, increased sediment in watercourses from construction, pollutants from machinery and materials during construction, impacts on species at risk, the marine environment, the hydrology of wetlands, and potential impacts on the soils and geological structures along the proposed Project alignment.

Marine Impacts

Chawathil registered concerns relating to the proposed expansion of marine activity and increased marine traffic in the Salish Sea and Burrard Inlet.

Impacts on Aboriginal Rights

Chawathil described concerns about the potential for the Project to adversely impact their Aboriginal rights, including rights associated with hunting, traditional foods and resources, as well as medicinal plant gathering. In the proponent's supplemental Traditional Land Use submission of July 21, 2014, multiple traditional use sites associated with Cheam and Chawathil were identified which include: trails and travelways, and sacred sites. Chawathil is concerned that the proponent has not demonstrated an understanding of what Chawathil requires in order to exercise their traditional and current land uses, both now and in the future. Chawathil feels that their involvement within the NEB process was not fruitful as it did not take into account evidence which they provided on Aboriginal title.

Cumulative Effects

Chawathil raised concerns about the cumulative effects of industrial development within their traditional territory. Chawathil stated that they did not have the resources required to conduct a fulsome accounting of the cumulative impacts on their territory from hunters, mining, forestry, and others, suggesting this could be a potential shortcoming in the NEB process as Chawathil was not able to put this information on the record.

Economic Effects

Chawathil is concerned that Trans Mountain's economic commitments to First Nations (such as training, employment, and contracting opportunities) lack real definition and force, and are unlikely to contribute to a substantial benefit within the community.

Health and Human Safety

Chawathil identified concerns regarding emergency preparedness in the community and human safety and health, noting that community members are impacted by the threat of a spill, which results in increased anxiety among community members and a potential disruption of their connection to the land. This concern was emphasized again during the October 17, 2016 meeting with the Crown consultation team. The use of pesticides on the Right of Way (RoW) and associated toxicity was also raised as a concern. Chawathil expressed their view that First Nations were not incorporated into Trans Mountain spill response planning in a significant way.

Accidents and Malfunctions

Chawathil identified significant concerns about adverse impacts resulting from an accident or malfunction leading to a release of pipeline contents into the environment. A leak in or near the Fraser River or its tributaries could contaminate fish habitat for species of cultural and economic importance. Cheam and Chawathil stated in a letter from December 9, 2014 that they view the potential for a spill as deeply concerning and highly significant. At the October 17, 2016 meeting with the Crown consultation team, Chawathil also expressed concern about how snowfall and other weather conditions could affect pipeline pressure.

Project Construction Phase

Chawathil expressed concerns about Project-related construction activities, including the following: cedar removal and waste of cedar timber, impact on fishing in the Fraser River (which is a source of income and important traditional activity), impacts on deer hunting grounds and erosion on hillsides if trees are cleared.

Chawathil's Response to NEB Recommendation Report

In the October 17, 2016, meeting with the Crown consultation team, Chawathil indicated that during the NEB review process, the proponent failed to provide un-redacted emergency management documents. Following the release of the *NEB Recommendation Report* in May 2016, the NEB ordered all pipeline companies to release their full emergency response manuals. Chawathil would like to ensure that the Crown ensures a proper emergency preparedness and response regime is in place and properly analyzed. Chawathil believes additional assessment on emergency response is required before a decision. Chawathil finds that the NEB conditions focus on filing plans with the NEB and do not impose standards for engaging First Nations on the development of draft plans in advance of a final plan being submitted for approval to the NEB. As such, Chawathil finds that many of the NEB conditions that include a requirement for the proponent to engage with them lack specific standards for what meaningful engagement means in the context of condition compliance.

V – Potential Impacts of the Project on Chawathil’s Aboriginal Interests

A discussion of the Crown’s assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Chawathil’s Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Chawathil’s ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

At the October 17, 2016 meeting with the Crown consultation team, Chawathil emphasized the importance of water in terms of cultural practices, spirituality, livelihoods, and passage rights. It was noted that from Bellemont, there are more than 40 streams that run through Chawathil’s traditional territory. Should there be a leak or break in the pipeline, 20 kilometers of traditional fishing area could be negatively affected. There is also concern in the community regarding flooding. There is expected to be another large flood in the next 50 years that would rival the 1894 flood, when the entire community was submerged.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown’s conclusion on the seriousness of Project impacts on Chawathil’s Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Chawathil, Chawathil’s engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate (EAC) issued by the Province.

Chawathil completed a joint traditional land and resource use (TLRU) study with Cheam, which was submitted confidentially to the NEB. The report provided a baseline inventory of harvesting and fixed cultural sites which current Chawathil community members have used in their lifetime. A report entitled, *Assessment of Use and Occupancy Data within Proximity to Existing and Proposed TMPL Corridors* (AUOD) ([A4Q2D1](#)) was filed as written evidence in 2015. Traditional cultural practices identified by Chawathil include canoe pulling, use of medicinal plants, basket weaving, fishing and hunting.

Impacts on Hunting, Trapping and Plant Gathering

Traditional harvesting is an important element of both the livelihood and culture of Chawathil. Historically, Chawathil members have used medicinal plants, and community members continue to gather mushrooms and wild berry species for food. Community members also use regalia made from hunted game and bird feathers in traditional ceremonies.

Chawathil identified concerns regarding Project-related effects on wildlife and wildlife habitat, the environment, and their Aboriginal rights. As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens, vegetation communities of concern, old growth forests, wetlands, and wildlife and wildlife habitat (including at risk-listed species). NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping, and gathering (Section 4.3.1 of this Report). With regards to specific concerns raised by Chawathil, the proponent would implement several mitigation measures to reduce potential effects to species important for Chawathil's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction of wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP) and the Wildlife Management Plans.

The area of the Fraser Valley downstream of the Fraser Canyon, at the confluence of the Pitt and Fraser rivers, has been traditionally used for plant gathering, specifically bog cranberries and wapato. As part of the AUOD study, Chawathil identified hunting and plant gathering sites. Forty-nine bird features (duck, grouse, other birds), 286 mammal features (deer, elk, moose, other mammals), and 406 plant and tree features (berries, ceremonial plant, construction wood, firewood, food plant, medicine plant, other plant (or wood), specialty wood) were identified within 1 km of the proposed pipeline corridor. At these sites, Chawathil harvests wildlife, ceremonial plants, construction wood, firewood, food plants and medicinal plants.

Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Chawathil's access to hunting, trapping and plant gathering activities, largely confined to the Project footprint for the pipeline and associated facilities. The Crown understands that with construction and reclamation activities, disruptions to access may result in a loss of harvesting opportunities for Chawathil. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access associated with hunting, trapping, and gathering sites (Section 4.3.1 of this Report). With regards to specific concerns raised by Chawathil, the proponent would implement several mitigation measures to reduce potential effects on TLRU sites important for Chawathil's hunting, trapping, and plant gathering activities, such as management plans that include access management, scheduling and notification of Project activities, and environmental monitoring programs that monitor access control measures. The Access Management Plan is intended

to reduce disturbances caused by access, construction equipment and vehicle traffic, during and following construction in order to minimize disturbance to access Chawathil's traditional lands. The proponent has committed to minimizing the development of access routes, controlling public access along the construction right-of-way (RoW), selecting appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent has also committed to work with applicable resource managers, traditional land and resource users to define locations where access control is necessary, and what type(s) of access control will be implemented. In the event that hunting, trapping, and plant gathering sites are identified during ongoing engagement with Chawathil prior to construction, the sites will be assessed, and appropriate mitigation measures will be determined. The proponent committed to working with Chawathil to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Chawathil expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities. Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Chawathil's hunting, trapping, and plant gathering activities. The Crown understands that this short-term disruption could temporarily alter the behaviour of community members' hunting, trapping or plant gathering activities during construction, and that reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project, could have spiritual and cultural impacts on community members. If the Project is approved, the NEB conditions would either directly or indirectly avoid or reduce potential social, cultural, spiritual, and experiential effects associated with hunting, trapping, and plant gathering activities (Section 4.3.1 of this Report). With regards to specific concerns raised by Chawathil, the proponent would implement several mitigation measures to reduce potential effects to Chawathil's hunting, trapping, and plant gathering activities. The proponent is committed to implementing weed management (as outlined in the Weed and Vegetation Management Plan) to reduce the potential for weed infestation following construction, and utilizing an Integrated Vegetation Management approach intended to reduce the use of herbicides and promote healthy ecosystems. The proponent will consult with Aboriginal groups regarding problem vegetation management and methods of treatment. Measures outlined in the proponent's Reclamation Management Plan are intended to stabilize and revegetate affected lands to achieve land productivity along the construction RoW and footprint, equivalent to the adjacent land use. The proponent has also committed to ongoing engagement with Aboriginal groups that are interesting in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Chawathil, Chawathil's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor impact on Chawathil's hunting, trapping and plant gathering activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Chawathil;
- Project-related pipeline and facility construction and routine maintenance activities within Chawathil's traditional territory are temporary and thus, likely to cause minor disruptions to Chawathil's community members accessing traditional hunting, trapping and plant gathering sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their hunting, trapping and plant gathering activities.

Impacts on Freshwater Fishing

Chawathil identified concerns related to the environmental effects of the Project on fish and other aquatic species, fish habitat, and member's Aboriginal rights to fish. In particular, salmon and salmon fishing are of great importance as a primary source of income and sustenance to Chawathil community members.

As described in the *NEB Recommendation Report*, Project-related construction and operation could result in low to moderate magnitude effects on fish and fish habitat and surface water. Moderate effects to fish and fish habitat would be localized to individual watercourse crossings where any potential serious harm would be compensated by offset measures. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Section 4.3.2 of this Report). A number of recommended NEB conditions require the proponent to file reports that will monitor Project-related impacts to fish, fish habitat and riparian habitats. With regards to specific concerns raised by Chawathil, the proponent would implement several mitigation measures to reduce potential effects to species important for Chawathil's fishing activities. The proponent has committed to time watercourse crossing construction activities to occur within the least risk biological windows in an attempt to avoid causing serious harm to fish. The proponent has also committed to working with Aboriginal groups to identify the most appropriate means of offsetting serious harm to marine fish and fish habitat, and has proposed the implementation of channel and bank reclamation measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat.

Fishing activities are mostly practiced along the Fraser River and the Fraser Canyon, an area where salmon are most abundant and conditions are suitable for preparing the meat (wind-drying). Marine mammals, shellfish and molluscs are traditionally harvested at the mouth of the Fraser River. As part of the AUOD study, Cheam and Chawathil identified 546 fishing features (ooligan, salmon, sturgeon, trout, other fish), and 21 other aquatic life features (crayfish) within 1 km of the proposed pipeline corridor.

Chawathil raised concerns with the Project's potential impacts on specific locations related to their fishing activities, including the effects of construction on the Fraser River as well as expanded marine traffic in the Salish Sea and Burrard Inlet. Project-related construction and routine maintenance

activities are expected to cause short-term, temporary disruptions to Chawathil's access to fishing activities. The Crown understands that if construction and reclamation occur during the fishing season, there could be a potential reduction in access to waterways, staging areas, and fishing sites for Chawathil community members. However, disruptions to access would largely be confined to the Project footprint for the pipeline and associated facilities during construction and reclamation. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access to fishing sites important for Chawathil (Section 4.3.2 of this Report). With regards to specific concerns raised by Chawathil, the proponent would implement several mitigation measures to reduce potential effects to fishing sites important Chawathil's fishing activities. As previously discussed, the proponent is committed to minimize disturbance to access to Chawathil's traditional lands, as described in the Access Management Plan. The proponent committed to working with Chawathil to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Chawathil expressed concerns regarding the direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of their fishing activities. As described previously, the Project construction and routine maintenance is expected to cause short-term, temporary disruptions to Chawathil's fishing activities. The Crown understands that this temporary interruption could mean that community members alter their fishing activities during construction, which could affect their participation in the traditional activity. If the Project is approved, the NEB conditions would either directly or indirectly reduce the potential effects on social, cultural, spiritual or experiential effects associated with fishing activities (Section 4.3.2 of this Report).

In consideration of the information available to the Crown from the NEB process, consultation with Chawathil, Chawathil's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor impact on Chawathil's freshwater fishing activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Chawathil;
- Project-related pipeline and facility construction and routine maintenance activities within Chawathil's traditional territory are temporary and thus, likely to cause minor disruptions to Chawathil's community members accessing traditional fishing sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Chawathil regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their freshwater fishing activities.

Impacts on Other Traditional and Cultural Practices

Chawathil identified many concerns related to environmental effects of the Project on other traditional and cultural practices, including to spiritually and culturally important sites.

Other traditional and cultural practices sites include trails and travelways, habitation sites, gathering places, and sacred areas. As part of the AUOD study, Chawathil and Cheam identified one habitation site (cabin) and 124 gathering places (112 ceremonial site features and 12 other overnight features), and 121 sacred areas (27 death sites, 45 other cultural sites, 12 sacred sites and 37 storied landform sites) within 1 km of the proposed pipeline corridor. Four Stó:lō Nation sacred areas are located within 4 km of the proposed pipeline corridor: Cultus Lake, Mount Cheam, Mount Hope and Lady Franklin Rock. Three Stó:lō Nation sacred areas are located more than 12 km from the proposed pipeline corridor: Echo Island, Mount Slease, and Mount McGuire. Sumas Lake, an important historical site, is crossed by the proposed pipeline corridor. Coqualeetza, approximately 1.6 km northwest of the proposed pipeline corridor, is considered a significant historical and cultural site.

Chawathil identified concerns regarding the environmental effects of the Project on other traditional and cultural practices, including impacts on archaeological artifacts and known sacred and ceremonial sites, including recreational areas, historic trail systems, and known areas with culturally modified trees. As described in Section 4.3.4 of the Report, Project-related activities are not likely to result in significant adverse effects on the ability of Aboriginal groups to use land, waters or resources for traditional purposes. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). With regards to specific concerns raised by Chawathil, the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources important for Chawathil's traditional and cultural practices. The proponent has also committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during RoW finalization, narrowing the RoW in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments.

Chawathil raised concerns with the Project's potential impacts relating to Mount Hope Lookout Trail and increased access to the land by members of the public due to Project-related activities. Project-related activities are expected to cause short-term disruptions that temporarily affect the ability of Aboriginal groups to access land, waters or resources for traditional purposes. The Crown understands that Chawathil's opportunities for certain traditional and cultural activities will be temporarily interrupted during construction and routine operation, and there could be reduced access to travelways, habitation sites, gathering sites, and sacred areas. However, temporary disruptions to Chawathil's traditional and cultural practices would be largely confined to sites within the Project footprint for the pipeline and associated facilities. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific sites and access to physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown notes the proponent's commitment to ongoing engagement

with Aboriginal groups regarding the integration of traditional knowledge related to the location and construction of the Project.

Chawathil expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its traditional and cultural practices, including impacts on Chawathil's spiritual connection with the land, especially for youth and future generations. As described previously, the Crown understands that Project-related activities may result in temporary interruptions to Chawathil's cultural and spiritual practices, or that their participation in the traditional activity is curtailed, during Project construction and routine maintenance activities.

In consideration of the information available to the Crown from the NEB process, consultation with Chawathil, Chawathil's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor impact on Chawathil's other traditional and cultural practices. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on Chawathil traditional and cultural practices;
- Project-related construction and routine maintenance activities within Chawathil traditional territory are temporary and thus, likely to cause minor disruptions to Chawathil community members accessing traditional and cultural practice sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Chawathil regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their other cultural and traditional practices.

Impacts on Aboriginal Title

The Crown provides a description of the potential impacts of the Project on Aboriginal title in Section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB conditions that would either directly or indirectly avoid/reduce Project impacts associated with the degree of disturbance to terrestrial and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as well as NEB conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved.

Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in Section 4.3.5, it is the Crown's opinion that the Project is expected to have minor impacts on Chawathil's asserted Aboriginal title to the proposed Project area.

Impacts Associated with Accidental Pipeline Spill

Chawathil expressed several concerns with direct and indirect effects of Project-related pipeline spills on their Aboriginal Interests, particularly:

- The possible destruction of Chawathil's territory considering the constrictive nature of the Fraser Valley;
- The importance of water for cultural practices, spirituality, livelihoods, and passage rights;
- The more than forty streams that run through Chawathil's traditional territory;
- The twenty km of traditional fishing area that could be threatened by a terminal spill;
- The potential for a spill to compound the existing flood risk facing the community; and
- The consumption of traditional sources of food.

The Crown also understands Chawathil's concerns regarding spills, and the potential for a spill to impact Chawathil's use and occupation of its asserted traditional territory, ability to make decisions over the area impacted, and the potential for a spill to adversely impact any economic development aspirations Chawathil has for its territory.

A discussion of the potential impacts of a pipeline spill on Aboriginal Interests is provided in Section 4.3.6 of this Report. In consideration of this information and analysis, as well as information available to the Crown on Chawathil's Aboriginal Interests and concerns raised by Chawathil during the NEB process and Crown consultation process, a pipeline spill associated with the Project could result in minor to serious impacts on Chawathil's Aboriginal Interests. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. The Crown acknowledges that Aboriginal peoples who live nearby and rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.²

VI – Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations, the Crown expects impacts of the Project on the exercise of Chawathil's Aboriginal Interests would be minor.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Chawathil's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Chawathil in emergency response planning activities. The federal Crown is also considering incremental

² Trans Mountain Final Argument, p. 85 and 207

measures that would further accommodate the potential adverse impacts of the Project on Chawathil, as discussed in Sections 4 and 5 of the main body of this report.

Appendix C.8 – Cheam First Nation

I – Background Information

Cheam First Nation (Cheam) is located in the Hope area of the Upper Fraser Valley, British Columbia (BC). Cheam has three reserves: Cheam Indian Reserve No. 1 (305.1 hectares [ha]), Tseatah Indian Reserve No. 2 (157.8 ha), and the shared Pekw'Xe:yles Reserve (10.3 ha), held in common with several other Stó:lō nations, in the eastern Fraser Valley. Cheam's total registered population is 537 (187 members are living on Cheam's reserves, 65 are living on other reserves, and 285 are living off-reserve).

The name "Cheam" is a Halq'eméylem word pronounced "Chiyó:m.", which means "wild strawberry place". The historic name of the band in full seems to have been "Lexwchiyó:m". Cheam is identified as being a band within the Pelhó'lhxw or Pilalt Tribe. Although included in the classification "upper Stó:lō" and sometimes grouped with the Tait or Chilliwack, Cheam is generally classified in the ethnographic literature as a distinct group, sometimes called "Pilalt".

Cheam members historically spoke Halq'eméylem, the language of the Upriver Stó:lō communities, which falls into the Coastal Salish language group. The [Report on the Status of B.C. First Nations Languages](#) [2014] states that amongst Stó:lō people, 1.4% are fluent speakers, 5.2% have some level of skill with the language, and 10.9% are learners. The *Coqualeetza Cultural Education Centre (2013), Language Needs Assessment #2186* states that Cheam has five fluent speakers of the language, 11 persons with some skill with the language, and 21 people learning the language.

Cheam writes of their reserves on their website: "Indian reserves are the remnants of "Our Land" they are the bits and pieces of our sovereignty, of our culture that have survived. They are monuments of our victory against extinction. They are symbols of continuing struggle against our oppression by the Europeans. Today an Indian reserve is a jail. Tomorrow it should be the basis of independence."¹ The Stó:lō often refer to *S'olh Temexw*, which is the name used by the Stó:lō people for their traditional territory. Cheam is not, however, a party to the Stó:lō Bands *Writ of Summons* submitted in 2003, and is not participating in BC Treaty Process.

II – Preliminary Strength of Claim Assessment

- The Project corridor transects Cheam's asserted traditional territory. Approximately 33 kilometres (km) of the proposed pipeline and one pipeline facility (Wahleach Station) would be located within *S'olh Temexw* as historically associated with Cheam.
- The Crown's preliminary assessment of Cheam's claim for Aboriginal rights over the section of the Project, from Chilliwack to the west through to Laidlaw to the east, is that Cheam's *prima facie* claim for rights are assessed as ranging from moderate to the west, to strong in the vicinity

¹ Cheam First Nation. 2016. History: Overview of History of the Stó:lō After Contact. Available at: <http://www.cheam.ca>

of their reserve, IR #1, to moderate in the vicinity of Mount Cheam and then weak from Peters Band's IR to Laidlaw.

- The Crown's preliminary assessment of Cheam's *prima facie* claim for Aboriginal title over the section of the Project, on the south side of the Fraser River, from Chilliwack through to Laidlaw, ranges from moderate to the west, to strong in the vicinity of their current main reserve, IR #1, and dropping quickly to weak again east of Popkum.

III – Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Cheam's Aboriginal Interests, the Crown is of the view that the legal duty to consult Cheam lies at the deeper end of the *Haida* consultation spectrum. Cheam was placed on Schedule B of the section 11 order issued by the BC Environmental Assessment Office (EAO), which afforded Cheam opportunities to be consulted at a deeper level.

Cheam participated in the National Energy Board (NEB) hearing process jointly with Chawathil First Nation (Chawathil). Cheam and Chawathil were active intervenors in the NEB review of the Project and provided correspondence, information requests, written evidence during the hearing, as well as an oral summary argument on January 22, 2016 in Burnaby, BC. Cheam and Chawathil also responded to the Major Projects Management Office's (MPMO) Issues Tracking Table Information Request ([A71253](#)).

The Major Projects Management Office (MPMO) offered Cheam \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Cheam an additional \$14,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Cheam signed a contribution agreement with the MPMO in response to the first of these offers, for a total of \$12,000 in allocated funding. EAO offered Cheam with \$5,000 in capacity funding to assist with the consultation process on October 19 and November 4, 2016 but did not receive a response.

Cheam and Chawathil met jointly with the Crown on April 28, 2016 to discuss the Project. Cheam also met again with the Crown on September 30, 2016. On June 15, 2016, Cheam Chief Ernie Crey was a co-author on a letter signed by collective of First Nations proposing an Indigenous oversight entity for the Project as a mitigation measure.

The Crown provided a first draft of the Consultation and Accommodation Report (the Report) to Cheam for review and comment on August 17, 2016. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016 and Cheam provided comments on both the first and second draft of this Report on November 15, 2016.

Cheam provided a separate Aboriginal group submission to the Crown on November 15, 2016.

IV – Summary of Key Cheam Issues and Concerns Raised

The Crown has gained its understanding of Cheam’s issues and concerns through Cheam and Chawathil’s joint intervention in the NEB hearing process, and through direct engagement and consultation, which included a meeting in Chilliwack on April 28, 2016 and September 30, 2016. In addition, the Crown has considered information regarding the proponent’s engagement with Cheam and Chawathil, as described in the proponent’s Aboriginal Engagement Report (July 2016). Cheam and Chawathil also responded to an Issues Tracking Table Information Request submitted to them by the Crown by further elaborating their concerns. The Crown is in receipt of an open letter sent to Prime Minister Justin Trudeau, Alberta Premier Rachel Notley, and British Columbia Premier Christy Clark dated June 15, 2016, from a collective of Aboriginal groups, including Cheam. This letter identifies interests and concerns related to Indigenous consent of the Project and the Project’s consultation process.

This section offers a summary of the key issues raised by Cheam, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown’s assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown’s views and conclusions. The Crown’s understanding of Cheam’s key Project-related issues and concerns are summarized below:

Methodology, Process and Consultation

Cheam stated it does not accept the Crown's reliance on the NEB process as an appropriate approach to discharge its legal duty to consult. Cheam also expressed their view that the NEB should have consulted with them on the list of issues that was considered during the project review. Cheam expressed the view that their consent is required for the Project to proceed and that Cheam has a right to manage their lands as holders of Aboriginal title.

Cheam also considered the amount of funding available insufficient to enable their meaningful participation. Cheam and Chawathil’s letter from October 10, 2014 states that they were unable to provide the NEB panel with Oral Traditional Evidence due to a lack of funding. In the meeting of April 28, 2016, Cheam and Chawathil drew attention once more to concerns surrounding funding; specifically, the restrictive conditions on funding, the inability to access funding for traditional land use studies or hire technical experts, and a lack of opportunity to engage directly with the Treasury Board Secretariat. Cheam and Chawathil expressed concern that there is a gap in information they would have liked to provide to the NEB (e.g. Oral Traditional Evidence) linked to restrictions in available funds, and this lack of funding has not allowed them to comment or assess gaps in the NEB conditions.

Cheam also noted their view that interaction with the proponent to date has been unsatisfactory

Cultural and Social Impacts

Cheam raised concerns about potential impacts to archaeological artifacts as well as potential impacts on known sacred and ceremonial sites, including recreational areas, historic trail systems, and known areas with culturally modified trees. It was mentioned at the April 28, 2016 meeting that Cheam and

Chawathil have documented 20,000 site-specific land use areas through their land use studies. Impacts to Bridal Veil Park, an important Cheam spiritual site, were also raised.

Environmental Impacts

Cheam stated they have a number of environmental concerns, including: potential environmental and cumulative environmental effects involving degradation of protected areas, wildlife and wildlife habitat, fish and other aquatic species in their habitat (especially impacts to spawning), water quality, air quality and greenhouse gas emissions, land erosion, pollutants from machinery and materials during construction, impacts on *Species at Risk*, the marine environment, the hydrology of wetlands, and potential impacts to the soils and geological structures along the proposed Project alignment.

Marine Impacts

Cheam registered concerns relating to the proposed expansion of marine activity in the Salish Sea and Burrard Inlet.

Impacts on Aboriginal Rights

Cheam described concerns about the potential for the Project to adversely impact their Aboriginal rights, including rights associated with hunting, traditional foods and resources, as well as medicinal plant gathering. In the proponent's supplemental Traditional Land Use submission of July 21, 2014, traditional use sites associated with Cheam and Chawathil were identified, which include: trails and travelways, and sacred sites. Cheam is concerned that the proponent has not demonstrated an understanding of what Cheam require in order to exercise their traditional and current land uses now and in the future. In their Crown consultation meeting of September 30, 2016 Cheam expressed their concern that a catastrophic spill would impact their Aboriginal Interests.

Cumulative Effects

Cheam raised concerns about the cumulative effects of industrial development in its territory, on asserted territory land and water uses, and the disproportionate effect on the impoverished community members that rely on land uses for subsistence purposes. Cheam stated that it did not have the resources required to conduct a full accounting of the cumulative impacts on its territory from hunters, mining, forestry, and others, suggesting this to be a potential shortcoming in the NEB process as Cheam was not able to put this information on the record. Further disruption to hunting areas, as well as animal migration routes, was also raised as a concern.

Health and Human Safety

Cheam identified in conversations with the proponent their concerns regarding human safety and health and noted that community members are impacted by the threat of a spill, which results in increased anxiety and a potential disruption of their connection to the land.

Accidents and Malfunctions

Cheam identified significant concerns about adverse impacts which could result from an accident or malfunction and the release of pipeline contents into the environment. A leak in or near the Fraser River

or its tributaries could contaminate fish habitat for species of cultural and economic importance. Cheam and Chawathil state in a letter from December 9, 2014, that they view the potential for a spill as highly concerning and highly significant. In its September 30, 2016 meeting with the Crown consultation team, Cheam indicated that emergency management is a key concern for Cheam.

Project Construction Phase

Cheam expressed concerns about Project-related construction activities, including the following: cedar removal and waste of cedar timber, impact on fishing in the Fraser River (which is a source of income and important traditional activity), impacts on deer hunting grounds and erosion on hillsides if trees are cleared.

Accommodation Proposals

In his June 15 letter, Chief Crey proposed the creation of an Indigenous oversight committee. The oversight committee would be involved with determining the pipeline route and other specifics during the construction process and during operation. The proposal is based the model implemented by the Diablo Canyon Independent Safety Committee in California. Chief Crey proposes that the creation of such a committee be added to the NEB conditions and that it have the capability to work with the NEB, the proponent, and develop routing plans.

Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Cheam that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

Cheam's Response to NEB Recommendation Report

As indicated in the June 15, 2016 letter and in its September 30, 2016 meeting with the Crown consultation team, Cheam considers the conditions in the *NEB Recommendation Report* insufficient and thus supports the establishment of an Indigenous oversight committee. In the same letter and at the September 30 meeting, Cheam indicated that it did not believe the NEB appropriately recognized Cheam's title rights. In its September 30, 2016 meeting with the Crown consultation team, Cheam expressed concern that the NEB process dominated the assessment of the Project, yet provided no opportunity to discuss rights and title, instead the NEB reduced discussion to land use interests.

V – Potential Impacts of the Project on Cheam's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and Section 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering) by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Cheam's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Cheam's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Cheam's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Cheam, Cheam's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province.

Cheam completed a joint TLRU study with Chawathil which was submitted confidentially to the NEB. The report provided a baseline inventory of harvesting and fixed cultural sites which current Cheam community members have used in their lifetime. A report entitled "*Assessment of Use and Occupancy Data within Proximity to Existing and Proposed TMPL Corridors*" (AUOD) ([A4Q2D1](#)) was filed as written evidence in 2015. Cheam also conducted a Cultural Use Assessment (CUA) for the Project in 2014, which provided information on subsistence and cultural activities practiced throughout Cheam's asserted traditional territory; however, site-specific TLRU information was not provided. In its Supplemental Technical Reports ([A4S7I7](#), [A3Z4Z2](#)), the proponent summarized and estimated approximate distances and directions from the proposed pipeline corridor based on information in the redacted version of the AUOD study and the CUA. Cheam also conducted a joint, third-party Integrated Cultural Assessment (ICA) ([A3Z4Z2](#), [A3Z4Z3](#), [A3Z4Z4](#), [A3Z4Z5](#)) with Sumas First Nation, Aitchelitz First Nation, Kwaw-Kwaw-Apilt First Nation, Shxwhá:y Village, Skowkale First Nation, Skwah First Nation, Soowahlie Indian Band, Squiala First Nation, Tzeachten First Nation and Yakweakwoose First Nation led by Ts'elxweyeqw Tribe Management Limited (TTML). The report provides information regarding subsistence and cultural activities that are practiced throughout Stó:lō asserted traditional territory. The results of the TTML TLRU are summarized in the Supplemental Technical Report ([A3Z4Z2](#)). Traditional cultural practices identified by Cheam include, fishing, hunting, trapping, drying meat, tanning hides, drying fish, red cedar carvings, four-day fast and longhouse, winter dance, mask dance, regalia placement, cleansing/bathing, fasting/sweat ceremony/burning for ancestors, weaving, carving, plant gathering, and torch lighting.

Impacts on Hunting, Trapping and Plant Gathering

As described in their TLRU, hunting and trapping are undertaken by both traditional and modern practices, and are important to Cheam for ceremonial and subsistence purposes. Mountain goat, elk, deer, moose, bear, grouse and various game and birds were identified by Cheam as species that are hunted, of which deer is of particular importance. Plants are harvested for subsistence, medicine, building materials and ceremonial purposes. Cheam Lake is an area that holds cultural and spiritual significance to the Cheam culture.

Cheam did not identify any hunting, trapping or plant gathering sites as part of the CUA. As part of the AUOD study, Cheam and Chawathil identified hunting and plant gathering sites. Forty-nine bird features (duck, grouse, other birds), 286 mammal features (deer, elk, moose, other mammals), and 406 plant and tree features (berries, ceremonial plant, construction wood, firewood, food plant, medicine plant, other plant (or wood), specialty wood) were identified within 1 km of the proposed pipeline corridor. At these sites, Cheam and Chawathil harvest animals for subsistence purposes, and harvest ceremonial plants, construction wood, firewood, wood carving, food plants and medicinal plants. As summarized in TTML TLRU study, Sumas Mountain and Mount Cheam were identified as hunting sites, and Sumas Sloughs and Bowman's Island were identified as trapping sites used by Stó:lō community members.

Cheam identified many concerns related to environmental effects of the Project on hunting, trapping, and plant gathering activities, including loss of berries, traditional medicines, and harvesting opportunities, loss of plants and medicinal resources relied on by Cheam members, and impacts on a wide variety of wildlife species:

- Potential Project and cumulative effects involving the degradation of wildlife and wildlife habitat (such as bear, deer, elk, beaver and cougar habitat), land erosion, pollutants from machinery and materials during construction, impacts on Species at Risk, and potential impacts to the soils;
- Project-related construction activities that could impact deer hunting grounds;
- Project-related construction activities, such as cedar removal and waste of cedar timber;
- The use of pesticides on the RoW and associated toxicity; and
- Oil spill impacts on the environment.

As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants, lichens and vegetation communities of concern, old growth forests, wetlands, and wildlife and wildlife habitat (including species at risk-listed species). If the Project is approved, the NEB conditions would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping, and gathering (Section 4.3.1 of this Report). With regards to specific concerns raised by Cheam, the proponent would implement several mitigation measures to reduce potential effects to species important for Cheam's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction of wildlife to the work site, minimize sensory disturbance and protect site-specific habitat features are outlined in the Project Environmental Protection Plan (EPP) and the Wildlife Management Plans.

Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Cheam's hunting, trapping, and plant gathering activities. The Crown understands that this short-term disruption could temporarily alter the behaviour of community members' hunting,

trapping or plant gathering activities during construction, and that reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project, could have spiritual and cultural impacts on community members. If the Project is approved, the NEB conditions would either directly or indirectly avoid or reduce potential social, cultural, spiritual, and experiential effects associated with hunting, trapping, and plant gathering activities (Section 4.3.1 of this Report). With regards to specific concerns raised by Cheam, the proponent would implement several mitigation measures to reduce potential effects to Cheam hunting, trapping, and plant gathering activities. The proponent is committed to implementing weed management (as outlined in the Weed and Vegetation Management Plan) to reduce the potential for weed infestation following construction, and utilizing an Integrated Vegetation Management approach intended to reduce the use of herbicides and promote healthy ecosystems. The proponent will consult with Aboriginal groups regarding problem vegetation management and methods of treatment. Measures outlined in the proponent's Reclamation Management Plan are intended to stabilize and revegetate affected lands to achieve land productivity along the construction RoW and footprint, equivalent to the adjacent land use. The proponent has also committed to ongoing engagement with Aboriginal groups regarding the integration of traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Cheam, Cheam's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor impact on Cheam's hunting, trapping and plant gathering activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Cheam;
- Project-related pipeline and facility construction and routine maintenance activities within Cheam's traditional territory are temporary and thus, likely to cause minor disruptions to Cheam's community members accessing traditional hunting, trapping and plant gathering sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Cheam regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their hunting, trapping and plant gathering activities.

Impacts on Freshwater Fishing

Cheam identified many concerns related to environmental effects of the Project on fishing activities. As summarized in their TLRU, fishing is considered to be central to Cheam culture and is used for cultural, subsistence and economic purposes. Cheam did not identify any fishing sites during the CUA. As part of the AUOD study, Cheam and Chawathil identified 546 fishing features (ooligan, salmon, sturgeon, trout, other fish), and 21 other aquatic life features (crayfish) within 1 km of the proposed pipeline corridor. Stó:lō community members also identified eight waterways and 16 unnamed channels as fishing sites

during the TTML TLRU study. Site-specific locations in relation to the Project were not provided. Cheam community members identified Hunter Creek as an important location for fishing and recreation. Cheam members also expressed concern about potential disturbances to salmon spawning beds and habitats.

In addition to providing traditional use information, Cheam raised specific concerns with potential Project impacts relating to their Aboriginal right to fish:

- Potential Project and cumulative effects involving the degradation of fish and fish habitat, including impacts on fish and other aquatic species in their habitat (especially to spawning), water quality, and the marine environment, pollutants from machinery and materials during construction, and impacts on *Species at Risk*;
- Project-related construction activities that could impact fishing in the Fraser River, thereby impacting a source of income and important traditional activity;
- Expansion of marine activity and increased marine traffic in the Salish Sea and Burrard Inlet; and
- Oil spill impacts on the environment.

As described in the *NEB Recommendation Report*, Project-related construction and operation could result in low to moderate magnitude effects on fish, fish habitat and surface water. Moderate effects to fish and fish habitat would be localized to individual watercourse crossings where any potential serious harm would be compensated by offset measures. If the Project is approved, the NEB conditions would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Section 4.3.2 of this Report). A number of recommended NEB conditions require the proponent to file reports that will monitor Project-related impacts to fish, fish habitat and riparian habitats. With regards to specific concerns raised by Cheam, the proponent would implement several mitigation measures to reduce potential effects to species important for Cheam's fishing activities. The proponent has committed to time watercourse crossing construction activities to occur within the least-risk biological windows in an attempt to avoid causing serious harm to fish. The proponent has also committed to working with Aboriginal groups to identify the most appropriate means of offsetting serious harm to marine fish and fish habitat and has proposed the implementation of channel and bank reclamation measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat.

In consideration of the information available to the Crown from the NEB process, consultation with Cheam, Cheam's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor impact on Cheam's freshwater fishing activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Cheam;

- Project-related pipeline and facility construction and routine maintenance activities within Cheam’s traditional territory are temporary and thus, likely to cause minor disruptions to Cheam’s community members accessing traditional fishing sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Cheam regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their freshwater fishing activities.

Impacts on Other Traditional and Cultural Practices

Cheam identified many concerns related to environmental effects of the Project on other traditional and cultural practices, including to spiritually and culturally important sites. As summarized in their TLRU, historically Cheam used the Fraser River and its tributaries as travelways. Although less common, traditional travel (canoeing) is still used for participation in spiritual and ceremonial activities, plant gathering, hunting, and fishing, and seasonal travel. Trails were also used as a means of transportation and travel, to participate in spiritual and ceremonial activities, and to gather, hunt and fish. Historical trails and travelways continue to be used by some community members today, and are located throughout the TRLU Regional Study Area (RSA).

Cheam did not identify any specific travelways during the CUA or AUOD Study, or habitation sites during the CUA. As part of the AUOD study, Cheam and Chawathil identified one habitation site (cabin) and 124 gathering places (112 ceremonial site features and 12 other overnight features) within 1 km of the proposed pipeline corridor. Nine sacred sites were identified during the CUA; however the specific locations or proximities to the Project Area were not provided. Sacred sites are located at Jones Creek, Wahleach Creek, Eyteleq’s Creek, W:is Creek, Yellow Creek, Bridal Falls Creek, Elk Creek and Mount Cheam, and include regalia storage, pithouse, ceremony structure, bathing areas, and sites used for spiritual practices (including fasting). As part of the AUOD study, Cheam and Chawathil identified fixed cultural sites such as 27 death sites, 45 other cultural sites, 12 sacred sites and 37 storied landform sites located within 1 km of the proposed pipeline corridor. Stó:lō Nation identified four sacred areas located within 4 km of the Project Area: Cultus Lake, Mount Cheam, Mount Hope and Lady Franklin Rock. Echo Island, Mount Sleese and Mount McGuire are located more than 12 km from the Project Area. Sumas Lake, an important historical site, is crossed by the proposed pipeline corridor. Coqualeetza, approximately 1.6 km northwest of the Project Area, is considered a significant historical and cultural site. As summarized in their TLRU study, Stó:lō community members identified 14 trails and travelways; however site-specific locations in relation to the Project Area were not provided. During the TTML TLRU study, Cheam bighouse was identified as a gathering place. Stó:lō community members identified six burial sites, 11 Sxwo:yxwey places, 18 puberty places, 11 smilha/syuwel places, 10 historic bathing sites and 17 current bathing sites located within 100 m of the proposed pipeline corridor. Site-specific locations were not provided in the ICA.

As described in Section 4.3.4 of the Report, Project-related activities are not likely to result in significant adverse effects on the ability of Aboriginal groups to use land, waters or resources for traditional purposes. If the Project is approved, the NEB conditions would either directly or indirectly avoid or reduce potential environmental impacts on physical and cultural heritage resources (Section 4.3.4 of this

Report). With regards to specific concerns raised by Cheam, the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources important for Cheam's traditional and cultural practices. The proponent has also committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during RoW finalization, narrowing the RoW in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments.

In addition to providing traditional use information, Cheam raised specific concerns with potential Project impacts relating to other traditional and cultural practices:

- Potential Project impacts on archaeological artifacts, and known sacred and ceremonial sites, including recreational areas, historic trail systems, and known areas with culturally modified trees;
- Loss of the spiritual connection with the land, especially for the youth and future generations;
- Impacts to Bridal Veil Park; and
- Threat of an oil spill and potential impacts of an oil spill, resulting in increased anxiety and a potential disruption of Cheam community members' connection to the land.

Project-related activities are expected to cause short-term disruptions that temporarily affect the ability of Aboriginal groups to access land, waters or resources for traditional purposes. The Crown understands that Cheam's opportunities for certain traditional and cultural activities will be temporarily interrupted during construction and routine operation, and there could be reduced access to travelways, habitation sites, gathering sites, and sacred areas. However, temporary disruptions to Cheam's traditional and cultural practices would be largely confined to sites within the Project footprint for the pipeline and associated facilities. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific sites and access to physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown notes the proponent's commitment to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

As described previously, the Crown understands that Project-related activities may result in temporary interruptions to Cheam's cultural and spiritual practices, or that their participation in the traditional activity is curtailed, during Project construction and routine maintenance activities. In consideration of the information available to the Crown from the NEB process, consultation with Cheam, Cheam's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor impact on Cheam's other traditional and cultural practices. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on Cheam's traditional and cultural practices;
- Project-related construction and routine maintenance activities within Cheam's traditional territory are temporary and thus, likely to cause minor disruptions to Cheam's community members accessing traditional and cultural practice sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Cheam regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their other cultural and traditional practices.

Impacts on Aboriginal Title

The Crown provides a description of the potential impacts of the Project on Aboriginal title in Section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid/reduce Project impacts associated with the degree of disturbance to terrestrial and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as well as NEB Conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved.

Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in Section 4.3.5, it is the Crown's opinion that the Project is expected to have minor impacts on Cheam's asserted Aboriginal title to the proposed Project area.

Impacts Associated with Accidental Pipeline Spill

Cheam expressed several concerns with direct and indirect effects of Project-related pipeline spills on their Aboriginal Interests, particularly impacts on the Fraser River in the event that a spill occurs up-river of the reserve and flows down river.

The Crown also understands Cheam's concerns regarding spills, and the potential for a spill to impact Cheam's use and occupation of its asserted traditional territory, ability to make decisions over the area impacted, and the potential for a spill to adversely impact any economic development aspirations Cheam has for its territory.

A discussion of the potential impacts of a pipeline spill on Aboriginal Interests is provided in Section 4.3.6 of this Report. In consideration of this information and analysis, as well as information available to the Crown on Cheam's Aboriginal Interests and concerns raised by Cheam during the NEB process and Crown consultation process, a pipeline spill associated with the Project could result in minor to serious impacts on Cheam's Aboriginal Interests. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a

high degree of uncertainty. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who live nearby and rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill².

VI – Conclusions

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations, the Crown expects impacts of the Project on the exercise of Cheam's Aboriginal Interests would be minor.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Cheam's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Cheam in emergency response planning activities. The federal Crown is also considering incremental measures that would further accommodate the potential adverse impacts of the Project on Cheam, as discussed in Sections 4 and 5 of the main body of this Report.

² Trans Mountain Final Argument, p. 85 and 207

Appendix C.11 – Matsqui First Nation

I – Background Information

Matsqui First Nation (Matsqui) is an autonomous tribe whose traditional territory encompasses a large area of the Fraser Valley, British Columbia (BC). Matsqui is an ethnically Stó:lō community whose traditional language is Halq'eméylem. Matsqui has an affiliation with the Stó:lō Nation through the Stó:lō Nation Chiefs Council. Matsqui has made it clear that this affiliation exists for service delivery purposes and does not represent a political affiliation.

Matsqui consists of five reserves located west and north of Abbotsford: Matsqui no. 4 (24.3 hectares [ha]), Matsqui Main no. 2 (129.7 ha), Sahhacum no. 1 (20.2 ha), Three Islands no. 3 (246.3 ha), and the shared Pekw'xe:yales (Peckquaylis) (10.3 ha). Its total registered population, as of June 2016, is 265 (100 are living on their reserve, 16 are living on other reserves, and 149 are living off reserve).

Matsqui is a party to the Stó:lō Nation protective *Writ of Summons*, filed in the BC Supreme Court on December 9, 2003, asserting Aboriginal title to a territory identified in the writ. Matsqui signed a revenue sharing agreement with the Province of BC in 2013, identifying its asserted traditional territory in the 2013 Forest Consultation and Revenue Sharing Agreement.¹

Matsqui Main no. 2 is crossed by the existing pipeline right-of way (RoW). The Project RoW may diverge from the existing pipeline route in close proximity to Matsqui Main no. 2. The final proposed RoW may transect the southwest corner of the reserve at the consent of Matsqui.

Matsqui has a Land Code in place pursuant to the Framework Agreement on First Nation Land Management and the *First Nation Land Management Act*, (S.C. 1999, c. 24). Any disposition of land tenures on Matsqui Lands must be done in accordance with Matsqui's Land Code and the Matsqui Environmental Assessment Law. Matsqui's Environmental Assessment Law requires that an environmental assessment be conducted for any grant or disposition of an interest in First Nation Land and any Project on First Nation Land (s. 5.1). According to the Land Code, any grant or disposition of an interest in Matsqui Land for a term exceeding 49 years, requires approval by majority vote of Eligible Voters who attend a meeting (s. 23.1). As such, the proposed interest on Matsqui Main no. 2 required adherence to Matsqui's Land Code and Environmental Assessment Law.

Trans Mountain sought and received the consent of Matsqui for the construction and operation of the Project on Matsqui Main no. 2 through the process clearly delineated in Matsqui's Land Code. Matsqui provided a letter of support for the Project pursuant to the conditions set out in its own environmental assessment [[A4X3L2](#)].

¹ http://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/frcsa_matsqui.pdf

II – Preliminary Strength of Claim Assessment

- Approximately 40 kilometres (km) of the proposed pipeline and two pipeline facilities (Sumas Station and Sumas Tank Farm) would be located within Matsqui's asserted traditional territory.
- The existing and proposed RoW travels 170 km through the Stó:lō Nation writ. The proposed new pipeline would be located largely within the existing RoW with some adjustment for habitat and geological considerations.
- The existing RoW and proposed pipeline cross Matsqui Main Reserve no. 2.
- The Crown's preliminary assessment of Matsqui's claim for rights is strong in the portion of the Project south of Mission that overlaps the area considered to be Matsqui historic territory. The Matsqui territory included the southern section of the river bank from Sumas Mountain to Crescent Island; inland, Matsqui had the area between Abbotsford and Aldergrove and south into Nooksack territory. Matsqui had a village on the south shore of the Fraser River village (Matsqui IR 4) as well as one located inland at Clayburn (probably located at Sahhacum IR 1), which some ethnographers considered to be the "main" Matsqui village. The upland territory of the Matsqui, south of the Fraser and north of the boundary with the Nooksack territory, featured a well-established network of land and water routes that enabled travel through a varied landscape of forests, marshes and prairie. A village site located in South Langley, likely in or around the Matsqui Reserve adjacent to the American border, indicates settlement and regular use south of the Fraser River as far as the border. The Matsqui are described as having hunted for game, birds and waterfowl, collected edible and medicinal plants, fished and harvested timber in this general area through the early 1900s.
- The portion of the Project east of that area is assessed as moderate-to-strong as Sumas and Matsqui appear to have a long-standing, strong relationship and may have utilized hunting and resource areas in an agreeable or organized manner. Generally speaking the use of territories by Sto:lo groups was not necessarily exclusive – the vast areas with less significant resources may have been more freely used. However, while Matsqui appear to have had close connections with their neighbours, especially the Nooksack and Sumas, it appears that these groups recognized and respected the boundaries between each other's territories. While sharing took place, it was probably with permission of their neighbour given the potential reprisals for breach of protocol or trespass. The portion of the Project west of this area is assessed as a weak-to-moderate claim as that area was considered outside historic Matsqui territory, and although it is possible Matsqui used that area due to its proximity to Sumas territory, it was probably subject to the permission of the Kwantlen, whose territory it was considered at time of contact.
- The Crown's preliminary assessment of Matsqui's claim for title is strong in the portion of the Project in proximity to Clayburn, where it appears an important village was located. Upland territory featured well established land and water routes that were used regularly to travel around the territory for hunting, fishing and resource gathering. The portion of the Project east of that area is assessed as weak-to-moderate as it was considered Sumas territory, and also

decreasing to weak-to-moderate towards the western portion of its asserted territory as that was considered Kwantlen territory.

III – Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Matsqui's Aboriginal Interests, the Crown is of the view that the legal duty to consult Matsqui lies at the deeper end of the *Haida* consultation spectrum. Matsqui was placed on Schedule B of the Section 11 order issued by the EAO, which affords Matsqui opportunities to be consulted at a deeper level.

Matsqui participated in the National Energy Board (NEB) hearing process as an intervenor and submitted written evidence (including confidential traditional use information), participated in two rounds of information requests to the proponent, responded to the Major Projects Management Office's (MPMO) information request (draft issues tracking table [[A71200](#)]), and corresponded with the NEB regarding section 18 of the *Canadian Environmental Assessment Act* (CEAA) 2012.

Matsqui signed a contribution agreement with the NEB totaling \$75,000 plus travel for two to the hearing. The Major Projects Management Office (MPMO) offered Matsqui \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Matsqui an additional \$14,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Matsqui signed a contribution agreement with the MPMO in the amount of \$26,000. On September 30, 2016 Matsqui was issued \$5,000 in capacity funding by EAO to assist with the consultation process.

On October 2, 2015, the proponent and Matsqui signed a confidential mutual benefits agreement (MBA), which included a Letter of Support for the Project [[A4X3L2](#)].

Matsqui met with the Crown during the Early Engagement Phase on June 13, 2014. Matsqui met with the Crown consultation team following the close of the NEB hearing record on March 1, 2016 and September 26, 2016.

A first draft of this Consultation and Accommodation Report (the Report) was provided to Aboriginal groups for review and comment on August 17, 2016. Matsqui provided comments on the first draft of the Report on September 22, 2016, and on October 25 and 27, 2016. These comments have been considered and addressed in this version of the Report. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016. On November 2, 2016, Matsqui provided the Crown with additional Traditional Land Use information to inform the preliminary Strength of Claims assessment.

IV – Summary of Key Matsqui Issues and Concerns Raised

The Crown has gained its understanding of Matsqui's issues and concerns through Matsqui's involvement in the NEB process, including the responses provided to the Crown on its Information Request (IR) addressed to Matsqui, and through other engagement with the Crown. In addition, the

Crown has considered information regarding the proponent's engagement with Matsqui, as described in the proponent's Aboriginal Engagement Report (July 2016). This section offers a summary of the key issues raised by Matsqui, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Matsqui's key Project-related issues and concerns are summarized below:

Methodology, Process and Consultation

Despite active participation in the NEB process and extended correspondence with the NEB, Matsqui were frustrated with the lack of recognition of Matsqui's jurisdiction under the *First Nations Land Management Act* and the Framework Agreement on First Nation Land Management. Matsqui noted that a major problem with the NEB hearing process was the burden placed on intervenors to assess the Project, leaving intervenors responsible to submit research and reports to challenge the statements made by the proponent in its application. Matsqui has noted in their evidence and correspondence with the NEB, Canada and the Province of British Columbia, that reviewing large volumes of materials is a significant burden.

Matsqui asserted that areas of particular concern – namely, the impact of a catastrophic spill in the Fraser River, the risk associated with liquefaction in the Fraser Valley, emergency response, and the cumulative impact of the Project on Matsqui's territory – were not properly addressed through the NEB hearing process. Matsqui further indicated that the failure of the NEB to require the proponent to conduct a seismic risk analysis during the preparation of the environmental assessment is a major concern.

Matsqui indicated the view that their consent is necessary because of the proximity of the pipeline route to Matsqui Main Reserve no.2 and because the Project travels through their core territory. Matsqui believes that their consent is required regardless of whether the Project crosses Matsqui Main no. 2 or their traditional territory.

In a letter to the MPMO dated September 22, 2016 Matsqui indicated that they believed they had "been understood by the NEB" and therefore were deeply disappointed to review the draft Consultation and Accommodation Report, which Matsqui determined reflected "inaccurate characterizations of [Matsqui's] rights." Matsqui views the NEB process as inadequate because it does not allow for forms of accommodation to be considered (including economic accommodation) that Matsqui has stated the Crown must provide if the Governor-in-Council approves the Project.

Cumulative Impacts

Matsqui raised several concerns with how cumulative impacts were assessed at the NEB. Matsqui noted that the cumulative environmental impact of numerous projects (e.g., logging, urban development, farming, and draining) has compromised the ability of Matsqui people to use and regulate the resources of their territory. For example, many trapping areas in the territory are no longer active due to the establishment of regional parks, urban development, and drainage of semi-aquatic trapping areas.

Matsqui also stated that the baseline of the effects assessment should take into account the conditions prevailing before European settlement.

Economic Impacts

Matsqui is concerned about potential adverse economic impacts of the Project. Were there to be a spill on or near Matsqui reserve lands or the Fraser River it could potentially impact Matsqui due to:

- Jobs/wages lost from disruption of on-reserve industry;
- Lost rent/taxes from disrupted industrial tenants;
- Lost/diminished residential development opportunities;
- Replacement cost of fish for personal consumption; and
- Potential impact to Economic Opportunity fishery.

Impacts to Aboriginal Rights and Title

Matsqui places considerable emphasis on their claimed status as a sovereign nation. They highlighted that they have the authority to make land use and other decisions on Matsqui reserve lands, pursuant to the *First Nations Land Management Act* and the Framework Agreement on First Nation Land Management.

Matsqui continues to claim Aboriginal title over the entirety of their traditional territory. Matsqui indicated that, should the Project be approved without Matsqui consent, whether or not it crosses Matsqui Main no. 2, it would be viewed as an affront to Matsqui sovereignty.

Similarly, Matsqui believes a marine oil spill could negatively impact their Aboriginal right to fish on the Fraser River.

Matsqui asserts Aboriginal rights and title throughout their traditional territory (including hunting, fishing, harvesting/medicine gathering rights) and is concerned that the Project will have an impact on land, water and resources within their traditional territory.

Health and Human Safety

Matsqui expressed concerns about the proponent's response to potential oil spills. Specifically, Matsqui is concerned that the proponent's assessment of impact of spills on human health inappropriately considered Matsqui members as urban dwellers and did not distinguish the unique and significantly adverse impacts of a spill on Matsqui. Many Matsqui members live on reserve lands that are not urban areas, and Matsqui consumes significantly more fish directly from the Fraser River than typical urban populations. Matsqui members are therefore more vulnerable to adverse health outcomes from potential pipeline spills.

Accidents and Malfunctions

One of Matsqui's most pressing concerns has to do with the impact of an oil spill, particularly one that affects the Fraser River on which Matsqui heavily relies as a source of social wellbeing, physical activity,

cultural enrichment, and country food (especially salmon). Should a worst-case major oil spill occur, it is possible that the negative impacts could last for decades. Matsqui is concerned about the impact of a spill on eulachon and sturgeon, two fish species that are currently designated as endangered by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC).

Matsqui's Response to NEB Recommendation Report

Matsqui raised concerns that the *NEB Recommendation Report* did not adequately address how the Project would adversely impact Aboriginal title. Further, the NEB referred to traditional governance systems that may be affected if the Project impacts traditional activities. The *NEB Recommendation Report* it does not address the ways in which modern self-governance will be impacted by the Project. Matsqui also raised concerns about the NEB conclusions regarding likelihood and significance being problematic. The NEB conclusions on impacts do not properly take into account cumulative effects of the Project.

Matsqui understands that many of the conditions suggested by the NEB involve further reports to be produced by the proponent. Matsqui considers the findings of these reports to be relevant to issues raised and considered through the course of Matsqui's participation in the NEB hearing and through its environmental assessment.

Matsqui's final determination pursuant to its Environmental Assessment Law, will include consideration of the following conditions being fulfilled by the proponent no later than 90 days prior to commencement of construction:

- A seismic risk assessment of Matsqui Traditional Territory;
- Assessment of Trans Mountain Expansion Project logistics plans, worker and population estimates, traffic effects, and other socioeconomic effects of the construction workforce in Matsqui traditional territory, including Traffic Control Plans, Traffic and Access Control Management Program, and related information that will not be available until 90 days before construction; and
- A stand-alone list of actions and commitments to avoid, mitigate, or compensate for identified Project effects. This list should include actions described in the text of the environmental assessment, even if those actions are not contained in mitigation tables or the Socio-Economic Management Plan, and a commitment to comply with conditions and requirements established by the NEB at any time during the pre-construction, construction, or post-construction periods.

V – Potential Impacts of the Project on Matsqui's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), including by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Matsqui's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Matsqui's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g. fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Matsqui's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Matsqui, Matsqui's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant conditions proposed by the Province of any Environmental Assessment Certificate issued.

Matsqui conducted a traditional land and resource use (TLRU) study titled, *For We are the Real Owners of the Land from Time Immemorial as God Created Us Indians in this Territory: Historical Land Use, Territory, and Aboriginal Title of the Matsqui People*. The complete TLRU study was filed as confidential written evidence and a redacted version was submitted to the NEB that removes current traditional use information to ensure confidentiality of the information. In its Supplemental Technical Report [[A4S717](#)], the proponent estimated approximate distances and directions from the pipeline corridor based on information in Matsqui's redacted version of the TLRU study. As Matsqui noted in the comments on the draft Report, the TLRU sites identified in the redacted TLRU study are examples only and are not comprehensive.

Impacts on Hunting, Trapping and Plant Gathering

As described in their TLRU, Matsqui community members historically hunted black and grizzly bear, elk, mountain goat, deer, wildcat (lynx), groundhog (marmot), marten, raccoon, squirrel and beavers within their traditional territory and continue to hunt game and birds. Matsqui hunted fowl including geese, ducks, grouse, pheasants, blue heron, robins, jays, crows, partridges and eagles. Knowledge of hunting methods, animal knowledge and accompanying teachings were passed down between generations. Hunting remains a common land use activity for certain Matsqui people. The TLRU records that today, members hunt for deer, elk, moose, geese, grouse, ducks and pheasants in Matsqui territory. Community members commonly trap mink, muskrat, rabbit, fox, raccoon, beaver and river. Community members also grew and harvested cranberries on the Matsqui Prairie and harvested medicinal tea leaves, leaf stems of cow parsnips, huckleberries, wetland wapato, prairie camus roots huckleberries, salmonberries, blackberries, crab apples and skunk cabbage. Western red cedar was collected for many manufactured products, including house posts and planks, canoes, basketry, clothing and textiles. Historically, community members managed berry and grass resources in their traditional territory using controlled burns and continue to manage these resources using the same method.

Matsqui identified concerns related to environmental effects of the Project on hunting, trapping, and plant gathering activities, including their ability to harvest deer, elk, moose, geese, grouse, ducks, pheasants, traditional medicines, berries, and cedar. As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens, vegetation communities of concern, old growth forests, wetlands, and wildlife and wildlife habitat (including at risk-listed species). If the Project is approved, the NEB conditions would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping, and gathering (Section 4.3.1 of this Report). With regards to specific concerns raised by Matsqui, the proponent would implement several mitigation measures to reduce potential effects to species important for Matsqui's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction of wildlife to the work site, minimize sensory disturbance and protect site-specific habitat features are outlined in the Project Environmental Protection Plan (EPP) and the vegetation and wildlife management plans.

Matsqui identified hunting, plant gathering and trapping sites in their TLRU study. A duck hunting site on Sumas Prairie and a plant gathering site on Matsqui Prairie are within the proposed pipeline corridor. Other hunting and plant gathering sites were identified in the TLRU study although the locations of these sites were kept confidential. Matsqui's TLRU recorded 30 trapping areas in Matsqui territory, of which many are no longer active due to regional parks, urban development and drainage of semi-aquatic trapping areas. Trap lines are primarily along the creeks in Matsqui territory from Fort Langley to the Matsqui reserve lands, and south through to Aldergrove [IR 4]. Specific use areas included Matsqui Islands [IR 3], Queen's Island, Burgess Creek, Mount Lehman, Sumas River, and Bradner. Matsqui continues to harvest plants throughout their traditional territory including Matsqui Prairie. In addition to hunting in Matsqui territory, Matsqui members also hunt in Stó:lō territory. When Matsqui hunt in the traditional Stó:lō territory, the use of these territories is facilitated by cultural protocols similar to those of the past.

Matsqui raised concerns with the Project's potential impacts relating to specific locations and access to hunting, trapping, and plant gathering activities. Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Matsqui's access to hunting, trapping and plant gathering activities, largely confined to the Project footprint for the pipeline and associated facilities. The Crown understands that with construction and reclamation activities, disruptions to access may result in a loss of harvesting opportunities for Matsqui. If the Project is approved, the NEB conditions would either directly or indirectly avoid or reduce potential impacts on specific locations and access associated with hunting, trapping, and gathering sites (Section 4.3.1 of this Report). With regards to specific concerns raised by Matsqui, the proponent would implement several mitigation measures to reduce potential effects on TLRU sites important for Matsqui's hunting, trapping, and plant gathering activities, such as management plans that include access management, scheduling and notification of

Project activities, and environmental monitoring programs that monitor access control measures. The Access Management Plan is intended to reduce disturbances caused by access, construction equipment and vehicle traffic during and following construction in order to minimize disturbance to access to Matsqui's traditional lands. The proponent has committed to minimizing the development of access routes, controlling public access along the construction right-of-way, selecting appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent has also committed to work with applicable resource managers, traditional land and resource users to define locations where access control is necessary, and what type(s) of access control will be implemented. In the event that hunting, trapping, and plant gathering sites are identified during ongoing engagement with Matsqui prior to construction, the sites will be assessed, and appropriate mitigation measures will be determined. The proponent committed to working with Matsqui to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Matsqui raised concerns regarding the direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities, including impacts to Matsqui cultural expression, health, and social well-being. Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Matsqui's hunting, trapping, and plant gathering activities. The Crown understands that this short-term disruption could temporarily alter the behaviour of community members' hunting, trapping or plant gathering activities during construction, and that reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project, could have spiritual and cultural impacts on community members. If the Project is approved, the NEB conditions would either directly or indirectly avoid or reduce potential social, cultural, spiritual, and experiential effects associated with hunting, trapping, and plant gathering activities (Section 4.3.1 of this Report). The proponent has also committed to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Matsqui, Matsqui's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor-to-moderate impact on Matsqui's hunting, trapping and plant gathering activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Matsqui;
- Project-related pipeline and facility construction and routine maintenance activities within Matsqui's traditional territory are temporary and thus, likely to cause minor disruptions to Matsqui's community members accessing traditional hunting, trapping and plant gathering sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and

- Concerns identified by Matsqui regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their hunting, trapping and plant gathering activities.

Impacts on Freshwater Fishing

As summarized in their TLRU, Matsqui community members historically fished for salmon (coho, sockeye, spring, pink, chum) from Crescent Island to Sumas Mountain. Currently, community members fish in streams located throughout the Matsqui Prairie and fish for salmon and sturgeon along the Fraser River. Matsqui filed other evidence with the NEB that identified the Matsqui Fishing Area, an area in and along the Fraser River from the mouth of Stave River to the Mission Railway Bridge, as the main fishing area that contains numerous fishing sites. The proposed pipeline corridor crosses the Fraser River, although not in Matsqui's traditional territory.

Matsqui identified many concerns related to environmental effects of the Project on fishing activities, including the risks of a spill adversely impacting Matsqui's ability to fish for salmon and other species. As described in the *NEB Recommendation Report*, Project-related construction and operation could result in low to moderate magnitude effects on fish and fish habitat and surface water. Moderate effects to fish and fish habitat would be localized to individual watercourse crossings where any potential serious harm would be compensated by offset measures. If the Project is approved, the NEB conditions would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Section 4.3.2 of this Report). A number of recommended NEB conditions require the proponent to file reports that will monitor Project-related impacts to fish, fish habitat and riparian habitats. With regards to specific concerns raised by Matsqui, the proponent would implement several mitigation measures to reduce potential effects to species important for Matsqui's fishing activities. The proponent has committed to time watercourse crossing construction activities to occur within the least risk biological windows in an attempt to avoid causing serious harm to fish, has committed to working with Aboriginal groups to identify the most appropriate means of offsetting serious harm to marine fish and fish habitat, and has proposed the implementation of channel and bank reclamation measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat.

Matsqui identified fishing sites in their TLRU study, three of which are within the proposed pipeline corridor. These sites include the Sumas watershed, streams throughout Matsqui Prairie, and the Fraser River.

Matsqui raised concerns with the Project's potential impacts relating to specific locations and access to fishing activities, including streams throughout the Matsqui Prairie, and along the Fraser River from the mouth of the Stave River to the Mission Railway Bridge. Project-related construction and routine maintenance activities are expected to cause short-term, temporary disruptions to Matsqui's access to fishing activities. The Crown understands that if construction and reclamation occur during the fishing season, there could be a potential reduction in access to waterways, staging areas, and fishing sites for Matsqui community members. However, disruptions to access would largely be confined to the Project footprint for the pipeline and associated facilities during construction and reclamation. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on

specific locations and access to fishing sites important for Matsqui (Section 4.3.2 of this Report). With regards to specific concerns raised by Matsqui, the proponent would implement several mitigation measures to reduce potential effects to fishing sites important for Matsqui's fishing activities. As previously discussed, the proponent is committed to minimize disturbance to access to Matsqui's traditional lands, as described in the Access Management Plan. The proponent committed to working with Matsqui to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Matsqui expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its fishing activities, as Matsqui heavily relies on the Fraser River as a source of social wellbeing, physical activity, cultural enrichment, and country food (especially salmon). As described previously, the Project construction and routine maintenance is expected to cause short-term, temporary disruptions to Matsqui's fishing activities. The Crown understands that this temporary interruption could mean that community members alter their fishing activities during construction, which could affect their participation in the traditional activity. NEB conditions, if the Project is approved, would either directly or indirectly reduce the potential effects on social, cultural, spiritual or experiential effects associated with fishing activities (Section 4.3.2 of this Report).

In consideration of the information available to the Crown from the NEB process, consultation with Matsqui, Matsqui's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor-to-moderate impact on Matsqui's freshwater fishing activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Matsqui;
- Project-related pipeline and facility construction and routine maintenance activities within Matsqui's traditional territory are temporary and thus, likely to cause minor disruptions to Matsqui's community members accessing traditional fishing sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Matsqui regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their freshwater fishing activities.

Impacts on Other Traditional and Cultural Practices

As summarized in their TLRU, other traditional and cultural practices identified by Matsqui include trails/travelways, habitation sites, gathering places, and sacred areas. Historically, the Fraser River and its tributaries were major travelways for Matsqui. Community members also historically used trails and travelways throughout the Matsqui Prairie and continue to use trails/travelways in their traditional territory today. Matsqui identified historic and current use of habitation sites throughout their traditional territory including historic villages and settlements on Matsqui Island, the mouth of Matsqui

Creek, high plateau near Fishtrap Creek Park, and Bradner and Ross Roads near the Canada/United States border, among others. Community members continue their participation in a variety of regional, social, economic and political gatherings including potlatches, winter dance ceremonies, and masked dances. Ceremonies connect Matsqui with other Aboriginal groups from the lower Fraser region, Washington, and Coast Salish communities.

As described in Section 4.3.4 of the Report, Project-related activities are not likely to result in significant adverse effects on the ability of Aboriginal groups to use land, waters or resources for traditional purposes. If the Project is approved, the NEB conditions would either directly or indirectly avoid or reduce potential environmental impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). With regards to specific concerns raised by Matsqui, the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources important for Matsqui's traditional and cultural practices. The proponent has also committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during RoW finalization, narrowing the RoW in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments.

Other traditional and cultural practices sites identified by Matsqui in their TLRU include 12 habitation sites and two sacred areas. Matsqui also identified a network of historic trails and travelways linking the Fraser River through Matsqui Prairie and gathering places throughout the lower Fraser River watershed downriver of Sawmill Creek. Within the proposed pipeline corridor, Matsqui identified one trail/travelway and four habitation sites including Matsqui Main Reserve no. 2, settlements along Sumas Lake and the Fraser River, as well as winter homes/settlements along Matsqui Creek/McLennan Creek. Matsqui identified an additional three habitation sites within 2 km of the proposed pipeline corridor. No gathering places or sacred areas were identified within the proposed pipeline corridor. In their TLRU, Matsqui identified several transformer sites on Sumas Mountain that are important to the Matsqui. Matsqui noted that near the east/west middle of the mountain, close to its northern end, is a small lake known as either Lost Lake or Chadsey Lake. According to oral traditions, this lake is the home of Thunderbirds who have a house on a rock in the water. To the south, closer to the Sumas Kilgard community, are caves and a stone known as Thunderbird Caves and Thunderbird Rock. Other trails/travelways, habitation sites, gathering places, and sacred areas were identified in the TLRU study although geographic locations were not provided for confidentiality purposes.

Project-related activities are expected to cause short-term disruptions that temporarily affect the ability of Aboriginal groups to access land, waters or resources for traditional purposes. The Crown understands that Matsqui's opportunities for certain traditional and cultural activities will be temporarily interrupted during construction and routine operation, and there could be reduced access to travelways, habitation sites, gathering sites, and sacred areas. However, temporary disruptions to Matsqui's traditional and cultural practices would be largely confined to sites within the Project footprint for the pipeline and associated facilities. If the Project is approved, the NEB conditions would

either directly or indirectly avoid or reduce potential impacts on specific sites and access to physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown notes the proponent's commitment to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project.

Matsqui expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its other traditional and cultural practices, including social wellbeing and cultural enrichment. As described previously, the Crown understands that Project-related activities may result in temporary interruptions to Matsqui's cultural and spiritual practices, or that their participation in the traditional activity is curtailed, during Project construction and routine maintenance activities.

In consideration of the information available to the Crown from the NEB process, consultation with Matsqui, Matsqui's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor impact on Matsqui's other traditional and cultural practices. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on Matsqui's traditional and cultural practices;
- Project-related construction and routine maintenance activities within Matsqui's traditional territory are temporary and thus, likely to cause minor disruptions to Matsqui community members accessing traditional and cultural practice sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their other cultural and traditional practices.

Impacts on Aboriginal Title

Matsqui has authority over Matsqui reserve lands pursuant to the Framework Agreement on First Nation Land Management and the *First Nation Land Management Act*, (S.C. 1999, c. 24). Because of that authority, a proponent proposing a project on Matsqui reserve lands must complete an environmental assessment as a condition of gaining Matsqui's permission to use its reserve lands.

Matsqui is concerned that using land for pipeline activities adversely impacts Matsqui's claimed right to make and benefit from land use decisions. Matsqui believes that because of its strength of claim and the seriousness of the Project's impact, a decision to approve the Project without Matsqui's consent on its reserve lands and within its core traditional territory, would be an unjustified infringement of its title.

Matsqui raised other specific concerns related to the impacts of the Project on its Aboriginal title claims, including throughout the NEB and Crown consultation process:

- Impacts could impede or disrupt Matsqui's use of its asserted traditional territory;

- The reliance on country foods is critically important to Matsqui members' economic well-being; and
- Impact of an oil spill, particularly one that affects the Fraser River on which Matsqui heavily relies as a source of material wealth.

The Crown provides a description of the potential impacts of the Project on Aboriginal title in Section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid/reduce Project impacts associated with the degree of disturbance to terrestrial and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as well as NEB conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved. The Crown notes that Matsqui executed a Mutual Benefits Agreement with the proponent. Although these agreements are confidential, the Crown understands they may contain provisions for financial, environmental and training benefits that could further reduce or accommodate impacts to Aboriginal title claims if the Project proceeds.

Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in Section 4.3.5, it is the Crown's opinion that the Project is expected to have negligible impacts on Matsqui's asserted Aboriginal title to the proposed Project area.

Impacts Associated with Accidental Pipeline Spills

Matsqui expressed concerns regarding the impact of a potential oil spill on their Aboriginal Interests, including the effects of a spill on Matsqui's ability to exercise their Aboriginal rights, harvest country foods, and to preserve the environment and culturally significant sites. They are also deeply concerned that a spill in the Fraser River could have a catastrophic impact on their ability to fish for salmon and other species on which Matsqui rely for their physical, spiritual, emotional, and cultural well-being.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. A discussion of the potential impacts of an accidental pipeline spill on Aboriginal Interests is provided in Section 4.3.6 of this Report. In consideration of this information and analysis, as well as information available to the Crown on Matsqui's Aboriginal Interests and concerns raised by Matsqui during the NEB review and Crown consultation processes, a pipeline spill associated with the Project could result in minor to serious impacts on Matsqui's Aboriginal Interests. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.²

² Trans Mountain Final Argument, p. 85 and 207.

VI – Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations, the Crown expects impacts of the Project on the exercise of Matsqui's Aboriginal Interests would be up to minor-to-moderate.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Matsqui's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Matsqui in emergency response planning activities. The federal Crown is also considering incremental measures that would further accommodate the potential adverse impacts of the Project on Matsqui, as discussed in Sections 4 and 5 of the main body of this Report.

In addition, the Crown is aware that the proponent has entered into a Mutual Benefits Agreement with Matsqui in an attempt to offset potential impacts, should the Project proceed.

Appendix C.15 – Shxw’ówhámél First Nation

I - Background Information

Shxw’ówhámél First Nation (Shxw’ówhámél) is located along the banks of the Fraser River in southwestern British Columbia (BC), approximately 10 kilometers (km) west of Hope, BC.

Shxw’ówhámél (pronounced “*Sh-wow-HA-mel*”) is part of the Stó:lō ethno-cultural group and is a party to the Stó:lō Nation *Writ of Summons* filed in the BC Supreme Court on December 9, 2003. Shxw’ówhámél is a party to the Stó:lō First Nation Strategic Engagement Agreement with the Province of BC, signed in 2014, which identifies its asserted traditional territory.¹ Shxw’ówhámél signed a revenue sharing agreement with the Province of BC in 2016, identifying its asserted traditional territory in the 2016 Forest Consultation and Revenue Sharing Agreement.²

As Stó:lō people, Shxw’ówhámél have close cultural and spiritual connections with the Fraser River. This central role of the Fraser River is captured by the name Shxw’ówhámél, which means “where the river widens” and is a direct reference to Shxw’ówhámél’s traditional village sites that were located along the banks of the Fraser River where it widens after exiting the Fraser Canyon. The Fraser River is also an important year-round food source for Shxw’ówhámél: members actively hunt, fish for salmon and other species, and gather berries and plants along its shoreline.

Shxw’ówhámél’s traditional language is the Stó:lō language, Halq’eméylem.

There are 197 registered Shxw’ówhámél members, of which 80 are living on reserve. Shxw’ówhámél holds four reserves, two of which are located on the Fraser River just west of Hope (Ohamil No. 1, Wahleach Island No. 2). A third reserve is located further north on the Fraser River to the east of Yale, BC (Kuthlath No. 3). A final reserve is held in common with several other Stó:lō communities near Mission, BC on the north side of the Fraser River (Pekw’xe:yles).

As of spring 2016, the proponent advised they had a commercial agreement with Shxw’ówhámél to construct the Project across their reserve lands (Ohamil No. 1). The proponent will be seeking Governor in Council authorization for *Indian Act* s.35 tenures if the proponent is granted rights to expropriate to allow for the expansion of the pipeline. The *Indian Act* tenure will require a Band Council Resolution requesting the tenure be issued. Additionally, the form of agreements and fair market compensation will be considered before the approval of the tenure. Shxw’ówhámél has a Land Code in place; therefore, the proponent will negotiate the tenure under the code.

¹ http://www2.gov.bc.ca/assets/gov/zzzz-to-be-moved/9efbd86da302a0712e6559bdb2c7f9dd/9efbd86da302a0712e6559bdb2c7f9dd/agreements/sea_stolo_nations.pdf

² http://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/shxwowhamel_fcrsa_executed_feb22_2016.pdf

The existing pipeline crosses Shxw'ōwhámél's Ohamil No. 1 reserve.

II - Preliminary Strength of Claim Assessment

- The Project right of way (RoW) is estimated to run through 195 km of Shxw'ōwhámél's asserted traditional territory – also delineated as the Stó:lō Nation writ area. Six facilities (i.e. Hope Station, Wahleach Station, Sumas Station, Sumas Terminal, Border Traps, and Westridge Marine Terminal) would be located within Shxw'ōwhámél's asserted traditional territory. Approximately 14.5 km of the marine shipping route is also within Shxw'ōwhámél's asserted traditional territory.
- The Project RoW would bisect Shxw'ōwhámél's main reserve, Ohamil No. 1, and runs approximately 1.1 km from Wahleach Island reserve.
- Shxw'ōwhámél is understood to be a modern descendant of the group ethnographically identified as the Tait. The Tait are one of several groups classified as Upper Sto:lo. Though similar language and customs appear to have been shared between the Upper Sto:lo groups, the Tait spoke a unique dialect. The Crown's preliminary assessment of the Tait's *prima facie* claim for rights over the area of the Project pipeline ranges from weak to strong. The portion that spans the asserted territory falls within the area ethnographers attributed to the historic Tait territory and would support a strong *prima facie* claim.³
- The Crown's preliminary assessment of the *prima facie* strength of claim for rights within the portion of the shipping route, including the Westridge Marine Terminal that falls within Shxw'ōwhámél's asserted traditional territory is weak. There is no information to indicate that ethnographers associated this area with Shxw'ōwhámél.
- The Crown's preliminary assessment of Tait's *prima facie* claim for title over the area from Agassiz up to Hope is considered moderate to strong, and the claim is strong for the portion of the Project in proximity to Hope. This is supported by the number of historic Tait village sites scattered from Popkum up through to Ruby Creek on towards Hope, including the historic site of *C'Kals*, a large village site where Hope is now located. The stretch northwest of Hope is considered to be moderate, an area likely utilized for resource gathering activities by those who occupied the Tait villages in and near Hope and northwards.⁴ The claim diminishes to a weak *prima facie* claim for title for the remaining portions of the Project falling within the Sto:lo writ boundary as ethnographers did not associate these areas with the Tait.

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Shxw'ōwhámél's Aboriginal Interests, the Crown is of the view that the legal duty to consult Shxw'ōwhámél lies at the deeper end of the *Haida* consultation spectrum. Shxw'ōwhámél was placed on

³ Cascades Lower Canyon CFA: The Shxw'ōwhámél, Chawathil, Union Bar and Yale First Nations: A Preliminary Review of Ethnographic and Historical Sources; Stó:lō/Yale Territorial Overlaps: A Preliminary Review of Ethnographic and Historical Sources; Sto:lo First Nations: Traditional Territories of the "Upriver" Halkomelem or "Upper Sto:lo" – Review of Ethnographic and Historical Sources (Nov 18, 2013).

⁴ Ibid.

Schedule B of the section 11 order issued by the Environmental Assessment Office (EAO), which afforded Shxw'ówhámel opportunities to be consulted at a deeper level.

Shxw'ówhámel initially participated in the National Energy Board (NEB) review process as a member of the Stó:lō Collective, but sought late intervenor status independently on February 11, 2014. Shxw'ówhámel provided Oral Traditional Evidence, submitted several independently conducted biophysical, geological, and cultural studies as written evidence, and participated in various information request rounds including responding to the Major Projects Management Office's (MPMO) Issues Tracking Table Information Request ([A71246](#)).

Shxw'ówhámel signed a confidential Legacy Agreement on March 21, 2013 with the proponent, followed by a Mutual Benefits Agreement on November 24, 2015. Shxw'ówhámel withdrew from the hearing on December 17, 2015, and subsequently filed a regulatory support letter ([A74836](#)) for the Project on December 18, 2015. Shxw'ówhámel had previously stated that their permission and consent was required for projects on their traditional territory ([A74771](#)).

Shxw'ówhámel has also regularly consulted with the Crown outside of the formal NEB process. Shxw'ówhámel has sent several letters and emails to the Minister of Natural Resources and MPMO officials outlining concerns regarding the Crown's reliance on the NEB process to fulfill the legal duty to consult. Shxw'ówhámel, together with Peters Band, met with the Crown in Vancouver on March 3, 2016.

Shxw'ówhámel signed a contribution agreement with the NEB for \$45,000 in participant funding plus travel for one to attend the oral traditional evidence hearings. The MPMO offered Shxw'ówhámel \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Shxw'ówhámel an additional \$7,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Shxw'ówhámel signed contribution agreements with the MPMO in response to both of these offers, for a total of \$19,000 in allocated funding. Shxw'ówhámel was provided with \$5,000 in capacity funding by EAO on October 27, 2016.

The Crown provided a first draft of the Consultation and Accommodation Report (the Report) to Shxw'ówhámel for review and comment on August 17, 2016. The Crown received comments on the Report from Shxw'ówhámel on September 19, 2016. A second draft of this Report was provided to Aboriginal groups for review and comment on November 2, 2016 and Shxw'ówhámel provided comments on November 15, 2016. Shxw'ówhámel also provided a separate Aboriginal group submission to the Crown on November 18, 2016.

IV - Summary of Key Shxw'ówhámel Issues and Concerns Raised

This section offers a summary of the key issues raised by Shxw'ówhámel, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section considers these issues and includes the Crown's views and conclusions.

The Crown has gained its understanding of Shxw'ówhámél's Aboriginal Interests and concerns through the community's intervention in the NEB hearing process and through direct engagement and consultation, which includes meeting in Vancouver on March 3, 2016. Shxw'ówhámél has provided a significant volume of information through the NEB hearing process that has been used by the Crown to track key issues and concerns, which was incorporated into an Issues Tracking Table, submitted to Shxw'ówhámél through an Information Request. Shxw'ówhámél responded to the Crown's Issues Tracking Table Information Request by further elaborating their concerns. In addition, the Crown has considered information regarding the proponent's engagement with Shxw'ówhámél, as described in the proponent's Aboriginal Engagement Report (July 2016). The Crown's understanding of Shxw'ówhámél's key Project-related issues and concerns is summarized below.

Methodology, Process and Consultation

Shxw'ówhámél has expressed concerns related to the NEB process, including its limited scope. Shxw'ówhámél has stated on several occasions that the NEB, as a quasi-judicial process, is not an appropriate means for the Crown to discharge its legal duty to consult. Furthermore, Shxw'ówhámél asserts that First Nations were not consulted on the structure of the NEB process and drew attention to what they consider a double-standard that exists without cross-examination being permitted of the applicant during the review. Shxw'ówhámél has suggested that this, in part, points to the lack of a relationship between their community and the NEB.

During their meeting with the Crown in March 2016, Shxw'ówhámél claimed there had been a lack of meaningful Crown consultation to-date. Similarly, they have noted on several occasions that their input has not been sought on the development of a "mutually determined consultation process," nor its elements. In reviewing the draft version of this Report, Shxw'ówhámél reiterated the position that consultation has not yet occurred and that the Crown failed to consult Shxw'ówhámél about the framework for the Project's review process. Therefore, Shxw'ówhámél states the environmental assessment completed by the NEB does not fully provide the Crown with the information it requires on the potential adverse impacts on Shxw'ówhámél's Aboriginal Interests.

Shxw'ówhámél has also expressed the view that the NEB's reliance on the proponent's field work for the environmental assessment process is problematic, stating that if there is not an independent process, the process is inherently flawed. Shxw'ówhámél has noted this leaves room for the proponent to be able to tamper with evidence; accordingly, Shxw'ówhámél is concerned that certain information has been deliberately left out of the evidence filed on the Project. Shxw'ówhámél suggested First Nations and governments should conduct independent environmental assessments. Shxw'ówhámél has also stated they have concerns with the level of consultation undertaken by the proponent.

During their meeting with the Crown, Shxw'ówhámél stated that there is a need to reconsider consultation procedure, policy and mandate. Shxw'ówhámél discussed their interest in developing a Nation-to-Nation agreement that supports a separate consultation process outside of the NEB process. Shxw'ówhámél envisions this agreement including measures for: environmental protection; effects of

the existing pipeline (historical and ongoing); participation in environmental monitoring and emergency response planning; and resource revenue sharing.

Shxw'ōwhámél has also noted that the amount of funding for participation is inadequate in light of the resources needed to meaningfully participate in the review and consultation processes. They go on to add that the timing of funding decisions further constrains their ability to participate. Shxw'ōwhámél has stated that procedures related to participant funding (e.g. application and reporting requirements) are excessive considering the amounts allocated. Shxw'ōwhámél has suggested that in order for Aboriginal groups to participate fully in the NEB process, adequate funding for consultations need to be provided in advance of Aboriginal groups incurring costs.

Shxw'ōwhámél disagrees with the Crown's potential impacts assessments of the Project on Shxw'ōwhámél's Aboriginal Interests. Shxw'ōwhámél expressed specific concerns in their letter dated November 15, 2016, including the following:

- Impacts on Hunting, Trapping and Plant Gathering;
- Impacts on Freshwater Fishing;
- Impacts on Other Traditional and Cultural Practices; and
- Impacts on Aboriginal Title.

Cumulative Effects

Shxw'ōwhámél expressed concern regarding the contribution of the Project to the pre-existing negative cumulative effects that Shxw'ōwhámél has experienced due to prior industrial and commercial development. Submissions to the NEB and MPMO from Shxw'ōwhámél indicate their view that the 1858 Gold Rush, the construction of the Canadian National Railway, the Trans-Canada highway, the original Trans Mountain Pipeline in 1953, the wide expanse of Highway # 1, and numerous road, train and pipeline projects have had negative cumulative effects by taking more land than was needed and blocking community members' access to the south side of their reserve. During their meeting with the Crown, Shxw'ōwhámél discussed the potential impacts of the existing pipeline aging in-ground and its abandonment, particularly on their water supply.

Economic Impacts

Shxw'ōwhámél expressed interest in exploring opportunities for training and employment contracts to develop transferable skills and employment capacity within the community. Shxw'ōwhámél stated, however, that any development project on their traditional territory must be of sufficient benefit to community members and future generations to warrant construction, not solely in terms of economic opportunities, but also as it relates to the environment, culture, resources, and other factors. Shxw'ōwhámél discussed their economic and subsistence interest in hunting and fishing activities, and harvest of wild mushrooms, boxwood and mosses for commercial sale in relation to the potential impacts arising from the Project. Shxw'ōwhámél also noted the potential interference of the Project on future economic development opportunities on their reserve land as a result of impacts to the environment.

Environmental Impacts

Shxw'ówhámel raised concerns regarding the potential impact of the Project on the Fraser River and its fish, particularly salmonids, which are an important source of income and cultural fulfillment.

Shxw'ówhámel also drew attention to the impact of the Project on: riparian areas and wetlands; wildlife and their habitat (including red-tailed hawks, eagles, owls, bear, moose, deer, goat, ducks, plants and berries); and the groundwater and drinking water of Hunter, Lorenzetta and Jones Creeks.

Cultural and Social Impacts

Shxw'ówhámel has repeatedly expressed concern regarding the potential for damage or destruction of culturally important pithouses, ceremonial and other archaeological sites within the proposed pipeline corridor and within 2km of this area. In their response to the MPMO's Information Request, Shxw'ówhámel claims that these sites are "integrated with the contemporary cultural fabric of the Shxw'ówhámel people." Shxw'ówhámel has requested that at all stages of the Project, the proponent should be "conducting [its] work with appropriate oversight from Shxw'ówhámel, [allowing for their] participation in the development of a plan to protect traditional territory, including sacred sites." In Shxw'ówhámel's review of the draft Consultation and Accommodation Report they noted the proponent adjusted the proposed RoW alignment to avoid the pithouses and archeological sites identified by Shxw'ówhámel. Shxw'ówhámel has stated: "[they] expect that efforts consistent with this proposal will be made to ensure that damage or destruction of culturally important pithouses and archaeological sites does not occur."

Shxw'ówhámel has also stated that increased development could sever their ties to the land, resulting in a lost ability to transfer traditional knowledge across generations.

Impacts on Aboriginal Rights

Shxw'ówhámel claims Aboriginal rights and title throughout their territory. Shxw'ówhámel provided traditional land use data to the proponent, which identified a number of important current traditional locations proximal to the existing and proposed RoW, including: trails and travelways, habitation sites, plant gathering, hunting, fishing, trapping, gathering places, and sacred areas. Shxw'ówhámel noted on several occasions that the pipeline corridor will cross their traditional territory, two of their reserves, and their primary drinking water aquifer. Shxw'ówhámel has raised the issue of affected access to traditional fishing sites and travel corridors during construction, leading to a loss of fish harvest.

Marine Impacts

Shxw'ówhámel expressed concern regarding the impacts of the Project on Aboriginal rights and title, culture, the environment, and the community economy arising from the Westridge Marine Terminal expansion, increased marine traffic and a potential oil spill in Burrard Inlet or elsewhere along the marine shipping route.

Health and Human Safety

Shxw'ówhámel suggested that construction may cause unsafe conditions due to heavy traffic flow. Moreover, members may be displaced due to air and noise pollution and the influx of outsiders in the

community. Construction may also lead to adverse effects on marine and terrestrial resources (for example the effects on fish sourced for consumption), travel routes, the exercise of Aboriginal rights, and impacts to title lands.

Project Construction Phase

Shxw'ōwhámel drew attention to issues that could occur during construction including: displacement of wildlife, water pollution, disturbance of plants (including medicinal plants), and impact on fish movement. Shxw'ōwhámel also identified concern regarding construction and RoW clearing leading to a loss of critical waterways and travel routes, and potentially destroying important historic pithouses and other archaeological and sacred sites. The impacts to these sites could be sustained throughout all phases of the Project and adversely impact the Shxw'ōwhámel community, culture and well-being.

Shxw'ōwhámel also noted the Project could cause access restrictions to the south side of their reserve.

Accidents and Malfunctions (Marine and Terrestrial)

Shxw'ōwhámel underscored the potentially devastating impacts of a spill on: the waters in their traditional territory, including surface water, groundwater, drinking water supply, and rivers, Kawkawa Lake, and the ecosystems within these waters. They also note the potential adverse effects of the Project on potential socio-economic and commercial interests as well as their ability to hunt, fish (particularly sturgeon), gather, use traditional waterways, and practice cultural ceremonies. Shxw'ōwhámel has drawn particular attention to their groundwater aquifer, which they state is classified as highly vulnerable to a pipeline leak.

Shxw'ōwhámel has raised the impacts of a natural disaster, such as landslides, seismic activity or flooding, on the pipeline. Additionally, Shxw'ōwhámel is concerned the proponent has not sufficiently studied the outcomes of a spill in fresh water or sediment-laden waters, and that their *Groundwater Report* does not adequately capture damage in the event of a spill. Shxw'ōwhámel has expressed concern with the proponent's ability to respond to a spill in a timely manner and the amount of time needed to evacuate residents.

Recognition of Economic Rights

Shxw'ōwhámel maintains their right to resource revenue sharing is based on their underlying title to their lands. Shxw'ōwhámel has stated that in the *Tsilhqot'in* decision, "the Supreme Court of Canada recognized that Aboriginal Title holders have the right... 'to enjoy [the land's] economic fruits.'"

Pipeline Integrity

In reviewing the draft version of this Report, Shxw'ōwhámel stated that proponents should assess pipeline integrity throughout a project's lifecycle. Additionally, in the case of Trans Mountain, Shxw'ōwhámel stated the proponent should identify measures for the abandonment of both the existing and new pipeline. Shxw'ōwhámel noted they have not yet been made aware of a detailed decommissioning plan for the pipelines. Shxw'ōwhámel expressed their concerns about the impacts of the decaying pipeline components should it be left in the ground post-operation.

Accommodation Proposals

Shxw'ōwhámel has proposed several accommodations based on outstanding issues, listed as follows:

- The negotiation of an agreement between the Crown and Shxw'ōwhámel for joint decision-making and Project oversight, consistent with the Nation-to-Nation commitment and the United Nations Declaration on the Rights of Indigenous People (UNDRIP), including funding for engagement and negotiations;
- Sufficient funding for consultation provided in advance of Shxw'ōwhámel incurring costs for consultation on the Project moving forward;
- Involvement in abandonment planning for both the existing and new pipeline;
- The recognition of Shxw'ōwhámel's right to resource revenue sharing, based on their underlying title to their lands;
- A requirement that the proponent post an environmental bond or security in a form and amount that is acceptable to Shxw'ōwhámel;
- An appropriate oversight role in the development of a plan to protect Shxw'ōwhámel's traditional territory, including culturally important pithouses and other archeological sites;
- An enhanced role for Shxw'ōwhámel in the review and approval of environmental management and protection plans, emergency response plans, and monitoring (including over wetlands, water quality, fish and fish habitat, wildlife and post construction reclamation) during construction and operations stages, and at abandonment; and
- Compensation in order to offset the impacts of the Project, as well as compensation for the past 60 years, during which the existing pipeline has presented obstacles to land use.

On July 22, 2016, the MPMO replied to correspondence received from Shxw'ōwhámel and Peters Band expressing interest in receiving a draft protocol and budget to showcase the type of Nation-to-Nation agreement Shxw'ōwhámel and Peters Band were seeking. To date, the Crown has not received any further correspondence on the matter, nor did Shxw'ōwhámel (or Peters Band) respond to the Crown's invitation to arrange a second consultation meeting in fall 2016.

Shxw'ōwhámel expressed interest in receiving further information regarding the proposed Indigenous Advisory and Monitoring Committee. Although Shxw'ōwhámel understands that this proposal is still under development, Shxw'ōwhámel would like to provide input and requested updates when available. Shxw'ōwhámel has consistently requested a role beyond merely providing advice, seeking to be actively involved in environmental decision-making on their lands.

Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Shxw'ōwhámel that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighting Project costs and benefits with the impacts on Aboriginal Interests.

Shxw'ówhámél's Response to NEB Recommendation Report

No specific comments were received from Shxw'ówhámél on the *NEB Recommendation Report*.

V - Potential Impacts of the Project on Shxw'ówhámél's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and 4.3 of this report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Shxw'ówhámél's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Shxw'ówhámél's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g. fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Shxw'ówhámél's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Shxw'ówhámél, Shxw'ówhámél's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant conditions proposed by the Province of any Environmental Assessment Certificate issued.

Shxw'ówhámél completed a traditional land use (TLU) study in 2015 titled, *Traditional Use and Occupancy Study and Cumulative Effects Assessment* ([A4Q1A4](#), [A4Q1A5](#), [A4Q1A6](#)). The report included identification of traditional land uses in the segment of the proposed pipeline from Hope to Burnaby. Further, a *Cultural Heritage Impact Assessment* was prepared by the Stó:lō Research and Resource Management Centre ([A4Q1A3](#)). Traditional land uses identified by Shxw'ówhámél include hunting, gathering plants, information on fishing sites, sacred sites, trapping sites, habitation sites, gathering areas for community members, and trails and travelways. Shxw'ówhámél's TLU information is summarized in the Project Application ([A4S7I7](#)). Where available, the proponent estimated approximate distances and directions of geographic locations from the proposed pipeline corridor.

Shxw'ówhámél has not provided information to the Crown indicating traditional uses in the marine environment in the vicinity of the Westridge Marine Terminal or the portion of the marine shipping route that overlaps with Shxw'ówhámél's asserted traditional territory, or otherwise identified any potential impacts on its Aboriginal Interests arising from these components of the Project. As a result, the Crown has focused its assessment of impacts on impacts on Shxw'ówhámél's Aboriginal Interests arising from the pipeline.

Impacts on Hunting, Trapping and Plant Gathering

As laid out in their TLU information, Shxw'ówhámel believes that hunting preserves community, cultural identity, ancestry, family, health and spiritual well-being in addition to supporting a traditional lifestyle. Shxw'ówhámel community members hunt deer, ducks, elk, grouse, black bear, goose, mountain goat and rabbit in the proposed pipeline corridor. Trapped species includes beaver, fox, squirrel, marten, mink and weasel. Elders encourage community members to pursue traditional plant gathering activities (e.g., harvesting of medicinal plants and different types of wood, mushrooms, and mosses) not only for economic and sustenance purposes, but also to maintain community bonding and well-being. Harvested plants include salmon berries, thimble berries, Saskatoon berries, trailing black berries, goose berries, sweet blue huckleberries, blueberries, swamp potato, wild potato, bracken fern, hazelnuts, wild crab apples, Yéla, devil's club, cascade, dandelions, licorice root, cascara bark, cedar, birch bark, boxwood, spruce root, acorn, wild rhubarb, blackcaps, briars, mushrooms, frog leaf, mosses, and Barbie bark. The buds, boughs and wood of cedar are also harvested throughout the year and used for ceremonial purposes.

Shxw'ówhámel identified concerns related to environmental effects of the Project on hunting, trapping, and plant gathering activities. These concerns include the cumulative and immediate impacts of construction, operations, and a potential spill on wetlands and riparian areas, wildlife and their habitat, hunting and trapping activities, harvesting of plants and fungi in Shxw'ówhámel's asserted traditional territory. Shxw'ówhámel has also raised concerns with the environmental effects of the existing Trans Mountain pipeline aging in situ. As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, old growth forests, wetlands, and wildlife and wildlife habitat (including species at risk) listed species. If the Project is approved, the NEB conditions would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping, and gathering (Section 4.3.1 of this Report). With regards to specific concerns raised by Shxw'ówhámel, the proponent would implement several mitigation measures to reduce potential effects to species important for Shxw'ówhámel's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction of wildlife to the work site, minimize sensory disturbance and protect site-specific habitat features are outlined in the Project Environmental Protection Plan and the Wildlife Management Plans.

During the TLU, Shxw'ówhámel identified 21 hunting sites within 500 meters (m) of the proposed pipeline corridor. Only one site-specific hunting site (black bear) was identified in the proposed pipeline corridor due to substantial clustering and overlapping of sites on TLU maps, and lack of qualitative descriptions. Four trapping sites located within 500 m of the proposed pipeline corridor were identified by Shxw'ówhámel during the TLU, of which only two site-specific locations are provided due to substantial clustering and overlapping of sites on TLU maps, and lack of qualitative descriptions. One trapping site is located within the proposed pipeline corridor, and one trapping site is located

approximately 1.2 km northwest of the proposed pipeline corridor. During the TLU, Shxw'ówhámél identified 170 plant gathering sites within 500 m of the proposed pipeline corridor, of which 43 plant gathering sites are located within the proposed pipeline corridor. Due to substantial clustering and overlapping of sites on TLU maps, and lack of qualitative descriptions, only three site-specific locations of plant gathering sites could be determined. One site at Coquihalla Summit is located within the proposed pipeline corridor, and two sites at Cheam Mountain and Skagit Mountain region are approximately 3 km and 7.8 km, respectively, from the proposed pipeline corridor.

Shxw'ówhámél raised concerns with the Project's potential impacts relating to specific locations and access to hunting, trapping, and plant gathering activities, including restricted access resulting from cumulative development and effects on riparian areas and wetlands, groundwater, and drinking water of Hunter, Lorenzetta, and Jones Creeks. Project-related construction and routine maintenance activities are expected to cause short-term, temporary disruptions to Shxw'ówhámél's access to hunting, trapping and plant gathering activities, largely confined to the Project footprint. The Crown understands that with construction and reclamation activities, disruptions to access may result in reduced harvesting opportunities for Shxw'ówhámél. If the Project is approved, the NEB conditions would either directly or indirectly avoid or reduce potential impacts on specific locations and access associated with hunting, trapping, and gathering sites (Section 4.3.1 of this Report). With regards to specific concerns raised by Shxw'ówhámél, the proponent would implement several mitigation measures to reduce potential effects on traditional use sites important for Shxw'ówhámél's hunting, trapping, and plant gathering activities, such as management plans that include access management, scheduling and notification of Project activities, and environmental monitoring programs that monitor access control measures. The Access Management Plan is intended to reduce disturbances caused by access, construction equipment and vehicle traffic during and following construction in order to minimize disturbance to access Shxw'ówhámél's traditional lands. The proponent has committed to minimizing the development of access routes, controlling public access along the construction right-of-way, selecting appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent has also committed to work with applicable resource managers, traditional land and resource users to define locations where access control is necessary, and what type(s) of access control will be implemented. In the event that hunting, trapping, and plant gathering sites are identified during ongoing engagement with Shxw'ówhámél prior to construction, the sites will be assessed, and appropriate mitigation measures will be determined. The proponent committed to working with Shxw'ówhámél to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Shxw'ówhámél expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities, including severing their ties to the land and a lost ability to transfer traditional knowledge across generations due to cumulative and immediate impacts of construction, operations, and a potential spill. Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Shxw'ówhámél's hunting, trapping, and plant gathering activities. The Crown understands that this short-term disruption could temporarily alter the behaviour of community members' hunting, trapping

or plant gathering activities during construction, and that reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project, could have spiritual and cultural impacts on community members. If the Project is approved, NEB conditions would either directly or indirectly avoid or reduce potential social, cultural, spiritual, and experiential effects associated with hunting, trapping, and plant gathering activities (Section 4.3.1 of this Report). With regards to specific concerns raised by Shxw'ōwhámel, the proponent would implement several mitigation measures to reduce potential effects on Shxw'ōwhámel's hunting, trapping, and plant gathering activities. The proponent is committed to implementing weed management (as outlined in the Weed and Vegetation Management Plan) to reduce the potential for weed infestation following construction, and utilizing an Integrated Vegetation Management approach intended to reduce the use of herbicides and promote healthy ecosystems. The proponent will consult with Aboriginal groups regarding problem vegetation management and methods of treatment. Measures outlined in the proponent's Reclamation Management Plan are intended to stabilize and revegetate affected lands to achieve land productivity along the construction RoW and footprint, equivalent to the adjacent land use. The proponent has also committed to ongoing engagement with Aboriginal groups regarding the integration of traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Shxw'ōwhámel, Shxw'ōwhámel's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor-to-moderate impact on Shxw'ōwhámel's hunting, trapping and plant gathering activities.

In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Shxw'ōwhámel;
- Project-related pipeline and facility construction and routine maintenance activities within Shxw'ōwhámel's traditional territory are temporary and thus, likely to cause minor disruptions to Shxw'ōwhámel's community members accessing traditional hunting, trapping and plant gathering sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Shxw'ōwhámel regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their hunting, trapping and plant gathering activities.

Impacts on Freshwater Fishing

According to their TLU information, Shxw'ōwhámel have always held residence near the Fraser River and its tributaries, using the Fraser River for subsistence, trade and cultural purposes. Salmon is the most abundant fish species in the Fraser River, and is considered highly important both culturally and

spiritually. Fished species include, but are not limited to, eulachon, grayling, salmon, sturgeon, and trout.

Shxw'ōwhámel identified many concerns related to environmental effects of the Project on fishing activities, in particular increased cumulative and immediate effects of disturbances that the new pipeline could have on water and important fish species, such as salmon and sturgeon. As described in the *NEB Recommendation Report*, Project-related construction and operation could result in low to moderate magnitude effects on fish and fish habitat and surface water. Moderate effects to fish and fish habitat would be localized to individual watercourse crossings where any potential serious harm would be compensated by offset measures. If the Project is approved, the NEB conditions would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Section 4.3.2 of this Report). A number of recommended NEB conditions require the proponent to file reports that will monitor Project-related impacts to fish, fish habitat and riparian habitats. With regards to specific concerns raised by Shxw'ōwhámel, the proponent would implement several mitigation measures to reduce potential effects to species important for Shxw'ōwhámel's fishing activities. The proponent has committed to time watercourse crossing construction activities to occur within the least risk biological windows in an attempt to avoid causing serious harm to fish, has committed to working with Aboriginal groups to identify the most appropriate means of offsetting serious harm to marine fish and fish habitat, and has proposed the implementation of channel and bank reclamation measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat.

During the TLU, Shxw'ōwhámel identified 124 fishing sites located within 500 m of the proposed pipeline corridor, of which eight fishing sites are located within the proposed pipeline corridor. Due to substantial clustering and overlapping of sites on TLU maps, and lack of qualitative descriptions, site-specific locations of these eight fishing sites could not be determined.

Shxw'ōwhámel raised concerns with the Project's potential impacts relating to specific locations and access to fishing and harvesting activities, including affected access to traditional fishing sites and travel corridors during construction, leading to a loss of fish harvest. Project-related construction and routine maintenance activities are expected to cause short-term, temporary disruptions to Shxw'ōwhámel's access to fishing activities. The Crown understands that if construction and reclamation occur during the fishing season, there could be a potential reduction in access to waterways, staging areas, and fishing sites for Shxw'ōwhámel's community members. However, disruptions to access would largely be confined to the Project footprint for the pipeline and associated facilities during construction and reclamation. If the Project is approved, NEB conditions would either directly or indirectly avoid or reduce potential impacts on specific locations and access to fishing sites important for Shxw'ōwhámel (Section 4.3.2 of this Report). With regards to specific concerns raised by Shxw'ōwhámel, the proponent would implement several mitigation measures to reduce potential effects on fishing sites important for Shxw'ōwhámel's fishing activities. As previously discussed, the proponent is committed to minimize disturbance to access to Shxw'ōwhámel's traditional lands, as described in the Access Management Plan. The proponent committed to working with Shxw'ōwhámel to develop strategies to most effectively communicate the construction schedule and work areas to community members.

Shxw'ōwhámel expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of their fishing activities, including impacts on Aboriginal rights, culture, language and traditions, and the transfer of these practices and knowledge across generations. As described previously, Project construction and routine maintenance is expected to cause short-term, temporary disruptions to Shxw'ōwhámel's fishing activities. The Crown understands that this temporary interruption could mean that community members alter their fishing activities during construction of the Project, which could affect their participation in the traditional activity. If the Project is approved, NEB conditions would either directly or indirectly reduce the potential social, cultural, spiritual or experiential effects associated with fishing activities (Section 4.3.2 of this Report).

In consideration of the information available to the Crown from the NEB process, consultation with Shxw'ōwhámel, Shxw'ōwhámel's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor impact on Shxw'ōwhámel's freshwater fishing activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on species harvested by Shxw'ōwhámel;
- Project-related pipeline and facility construction and routine maintenance activities within Shxw'ōwhámel's traditional territory are temporary and thus, likely to cause minor disruptions to Shxw'ōwhámel's community members accessing traditional fishing sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Shxw'ōwhámel regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their freshwater fishing activities.

Impacts on Other Traditional and Cultural Practices

As described in their TLU information, many historic trails, once used by Shxw'ōwhámel ancestors, are now part of the currently used trail systems. Community members have reported that travelways give reprieve from the noise and congestion of highway traffic, act as a passage to traditional activities such as bathing, fasting, fishing, hunting, trapping, plant harvesting, and maintain communal connectivity. Gathering for potlatches, naming ceremonies, wakes and other Big House ceremonies are an integral part of Shxw'ōwhámel life and culture. Sacred areas are places used by Shxw'ōwhámel community members to practice spiritual and sacred activities such as praying, fasting, bathing and singing. Community members rely on the availability of natural resources such as cedar buds, roots, boughs, cedar poles and bark, fur and feathers at these sacred areas.

During the TLU, Shxw'ōwhámel identified 45 travel routes, 43 habitation sites, 17 gathering places, and 73 sacred areas within 500 m of the proposed pipeline corridor, of which 23 trails and travelways, one habitation site (cabin), three gathering places, and 14 sacred areas are located within the proposed pipeline corridor. Site specific locations could not be determined for many of the sites due to substantial

clustering and overlapping of sites on TLU maps, and lack of qualitative descriptions. One trail system through the Chilliwack River watershed and Bridal Falls region is within the proposed pipeline corridor, and the trail systems in and around the Fraser River are located approximate 100 m from the proposed pipeline corridor. The trail systems in the Cheam Mountain and Sumas Lake region are 3 km and 5 km, respectively, from the proposed pipeline corridor. The 43 habitation sites within 500 m of the proposed pipeline corridor are primarily overnight tent sites where community members gather to hunt, fish, and trap, and harvest plants and other materials for traditional purposes. Important sacred areas include the burial sites at Ohamil No. 1, and Kawkawa Lake, located approximately 200 m north of the proposed pipeline corridor.

Shxw'ōwhámel identified many concerns related to environmental effects of the Project on other traditional and cultural practices, including damage or destruction to culturally important pithouses, and other ceremonial and archaeological sites within the proposed pipeline corridor. Shxw'ōwhámel also raised concerns about the impacts of a potential spill on the waters off their traditional territory and their ability to practice cultural ceremonies. As described in Section 4.3.4 of the Report, Project-related activities are not likely to result in significant adverse effects on the ability of Aboriginal groups to use land, waters or resources for traditional purposes. If the Project is approved, the NEB conditions would either directly or indirectly avoid or reduce potential environmental impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). With regards to specific concerns raised by Shxw'ōwhámel, the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources important for Shxw'ōwhámel's traditional and cultural practices. The proponent has also committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during RoW finalisation, narrowing the RoW in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments.

Shxw'ōwhámel raised concerns with the Project's potential impacts on access to traditional fishing sites and travel corridors during construction, leading to a loss of fish harvest. Project-related activities are expected to cause short-term disruptions that temporarily affect the ability of Aboriginal groups to access land, waters or resources for traditional purposes. The Crown understands that Shxw'ōwhámel's opportunities for certain traditional and cultural activities will be temporarily interrupted during construction and routine operation, and there could be reduced access to travelways, habitation sites, gathering sites, and sacred areas. However, temporary disruptions to Shxw'ōwhámel's traditional and cultural practices would be largely confined to sites within the Project footprint for the pipeline and associated facilities. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific sites and access to physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown notes the proponent's commitment to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

Shxw'ówhámél expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its other traditional and cultural practices, including: the risk that increased development could have on the land, resulting in a reduced ability to transfer traditional knowledge across generations; and the potential impacts of the Project on salmonids, which are an important source of cultural fulfillment. As described previously, the Crown understands that Project-related activities may result in temporary interruptions to Shxw'ówhámél's cultural and spiritual practices, or that their participation in the traditional activity is curtailed, during Project construction and routine maintenance activities.

In consideration of the information available to the Crown from the NEB process, consultation with Shxw'ówhámél, Shxw'ówhámél's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor-to-moderate impact on Shxw'ówhámél's other traditional and cultural practices. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related construction and routine maintenance activities are likely to have minor to moderate environmental effects on Shxw'ówhámél's traditional and cultural practices;
- Project-related construction and routine maintenance activities within Shxw'ówhámél's traditional territory are temporary and thus, likely to cause minor disruptions to Shxw'ówhámél's community members accessing traditional and cultural practice sites within the Project footprint, and negligible disruptions for sites that are not within the Project footprint; and
- Concerns identified by Shxw'ówhámél regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their other cultural and traditional practices.

Impacts on Aboriginal Title

The Crown has actively consulted with Shxw'ówhámél throughout the NEB process and Crown consultation process at a deeper level in an attempt to better identify, understand, and resolve concerns relating to Aboriginal title. Concerns related to Aboriginal title raised by Shxw'ówhámél throughout the NEB and Crown consultation process include:

- Impacts that could impede or disrupt Shxw'ówhámél's use of its asserted traditional territory, including access restrictions to the south side of Shxw'ówhámél's reserve and potential impacts in the event of a spill;
- Recognition of Shxw'ówhámél's right to resource revenue sharing, based on their underlying title to their lands; and
- Project-related activities that affect Shxw'ówhámél's economic development aspirations for its asserted traditional territory.

The Crown provides a description of the potential impacts of the Project on Aboriginal title in Section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or

minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB conditions that would either directly or indirectly avoid/reduce Project impacts associated with the degree of disturbance to terrestrial and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as well as NEB conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved. The Crown notes that Shxw'ówhámel executed a Mutual Benefits Agreement with the proponent. Although these agreements are confidential, the Crown understands they may contain provisions for financial, environmental and training benefits that could further reduce or accommodate impacts to Aboriginal title claims if the Project proceeds.

Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in Section 4.3.5, it is the Crown's opinion that the Project is expected to have negligible impacts on Shxw'ówhámel's asserted Aboriginal title to the proposed Project area.

Impacts Associated with Accidental Pipeline Spills

Shxw'ówhámel expressed concerns regarding the direct and indirect effects of Project-related pipeline spills on their Aboriginal Interests, including the effects of a potential spill on:

- Waters in their traditional territory, including surface water, groundwater, drinking water supply, and rivers, Kawkawa Lake, and the ecosystems within these waters where Shxw'ówhámel members exercise Aboriginal rights;
- Members' ability to harvest cultural keystone species, including salmonids, sturgeon, and culturally significant wildlife and plants;
- Fish, wildlife, and vegetation;
- Members' access to resources and use of traditional travelways;
- Members' ability to practice cultural traditions and transfer traditional knowledge; and
- Potential socio-economic and cultural interests.

Arising from concerns about pipeline spills, Shxw'ówhámel has stated proponents should assess pipeline integrity throughout a project's lifecycle. Additionally, in the case of Trans Mountain, Shxw'ówhámel has stated the proponent should identify measures for the abandonment of both the existing and new pipeline.

The Crown also understands Shxw'ówhámel's concerns regarding spills, and the potential for a spill to impact Shxw'ówhámel's use and occupation of its asserted traditional territory, ability to make decisions over the area impacted, and the potential for a spill to adversely impact any economic development aspirations Shxw'ówhámel has for its territory. A discussion of the potential impacts of a pipeline spill on Aboriginal Interests is provided in Section 4.3.6 of this Report.

In consideration of this information and analysis, as well as information available to the Crown on Shxw'ówhámel's Aboriginal Interests and concerns raised by Shxw'ówhámel during the NEB process and

Crown consultation process, a pipeline spill associated with the Project could result in minor to serious impacts on Shxw'ówhámel's Aboriginal Interests. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who live nearby and rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.⁵

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations, the Crown expects impacts of the Project on the exercise of Shxw'ówhámel First Nation's Aboriginal Interests would be up to minor-to-moderate.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Shxw'ówhámel First Nation's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Shxw'ówhámel First Nation in emergency response planning activities. The federal Crown is also considering incremental measures that would further accommodate the potential adverse impacts of the Project on Shxw'ówhámel First Nation, as discussed in Sections 4 and 5 of the main body of this report.

In addition, the Crown is aware that the proponent has entered into a Mutual Benefits Agreement with Shxw'ówhámel First Nation in an attempt to offset potential impacts, should the Project proceed.

⁵ Trans Mountain Final Argument, p. 85 and 207

Appendix C-19 - Stó:lō Collective

I - Background Information

The Stó:lō Collective is a body established for the purpose of intervening in the National Energy Board (NEB) process, and for consultation with the Crown with respect to the Project. The Stó:lō Collective represents 13 closely related Aboriginal groups: Aitchelitz First Nation (Aitchelitz), Kwaw-Kwaw-Apilt First Nation (Kwaw-Kwaw-Apilt), Leq'á:mel First Nation (Leq'á:mel), Shxwhá:y Village (Shxwhá:y), Skawahlook First Nation (Skawahlook), Skwah First Nation (Skwah), Soowahlie Indian Band (Soowahlie), Sq'éwlets (Scowlitz) First Nation, Squiala First Nation (Squiala), Sumas First Nation (Sumas), Tzeachten First Nation (Tzeachten), and Yakweawkwoose First Nation (Yakweawkwoose).

The Stó:lō Collective groups are all Coast Salish peoples who refer to themselves as Stó:lō, or tribes of Stó:lō Nation. These communities all share close spiritual, physical, psychological, and cultural ties with the lands and resources of their traditional territory, which they call *S'ólh Téméxw*. The Stó:lō Collective groups share a common language, Halq'eméylem, which falls into the Coastal Salish language group. The [Report on the Status of B.C. First Nations Languages](#) (2014) states that amongst Stó:lō people, 1.4% are fluent speakers, 5.2% have some level of skill with language, and 10.9% are learners.

Although each Stó:lō Collective group has unique cultural characteristics, they all engage in fishing, hunting, gathering and trapping throughout their traditional territory. The Stó:lō Nation is party to a protective *Writ of Summons* filed with the BC Supreme Court on December 9, 2003, asserting Aboriginal title to a territory identified in the writ, referred to herein as the “Stó:lō Nation writ area”. Most of the members of the Stó:lō Collective are parties to the Strategic Engagement Agreement Amending Agreement in 2016 with the Province of BC.¹ Most of the members of the Stó:lō Collective were parties to that Stó:lō Nation protective *Writ of Summons*, with the exception of Skwah First Nation and Shxwhá:y Village.

As of Spring 2016, the proponent advised the Crown that they had a commercial agreement with Tzeachten to construct the Project across their reserve lands. The proponent will be seeking Governor in Council authorization for *Indian Act* s.35 tenures if the proponent is granted rights to expropriate to allow for the expansion of the pipeline. Tzeachten has a Land Code in place and, therefore, the proponent would be required to negotiate the tenure under the code.

In recognition of how the member communities of the Stó:lō Collective chose to organize themselves for the purpose of reviewing the Project, engage with the proponent, provide information during the NEB hearing, and engage with the Crown, the Crown has assessed the potential adverse impacts of the Project on the Aboriginal Interests of the Stó:lō Collective. The collective input of each member community has been considered. For further details on specific communities, please see Tables 1 and 2.

¹ http://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/stolo_sea_amendment-3_spring_2016.pdf

Table 1 - Stó:lō Collective Member Community Summary

Stó:lō Collective Member	Location	Population (June 2016)	Reserves	Pronunciation	Participation in BC Treaty Process	Associations/ Other
Aitchelitz First Nation (Aitchelitz)	Based in the Chilliwack area of the Upper Fraser Valley.	42 (20 living on reserve)	One reserve plus the shared Pék'w'xe:yles reserve in eastern Fraser Valley, Grass reserve in the Chilliwack Valley, and Skumalasp in eastern Fraser Valley.	"A-che-leets" Aitchelitz translates as "point where two rivers meet."	Stó:lō Xwexwilmexw Treaty Association represents Aitchelitz in the BC Treaty Process.	Identified as part of the Ts'elxweyeqw Tribe (also known as Ts'elxwéyeqw Tribe Management Limited) and of the Ch-ihl-kway-uhk Tribe. <i>Signed a Forest & Range Consultation and Revenue Sharing Agreement with BC in 2014</i>
Kwaw-kwaw-apilt First Nation (Kwaw-kwaw-apilt)	Based in the Sardis area of the Upper Fraser.	44 (30 living on reserve)	One reserve plus the shared Pék'w'xe:yles reserve in eastern Fraser Valley, Grass reserve in the Chilliwack Valley, and Skumalasp in eastern Fraser Valley.	"Kwa-kwa-a-pilt" The proper orthographic rendering appears to be Qweqwe'ópelhp.		Identified as part of the Pil'Alt tribe. Member of the Stó:lō Tribal Council. <i>Signed a Forest & Range Consultation and Revenue Sharing Agreement with BC in 2015.</i>
Leq'á:mel First Nation (Leq'á:mel)	Located 22 kilometres (km) east of Mission, on the north side of the Fraser River.	412 (118 living on reserve)	Ten reserves in the centre of Stó:lō territory. plus the shared Pék'w'xe:yles reserve in eastern Fraser Valley	Leq'á:mel translates as "level place."	Stó:lō Xwexwilmexw Treaty Association represents Leq'á:mel in the BC Treaty Process.	Nicomen language dialect area in the Statement of Intent map produced by the Stó:lō Nation. <i>Signed Strategic Engagement Agreement Between Stó:lō First Nations and British Columbia with BC in 2014.</i>

Stó:lō Collective Member	Location	Population (June 2016)	Reserves	Pronunciation	Participation in BC Treaty Process	Associations/ Other
Scowlitz First Nation (Scowlitz)	Located in the Harrison Bay area of the Upper Fraser Valley.	257 (108 Live on Reserve)	Three reserves plus the shared Pekw'xe:yles reserve in eastern Fraser Valley.	"Scow-litz" Scowlitz translates as "turn of the river at bottom [of mountain]."		Scowlitz is identified as the historic Sq'ewlets Tribe. Signed a <i>Forest & Range Consultation and Revenue Sharing Agreement</i> with BC in 2015.
Shxwhá:y Village (Shxwhá:y)	Located 3 km west of Chilliwack.	412 (59 living on reserve)	One reserve plus the shared Pekw'xe:yles reserve in eastern Fraser Valley, Grass reserve in the Chilliwack Valley, and Skumalasp in eastern Fraser Valley.	"Sh-why" Shxwhá:y translates as "a place where they made canoes"		Signed <i>Strategic Engagement Agreement Between Stó:lō First Nations and British Columbia</i> with BC in 2014.
Skowkale First Nation (Skowkale)	Located in the Sardis area of the Upper Fraser Valley.	257 (155 living on reserve)	Two reserves plus the shared Pekw'xe:yles reserve in eastern Fraser Valley, and the Grass reserve in the Chilliwack Valley.	"Skow-kale" Skowkale translates literally as "at a bend in the [Chilliwack] River"	Stó:lō Xwexwilmexw Treaty Association represents Skowkale in the BC Treaty Process.	Skowkale identifies itself as part of the Ts'elxweyeqw Tribe and of the Ch-ihl-kway-uhk Tribe. Signed <i>Strategic Engagement Agreement Between Stó:lō First Nations and British Columbia</i> with BC in 2014.

Stó:lō Collective Member	Location	Population (June 2016)	Reserves	Pronunciation	Participation in BC Treaty Process	Associations/ Other
Skwah First Nation (Skwah)	Located in the Sardis area of the Upper Fraser Valley.	514 (236 living on reserve)	Four reserves plus the shared Pekw'xe:yles reserve in eastern Fraser Valley, Grass reserve in the Chilliwack Valley, and Skumalasph in eastern Fraser Valley.	“Skwaa” The proper orthographic rendering appears to be Sqwá.		Identifies as part of the Pilalt people and of the Ch-ihl-kway-uhk Tribe. <i>Signed Ch-ihl-kway-ukh Tribe Forest Agreement with BC in 2014.</i> <i>Signed a Forest & Range Consultation and Revenue Sharing Agreement with BC in 2015.</i>
Skawahlook First Nation (Skawahlook)	Located in the Agassiz area of the Upper Fraser Valley.	87 (7 living on reserve)	Two reserves plus the shared Pekw'xe:yles reserve in eastern Fraser Valley.	“Skwa-ha-look” The proper orthographic rendering appears to be Sq'ewá:lxw.	Stó:lō Xwexilmexw Treaty Association represents Skawahlook in the B.C. Treaty Process.	Identified as a Stó:lō community within the Tait language dialect area. <i>Signed Strategic Engagement Agreement Between Stó:lō First Nations and British Columbia with BC in 2014.</i>
Soowahlie Indian Band (Soowahlie)	Located in the Cultus Lake area of the Upper Fraser Valley.	375 (167 living on reserve)	One reserve plus the shared Pekw'xe:yles reserve in eastern Fraser Valley and the Grass reserve in the Chilliwack Valley.	“Soo-wall-ee” Soowahlie translates literally as “melting or dissolving away.”		Identified as part of the Ts'elxweyeqw Tribe (also spelled Ch-ihl-kway-uhk). <i>Signed Ch-ihl-kway-ukh Tribe Forest Agreement with BC in 2014.</i> <i>Signed Strategic Engagement Agreement Between Stó:lō First Nations and British Columbia with BC in 2014.</i>

Stó:lō Collective Member	Location	Population (June 2016)	Reserves	Pronunciation	Participation in BC Treaty Process	Associations/ Other
Squiala First Nation (Squiala)	Located on the Chilliwack River, in Chilliwack.	219 (112 living on reserve)	Two reserves plus the shared Pekw'xe:yles reserve in eastern Fraser Valley, Grass reserve in the Chilliwack Valley, and Skumalasph in eastern Fraser Valley.	"Skwye-ala" Squiala translates literally as "gathering of a lot of people."		Identified as part of the Ts'elxweyeqw Tribe (also spelled Ch-ihl-kway-uhk). <i>Signed Strategic Engagement Agreement Between Stó:lō First Nations and British Columbia with BC in 2014.</i>
Sumas First Nation (Sumas)	Located in the Upper Sumas area of the Upper Fraser Valley.	329 (141 living on reserve)	One reserve plus the shared Pekw'xe:yles reserve in eastern Fraser Valley.	"Soo-mass" Sumas translates literally as "level place lake."		Scowlitz is identified as the historic Sema:th Tribe. <i>Signed Strategic Engagement Agreement Between Stó:lō First Nations and British Columbia with BC in 2014.</i> <i>Signed a Forest & Range Consultation and Revenue Sharing Agreement with BC in 2013.</i>

Stó:lō Collective Member	Location	Population (June 2016)	Reserves	Pronunciation	Participation in BC Treaty Process	Associations/ Other
Tzeachten First Nation (Tzeachten)	Located 3 km south of Sardis.	522 (239 living on reserve)	One reserve plus the shared Pekw'xe:yles reserve in eastern Fraser Valley, and the Grass reserve in the Chilliwack Valley..	“Chak-tum” Tzeachten translates literally as “place of the fish weir.”	Stó:lō Xwexwilmexw Treaty Association represents Tzeachten in the B.C. Treaty Process.	Identified as part of the Ts'elxweyeqw Tribe (also spelled Ch-ihl-kway-uhk). <i>Signed Ch-ihl-kway-ukh Tribe Forest Agreement with BC in 2014.</i> <i>Signed Strategic Engagement Agreement Between Stó:lō First Nations and British Columbia with BC in 2014.</i>
Yakweakwioose First Nation (Yakweakwioose)	Located in the Sardis area of the Upper Fraser Valley.	70 (32 living on reserve)	One reserve plus the shared Pekw'xe:yles reserve in eastern Fraser Valley, and the Grass reserve in the Chilliwack Valley..	“Yak-week-we-oose” Yakweakwioose translates literally as “covering (of grass) burnt repeatedly.”	Stó:lō Xwexwilmexw Treaty Association represents Yakweakwioose in the B.C. Treaty Process.	Identified as part of the Ts'elxweyeqw Tribe (also spelled Ch-ihl-kway-uhk). <i>Signed Strategic Engagement Agreement Between Stó:lō First Nations and British Columbia with BC in 2014.</i>

II - Preliminary Strength of Claim Assessment

As part of Stó:lō's traditional system of governance, communities facing major decisions within S'ólh Téméxw form collectivities to study, understand and communicate the implications for the Nation as a whole. In the Stó:lō Collective's view, the Crown should support such a collective approach as it represents a Nation-to-Nation approach to consultation. As such, the Crown's typical approach for assessing preliminary strength of claim for each member band as defined under the *Indian Act* was viewed as imposing a "Western lens" on how the Stó:lō wish to govern themselves for the purposes of this Project review process.

Based on the Stó:lō Collective's understanding, taking a more holistic approach to strength of claim analysis across the broader territory would also be more reflective of the important connections between the Stó:lō bands, such as the intermarriages, movement between territories and cultural ties that are ongoing and dynamic.

Given Stó:lō's view that each member First Nation has a different form of relation to rights and title, the Crown has attempted to revise its approach and aggregate the preliminary strength of claim analyses while preserving the Crown's understanding of the ancestral connection to historic groupings and areas of more intensive use by those groupings within the broader Stó:lō Nation territory, as reflected in Table 2. Based on this approach, the Crown's preliminary assessment of the Stó:lō Collective's claim for rights over the section of the Project running through approximately 195 km of the Stó:lō asserted traditional territory, will range from weak to strong. Approximately 14.5 km of the marine shipping route is also within the Stó:lō Collective's asserted traditional territory, as delineated by the Stó:lō Nation *writ* area.

From an area near present day Vedder Canal to the east side of the City of Chilliwack, and from Agassiz up to Hope, claims range from a moderate to a strong *prima facie* claim for Aboriginal rights, with stronger claims over the section of the Project from the west base of Sumas Mountain to, in and around, Vedder Canal. The pipeline proposes to cross over the valley area that was once Sumas Lake. Sumas Lake is a potentially important resource gathering area and was a central defining feature of certain Stó:lō communities until the lake was drained in the 1920's. Within the portion of the shipping route that falls within Stó:lō Collective's asserted traditional territory, there is a weaker case for Aboriginal rights given a lack of information to indicate that this area was associated with the member communities of the Stó:lō Collective.

The Crown's preliminary assessment of the Stó:lō Collective's Aboriginal title claim over the section of the Project running through approximately 195 km of the Stó:lō asserted traditional territory, as delineated by the Stó:lō Nation *writ* area, will also range from weak to strong. Of specific relevance, for the Project segment running east from an area near Vedder Canal to the east side of Chilliwack, and from Agassiz up to Hope, the Crown's preliminary assessment ranges from moderate to strong *prima facie* claim for title. For the Project segment running along the west base of Sumas Mountain in and around Vedder Canal, the Crown's assessment is a moderate-to-strong *prima facie* claim for title. This area, historically considered Sumas territory, includes the valley that once included Sumas Lake.

Seven Project facilities [Hope Station, Wahleach Station, Sumas Station, Sumas Tank Farm, Port Kells Station, Burnaby Terminal, and Westridge Marine Terminal (WMT)] fall within the broad asserted traditional territory of the Stó:lō Collective, and the proposed right-of-way (RoW) crosses the Fraser River from Ruby Creek and Skawahlook reserves between KPs 1025 – 1030, west of the Hope Pump Station. The proposed RoW runs immediately adjacent to a number of Stó:lō Collective member communities and First Nation reserves. In particular, the RoW would cross Grass No.15 and Tzeachten No. 13. In addition, the Sumas First Nation is flanked by the Sumas Tank Farm at KP 1085 and the Sumas Pump Station near KP 1082.

The Stó:lō Collective has articulated its disagreement with the Crown's assessment of the Stó:lō Collective's preliminary strength of claim. Furthermore, the Stó:lō Collective expressed disagreement with the Crown's assessment of Project impacts on the Stó:lō Collective's Aboriginal Interests.

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Stó:lō Collective's Aboriginal Interests, the Crown is of the view that the legal duty to consult Stó:lō Collective lies at the deeper end of the *Haida* consultation spectrum. Stó:lō Collective was placed on Schedule B of the Section 11 order issued by the BC Environmental Assessment Office (EAO), which affords Stó:lō Collective opportunities to be consulted at a deeper level.

The Stó:lō Collective participated in the NEB review of the Project as an intervenor. The Stó:lō Collective submitted a significant amount of information describing Stó:lō rights and concerns regarding the Project. The Stó:lō Collective submitted technical written evidence, correspondence, information requests, and responded to the Crown's Issues Tracking Table Information Request by further elaborating their concerns [[A71257](#)].

The Stó:lō Collective chose not to participate in the Oral Traditional Knowledge hearings as they objected to the process, which they felt unfairly restricted the kind of information that Aboriginal presenters could share, and limited the extent to which community representatives could describe potential impacts on community interests and rights. The NEB process also conflicted with Stó:lō customs and traditions that support knowledge transfer and honoring Elders. For example, Stó:lō noted that Elders were the only hearing participants subject to cross examination. As there were numerous concerns with the prescribed oral hearing procedures, the Stó:lō Collective chose to rely on the Stó:lō *Integrated Cultural Assessment* (ICA), which describes potential impacts the Project may have on resources, spirituality, economy, culture and unceded lands within S'ólh Téméxw [[A4F7Y9](#)].

As noted above, one of the key technical submissions made by the Stó:lō Collective is the ICA.² The ICA and its Cultural Heritage Overview Assessment presents the Stó:lō Cultural Model (see Figure C.19 – 1)

² "Integrated Cultural Assessment for the Proposed Trans Mountain Expansion Project," (March 2014), Prepared by: Ts'elxweyeqw Tribe Management Limited (TTML), Stó:lō Research and Resource Management Centre (SRRMC),

which schematically depicts, according to the Stó:lō Collective's worldview, a suite of Stó:lō values and the inter-connected relations between people, places, and things. The ICA uses this model, and a series of unique impact rating criteria to evaluate potentially linked environmental, social and economic effects that may be associated with building and operating a new oil pipeline through *S'ólh Téméxw*, and provides mitigation recommendations to help reduce the overall impact of the Project on Stó:lō people.

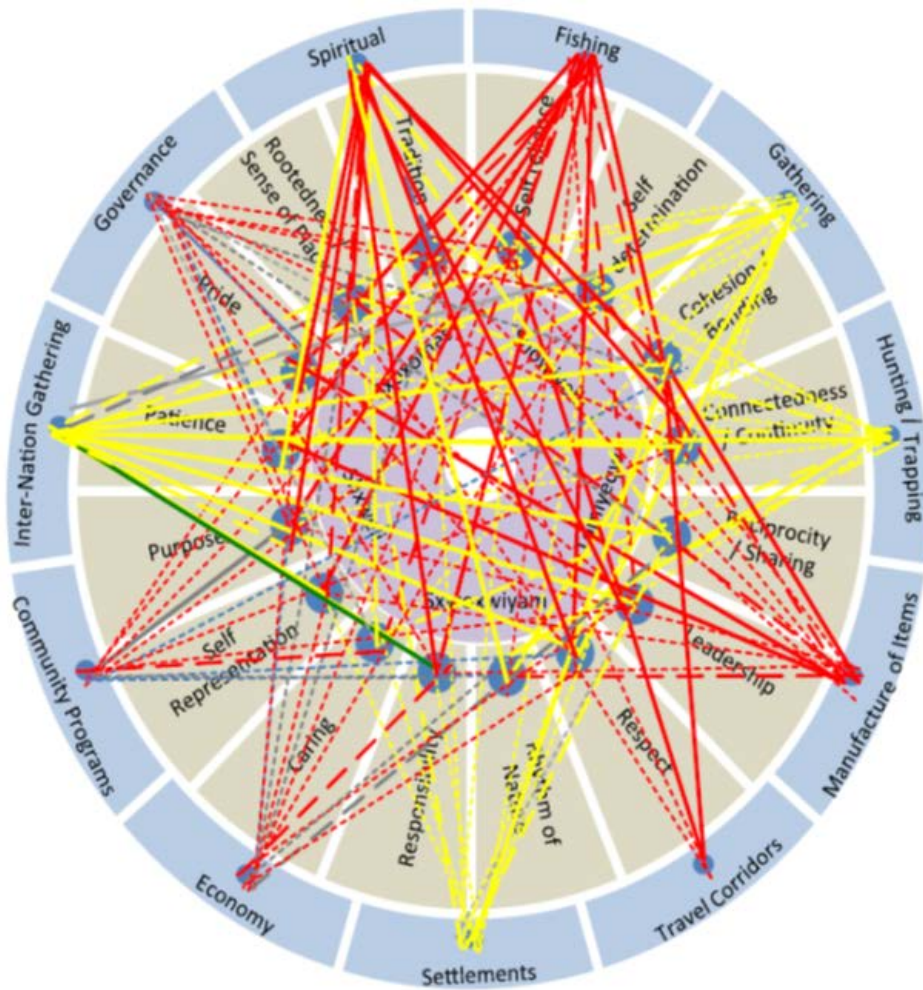


Figure 1: Stó:lō Cultural Model, showing threats to interlinked aspects of Stó:lō Cultural Integrity, without implementation of mitigation measures proposed to Trans Mountain by the Stó:lō Collective.

At a meeting held on September 23, 2016, the Stó:lō Collective emphasized the potential of adverse effects of the Project on Stó:lō culture and traditions. The Crown understands that a foundation for Stó:lō's approach to assessing the potential adverse impacts from the Project is a view that culture

and the Human Environment Group (HEG). The ICA is available on the NEB registry at Filing: A61882 (B-241-3 to B-241-6) or <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2487587&objAction=browse&viewType=1>

affects the way in which people understand themselves, their relationship to the land, their community, their purpose, and their connection to the spiritual world. The concept of 'cultural integrity' is used throughout the ICA, which notes that cultural activities are shaped by environmental conditions and social circumstances, and that outside forces (such as large scale industrial developments) can change the environment or social structures in a manner that affects how, why, where and when cultural activities occur, thereby impacting cultural integrity.

The Stó:lō Collective exchanged detailed correspondence with both the NEB and the Crown (including Ministers). Crown officials met with the Stó:lō Collective to discuss the Project during the Early Engagement phase on July 18, 2014. During the Panel hearing stage, the Crown Consultation Coordinator met with officials from the Stó:lō Collective's technical team on December 3, 2015 to review their key concerns with the evidentiary record and follow-up on proponent commitments made to date. On April 13, 2016, the Crown consultation team met with the Stó:lō Collective for an all-day meeting prior to the release of the NEB Recommendation Report. Following the release of the NEB Report, the Crown met with the Stó:lō Collective on September 23, 2016. Dialogue between Crown officials and the Stó:lō Collective remains ongoing.

The Stó:lō Collective signed a contribution agreement with the NEB for \$550,000 (\$42,307.00 per First Nation) in participant funding. The Stó:lō Collective was offered \$60,000 (\$4,615.38 per First Nation) from the Major Projects Management Office (MPMO) for participation in the initial round of Crown consultations following the close of the NEB hearing record. The MPMO also offered the Stó:lō Collective an additional \$70,000 (\$5,384.61 per First Nation) to support their participation in consultations following the release of the NEB Recommendation Report. The Stó:lō Collective signed contribution agreements with the MPMO in response to both of these offers, for a total of \$129,962.92 in allocated funding. On August 30, 2016 the Stó:lō Collective was issued \$20,000 in capacity funding by EAO to participate in consultation with the Crown.

The Crown provided a first draft of the Consultation and Accommodation Report (the Report) on August 17, 2016 and the Stó:lō Collective hand-delivered comments on the draft Report at an in-person meeting with the Crown on September 23, 2016. A second draft of this Report was provided to the Stó:lō Collective on November 3, 2016. The Crown has not received comments from the Stó:lō Collective. Instead the Stó:lō Collective sent letters on October 12, 2016 and October 18, 2016, which review key messages from the September 23, 2016 meeting. The Stó:lō Collective also sent an email on November 7, 2016 with a chart that looks at the NEB conditions, with what was stated in the Stó:lō Collective's ICA and the commitments Trans Mountain has made to the Stó:lō Collective through IR's and other methods.

IV - Summary of Stó:lō Collective's Key Issues and Concerns Raised

The Crown has gained its understanding of the Stó:lō Collective's issues and concerns through the Stó:lō Collective's involvement in the NEB process, including the responses the Stó:lō Collective provided to Natural Resources Canada on its Information Request addressed to them [[A71257](#)], through written and oral evidence, through information shared at in-person meetings with the Crown consultation team

on December 3, 2015, April 13, 2016 and September 23, 2016, and through other engagement and correspondence with the Crown. The Stó:lō Collective also sent correspondence to the EAO between May and September 2016. The Crown is also in receipt of an open letter sent to Prime Minister Justin Trudeau, Alberta Premier Rachel Notley, and British Columbia Premier Christy Clark from a collective of Aboriginal groups, including Sumas First Nation. This letter identifies interests and concerns related to Indigenous consent for the Project and the Project's consultation process.

This section offers a summary of the key issues raised by the Stó:lō Collective, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of the Stó:lō Collective's key Project-related issues and concerns are summarized below:

Cultural and Social Impacts

The Stó:lō Collective has identified concerns over: potential socio-economic effects, including human occupancy and resource use; heritage resources; socio and cultural well-being; community safety; health; and, infrastructure and services. Also identified are concerns regarding potential effects to: burial sites; archeological sites; traditional spiritual and ceremonial areas; and effects to reserve lands, including Certificate of Possession lands and leased lands. The Stó:lō Collective considers Stó:lō culture and well-being to be intimately connected to the health and integrity of *S'ólh Téméxw*, and that from their perspective cumulative effects have eroded some aspects of Stó:lō culture over time and are vulnerable to additional incremental impacts. As currently planned and assessed, the Stó:lō Collective are concerned that the Project poses significant risks, and represents a significant threat to the cultural integrity and survival of core relationships at the heart of Stó:lō's worldview, identity, health and well-being.

Specifically, the Stó:lō Collective expressed concerns that Project activities will deter First Nation members from attending gatherings, the presence of the construction workforce will inflate cost of accommodation and travel, and the Project may be a divisive or negative influence on inter-nation relations.

The Stó:lō Collective raised concerns about potential Project-driven impacts on historical camps and villages, burial sites, and impacts on housing and accommodation. Moreover, the Stó:lō Collective is concerned about protecting the health of Stó:lō people, which means ensuring the protection of spiritual places for future generations, and protecting the integrity of cultural sites and landscape features. Concerns were also raised with how Project plans have accommodated Stó:lō cultural heritage sites, Stó:lō cultural site protection, and impacts to historic trails and contemporary roads and infrastructure. For instance, at a meeting held on September 23, 2016, the Stó:lō Collective voiced their concern over potential adverse effects on Lightning Rock, which is considered to be a culturally significant spiritual and burial site. The Stó:lō Collective explained that the proponent plans to put a staging area in proximity to Lightning Rock, which they fear will destroy the cultural and spiritual connections Stó:lō maintain to this particular site and the surrounding area. Further to this, the

Stó:lō Collective raised frustration as their cultural heritage experts have been unable to meet with the proponent to participate in Lightning Rock management plans since September 2015.

Stó:lō raised concerns about the proponent's claim that traditional knowledge was provided by Aboriginal Monitors present during survey work when staff from a survey company named 7 Generations did not have site-specific knowledge of plant harvesting sites or archeological sites. Studies undertaken involving the Collective were deemed not complete when filed with the NEB. As these studies were to inform the proponent's general environmental and socio-economic studies including an archeological assessment along the proposed RoW, a gap was identified by the Collective in terms of information available to the NEB to adequately assess the cultural and social effects of the Project on Stó:lō.

To the Stó:lō, cultural sites are non-renewable valuable sites with an intangible element directly linked to Stó:lō 's need to manage its own historical connections and keep these intact. As described during consultation, the resources are not just physical and can be understood by the term 'belongings' that include the knowledge, and the continuity of intangible forms of knowledge that are intrinsically connected to belongings as opposed to artifacts. As described by a Stó:lō Collective member, even as fragments, the belongings can connect a people to their Elders, the past and the future.

Stó:lō expressed concern that neither NEB conditions nor provincial regulatory protections are currently able to adequately protect the intangible aspects of Stó:lō culture.

Methodology, Process and Consultation

The Stó:lō Collective does not consider the NEB process an appropriate venue for the Crown to rely on to discharge the legal duty to consult, as it limited face-to-face dialogue with the Crown. The Stó:lō Collective notes further its concerns that Canada, by relying on the NEB process and the proponent's submission, is receiving a "filtered" record and analysis. In their perspective, Canada needs to be aware of the Stó:lō Collective's view that the proponent's information is, at times, inaccurate, incomplete or insufficient. This particularly applies to information collected from meetings the proponent held with the Stó:lō Collective and other Aboriginal groups. The Stó:lō Collective identified their concern that the information they shared with the proponent had not been accurately reflected in its regulatory filings, leading to in their words "substantive concerns related to [the proponent's] ongoing, misleading and inaccurate portrayal of Stó:lō interests in the Project areas." The Stó:lō Collective feels that the NEB process failed to hold the proponent accountable for integrating Stó:lō's traditional use information into the assessment of Project effects, and as a result, NEB's assessment fails to recognize the important inter-relationships between Stó:lō's sacred sites and traditional use practices, and the potential impacts of the Project on Stó:lō's cultural expression and well-being. The Stó:lō Collective remains concerned about how the information on the NEB record will be used by decision makers moving forward.

Process-related concerns raised with EAO include: insufficient time to review the consultation materials, and incomplete and inaccurate communication logs that do not represent the effort the Stó:lō Collective communities have put into describing their interests and outstanding concerns with the proponent.

At both the April 13, 2016 and September 23, 2016 meetings with the Crown, the Stó:lō Collective provided examples of relevant Traditional Ecological Knowledge (TEK) which they felt should have been considered within the Project design, the environmental assessment, and mitigation planning. They noted that this knowledge has been ignored by the proponent. Such examples include the in-depth knowledge of historic waterways and complex hydrologic systems of the lower Fraser Valley, knowledge related to historic flooding, connectivity between wetlands and waterways, landslides and historic cycles of fish species and seasonal variations affecting fish habitat. The Stó:lō Collective also provided multiple examples of important traditional use sites, for instance the locations of bathing sites identified by First Nations within the 150 metre (m) RoW alignment at Bridal Veil Falls near Chilliwack, which did not appear on the proponent's detailed alignment sheets; nor did important wetland areas targeted for medicinal plant gathering, or harvesting areas for cultural species (such as eels traditionally used for harvesting sturgeon). Riverbank harvesting areas and various other spiritual and cultural sites also seemed to have been overlooked by the proponent in its more detailed planning work, which is alarming to the Stó:lō Collective. The Stó:lō Collective stated that the proponent's consultants also carried out testing on an archeological site in Stó:lō territory (Hunter Caves) and collected data and artifacts without approval or reason to do so, and took them to Alberta for testing without notifying the Stó:lō Collective. The Stó:lō Collective considers this theft and had to expend effort, time and energy to get them back. The Stó:lō Collective stated they have cooperated with the proponent and expended an enormous amount of energy and time in their engagement with the proponent, but the proponent has not been willing to change their Project design, mitigation plans, or approach to working within Stó:lō territory.

Procedurally, the Stó:lō Collective notes that during the NEB's 'time-out' relating to the Kelly evidence, the proponent continued to plan and refine their Project plans, and yet none of this newer information was able to be filed as evidence on the NEB record.

The Stó:lō Collective is concerned about the historical impacts of past development on collectively held Stó:lō rights, including inherent rights to title and govern lands and resource use, and the Stó:lō Collective's ongoing concern about cumulative impacts on rights that the Project will add to if it proceeds.

The Stó:lō Collective raised significant concerns regarding the lack of identification and assessment of impacts on Stó:lō rights and title through the NEB process, and stated that the Crown will need to make up for this shortcoming. At the meeting on September 23, 2016, the Stó:lō Collective expressed views on the NEB's conclusions, calling it a fundamentally flawed process. Citing the potential permanent impacts of the Project on sites of critical cultural importance, the Stó:lō Collective explained that damage to their traditional lands and culture should not be considered temporary, short-term or low magnitude. The

Stó:lō Collective feels that the proponent and NEB have shown continuous resistance to collaboration; a point that they feel needs to be brought to the attention of Crown decision-makers.

The Stó:lō Collective expressed concern that the NEB process failed to elicit the information required under the legislation governing the review of the Project, to determine if the Project is likely to result in significant adverse effects with respect to the rights, title or interests of the members of the Stó:lō Collective. The Stó:lō Collective was extremely concerned with the NEB's decision to eliminate cross-examination, to exclude evidence with respect to the existing pipeline, and to shut down the ability of intervenors to add relevant and important evidence for a period of approximately seven months prior to written submissions. The Stó:lō Collective also objected to the revised Final Argument filed by the proponent, and contends that all revisions should have been deleted except those directly related to replacement evidence.

The Stó:lō Collective is concerned by what they view as deficient terms and conditions for the Project, insufficient details of imposed mitigation measures, and the absence of a condition that the proponent must protect sacred sites and constitutionally recognize fishing rights of the members of the Stó:lō Collective. The number of management plans (Draft Conditions) that did not require Aboriginal consultation or traditional ecological knowledge were also of concern to the Stó:lō Collective.

The Stó:lō Collective also noted that the NEB conditions propose standards, but do not offer any form of "watchdog" regulation or oversight and that without a pre-determined system of check and balance, the NEB conditions will not be safeguarded. The Stó:lō Collective suggested that specific Aboriginal groups should be included within each NEB condition to ensure that the proponent works with respective Indigenous groups within their traditional territory and that commitments are upheld to each group.

The Stó:lō Collective stated that EAO capacity funding was insufficient to ensure all of the Stó:lō Collective member communities have the opportunity to understand the Project and the process, to review and understand information relating to potential impacts and mitigation, and to make informed contributions to the Stó:lō Collective's participation. The Stó:lō Collective further highlighted that they have many issues to be addressed in their communities; however, participation in the NEB process and the Crown consultation process has required a large portion of their resources, energy and attention.

The Stó:lō Collective explained that the Crown consultation team is working within an unnecessarily time-bound process, which they feel represents a roadblock to reaching the desired level of understanding of adverse effects on Aboriginal traditional uses, rights and culture. As such, the Stó:lō Collective feels that many of their issues will be left unaddressed and unresolved.

Cumulative Effects

The Stó:lō Collective's evidence filings ([A4L7A2](#)) state: "Stó:lō Collective are as concerned with the new pipeline proposal, as they were in 1952 when the existing Trans Mountain Pipeline was proposed. Based on Stó:lō records Ts'elxwéyeqw Tribe Chiefs first raised concerns related to the pipeline in 1952, through

Indian Affairs. The concerns of the Chiefs at that time were: a) the application did not mention future developments with regard to construction of further pipelines within the easement area; b) the depth the proposed pipeline would be in the ground; c) the lack of clarity in understanding of the developments or compensation; and d) the loss of their land by means of industrial developments." In terms of the current Project, the Stó:lō Collective have stated they have concerns about the cumulative effects of the Project together with the original project on culture, spirituality and ceremonial life of the Stó:lō people, and note specific concerns about potential for damage to areas of traditional, spiritual and ceremonial significance to the Stó:lō Collective.

Economic Impacts

The Stó:lō Collective has broad concerns about the Project's potential impacts on the economy and employment in their region. The Stó:lō Collective has stated it is interested in better understanding how they stand to economically benefit from the Project apart and outside of what might be included in a confidential Mutual Benefit Agreement negotiated with the proponent.

The Stó:lō Collective is concerned there will be limited economic benefit to Stó:lō people due to specific challenges faced by Stó:lō people when they try to participate in the wage economy, challenges that Stó:lō companies may face associated with the proposed Project, and potential adverse effects to existing economic activities.

Environmental Impacts

The Stó:lō Collective is concerned about all environmental issues as the environment - physical, biological, and human - is viewed by Stó:lō people as inseparable. The Stó:lō Collective has specifically highlighted their concerns related to potential environmental and cumulative environmental effects involving: protected areas; wildlife and wildlife habitat; fish and fish habitat; atmosphere, greenhouse gas emissions; vegetation; species at risk; marine environment; water, hydrology, and wetlands; and, the soils and geological structures along the RoW alignment. The Stó:lō Collective stated that concerns related to water quality and water withdrawals, timber and non-timber forest products, fish and wildlife, and wetlands have not adequately been addressed.

At the Crown consultation meeting on September 23, 2016, the Stó:lō Collective emphasized that the current scientific understanding of the fate and distribution of diluted bitumen accepted by the NEB is inadequate. The Stó:lō Collective explained that the NEB did not take into account that the Fraser River has a wandering gravel-bed, and that tidal forces can affect the Fraser as far upriver as Harrison Mills, not just to the Mission Bridge. It was noted that as Stó:lō are water people, the Fraser River acts as a source of sustenance, fishing and agricultural activity and a full understanding of the effects of a spill is needed. The Stó:lō Collective explained they are affected by issues of ground water; this is their drinking water and water for agriculture. Stó:lō people are fish and water people; they rely on this spiritually, culturally, mentally, and physically.

The Stó:lō Collective has highlighted air quality as a key environmental concern in relation to the Project, particularly that pipeline development, terminal operation and marine shipping could increase the

number of air pollutants within Stó:lō territory including in the Chilliwack area where the effects of air quality on cultural foods such as wind-dried salmon are well known. The Stó:lō Collective explained that air is funneled through the Fraser Valley and transports contaminants directly to their territory as seen by airport developments in Richmond and Abbotsford (another consideration overlooked by the NEB). In relation to environmental protection, the Stó:lō Collective commented at the September 23, 2016 meeting with the Crown that the last time they heard from the proponent was over a year ago and that since then, the Stó:lō Collective has asked about filing additional evidence and what they can do to move the process forward. The proponent responded that environmental experts were already in the field, which has left the Stó:lō Collective largely out of the process taking place within their territory; a fact which they deemed disappointing as they are the primary experts of their land.

Impacts on Aboriginal Rights

The Stó:lō Collective asserts rights and title over their entire traditional territory (S'ólh Téméxw) which is based upon a unique relationship with the land, waters and resources. Stó:lō peoples continue to use and occupy the territory for activities relating to spirituality, health, economics, cultural practices, fishing, hunting and gathering. Many Stó:lō bands live in the Project area and Stó:lō have Aboriginal fishing rights on the Fraser River that have been affirmed by the Supreme Court of Canada. In terms of governance rights, the Stó:lō Collective states that there are governance issues in the event of a spill. If Stó:lō leaders are not involved in emergency response planning, spill identification and response will be, from the Stó:lō Collective's perspective, "basically helpless" which undermines self-government because what happens in Stó:lō territory is not under their control (e.g., when the spill occurred in Sumas and the nation was not informed of what was happening).

The Stó:lō Collective is concerned about a reduced ability to hunt or trap, and /or provide wild meat to family, Siyá:m, Big House-based activities, and cultural events. The Stó:lō Collective is concerned about a feeling of disempowerment or dislocation regarding control over S'ólh Téméxw and incompatibility of the Project with Stó:lō land use goals. Lost opportunities and/ or ability to gather traditional plants (i.e., cedar bark, roots, buds, wood, berries, and medicines) and contamination of gathering sites were also raised as concerns. The Stó:lō Collective is concerned about the level of input into fisheries management, damage to traditional waterways (fish habitat, water quality, water flows, fish health) during Project water crossings, access modifications (i.e., new access, traffic), loss of traditional fishing sites, damage to equipment/boats, and decreased quality/integrity of fishing sites.

Accidents and Malfunctions (Marine/Terrestrial)

The Stó:lō Collective expressed concern about the possibility of a major rupture and the effect that would have on the lower Fraser River watershed. The Stó:lō Collective has sought a better understanding of the proponent's ability to respond effectively to any land-based spill. They state in their written evidence ([A4L7A5](#)) that "[t]he lack of communication surrounding emergency response procedures and remedial action has created anxiety related to wildlife health and personal safety." The Stó:lō Collective states that its communities have had negative experiences with the proponent following oil spills at the Sumas Terminal and the spill that affected Kilgard Creek. These events caused both confusion (around evacuation procedures, notifications and information sharing) and fear related

to health impacts, lack of remediation and long term effects to aquatic ecosystems and to local wildlife. The Stó:lō Collective is concerned that in the event of an accident or malfunction, additional tracts of the traditional territory of the members of the Stó:lō Collective may be impacted, including their reserves.

Project Construction Phase

Some portions of the traditional territory of the members of the Stó:lō Collective will be directly affected by the construction and operation of the Project. Stó:lō Collective community members are very concerned with the proximity of the Sumas Tank Farm and pipelines to existing gravel operations and worry that blasting has the potential to affect pipeline integrity and may increase the risk of spills. The Stó:lō Collective also raised concerns that cultural heritage sites and resources could be impacted by: construction and installation of the proposed pipeline; construction and installation of new and modified facilities, including pump stations and tanks; and, construction of temporary access roads and an equipment staging area. In particular, the Project staging area at Lightning Rock, one of the Stó:lō Collective's important spiritual and burial sites, was flagged as a major issue.

Accommodation Proposals

The Stó:lō Collective recommended 89 actions in their submissions to the NEB that would assist the proponent in avoiding or mitigating adverse effects on the Stó:lō Collective's Aboriginal Interests and other interests. The 89 actions are grouped thematically and request proponent action such as technical working groups to be established with funding by the proponent to directly engage on detailed mitigation planning that would integrate, among other local expertise, traditional knowledge held by Stó:lō Collective members.

In respect of Crown accommodations, the Stó:lō Collective are seeking the following key measures:

- Commitment from the Federal Government that there will be inclusion of Stó:lō Collective's participation in planning, survey work, monitoring and reporting during construction, development, and operations throughout the life of the Project;
- Commitment from the Federal Government that the proponent will be required to develop a Stó:lō Engagement Plan and adequate resources for Stó:lō Collective participation in planning, survey work, monitoring and reporting; Implementation of an Indigenous Oversight Committee with an ability to ensure that traditional ecological knowledge and other traditional knowledge are fully integrated in to Project planning and that local benefits can be maximized. This would also ensure the ability of the Stó:lō Collective to monitor and enforce the commitments of the proponent. The Stó:lō Collective is of the view that having Stó:lō directly involved in field surveys, mapping and developing protection plans is the fastest, cheapest way to address Stó:lō concerns; development of a funding mechanism to support Aboriginal involvement in the Indigenous Oversight Committee, and the implementation of Regional Aboriginal Technical Working Groups to ensure the collaboration of local expertise in developing mitigation and management plans and that protect significant cultural sites and resources;

- Development of an Aboriginal Monitoring and Review Board with adequate resources and funding to undertake Project monitoring and reporting to affected Aboriginal groups; and
- A specific Project condition that would require Trans Mountain to develop agreements with the Stó:lō Collective that outline how collaboration would take place with the proponent and how the Stó:lō Collective would be resourced to update construction alignment sheets and EPPs to reflect information provided in the ICA. This contractual, legally binding agreement, would include a plan, schedule, oversight, the participation of Stó:lō Collective representatives, and resources to participate.

The Stó:lō Collective stated that accommodating impacts on rights and title could be partially addressed by the Crown by involving the Stó:lō Collective directly in the decision making process and by implementing all 89 recommendations from their ICA report.

Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by the Stó:lō Collective that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

Stó:lō Collective's Response to NEB Recommendation Report

During the meeting with the Crown on September 23, 2016, Stó:lō Collective representatives called the NEB review a fundamentally flawed process and disagreed with the NEB's conclusions in a number of key areas. Citing the potential permanent impacts of the Project on sites of critical cultural importance to Stó:lō, the Stó:lō Collective noted impacts related to access and use of natural resources that in the Stó:lō Collective's view are significant.

The Stó:lō Collective further raised concerns that during the NEB hearing process, which has largely been used to inform the recommendations of the Report, technical experts were not cross-examined. The Stó:lō Collective indicated that they feel that their views have been taken at face value; whereas the views and knowledge of Stó:lō Elders were cross-examined.

In particular, the Stó:lō Collective disagreed with the characterization of impacts on the ability of Aboriginal groups to use the lands, waters and resources for traditional purposes as temporary interruptions. Disagreement was also voiced in regard to the NEB's conclusion that the Project's contribution to potential broader cultural impacts related to access and use of natural resources would not be significant. Drawing from Stó:lō's ICA, the Collective explained that any damage caused to the Stó:lō Collective's traditional lands and culture should not be considered temporary, short-term or low magnitude.

In respect of the NEB's terms and conditions for the Project, the Stó:lō Collective indicated their view that too much discretion was provided in the conditions in regard to which Aboriginal groups the proponent would have to engage during detailed Project planning. The Stó:lō Collective noted that the

use of vague language minimizes the NEB's ability to hold the proponent accountable to its commitments. In particular, the Stó:lō Collective's view is that the use of the term "Aboriginal Monitors" is inappropriately broad, and that for any site-specific survey work within Stó:lō's territory, the Aboriginal Monitors should be Stó:lō Collective members, as they are most familiar with the traditional land use and valued cultural sites potentially impacted by the Project.

The Stó:lō Collective also noted to the Crown that Lightning Rock is only one of many sites that are culturally and spiritually significant along the pipeline corridor and within the RoW. The Stó:lō Collective's view is that mitigation that only addresses Lightning Rock, as described in condition 77, is inadequate for ensuring protection of other culturally and spiritually significant sites.

V - Potential Impacts of the Project on Stó:lō Collective Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on the Stó:lō Collective's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to the Stó:lō Collective's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal Interests (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on the Stó:lō Collective's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with the Stó:lō Collective, the Stó:lō Collective's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province.

The joint ICA ([A3Z4Z2](#), [A3Z4Z3](#), [A3Z4Z4](#), [A3Z4Z5](#), [A4C7K2](#)) was prepared by Ts'elxwéyeqw Tribes Management Limited (TTML), Stó:lō Research and Resource Management Centre, and Human Environment Group on behalf of: Aitchelitz, Kwaw-Kwaw-Apilt, Leq'á:mel, Shxwhá:y, Skawahlook, Skwah, Soowahlie, Scowlitz, Squiala, Sumas, Tzeachten, and Yakweawkwoose.

The Stó:lō Research and Resource Management Centre conducted community interviews and a literature review that focused on traditional land uses on the proposed pipeline corridor. In its

Supplemental Traditional Land and Resource Use Technical Report ([A3Z4Z2](#)), the proponent estimated approximate distances and directions from the proposed pipeline corridor based on some of the information provided in Appendix B and C of the ICA Report.

In relying on this information to understand potential impacts, it is important to note the views of the Stó:lō Collective, who raised concerns with the supplemental technical report ([A3Z4Z2](#)) in their letter to the proponent and the NEB ([A4G6G0](#)) objecting to the proponent's decision to independently reduce the number of traditional land use (TLU) sites affected by the Project. The Stó:lō Collective objected to the proponent suggesting some of these sites were "unimportant" and notes that the proponent later explained that they reduced the number of TLU sites for confidentiality purposes. Furthermore, the Stó:lō Collective continue to object to the proponent's response to the NEB that the Stó:lō Collective had no concerns or recommendations pertaining to a number of important traditional land uses such as medicinal and food plant gathering and traditional travel corridors, which was evidently untrue according to the Stó:lō Collective.

Additional traditional land and resource use (TLRU) information for Leq'amel First Nation (a member of the Stó:lō Collective) is also summarized by the proponent in *Volume 5D* ([A3S2G8](#)) of the Project application. However, according to the Stó:lō Collective, the TLRU conducted by the proponent's consultants for Leq'amel was never reviewed, approved, or even provided to Leq'amel.

Impacts on Hunting, Trapping and Plant Gathering

According to the Stó:lō Collective's written evidence, community members continue to rely heavily on wild game, berries and plants, medicines and materials. Presently, a wide variety of wildlife and plants are harvested and gathered for food, medicine, building materials, and ceremonial use by the Stó:lō Collective's community members. Hunting and trapping, in particular deer hunting using both traditional and modern practices, continue to be important cultural activities to the Stó:lō Collective's community members. Trapping, although rarely practiced, remains highly valued by Stó:lō people. Hunted species include elk, moose, deer, grizzly bear, black bear, coyote, grouse, bobcat, and cougar. Plant gathering activities include gathering cedar roots, buds, bark, and wood, harvesting and processing berries, and gathering medicinal plants. Commonly targeted habitats include cedar forests, wetlands and nutrient rich forests. Medicinal plant gathering areas are noted for the spiritual importance to Stó:lō culture. A traditional food diet of wild game, fish, wild greens, berries and fruit continues to be very important to the health of Stó:lō people.

The Stó:lō Collective identified many concerns related to environmental effects of the Project on hunting, trapping, and plant gathering activities, including loss of berries, traditional medicines, and harvesting opportunities; loss of plants and medicinal resources relied on by Stó:lō Collective members; impacts on a wide variety of wildlife species; spread of invasive species and use of chemical vegetation management; increased erosion and run-off, sediment control, reduced ability to hunt or trap, and /or provide wild meat to family, Siyá:m, Big House-based activities, and cultural events; lost opportunities and/ or ability to gather traditional plants (i.e., cedar bark, roots, buds, wood, berries, and medicines) and contamination of gathering sites; potential environmental and cumulative environmental effects

involving: protected areas, wildlife and wildlife habitat, vegetation, species at risk, and wetlands; potential of adverse effects of traditional plants collected in a variety of wetland types, which may not be considered as important under the listing of *BC Wetlands of Concern* but are still considered significant to the Stó:lō Collective; potential for construction activities to limit use of game trails, restricting wildlife movement; increased lines-of-sight affecting predator-prey dynamics due to clearing activities; effects on Aboriginal harvesting practices and subsistence living and medicinal purposes; and lack of communication surrounding emergency response procedures and remedial action has created anxiety related to wildlife health and personal safety.

As described in the NEB Recommendation Report, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, old growth forests, wetlands, and terrestrial wildlife and wildlife habitat (including species at risk), marine mammals, and marine birds. If the Project is approved, the NEB conditions would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping, and gathering (Section 4.3.1 of this Report). With regards to specific concerns raised by the Stó:lō Collective, the proponent would implement several mitigation measures to reduce potential effects to species important for the Stó:lō Collective's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction of wildlife to the work site, minimize sensory disturbance and protect site-specific habitat features are outlined in the Project Environmental Protection Plan and the Wildlife Management Plans.

The Stó:lō Collective identified 98 specific hunting sites within its TLU. Additionally, the Stó:lō Collective identified five site-specific areas significant for plant species gathered by community members, including Cheam Mountain, Cheam wetlands, Sumas Mountain, Chilliwack Mountain, and Skagit Mountain. Stó:lō community members identified three traditional hunting areas (Sumas Mountain, Mount Cheam and forested areas between Cheam and east of Hope), of which three contemporary hunting sites are located within 100 m of the proposed pipeline corridor, and 95 contemporary hunting sites are located within 2 km of the proposed pipeline corridor. Three trapping sites were identified, of which two (Sumas Slough and Bowman's Island) are currently used; however, the proximity to the proposed pipeline corridor was not provided.

Stó:lō people also gather plants that are located within forested, marshlike/swampy, and both alpine and lowland areas in and around their own reserves. Several plant gathering sites were identified and mapped within the proposed pipeline corridor (between km 960-964, between km 1015 – 1016, between km 1019 – 1024, between km 1027 – 1031, near km marker 1039, near km marker 1098). Multiple water-crossings also support traditionally used plants, however these are too numerous to map in a document like the CHOA (Appendix B and C of the ICA). A full inventory of traditional plant gathering areas potentially affected by the Project can only be determined through field surveys. The area of the

Fraser Valley downstream of the Fraser Canyon and the confluence of the Pitt and Fraser rivers were traditionally used for plant gathering, specifically bog cranberries and wapato.

Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Stó:lō Collective's access to hunting, trapping and plant gathering activities, largely confined to the Project footprint for the pipeline and associated facilities. The Crown understands that with construction and reclamation activities, disruptions to access may result in a loss of harvesting opportunities for the Stó:lō Collective. For traditional activities directly affected by the construction and operation of the WMT, traditional activities would not occur within the expanded water lease boundaries during the operational life of the Project. Project-related marine shipping is expected to disrupt Stó:lō Collective's marine vessels and harvesters, and this could disrupt activities or access to hunting, trapping, and plant gathering sites.

If the Project is approved, the NEB conditions would either directly or indirectly avoid or reduce potential impacts on specific locations and access associated with hunting, trapping, and gathering sites (Section 4.3.1 of this Report). With regard to specific concerns raised by the Stó:lō Collective, the proponent would implement several mitigation measures to reduce potential effects on TLRU sites important for the Stó:lō Collective's hunting, trapping, and plant gathering activities, such as management plans that include access management, scheduling and notification of Project activities, and environmental monitoring programs that monitor access control measures.

The Access Management Plan is intended to reduce disturbances caused by access, construction equipment and vehicle traffic during and following construction in order to minimize disturbance to access to the Stó:lō Collective's traditional lands. The proponent has committed to minimizing the development of access routes, controlling public access along the construction RoW, selecting appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent has also committed to work with applicable resource managers, traditional land and resource users to define locations where access control is necessary, and what type(s) of access control will be implemented. In the event that hunting, trapping, and plant gathering sites are identified during ongoing engagement with the Stó:lō Collective prior to construction, the sites will be assessed, and appropriate mitigation measures will be determined. The proponent committed to working with the Stó:lō Collective to develop strategies to most effectively communicate the construction schedule and work areas to community members.

The Stó:lō Collective expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities, including: a sense of spiritual and cultural alienation on the land; impacts to human health from the use of pesticides to control invasive and other plant species, particularly impacts to community members that harvest country foods; sensory disturbance to birds and disturbance of bird habitat during construction; loss of opportunities and/ or ability to gather traditional plants (i.e., cedar bark, roots, buds, wood, berries, and medicines) and contamination of gathering sites; the possibility of a major rupture and the effect that

would have on the lower Fraser River watershed and the water-based culture of the community; and, lack of communication surrounding emergency response procedures and remedial action has created anxiety related to wildlife health and personal safety.

Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to the Stó:lō Collective's hunting, trapping, and plant gathering activities. The Crown understands that this short-term disruption could temporarily alter the behaviour of community members' hunting, trapping or plant gathering activities during construction, and that reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project, could have spiritual and cultural impacts on community members.

If the Project is approved, the NEB conditions may either directly or indirectly avoid or reduce potential social, cultural, spiritual, and experiential effects associated with hunting, trapping, and plant gathering activities (Section 4.3.1 of this Report). With regards to specific concerns raised by the Stó:lō Collective, the proponent would implement several mitigation measures to reduce potential effects to the Stó:lō Collective's hunting, trapping, and plant gathering activities. The proponent is committed to implementing weed management (as outlined in the Weed and Vegetation Management Plan) to reduce the potential for weed infestation following construction, and utilizing an Integrated Vegetation Management approach intended to reduce the use of herbicides and promote healthy ecosystems. The proponent will consult with Aboriginal groups regarding problem vegetation management and methods of treatment. Measures outlined in the proponent's Reclamation Management Plan are intended to stabilize and revegetate affected lands to achieve land productivity along the construction RoW and footprint, equivalent to the adjacent land use. The proponent has also committed to ongoing engagement with Aboriginal groups regarding the integration of traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with the Stó:lō Collective, the Stó:lō Collective's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor impact on the Stó:lō Collective's hunting, trapping and plant gathering activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related pipeline, facility, and WMT construction and operation, and marine shipping activities are likely to have low to moderate magnitude environmental effects on terrestrial, aquatic, and marine species harvested by the Stó:lō Collective;
- Construction of WMT, the pipeline and associated facilities are likely to cause short-term temporary disruptions to Stó:lō Collective's members accessing traditional hunting, trapping and plant gathering sites within the Project footprint; Project-related marine shipping activities are likely to cause temporary disruptions to activities or access to sites during the period of time Project-related tankers are in transit through Stó:lō Collective territory; and

- Concerns identified by the Stó:lō Collective regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their hunting, trapping and plant gathering activities.

Impacts on Freshwater Fishing, and Marine Fishing and Harvesting

Stó:lō, as people of the river, have a deeply established connection to fishing and marine harvesting, which are core to Stó:lō cultural activities and tradition, subsistence and economic purposes. This connection is considered essential to psychological, physical, and spiritual health. Historically, community members caught and processed fish using setting nets, torch lighting, dip netting, drift netting, and wind drying. Presently, fishing excursions continue to provide meaningful opportunities to teach traditional methods, share knowledge and learn the stories about the waterways. Most fishing occurs along the Fraser River, particularly at the Fraser Canyon where salmon are abundant and conditions for meat preparation are ideal. Traditionally, the mouth of the Fraser River has been used for harvesting marine mammals, shellfish and molluscs. Various species of fish continue to be harvested by Stó:lō community members, including: black crappie, brown bullhead, bull trout, prickly sculpin, sculpin, slimy sculpin, coastal cutthroat trout, chinook salmon, chum salmon, chiselmouth, coho, salmon, carp, cutthroat, dace, Dolly varden, eulachon, green sturgeon, lamprey, nooksack dace, peamouth chub, pink salmon, rainbow trout, redbreast shiner, sturgeon, sockeye salmon, steelhead, sum steelhead, Salish sucker, sucker, whitefish, and white sturgeon.

The Stó:lō Collective identified many concerns related to environmental effects of the Project on fishing activities, in particular, risks to the Stó:lō Collective's freshwater resources important to salmon in the Fraser River, the loss of traditional resources, and potential loss of wetland habitat, cumulative environmental effects involving fish and fish habitat, species at risk, marine environment, water, hydrology, and wetlands; and concern around water quality and effects to water quality and waterbodies during construction of the Project. The Stó:lō Collective emphasized that the Fraser River is a wandering gravelbed, meaning that fish and fish habitat is dynamic along with fishing sites.

As described in the NEB Recommendation Report, Project-related activities could result in low to moderate magnitude effects on freshwater and marine fish and fish habitat, surface water and marine water quality. Moderate effects to fish and fish habitat would be localized to individual watercourse crossings, and effects to marine fish and fish habitat would be limited to a few or many individuals, where any potential serious harm would be compensated by offset measures. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Sections 4.3.2 and 4.3.3 of this Report).

A number of recommended NEB conditions require the proponent to file reports that will monitor Project-related impacts on freshwater fish and fish habitat, marine fish and fish habitat, and riparian habitats. With regard to specific concerns raised by the Stó:lō Collective, the proponent would implement several mitigation measures to reduce potential effects to species important for the Stó:lō Collective's fishing activities. The proponent has committed to time watercourse crossing construction activities to occur within the least risk biological windows in an attempt to avoid causing serious harm to fish, has committed to working with Aboriginal groups to identify the most appropriate

means of offsetting serious harm to marine fish and fish habitat, and has proposed the implementation of channel and bank reclamation measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat. Further, the proponent has completed a preliminary offsetting plan for impacts on fish and fish habitat associated with construction and operation of the Westridge Marine Terminal. Key mitigations for marine shipping activities include the proponent's commitment (411) to require all tankers to process and empty their bilges prior to arrival and lock the discharge valve of the bilge water while in Canadian waters.

In the ICA, Stó:lō Collective community members identified waterways crossed by the Project that are associated with historic and contemporary fishing activities, including 11 segments associated with drift netting, three major areas associated with beach seining, and 140 known sites associated with setting nets. Twenty-four recorded fishing sites, including Silverhope Creek, Chawuthen Creek, Hunter Creek, Wahleach (Jones) Creek, Anderson Creek, Street Creek, Stewart Slough, Sumas Lake Canal, and 16 unnamed channels were identified. The locations of the fishing sites in relation to the Project were not provided.

The Stó:lō Collective raised concerns with the Project's potential impacts relating to specific locations and access to fishing activities, specifically: increased access to the land by members of the public due to Project-related activities, level of input into fisheries management, damage to traditional waterways (fish habitat, water quality, water flows, fish health) during Project water crossings, access modifications (i.e., new access, traffic), loss of traditional fishing sites, and decreased quality/integrity of fishing sites. The Crown understands that if construction and reclamation occur during the fishing season, there could be a potential reduction in access to waterways, staging areas, and fishing sites for Stó:lō Collective community members. However, disruptions to access would largely be confined to the Project footprint for the pipeline and associated facilities during construction and reclamation.

For fishing and harvesting activities directly affected by the construction and operation of the WMT, traditional activities would not occur within the expanded water lease boundaries during the operational life of the Project. Impacts on navigation, specifically in eastern Burrard Inlet, would exist for the lifetime of the Project, and would occur daily. Project-related marine vessels are expected to cause temporary disruptions to the Stó:lō Collective's marine fishing and harvesting activities. Disruptions to the Stó:lō Collective's marine fishing and harvesting activities are likely to be temporary when accessing fishing sites in the Burrard Inlet that require crossing shipping lanes, as community members would be able to continue their movements shortly after the tanker passes.

NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access to freshwater and marine fishing and harvesting sites important for the Stó:lō Collective (Section 4.3.2 and 4.3.3 of this Report). With regards to specific concerns raised by the Stó:lō Collective, the proponent would implement several mitigation measures to reduce potential effects on freshwater and marine fishing and harvesting sites, such as access management plans, scheduling and notification of Project activities including Project-related marine vessel traffic, and environmental monitoring programs. As previously discussed, the proponent is committed to minimize

disturbance to access to the Stó:lō Collective's traditional lands, as described in the Access Management Plan. The proponent committed to working with the Stó:lō Collective to develop strategies to most effectively communicate the construction schedule and work areas to community members. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a marine public outreach program (NEB Condition 131). This communication would allow Stó:lō Collective community members to take measures to reduce potential disruptions from tankers and allow planning for marine fishing and harvesting activities to take place that minimizes disturbance from Project-related tankers.

The Stó:lō Collective expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its fishing activities, including a sense of spiritual and cultural alienation, the loss of traditional resources, including spiritually and culturally important sites, and increased barriers to accessing traditional resources and practices. As described previously, the Project construction and routine maintenance is expected to cause short-term, temporary disruptions to the Stó:lō Collective's fishing activities. The Crown understands that this temporary interruption could mean that community members alter their fishing activities during construction, which could affect their participation in traditional activity. If the Project is approved, the NEB conditions would either directly or indirectly reduce the potential effects on social, cultural, spiritual or experiential effects associated with fishing activities (Section 4.3.2 of this Report).

Through the construction and operation of the WMT, the Crown understands that Stó:lō Collective community members, who may exercise their Aboriginal rights in Burrard Inlet, may experience noise disturbances and interruptions to cultural ceremonies along the shoreline, and loss or damage to visual quality of the Burrard Inlet. Project-related marine vessels are expected to cause temporary disruptions to the Stó:lō Collective's marine fishing and harvesting activities. The Crown understands that community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Stó:lō Collective community members to take measures to reduce potential disruptions from tankers and allow planning for cultural events to take place that minimizes disturbance from Project-related tankers. Reduced harvests, while not expected to occur from temporary access restrictions, could impact the Stó:lō Collective's cultural activities and sharing of marine food with the community.

In consideration of the information available to the Crown from the NEB process, consultation with the Stó:lō Collective, the Stó:lō Collective's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in a minor-to-moderate impact on the Stó:lō Collective's freshwater fishing and marine fishing and harvesting activities. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related pipeline, facility, WMT construction and operation, and marine shipping activities are likely to have low to moderate magnitude environmental effects on freshwater and marine species harvested by the Stó:lō Collective;
- Construction of WMT, pipeline and associated facilities are likely to cause short-term temporary disruptions to the Stó:lō Collective's community members accessing traditional freshwater fishing and marine fishing and harvesting sites within the Project footprint; Project-related marine shipping activities are likely to cause temporary disruptions to activities or access to sites during the period of time Project-related tankers are in transit through the Stó:lō Collective's traditional territory; and
- Concerns identified by the Stó:lō Collective regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their freshwater fishing and marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

Trails and travelways, in particular the Fraser River and tributary systems, have supported traditional harvesting, socio-economic connections and factored into Stó:lō identity and cultural values. Presently, traditional travel continues to be used by community members to participate in spiritual and ceremonial activities (e.g., accessing spiritually significant sites such as bathing and fasting), gather plants, hunt, and fish, and for the Stó:lō seasonal round of activities. Historically, the Stó:lō people are known to have built large, permanent settlement sites. There is a close connection between the Fraser River (and tributary systems) and Stó:lō settlement sites because of the Stó:lō people's reliance on salmon from the Fraser River and the accessibility to different regions. The largest and most populated settlements are often located at the confluence of major waterways. Historically, inter-nation gatherings were created by kinship and friendship to support trading goods such as fish, berries, wild meat, sweaters, blankets, and baskets. Presently, Stó:lō people continue to attend different types of gatherings in different parts of the asserted traditional territory to celebrate cultural traditions and give strength to other First Nation initiatives aimed at environmental protection, Aboriginal rights and title, governance, and social activism.

The Stó:lō Collective identified many concerns related to environmental effects of the Project on other traditional and cultural practices, including: absence of a condition that the proponent must protect sacred sites of the members of the Stó:lō Collective; adverse effects on spiritually and culturally important sites, such as historical camps and villages, burial sites, archaeological sites, traditional spiritual and ceremonial areas; impacts on the ability of the Stó:lō Collective to protect the integrity of cultural sites and landscape features; adverse effects stemming from how Project plans have overlooked Stó:lō Collective cultural heritage sites; interruption of ceremonial and cultural activities; effects to and loss of traditional use sites, historic campsites, villages and cultural landscape features and travelways; cumulative effects of the Project together with the original project on culture, spirituality and ceremonial life of the Stó:lō people and, effects on sacred sites and burial sites and subsequently community connections to ancestry. As described in Section 4.3.4 of the Report, Project-related activities are not likely to result in significant adverse effects on the ability of Aboriginal groups to use

land, waters or resources for traditional purposes. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental impacts on physical and cultural heritage resources (Section 4.3.4 of this Report).

With regards to specific concerns raised by the Stó:lō Collective, the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources important for the Stó:lō Collective's traditional and cultural practices. An environmental education program will be developed and implemented to ensure that all personnel working on the Project are informed of the location of known sacred sites and burial sites. The proponent has also committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during RoW finalization, narrowing the RoW in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments.

The Stó:lō Collective have identified at least 721 sites of cultural significance of which 17 are located within the pipeline corridor (potentially more due to undisclosed sites). The Stó:lō Collective's community members identified 14 trails and travelways that cross the proposed pipeline corridor. During the ICA, 151 previously recorded archaeological and historic sites (habitation and/or settlements) were identified within 1 km of the proposed pipeline corridor, of which 38 are located within 50 m of the corridor. The ICA also describes camps, winter villages and settlement sites on and off reserve as identified by Stó:lō community members. Two habitation sites were located within 50 m of the pipeline corridor. It should be noted that the Archaeological Impact Assessment (AIA) for the Project is not yet complete.

Additionally identified in the ICA were six Stó:lō gathering sites: Squiala, Shxwhá:y, Skowkale, Yakweakwoose, Cheam, and Sumas bighouses close to the Project. The locations of gathering places in relation to the Project were described in the ICA. During the ICA, approximately 550 cultural heritage sites used for spiritual activities were documented within 2 km of the proposed pipeline corridor. Stó:lō community members identified 73 sacred areas within 100 m of the proposed pipeline corridor: six burial sites, 11 Sxwo:yxwey places, 18 puberty places, 11 smilha/syuwel places, 10 historic bathing sites and 17 current bathing sites. Site-specific locations of the sacred areas were buffered to protect their specific locations on the maps presented in the ICA (Appendix C). As summarized in *Volume 5D* of the Project application, sacred areas are located at Cultus Lake, Mount Cheam (Cheam Peak), Echo Island (Harrison Lake), Echo Island (Harrison Lake), Mount Slesse (Slesse Mountain), Mount McGuire, and Mount Hope and Lady Franklin Rock, located between 3.3 km and 23.5 km from the proposed pipeline corridor. Semá:th Lake (Sumas Lake) is an important historical site crossed by the proposed pipeline corridor. Coqualeetza is an important historical and cultural site for the Stó:lō people approximately 1.6 km northwest of the proposed pipeline corridor.

The Stó:lō Collective raised a number of important concerns with the location of the Project in relation to specific locations and access points regarding other cultural and traditional practices and sites

including a Project staging area at Lightning Rock. Lightning Rock is one of many spiritual sites that Stó:lō Collective believe must be preserved both from a physical and cultural perspective. NEB Condition 77 (Archaeological and cultural heritage assessment – Lightning Rock) would require the proponent to file a report with the NEB on archaeological and cultural heritage field investigations undertaken to assess the potential impacts of Project construction and operations on the Lightning Rock site at Sumas. However, given that this is a sacred site with burial mounds, Stó:lō Collective have noted that any Project routing through this area is inappropriate given the need to preserve the cultural integrity of the site and the surrounding area. For the Stó:lō Collective, the site surrounding Lightning Rock should be a ‘no go’ area for the Project.

The Stó:lō Collective also noted the locations of various other culturally important sites including bathing sites within the 150 metre (m) RoW alignment at Bridal Veil Falls near Chilliwack, and an ancient pitt house within the RoW, none one of which appear on the proponent’s detailed alignment sheets, and for which no NEB conditions have been recommended.

The Stó:lō Collective voiced concern to the Crown on numerous occasions that the proponent has overlooked culturally significant sites of importance to the Stó:lō people, and that without a detailed understanding by the proponent of the locations and valued intangible properties associated with these sites, the Project could significantly affect areas of significant current and traditional use to Stó:lō Collective members. The Stó:lō Collective remains concerned that the proponent hasn’t fulfilled commitments it made in regard to protecting all cultural sites of importance to the Collective. While these commitments were made in meeting records with the Collective, failure to add these commitments to the proponent’s engagement logs means that the commitments are not captured by NEB Condition 2.

The Stó:lō Collective also expressed concern that there could be increased access to the land by members of the public due to Project-related activities. The Crown understands that there will be temporary interruptions to the Stó:lō Collective’s traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities. The expansion of the WMT and increased marine shipping within Burrard Inlet could also impose limitations on the Stó:lō Collective’s ability to use the water and surrounding lands for traditional activities in that area, given the acoustic and visual disturbance of WMT construction and increased frequency and presence of Project-related shipping. However, the Crown notes that effects of WMT construction on cultural activities would be temporary.

As described in Section 4.3.4 of the Report, Project-related activities are not generally expected to result in significant adverse effects on the ability of Aboriginal groups to use land, waters or resources for traditional purposes. If the Project is approved, the NEB conditions may either directly or indirectly avoid or reduce potential environmental impacts on physical and cultural heritage resources (Section 4.3.1 of this Report).

With regards to specific concerns raised by the Stó:lō Collective, the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources important for the Stó:lō Collective's traditional and cultural practices. The proponent has also committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during RoW finalization, narrowing the RoW in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments.

The Stó:lō Collective expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its other traditional and cultural practices, including socio-economic concerns, such as human occupancy and resource use, impacts to heritage resources, and cultural well-being, health, and infrastructure and services. Additional concerns include that Project activities will deter First Nation members from attending gatherings, that the presence of the construction workforce will inflate cost of accommodation and travel, and that the Project may be a divisive or negative influence on inter-nation relations. Stó:lō Collective have expressed significant frustration with the way in which their traditional use and knowledge information was considered by the proponent and the NEB. Owing to a lack of specificity in the NEB's conditions and their experience with the proponent's implementation of commitments made to-date, Stó:lō Collective are not confident that the recommended NEB conditions will be able to adequately protect culturally important sites and ensure the integration of traditional use information into detailed Project planning.

Finally, the Stó:lō Collective raised concerns that cumulative effects have eroded some aspects of Stó:lō culture over time and are vulnerable to additional incremental impacts; and, the Project poses significant risks, and represents a significant threat to the cultural integrity and survival of core relationships at the heart of the Stó:lō worldview, identity, health and well-being.

The Stó:lō Collective are concerned with protecting the health of Stó:lō people, protection of spiritual places for future generations, and protecting the integrity of cultural sites and landscape features. As described previously, the Crown understands that this may result in temporary interruptions to the Stó:lō Collective's cultural and spiritual practices, or that their participation in the traditional activity is curtailed, during Project construction and operation activities, and during the transit of marine vessels associated with the Project. The Crown notes the proponent's commitment to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

In consideration of the above information and other available to the Crown from the NEB process, consultation with the Stó:lō Collective, the Stó:lō Collective's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation and Project-related marine shipping activities are expected to result in a minor-to-moderate impact on the Stó:lō Collective's other

traditional and cultural practices. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related pipeline, facility, WMT construction and operation, and marine shipping activities are likely to have low to moderate environmental effects on traditional and cultural resources;
- Construction of the WMT, pipeline and associated facilities are likely to cause short-term temporary disruptions to the Stó:lō Collective's community members accessing traditional and cultural practice sites within the Project footprint; Project-related marine shipping activities are likely to cause temporary disruptions to activities or access to sites during the period of time Project-related tankers are in transit through the Stó:lō Collective's traditional territory; and
- Concerns identified by Stó:lō regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their other cultural and traditional practices.

Impacts on Aboriginal Title

The Crown notes that portions of the Project would be located within areas assessed as having moderate to strong *prima facie* claim for title. In particular, for the Project segment running east from an area near Vedder Canal to the east side of Chilliwack, and from Agassiz up to Hope, the Crown's preliminary assessment ranges from moderate to strong *prima facie* claim for title. For the Project segment running along the west base of Sumas Mountain in and around Vedder Canal, the Crown's assessment is a moderate-to-strong to strong *prima facie* claim for title.

The Crown has actively consulted with the Stó:lō Collective throughout the NEB process and Crown consultation process at a deeper level in an attempt to better identify, understand, and resolve concerns relating to Aboriginal title.

Concerns related to Aboriginal title raised by the Stó:lō Collective throughout the NEB and Crown consultation process include:

- Impacts that could impede or disrupt the Stó:lō Collective's use of its asserted traditional territory, including reduced ability to fish, hunt, trap, or gather plants, a major rupture on the lower Fraser River watershed, decreased quality/integrity of fishing sites, and proposed Project activities that may deter community members from attending gatherings;
- Impacts on historic settlements and camps: 151 previously recorded archaeological and historic sites (habitation and/or settlements) were identified within 1 km of the proposed pipeline corridor, of which 38 are located within 50 m of the corridor. The ICA also describes camps, winter villages and settlement sites on and off reserve as identified by Stó:lō community members. Two habitation sites were located within 50 m of the pipeline corridor;
- Activities that affect the Stó:lō Collective's ability to manage and make decisions over the Project area, including the loss of land by means of industrial developments, loss of fishing sites, and the potential lack of control over traditional territory in the event of a spill if Stó:lō leaders are not involved in emergency response planning; and

- Project-related activities that affect the Stó:lō Collective's economic development aspirations for its asserted traditional territory, including challenges that Stó:lō companies may face associated with the Project, and potential adverse effects on existing economic activities.

The Crown provides a description of the potential impacts of the Project on Aboriginal title in Section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid/reduce Project impacts associated with the degree of disturbance to terrestrial, marine, and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as well as NEB Conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved.

It is noted that the Stó:lō Collective has not executed a Mutual Benefits Agreement with the proponent.

Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in Section 4.3.5, it is the Crown's opinion, the Project is expected to have minor-to-moderate impacts on the Stó:lō Collective's asserted Aboriginal title to the Project area.

Impacts Associated with Accidental Pipeline, Terminal, and Tanker Spills

The Stó:lō Collective expressed several concerns with direct and indirect effects of Project-related spills on their Aboriginal Interests. As outlined within the Stó:lō Collective's ICA, the Stó:lō Collective feels that the Project poses significant risk and represents a significant threat to the cultural integrity and survival of core relationships at the heart of Stó:lō worldview, identity, health, and well-being. The possibility of a major rupture of the proposed pipeline and significant contamination of the lower Fraser River Watershed cannot be entirely negated. As a result, construction of the Project as currently planned and assessed in this Project would significantly jeopardize the survival of the unique Indigenous lifeway of the Stó:lō Collective, and unjustifiably infringe upon the Stó:lō Collective's Aboriginal Interests. Additionally, the Stó:lō Collective highlights that the significance criteria relating to a pipeline rupture that Stó:lō has created is different from that of the proponent; the Stó:lō Collective hope this will be considered by Crown and the GIC.

The Crown understands the Stó:lō Collective's concerns regarding spills, and the potential for a spill to significantly impact the Stó:lō Collective's use and occupation of its asserted traditional territory, ability to make decisions over the area impacted, and the potential for a spill to significantly impact any economic development aspirations the Stó:lō Collective has for its territory.

A discussion of the potential impacts of a spill on Aboriginal Interests is provided in Section 4.3.6 of this Report. In consideration of this information and analysis, as well as information available to the Crown on the Stó:lō Collective's Aboriginal Interests and concerns raised by the Stó:lō Collective during the NEB process and Crown consultation process, an oil spill associated with the Project could result in minor to

serious impacts on the Stó:lō Collective's Aboriginal Interests. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline, terminal or tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who live nearby and rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill³.

IV - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline and marine safety regimes would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations of the pipeline and WMT, as well as Project-related marine shipping activities between the WMT and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the Project on the exercise of the Stó:lō Collective's Aboriginal Interests would be up to minor-to-moderate.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support the Stó:lō Collective's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Stó:lō Collective in emergency response planning activities. The federal Crown is considering incremental measures that would further accommodate the potential adverse impacts of the Project on Stó:lō Collective, as discussed in Sections 4 and 5 of the main body of this Report.

³ Trans Mountain Final Argument, p. 85 and 207

Table 2 - Stó:lō Collective Member Community Preliminary Strength of Claim

Stó:lō Collective Member	Project Interaction	Preliminary Analysis – Aboriginal Rights	Preliminary Analysis – Aboriginal Title
Aitchelitz First Nation (Aitchelitz)	The proposed right-of-way (RoW) is estimated to run through approximately 17 km of the asserted territory of the Ts'elxweyeqw Tribe. Distance from the nearest Aitchelitz community to the proposed RoW is estimated at 0 km.	Aitchelitz is understood to be a part of the historic Chilliwack tribe, today associated with the Ts'elxweyeqw Tribe. The Chilliwack are one of several groups classified as Upper Stó:lō. The Crown's preliminary assessment of the Ts'elxweyeqw Tribe's claim for rights over the section of the Project, east from an area near present day Vedder Canal to the east side of the City of Chilliwack, ranges from a moderate to a strong <i>prima facie</i> claim for rights. Information indicates that at the time of contact (understood to be 1827) ethnographers did not associate the area north of Vedder Crossing with the Ts'elxweyeqw Tribe. Information indicates that the Ts'elxweyeqw began utilizing this northern area sometime after 1830.	The Crown's preliminary assessment of the Ts'elxweyeqw Tribe's title claim over the section of the Project, east from an area near Vedder Canal to the east side of the City of Chilliwack, ranges from a moderate to a strong <i>prima facie</i> claim for title. It is understood that by 1846, the Ts'elxweyeqw Tribe had migrated from the Chilliwack River Valley to Vedder Crossing, which resulted in Ts'elxweyeqw settling into villages in that area.
Kwaw-kwaw-apilt First Nation (Kwaw-kwaw-apilt)	The proposed RoW is estimated to run through 44.8 km of the Kwaw-Kwaw-Apilt's asserted traditional territory. One proposed Project facility (Wahleach Station) also falls within the asserted traditional territory. Distance from the nearest Kwaw-Kwaw-Apilt community to the proposed RoW is estimated at 0 km (as it crosses <i>Grass No.15</i>).	Kwaw-kwaw-apilt is understood to be a part of the historic Chilliwack tribe (Pil'Alt), today associated with the Ts'elxweyeqw Tribe. The Chilliwack are one of several groups classified as Upper Stó:lō. The Crown's preliminary assessment of the Pil'Alt Tribe's claim for rights over the section of the Project, east from an area near present day Vedder Canal to the east side of the City of Chilliwack, ranges from a moderate to a strong <i>prima facie</i> claim for rights. Information indicates that at the time of contact (understood to be 1827) ethnographers did not associate the area north of Vedder Crossing with the Pil'Alt Tribe. Information indicates that the Pil'Alt began utilizing this northern area sometime after 1830.	The Crown's preliminary assessment of the Pil'Alt Tribe's title claim over the section of the Project, east from an area near Vedder Canal to the east side of the City of Chilliwack, ranges from a moderate to a strong <i>prima facie</i> claim for title. It is understood that by 1846, the Pil'Alt Tribe had migrated from the Chilliwack River Valley to Vedder Crossing, which resulted in villages being settled in that area.

Stó:lō Collective Member	Project Interaction	Preliminary Analysis – Aboriginal Rights	Preliminary Analysis – Aboriginal Title
<p>Leq'á:mel First Nation (Leq'á:mel)</p>	<p>The proposed RoW is estimated to run through 23.9 km of the Leq'á:mel's asserted traditional territory. Two proposed Project facilities (Sumas Station and Sumas Tank Farm) also fall within the asserted traditional territory. Distance from the nearest Leq'á:mel community to the proposed RoW is estimated at 5.2 km.</p>	<p>The Crown's preliminary assessment of Leq'á:mel's <i>prima facie</i> rights over the section of the Project, from Abbotsford to Chilliwack, is weak to strong as the pipeline route falls within what was considered Leq'á:mel historic territory.</p>	<p>The Crown's preliminary assessment of Leq'á:mel's <i>prima facie</i> title over the section of the Project, from Abbotsford to Chilliwack, is weak to strong as the pipeline route falls within what was considered Leq'á:mel historic territory. Leq'á:mel village sites were described as being on lower side of Vedder mountain near Yarrow. Up until separation with Sumas, Leq'a mel was part of the lower Sumas reserve and territory.</p>
<p>Scowlitz First Nation (Scowlitz)</p>	<p>The proposed RoW does not cross the Scowlitz's asserted territory, nor do the proposed Project facilities fall within the Scowlitz's asserted traditional territory. The proposed RoW runs approximately 9 – 13 km from Scowlitz at Harrison Bay, and approximately 6 km from <i>Pekw'Xe:Yles</i> reserve.</p>	<p>The Crown's preliminary assessment of the Scowlitz's claim for rights in the area of its asserted territory in closest proximity to the section of the Project, located between Chilliwack and Agassiz, is a weak <i>prima facie</i> claim. The claim would most likely be limited to fishing rights closest to the confluence of the Harrison and Fraser Rivers. Ethno-historic information indicates Scowlitz's traditional territory southern extent is north of the Fraser River. The Project is on the south side of the Fraser River, outside of the Scowlitz's asserted territory.</p>	<p>The Crown's preliminary assessment of title is there is no information supporting a <i>prima facie</i> title claim by Scowlitz to the area within its asserted territory closest in proximity to the proposed ROW, as identified. There is no evidence of Scowlitz's occupation in the vicinity of the Project.</p>

Stó:lō Collective Member	Project Interaction	Preliminary Analysis – Aboriginal Rights	Preliminary Analysis – Aboriginal Title
Shxwhá:y Village (Shxwhá:y)	<p>The proposed RoW is estimated to run through 17 km of the asserted territory of the Ts'elxweyeqw Tribe. The proposed RoW lies south of the reserves held by Shxwhá:y, with the exception of <i>Grass No. 15</i>, which it is proposed to cross. The reserves in the vicinity of Chilliwack are found between Kilometre Posts (KPs) 1055 – 1065 of the proposed RoW. The proposed ROW runs between 0 km and 8.4 km from Shxwhá:y reserves.</p>	<p>Shxwhá:y is understood to be a part of the historic Chilliwack tribe, today associated with the Ts'elxweyeqw Tribe. The Chilliwack are one of several groups classified as Upper Stó:lō. The Crown's preliminary assessment of the Ts'elxweyeqw Tribe's claim for rights over the section of the Project, east from an area near present day Vedder Canal to the east side of the City of Chilliwack, ranges from a moderate to a strong <i>prima facie</i> claim for rights. Information indicates that at the time of contact (understood to be 1827), ethnographers did not associate the area north of Vedder Crossing with the Ts'elxweyeqw Tribe. Information indicates that the Ts'elxweyeqw began utilizing this northern area sometime after 1830.</p>	<p>The Crown's preliminary assessment of the Ts'elxweyeqw Tribe's title claim over the section of the Project, east from an area near Vedder Canal to the east side of the City of Chilliwack, ranges from a moderate to a strong <i>prima facie</i> claim for title. It is understood that by 1846, the Ts'elxweyeqw Tribe had migrated from the Chilliwack River Valley to Vedder Crossing, which resulted in Ts'elxweyeqw settling into villages in that area.</p>
Skowkale First Nation (Skowkale)	<p>The proposed RoW is estimated to run through 17 km of the asserted territory of the Ts'elxweyeqw Tribe.</p> <p>The proposed RoW lies south of the reserves held by Skowkale, with the exception of <i>Grass No. 15</i>, which it is proposed to cross. The Skowkale reserves in the vicinity of Chilliwack are found between KPs 1055 – 1065 of the proposed RoW. The proposed RoW runs between 0 km and 6 km from Skowkale's reserves.</p>	<p>Skowkale is understood to be a part of the historic Chilliwack tribe, today associated with the Ts'elxweyeqw Tribe. The Chilliwack are one of several groups classified as Upper Stó:lō. The Crown's preliminary assessment of the Ts'elxweyeqw Tribe's claim for rights over the section of the Project, east from an area near present day Vedder Canal to the east side of the City of Chilliwack, ranges from a moderate to a strong <i>prima facie</i> claim for rights. Information indicates that at the time of contact (understood to be 1827), ethnographers did not associate the area north of Vedder Crossing with the Ts'elxweyeqw Tribe. Information indicates that the Ts'elxweyeqw began utilizing this northern area sometime after 1830.</p>	<p>The Crown's preliminary assessment of the Ts'elxweyeqw Tribe's title claim over the section of the Project, east from an area near Vedder Canal to the east side of the City of Chilliwack, ranges from a moderate to a strong <i>prima facie</i> claim for title. It is understood that by 1846, the Ts'elxweyeqw Tribe had migrated from the Chilliwack River Valley to Vedder Crossing, which resulted in Ts'elxweyeqw settling into villages in that area.</p>

Stó:lō Collective Member	Project Interaction	Preliminary Analysis – Aboriginal Rights	Preliminary Analysis – Aboriginal Title
<p>Skwah First Nation (Skwah)</p>	<p>The existing and proposed RoW travels through approximately 45 km of Skwah’s asserted traditional territory. One Project facility (Wahleach Station) also falls within the asserted traditional territory.</p> <p>The proposed RoW would be located largely within the existing RoW with some adjustment for habitat and geological considerations. Skway has six reserves, one of which would be crossed by the proposed RoW (<i>Grass No. 15</i>).</p>	<p>Skwah is understood to be a part of the historic Chilliwack tribe, today associated with the Ts’elxweyeqw Tribe. The Chilliwack are one of several groups classified as Upper Stó:lō. The Crown’s preliminary assessment of the Ts’elxweyeqw Tribe’s claim for rights over the section of the Project, east from an area near present day Vedder Canal to the east side of the City of Chilliwack, ranges from a moderate to a strong <i>prima facie</i> claim for rights. Information indicates that at the time of contact (understood to be 1827), ethnographers did not associate the area north of Vedder Crossing with the Ts’elxweyeqw Tribe. Information indicates that the Ts’elxweyeqw began utilizing this northern area sometime after 1830.</p>	<p>The Crown’s preliminary assessment of the Ts’elxweyeqw Tribe’s title claim over the section of the Project, east from an area near Vedder Canal to the east side of the City of Chilliwack, ranges from a moderate to a strong <i>prima facie</i> claim for title. It is understood that by 1846, the Ts’elxweyeqw Tribe had migrated from the Chilliwack River Valley to Vedder Crossing, which resulted in Ts’elxweyeqw settling into villages in that area.</p>

Stó:lō Collective Member	Project Interaction	Preliminary Analysis – Aboriginal Rights	Preliminary Analysis – Aboriginal Title
<p>Skawahlook First Nation (Skawahlook)</p>	<p>The proposed RoW is estimated to run through 195 km of Skawahlook’s asserted traditional territory also delineated as the Stó:lō Nation <i>writ</i> area.</p> <p>Approximately 14.5 kms of the marine shipping route is also within Skawahlook’s asserted traditional territory.</p> <p>Seven Project facilities (Hope Station, Wahleach Station, Sumas Station, Sumas Tank Farm, Port Kells Station, Burnaby Terminal, and Westride Marine Terminal) also fall within the asserted traditional territory.</p> <p>The proposed RoW crosses the Fraser River from Ruby Creek and Skawahlook reserves between KPs 1025 – 1030 of the proposed RoW, west of the Hope Pump Station. The proposed RoW runs less than 1 km from the Skawahlook reserve.</p>	<p>Skawahlook is understood to be a modern descendant of the group ethnographically identified as the Tait. The Tait are one of several groups classified as Upper Stó:lō. The Crown’s preliminary assessment of the Tait’s <i>prima facie</i> claim for rights over the area identified for the Project ranges from weak to strong. The portion that spans the asserted territory falls within the area ethnographers attributed to the historic Tait territory and would support a strong <i>prima facie</i> claim.</p> <p>The Crown’s preliminary assessment of the <i>prima facie</i> strength of claim for rights within the portion of the shipping route that falls within Skawahlook First Nation asserted traditional territory is weak. There is no information to indicate that ethnographers associated this area with Skawahlook First Nation.</p>	<p>The Crown’s preliminary assessment of Tait’s <i>prima facie</i> claim for title over the area from Agassiz up to Hope is considered moderate to strong, and the claim is strong for the portion of the Project in proximity to Hope. This is supported by the number of historic Tait village sites scattered from Popkum up through to Ruby Creek on towards Hope, including the historic site of <i>C’Kals</i>, a large village site where Hope is now located. The stretch of territory northwest of Hope is moderate, an area likely utilized for resource gathering activities by those who occupied the Tait villages in and near Hope and northwards. The claim diminishes to a weak <i>prima facie</i> claim for title for the remaining portions of the Project falling within the Stó:lō <i>writ</i> boundary as ethnographers did not associate these areas with the Tait.</p>

Stó:lō Collective Member	Project Interaction	Preliminary Analysis – Aboriginal Rights	Preliminary Analysis – Aboriginal Title
Soowahlie First Nation (Soowahlie)	<p>The proposed RoW is estimated to run through 195 km of Soowahlie’s asserted traditional territory also delineated as the Stó:lō Nation <i>writ</i> boundary.</p> <p>Six facilities (i.e. Hope Station, Wahleach Station, Sumas Station, Sumas Terminal, Border Traps, and Westridge Marine Terminal) would be located within Soowahlie’s asserted traditional territory.</p> <p>Approximately 14.5 kms of the marine shipping route is also within Soowahlie’s asserted traditional territory.</p> <p>The reserves held by Soowahlie lie north and south of the proposed RoW, with the exception of <i>Grass No. 15</i>, which it is proposed to cross. The Soowahlie reserves in the vicinity of Chilliwack are found between KPs 1055 – 1070 of the proposed RoW. The proposed RoW runs between 0 km and 6 km from Soowahlie reserves.</p>	<p>Soowahlie is understood to be a part of the historic Chilliwack tribe, today associated with the Ts’elxweyeqw Tribe. The Chilliwack are one of several groups classified as Upper Stó:lō. The Crown’s preliminary assessment of the Ts’elxweyeqw Tribe’s claim for rights over the section of Project, east from an area near present day Vedder Canal to the east side of the City of Chilliwack, ranges from a moderate to a strong <i>prima facie</i> claim for rights. The claim diminishes to a weak <i>prima facie</i> claim for the remainder of the pipeline falling within the Stó:lō writ boundary as ethnographers did not associate these areas with the Ts’elxweyeqw Tribe.</p> <p>Information indicates that at the time of contact (understood to be 1827) ethnographers did not associate the area north of Vedder Crossing with the Ts’elxweyeqw Tribe. Information indicates that the Ts’elxweyeqw began utilizing this northern area sometime after 1830.</p> <p>The Crown’s preliminary assessment of the <i>prima facie</i> strength of claim to Aboriginal rights within the portion of the shipping route that falls within Soowahlie’s asserted traditional territory is weak. There is no information to indicate that ethnographers associated this area with the Soowahlie.</p>	<p>The Crown’s preliminary assessment of the Ts’elxweyeqw Tribe’s title claim over the section of the Project, east from an area near Vedder Canal to the east side of the City of Chilliwack, ranges from a moderate to a strong <i>prima facie</i> claim for title. It is understood that by 1846, the Ts’elxweyeqw Tribe had migrated from the Chilliwack River Valley to Vedder Crossing, which resulted in Ts’elxweyeqw settling into villages in that area. The claim diminishes to a weak <i>prima facie</i> claim for title for the remainder of the Project falling within the Stó:lō <i>writ</i> boundary as ethnographers did not associate these areas with the Ts’elxweyeqw Tribe.</p>

Stó:lō Collective Member	Project Interaction	Preliminary Analysis – Aboriginal Rights	Preliminary Analysis – Aboriginal Title
Squiala First Nation (Squiala)	<p>The proposed RoW is estimated to run through 17 km of the asserted territory of the Ts'elxweyeqw Tribe.</p> <p>The proposed RoW lies south of the reserves held by Squiala, with the exception of <i>Grass No. 15</i>, which it is proposed to cross. The reserves in the vicinity of Chilliwack are found between KPs 1055 – 1065 of the proposed RoW. The proposed ROW runs between 0 km and 8.4 km from Squiala reserves.</p>	<p>Squiala is understood to be a part of the historic Chilliwack tribe, today associated with the Ts'elxweyeqw Tribe. The Chilliwack are one of several groups classified as Upper Stó:lō. The Crown's preliminary assessment of the Ts'elxweyeqw Tribe's claim for rights over the section of the Project, east from an area near present day Vedder Canal to the east side of the City of Chilliwack, ranges from a moderate to a strong <i>prima facie</i> claim for rights. Information indicates that at the time of contact (understood to be 1827), ethnographers did not associate the area north of Vedder Crossing with the Ts'elxweyeqw Tribe. Information indicates that the Ts'elxweyeqw began utilizing this northern area sometime after 1830.</p>	<p>The Crown's preliminary assessment of the Ts'elxweyeqw Tribe's title claim over the section of the Project, east from an area near Vedder Canal to the east side of the City of Chilliwack, ranges from a moderate to a strong <i>prima facie</i> claim for title. It is understood that by 1846, the Ts'elxweyeqw Tribe had migrated from the Chilliwack River Valley to Vedder Crossing, which resulted in Ts'elxweyeqw settling into villages in that area.</p>

Stó:lō Collective Member	Project Interaction	Preliminary Analysis – Aboriginal Rights	Preliminary Analysis – Aboriginal Title
Sumas First Nation (Sumas)	<p>The proposed RoW is estimated to run through 21 km Sumas’s asserted territory. Two proposed Project facilities (Sumas Station and Sumas Tank Farm) also fall within the asserted traditional territory.</p> <p>The proposed RoW lies north of Sumas, which is found between KPs 1080 – 1085. Sumas is flanked by the Sumas Tank Farm at KP 1085 and the Sumas Pump Station at near KP 1082. The proposed RoW runs between 0.9 km and 8.4 km from Sumas reserves.</p>	<p>The Crown’s preliminary assessment of Sumas' <i>prima facie</i> claim to rights is strong over the section of the Project from the west base of Sumas Mountain to, in and around, Vedder Canal, an area historically considered Sumas territory. The pipeline crosses over the valley area that was once Sumas Lake. Sumas Lake was an important resource gathering area and a central defining feature of the Sumas Nation until it was drained in the 1920's. Moving east from Vedder Canal. Sumas rights would reduce to weak-to-moderate as the pipeline crosses into Ts'elxweyeqw Tribal territory in and around Vedder Canal.</p>	<p>The Crown’s preliminary assessment of Sumas' <i>prima facie</i> claim to title is moderate-strong to strong over the section of the Project from the west base of Sumas Mountain to Vedder Canal, which overlaps with historic Sumas' territory and an area in proximity to Sumas village sites - moving east from here the Sumas title would reduce sharply to weak as the proposed RoW crosses into Ts'elxweyeqw Tribal territory in and around Vedder Canal. The proposed RoW crosses over the valley area that was once Sumas Lake. Sumas Lake area contained a primary village site on the lower portion of the Vedder River near Yarrow, and was an important resource gathering area for the Sumas; this area of central importance to the Sumas Nation until it was drained in the 1920's. When the lake was drained there was a slight geographic movement by the Sumas as a result of the draining of Sumas Lake, immediately adjacent to Sumas Mountain (1924) which forced the Sumas to move even closer to the Mountain at the core of their asserted territory.</p>

Stó:lō Collective Member	Project Interaction	Preliminary Analysis – Aboriginal Rights	Preliminary Analysis – Aboriginal Title
Tzeachten First Nation (Tzeachten)	<p>The proposed RoW is estimated to run through 17 km of the asserted territory of the Ts'elxweyeqw Tribe.</p> <p>The proposed RoW is proposed to cross <i>Tzeachten No. 13</i> and <i>Grass No. 15</i>. The Tzeachten reserves in the vicinity of Chilliwack are found between KPs 1055 – 1070. The pipeline corridor runs between 0 km and 6 km from Tzeachten reserves.</p>	<p>Tzeachten is understood to be a part of the historic Chilliwack tribe, today associated with the Ts'elxweyeqw Tribe. The Chilliwack are one of several groups classified as Upper Stó:lō. The Crown's preliminary assessment of the Ts'elxweyeqw Tribe's claim for rights over the section of the Project, east from an area near present day Vedder Canal to the east side of the City of Chilliwack, ranges from a moderate to a strong <i>prima facie</i> claim for rights. Information indicates that at the time of contact (understood to be 1827), ethnographers did not associate the area north of Vedder Crossing with the Ts'elxweyeqw Tribe. Information indicates that the Ts'elxweyeqw began utilizing this northern area sometime after 1830.</p>	<p>The Crown's preliminary assessment of the Ts'elxweyeqw Tribe's title claim over the section of the Project, east from an area near Vedder Canal to the east side of the City of Chilliwack, ranges from a moderate to a strong <i>prima facie</i> claim for title. It is understood that by 1846, the Ts'elxweyeqw Tribe had migrated from the Chilliwack River Valley to Vedder Crossing, which resulted in Ts'elxweyeqw settling into villages in that area.</p>
Yakweakwioose First Nation (Yakweakwioose)	<p>The proposed RoW is estimated to run through 17 km of the asserted territory of the Ts'elxweyeqw Tribe.</p> <p>The proposed RoW lies south of the reserves held by Yakweakwioose, with the exception of <i>Grass No.15</i>, which it is proposed to cross.</p>	<p>Yakweakwioose is understood to be a part of the historic Chilliwack tribe, today associated with the Ts'elxweyeqw Tribe. The Chilliwack are one of several groups classified as Upper Stó:lō. The Crown's preliminary assessment of the Ts'elxweyeqw Tribe's claim for rights over the section of the Project, east from an area near present day Vedder Canal to the east side of the City of Chilliwack, ranges from a moderate to a strong <i>prima facie</i> claim for rights. Information indicates that at the time of contact (understood to be 1827), ethnographers did not associate the area north of Vedder Crossing with the Ts'elxweyeqw Tribe. Information indicates that the Ts'elxweyeqw began utilizing this northern area sometime after 1830.</p>	<p>The Crown's preliminary assessment of the Ts'elxweyeqw Tribe's title claim over the section of the Project, east from an area near Vedder Canal to the east side of the City of Chilliwack, ranges from a moderate to a strong <i>prima facie</i> claim for title. It is understood that by 1846, the Ts'elxweyeqw Tribe had migrated from the Chilliwack River Valley to Vedder Crossing, which resulted in Ts'elxweyeqw settling into villages in that area.</p>

Appendix D.1 – Cowichan Tribes

I - Background Information

Cowichan Tribes are a Coast Salish Nation whose asserted territory covers from Southeastern Vancouver Island and the Salish Sea to the Lower Mainland of British Columbia (BC), including Vancouver, Sunshine Coast, and the area north of Howe Sound. Cowichan Tribes' main community is located in Duncan on the east coast of Vancouver Island, about 50 kilometers (km) south of Nanaimo, and their nine reserves are clustered southeast of Duncan.

Cowichan Tribes members historically spoke the Hul'qumi'num (pronounced "Hul-ka-MEE-num") language. Cowichan Tribes' registered population as of April 2016 was 4,870, which includes 2,790 living on-reserve and 2,080 living off-reserve.

Cowichan Tribes are a party to the Hul'qumi'num Nation protective *Writ of Summons*, which was filed in the BC Supreme Court in December, 2003, asserting Aboriginal title to a territory identified in the *writ*. Cowichan Tribes are party to the Hul'qumi'num Treaty Group (HTG) *Statement of Intent*, which also includes Stz'uminus (Chemainus) First Nation, Lake Cowichan First Nation, Halalt First Nation, Penelakut Tribe, and Lyackson First Nation. The HTG is currently in Stage 4 of the BC Treaty process (i.e. Agreement-in-Principle). Ethnographic sources, which inform the Province's assessment of strength of claim, often refer to Cowichan people, rather than individual groups. Traditionally, the Cowichan people were organized into politically and economically independent local groups, occupied winter villages, and followed a seasonal round of resource exploitation from early spring to late fall with overlapping or shared use of many resource sites. Please note that the term 'Cowichan people' as used in the following *Preliminary Strength of Claim Assessment* includes all six HTG member nations (Cowichan Tribes, Lake Cowichan, Halalt, Stz'uminus, Lyackson and Penelakut).

Cowichan Tribes, Stz'uminus, Penelakut, and Halalt are also part of the Cowichan Nation Alliance focussed on resolution of Aboriginal rights, including title, on the south arm of the Fraser River. The Crown understands that Cowichan Tribes is taking a leadership role in the coordination of the Cowichan Nation Alliance

II - Preliminary Strength of Claim Assessment

- The right of way (RoW) transacts the asserted traditional territory of the members of the HTG, between the Westridge terminal and Surrey, and again between Chilliwack and Hope (approximately 72 km of new RoW). The following Project facilities are located within the asserted traditional territory of the members of the HTG: Hope Station, Wahleach Station, Port Kells Station, Burnaby Terminal, and Westridge Marine Terminal (WMT). The marine shipping route would pass through approximately 265 km of the asserted traditional territory of the members of the HTG.
- The Crown's preliminary assessment of the Cowichan Tribes' Aboriginal rights in areas proximal to the marine shipping corridor of the Project, which transits the Strait of Georgia, is assessed as

having a *prima facie* claim of Aboriginal rights ranging from weak to strong as follows. Areas of strong claims are areas within what ethnohistoric sources generally describe as pre-contact traditional territory of the Cowichan people and where there is information of their historic use as part of their traditional seasonal round, including areas in the Strait of Georgia proximal to, and within the southern reaches of, the southern arm of the Fraser River and portions of the southern Gulf islands that lie to the west of Galiano Island and above Active Pass. Areas of weak claims include areas proximal to the Strait of Georgia north of Gabriola passage and north and south of the South arm of the Fraser River, the Strait of Georgia south of Active Pass, and areas within Haro and Juan de Fuca Straits, which were not considered within the pre-contact traditional territory of Cowichan people.¹

- The Crown's preliminary assessment of the Cowichan Tribes' *prima facie* claim of Aboriginal title to upland areas proximal to the marine shipping corridor of the Project ranges from weak to moderate, with the higher end of the range (i.e. moderate) pertaining to exclusive areas of known Cowichan peoples' habitation and use. The Crown does not have clarity regarding how claims to Aboriginal title are being asserted, i.e. whether it is individual bands or a broader collective encompassing some or all of the present day HTG member nations (Cowichan Tribes, Lake Cowichan, Halalt, Chemainus, Lyackson and Penelakut). It is noted that in certain areas where there is limited indication that any of the individual groups within the broader collective of Cowichan people could have excluded each other at 1846. For example, upland areas proximal to the marine shipping corridor, including by the southern arm of the Fraser River, the Crown would assess the *prima facie* claim of Aboriginal title of the Cowichan Tribes as ranging from weak to moderate, with the moderate claims of the Cowichan people linked to the upland areas of the southern arm of the Fraser River, west of and proximate to the large village site of Tl'ektines. The Crown also does not have clarity regarding how Cowichan Tribes and/or members of the HTG are asserting Aboriginal title in the southern Gulf Islands that lie to the west of Galiano Island and above Active Pass and to the west of Valdes and Gabriola; in these areas, the Crown would assess the *prima facie* claim of Aboriginal title of the Cowichan Tribes to upland areas as ranging from weak to weak-to-moderate as there is some indication of habitation and resource gathering sites utilized by Cowichan people likely at 1846. The following areas are generally described by ethnohistoric sources as outside the traditional territory of the Cowichan people without evidence of their occupation or use, such that there is no support for a *prima facie* claim of Aboriginal title to upland areas: proximal to the Strait of Georgia north of Gabriola passage and north of the South arm of the Fraser River, the Strait of Georgia south of Active Pass and south of the south arm of the Fraser River, and within Haro and Juan de Fuca Straits.²

¹ Cowichan Tribes: Review of Ethnographic, Historical and Archaeological Resources. Prepared by Ministry of Attorney General, Legal Services Branch, Aboriginal Research Division. April 2, 2008. Revised September 18, 2009
The Hul'qumi'num Treaty Group: Review of Ethnographic, Historical and Archaeological Resources: Cowichan, Lake Cowichan, Halalt, Chemainus, Lyackson, Penelakut and Hwlitsum First Nations. Prepared by Aboriginal Research Division, Legal Services Branch, Ministry of Attorney General. September 8, 2009.

² Ibid.

- In November 2014, Cowichan Tribes, Stz'uminus First Nation, Penelakut Tribe and Halalt First Nation filed an *Amended Notice of Civil Claim* seeking a declaration of Aboriginal title to an area described as the Tl'uqtnus Lands and fishing rights to the South Arm of the Fraser River. The above assessment of the strength of claimed Aboriginal title to the upland area west of and proximate to the Tl'uqtnus/Tl'ektines site was conducted to inform the scope of consultation regarding this Project. It is a preliminary assessment only, considering only information reasonably available at the time of consultation and is not based on an exhaustive review of all information and legal issues related to this potential claim, and does not reflect the Crown's opinion of whether the court will ultimately decide in favour of the First Nation in the litigation of this claim.

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Cowichan Tribes' Aboriginal Interests, the Crown is of the view that the legal duty to consult Cowichan Tribes lies at the middle portion of the *Haida* consultation spectrum. Cowichan Tribes was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which afforded Cowichan Tribes opportunities to be consulted at a deeper level.

Cowichan Tribes participated in the National Energy Board (NEB) review process as an intervenor and submitted written evidence, provided a written final argument and oral summary argument, and responded to the Crown's Issues Tracking Table Information Request by further elaborating their concerns [[A71232](#)].

Cowichan Tribes received \$205,000 in participant funding from the NEB along with travel for four to the hearings. The Major Projects Management Office (MPMO) offered Cowichan Tribes \$6,000 to support their participation in Crown consultations following the close of the NEB hearing record. MPMO offered Cowichan Tribes an additional \$14,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Cowichan Tribes signed contribution agreements with the MPMO in response to both of these offers, for a total of \$20,000 in allocated funding. On August 19, 2016 EAO issued Cowichan Tribes \$5,000 in capacity funding to participate in consultation with the Crown.

The Crown consultation team met with Cowichan Tribes on May 12, 2016 and on September 28, 2016 (in conjunction with other members of the Cowichan Nation Alliance).

The Crown provided a first draft of the Consultation and Accommodation Report to Cowichan Tribes for review and comment on August 17, 2016. Crown received comments from Cowichan Tribes on October 7, 2016.

A second draft of this Report was provided to Aboriginal groups for review and comment on November 3, 2016. The Crown has not received comments from Cowichan Tribes.

IV - Summary of Key Cowichan Tribes Issues and Concerns Raised

The Crown has gained its understanding of Cowichan Tribes' issues and concerns through the community's involvement in the NEB process, including submissions made through NEB hearings process, the responses Cowichan Tribes provided to the Crown on its Information Request (IR) addressed to them, and through other engagement with the Crown. In addition, the Crown has considered information regarding the proponent's engagement with Cowichan Tribes, as described in the proponent's *Aboriginal Engagement Report* (July 2016).

This section offers a summary of the key issues raised by Cowichan Tribes, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Cowichan Tribes' key Project-related issues and concerns are summarized below:

Methodology, Process, and Consultations

- Cowichan Tribes expressed concern with the adequacy of the NEB review process to serve as a means to fulfil the Crown's consultation obligations, as well as the overall transparency of the review process itself;
- Cowichan Tribes' stated view is that the Crown must receive their consent prior to issuing any project approvals;
- Cowichan Tribes identified the concern that the NEB process is not sufficient to satisfy the Crown's obligations, specifically that further scientific investigation is needed beyond the NEB process;
- At the May 12, 2016 meeting with the Crown consultation team, Cowichan Tribes stated that they required decision-makers to be at the table during consultation sessions; and
- Cowichan Tribes expressed concern about the scope and adequacy of the Project assessment and are concerned the assessment does not meet the *Canadian Environmental Assessment Act (CEAA) 2012* standards. Cowichan Tribes indicated that marine shipping issues should have been included in the scope of the CEAA review. Cowichan Tribes further indicated that it should be the responsibility of the CEAA and the NEB to ensure that the legislation and regulatory processes of Transport Canada (including the *Canada Shipping Act*) are sufficient to address the risks that this Project poses to the environment and the rights of First Nations.

Cumulative Effects

- Cowichan Tribes expressed concern about cumulative effects of marine shipping and anchorages as well as cumulative impacts of climate change.

Environmental Impacts

- Cowichan Tribes expressed key environmental concerns related to upstream impacts of the Project on fish on the Fraser River, as well as the ongoing impacts of climate change.

Impacts on Aboriginal Rights

- Cowichan Tribes have identified concerns over potential Project impacts on their rights, such as the right to fish and their ability to travel, from Project construction through to pipeline operation and marine transportation. At the September 28, 2016, meeting with the Crown consultation team, the Cowichan Tribes representative raised the issue of increased activity at WMT displacing smaller boats from the inlet and increasing anchorage in the Salish Sea.

Accidents and Malfunctions

- As a Vancouver Island community, concerns expressed by Cowichan Tribes primarily relate to marine shipping and the possibility of an accident or malfunction leading to a spill that impacts Cowichan Tribes' use of the Lower Fraser River, in particular for fishing;
- Cowichan Tribes raised concerns over the adequacy of spill response mechanisms and risks facing first responders;
- Cowichan Tribes have also asked for an assurance that Cowichan Bay will not be used for anchorages for increased marine traffic in respect of the Project;
- Cowichan Tribes identified concerns that the proponent failed to fully consider the risk and effects of a marine tanker spill and is concerned the marine shipping risk assessment is unsubstantiated; and
- Cowichan Tribes expressed concern that the proponent has not adequately considered how bitumen-based crude oils would respond in Salish Sea conditions, how it would impact the environment in the event of a spill, and be cleaned up. Cowichan Tribes requests additional verification of Trans Mountain's marine spill model.

Economic Impacts

- Cowichan Tribes raised concerns that the Cowichan people have sub-standard living, housing, health care, education, and economic opportunities, and Cowichan Tribes have no territory on which to base economic development; and
- Cowichan Tribes stated that Cowichan territory was not ceded through a treaty and Cowichan Tribes feel this issue must be addressed before addressing the Project.

Accommodation Proposals

Cowichan Tribes proposed the following accommodation measures in its October 5, 2016, response to the draft Consultation and Accommodation Report:

- A guarantee that no tankers will be permitted to sail into or anchor in Cowichan Bay and that the potential increase in traffic due to the Project or others will not lead to more extensive use of Cowichan Bay and Gulf Island anchorages;
- The implementation of significant emergency response planning at the Project level, including the enforcement of the following NEB conditions: 90, 117, 124, 120, 136, 153 and 119;
- The application of the above NEB conditions to marine spill emergency response planning;
- The development of a world class marine spill response regime and the training of Cowichan Tribes members to become emergency responders;

- The implementation of regulatory improvement initiatives as discussed on page 379 of the *NEB Recommendation Report* prior to Project operation;
- The establishment of a the World Class Tanker Safety System (WCTSS) prior to the commencement of Project operation;
- The completion of the regulatory regime for marine shipping and the implementation of the TERMPOLE review findings (page 378 of the *NEB Recommendation Report*) prior to operation;
- Implementation of the Tanker Safety Expert Panel recommendations;
- The completion of Government studies into the behavior of different blends of oil in the marine environment in order to determine response strategies (page 135 of the *NEB Recommendation Report*);
- The Canadian Coast Guard should: invest in state-of-the-art navigational services and technologies and work with Transport Canada to examine current Automated Information system carriage requirements; establish the Incident Command System across the organization as part of the World Class Tanker Safety System; and develop Area Response Plans to gain a common understanding of the key planning elements, and to further improve the decision-making process;
- The gathering of additional marine bird data to inform area response planning;
- A guarantee that the Geographic Response Strategies, the Geographic Response Plan, and the Shoreline Cleanup Assessment Techniques developed by the Western Canada Marine Response Corporation (WCMRC) and discussed on page 154 of the *NEB Recommendation Report* will be comprehensive and used effectively;
- The WCMRC should complete its update of Coastal Sensitivity Maps with enhanced coastal mapping systems for the BC Coast, including coastline sensitivities and associated Geographic Response Strategies and associated logistical support information, as discussed on page 381 of the *NEB Recommendation Report*;
- The Senate Standing Committee on Energy, the Environment and Natural Resources Report recommendations should be implemented, including: the current spill preparedness and response capacity of 10,000 tons within prescribed time frames should be increased to fit the needs of the region (i.e. response capacity should be increased to respond to loss of cargo from an Aframax tanker); and the Canadian Coast Guard's mandated spill preparedness and response capabilities should be certified by Transport Canada or an independent, third-party agency periodically as described on page 331 of the *NEB Recommendation Report*;
- Canada's commitment to an effective and sophisticated joint response plan with the Washington State Department of Ecology to address the risk from vessels carrying diluted bitumen through shared waters in the Salish Sea (*NEB Recommendation Report* pages 381, 388-389); Canada should also commit to securing international agreements to reducing emissions from tanker traffic traveling within Canada's Exclusive Economic Zone;
- Transport Canada's expansion of the National Aerial Surveillance Program to deter potential polluters and identify any pollution incidents early (*NEB Recommendation Report* p. 379);
- Canada's appropriate regulatory amendments to the *Marine Liability Act* to enhance the Ship-source Oil Pollution Fund (*NEB Recommendation Report* p. 405);

- Area Response Plans including responses to contingencies listed on pages 136-137 of the *NEB Recommendation Report*;
- Filling the knowledge gap to ensure protection of resources of value to Cowichan Tribes. There should be a geographic response plan to protect resources of value in the Gulf Islands, Cowichan Bay, and the south arm of the Lower Fraser River;
- Aboriginal participation in marine shipping emergency response planning;
- Cowichan Tribe contribution to WCMRC personnel implementing local areas response plans, with training funded by Canada, including for the more general “marine certification” and “incident command system”;
- Stringent emissions in place for any marine vessels anchoring in Cowichan Bay;
- Meaningful consultation with Cowichan Tribes to reduce impacts on the exercise of Aboriginal fishing rights, including a potential seasonal reduction of traffic during key fishing months (July to September);
- Cowichan Tribes members option to use Automatic Identification Systems;
- Guarantee of compensation for “intangible” harms such as interference with culture and rights and psychological and emotional trauma in the event of a marine spill as referenced on pages 156 and 157 of the *NEB Recommendation Report*; and
- Assurance of compensation in the event of a spill so that Cowichan Tribes would not have to go to court to fight for it. Compensation principles would be developed in a forum other than the regular court system to determine fair, efficient and compassionate manner of compensation. If Canada commits to such a process, Cowichan Tribes would like to provide input in its development.

Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Cowichan Tribes that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

Cowichan Tribes’ Response to NEB Recommendation Report

In feedback provided on the draft of this Report, Cowichan Tribes is of the view that the NEB did not conduct a complete analysis of spill risks before making its recommendation. Cowichan Tribes asks how the risk of a marine spill is acceptable (pp. xiii-xiv) while it constitutes a medium risk according to page 10 of the *NEB Recommendation Report*. Cowichan Tribes states that impacts on First Nations were not properly considered in the Report. Cowichan Tribes indicates that insufficient weight was given to the importance of protecting First Nations rights and ensuring that traditional knowledge can be passed on within the assessment of marine spill risk (pp. 17-18). Cowichan Tribes disagrees with the conclusions about recovery in the event of a spill as stated on pages 398 to 402 of the *NEB Recommendation Report*. Cowichan Tribes also states that the review process failed to provide opportunities to cross examine and that information requests were ignored. Cowichan Tribes state that insufficient information about marine spill risks was provided and that Aboriginal groups were not included in the TERMPOL review

process, which the NEB relied to complete its public interest analysis on page 323 of the *NEB Recommendation Report*.

Cowichan Tribes concludes that the Government should not approve the Project because the environmental assessment was inadequate, the Project would incentivize further investments in greenhouse gas emitting projects, and the risks of a spill are too great. Cowichan Tribes further conclude that a marine spill would have a devastating impact on Cowichan Tribes and other First Nations around the Salish Sea.

V - Potential Impacts of the Project on Cowichan Tribes' Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests are provided in Sections 2.4.3 and 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted or established traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Cowichan Tribes' Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Cowichan Tribes' ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g. fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Cowichan Tribes' Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Cowichan Tribes, Cowichan Tribes' engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate (EAC) issued by the Province.

Cowichan Tribes completed a Third-party, independent traditional marine resource use (TMRU) study in 2013, which included a desktop literature review (information in reports, historical documents and archaeological site research) and community interviews that focused on Crown lands and waters within the asserted traditional territory of Cowichan Tribes crossed by the Marine Regional Study Area (RSA). In its Supplemental Technical Report ([A4A0W1](#)), the proponent estimated approximate distances and directions from the marine shipping lanes based on information in the Cowichan Tribes' Report. Additional TMRU information for Cowichan Tribes was presented in *Volume 8B* ([A3S4K3](#)) of the Project application. Traditional marine resource uses identified by Cowichan Tribes include hunting deer and

ducks, gathering plants, information on fishing sites, sacred sites, gathering areas for community members and trails and travelways.

Impacts on Hunting, Trapping, and Plant Gathering

As identified in the TMRU study, Cowichan Tribes members historically hunted a variety of marine species including harbour porpoise, humpback whale, sea lion, harbour seal, sea otter and various types of marine bird species. Community members use various methods, including nets, spears, traps, arrows and guns, to hunt ducks and geese. Deer is an important food source and is also used for ceremonial purposes. Duck is also eaten at ceremonial events, and the feathers are used for ceremonies and rituals. Plants identified by Cowichan Tribes during the TMRU study are used as an important food source or for medicinal purposes. Gathered plants include cranberry, blueberry, Devil's club, camas, Douglas fir, bigleaf maple, Garry oak, soapberry, coastal strawberry, green thin seaweed, prickly pear cactus, Trembling aspen, Indian celery, Red alder, Pacific crab apple, arbutus, trembling aspen, cascara, yellow cedar, trailing blackberry, bitter cherry, black cottonwood, western dock, Pacific dogwood, licorice fern, grand fir, red huckleberry, common juniper, stinging nettle, ironwood, wild onion, prince's pine, rattlesnake plantain, black raspberry, salal, salmon berry, Saskatoon berry, common snowberry, Pacific willow, and western yew.

During the TMRU study, Cowichan Tribes identified 9 hunting sites and 14 plant gathering sites, of which 3 hunting sites and one plant gathering site are within the Marine RSA. No trapping sites were identified. Cowichan Tribes members are required to cross the established shipping lanes to access two of the hunting sites (Canoe Pass and Fraser River) and one plant gathering site (Fraser Valley).

Cowichan Tribes expressed concerns with a potential spill from the pipeline impacting the Fraser River, which would have implications on Cowichan Tribes' use of the lower Fraser River. Cowichan Tribes expressed concern that increased marine shipping could affect the ability of members to cross the shipping lanes in order to access their sites at the lower Fraser River.

The general direct and indirect effects of the Project on hunting, trapping, and gathering, along with key mitigation measures, are described in section 4.3.1 of the main body of this Report.

As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, old growth forests, wetlands, and terrestrial wildlife and wildlife habitat (including species at risk), marine mammals, and marine birds.

Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Cowichan Tribes' hunting, trapping, and plant gathering activities. The Crown understands that this short-term disruption could temporarily alter the behaviour of community members' hunting, trapping or plant gathering activities during construction, and that reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project, could have spiritual and cultural impacts on community members.

Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Section 4.3.1 of this Report). The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP) and the vegetation and wildlife management plans. The proponent would implement a range of mitigation measures that would reduce potential effects associated with Cowichan Tribes' hunting, trapping, and plant gathering activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

The proponent is committed to implementing weed management (as outlined in the Weed and Vegetation Management Plan) to reduce the potential for weed infestation following construction, and utilizing an Integrated Vegetation Management approach intended to reduce the use of herbicides and promote healthy ecosystems. The proponent will consult with Aboriginal groups regarding problem vegetation management and methods of treatment. Measures outlined in the proponent's Reclamation Management Plan are intended to stabilize and revegetate affected lands to achieve land productivity along the construction RoW and footprint, equivalent to the adjacent land use. The proponent has also committed to ongoing engagement with Aboriginal groups interested in providing traditional knowledge related to the location and construction of the Project

NEB Condition 81 would require the proponent to develop a WMT-specific EPP, including mitigation and monitoring plans, to be finalized in consultation with Fisheries and Oceans Canada and potentially affected Aboriginal groups. The proponent would also be required to conduct a post-construction monitoring program for marine mammals from the expansion of the WMT. The proponent has committed to various mitigation measures to reduce effects of construction and operation of the WMT on marine birds, further the proponent has committed to compile information regarding mortality and collision events and to include that information in post-construction monitoring reports.

In consideration of the information available to the Crown from the NEB process, consultation with Cowichan Tribes, Cowichan Tribes' engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province, Project construction and routine maintenance during operation as well as project-related marine shipping are expected to result in a negligible impacts on Cowichan Tribes' trapping activities and a minor impact on Cowichan Tribes' hunting and plant gathering activities.

Impacts on Freshwater Fishing, and Marine Fishing and Harvesting

As identified in the TMRU study, Cowichan Tribes community members fish throughout the entire traditional territory, and identified numerous fishing sites, including several which would require

community members to cross the shipping lanes. Cowichan Tribes identified salmon as a vital food staple. Octopus is considered a favourite food source, and is used for bait and medicinal purposes. Blue mussel plays an important role in Cowichan history, and herring is a traditional food source that is increasingly difficult to catch. In the TMRU study Cowichan Tribes community members reported concerns about the effects of increased tanker traffic on fishing sites, since increased tanker traffic may potentially make fishing for species such as cod and snapper very difficult.

The TMRU study identified 53 fishing sites within the Marine RSA; access to six of these sites requires crossing the shipping lane. Sturgeon was fished at Lulu Island, Point Roberts, and Tsawwassen. Cowichan Tribes' fished for Sturgeon and Skate at Cowlitz Bay, Washington State and fished for Salmon and Sturgeon on the Fraser River. Salmon were also fished throughout the Salish Sea.

In addition to providing traditional use information, Cowichan Tribes raised specific concerns with potential Project impacts relating to their freshwater fishing, and marine fishing and harvesting activities:

- Cowichan Tribes' key environmental concerns relate to upstream impacts of the Project on fish on the Fraser River, as well as the ongoing impacts of climate change;
- Cowichan Tribes have concerns over potential Project impacts on their rights, such as the right to fish and their ability to travel, from project construction through to pipeline operation and marine transportation;
- Increased activity at WMT displacing smaller boats from the inlet and increasing anchorage in the Salish Sea;
- As a Vancouver Island community, concerns primarily relate to marine shipping and the possibility of an accident or malfunction leading to a spill that impacts Cowichan Tribes' use of the lower Fraser River, in particular for fishing; and
- Cowichan Tribes raised concerns over the adequacy of spill response mechanisms; and
- Cowichan Tribes have also asked for an assurance that Cowichan Bay will not be used for anchorages for increased marine traffic in respect of the Project.

As described in the *NEB Recommendation Report*, Project-related construction and operation could result in low to moderate magnitude effects on fish and fish habitat and surface water. Moderate effects to fish and fish habitat would be localized to individual watercourse crossings where any potential serious harm would be compensated by offset measures. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Sections 4.3.2 and 4.3.3 of this Report). A number of recommended NEB conditions require the proponent to file reports that will monitor Project-related impacts to fish, fish habitat and riparian habitats. With regards to specific concerns raised by Cowichan Tribes, the proponent would implement several mitigation measures to reduce potential effects to species important for Cowichan Tribes' fishing activities. The proponent has committed to time watercourse crossing construction activities to occur within the least risk biological windows in an attempt to avoid causing serious harm to fish, has committed to working with Aboriginal groups to identify the most appropriate means of offsetting

serious harm to marine fish and fish habitat, and has proposed the implementation of channel and bank reclamation measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat.

The general direct and indirect effects of the Project on Aboriginal rights to marine fishing and harvesting, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report. The conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with marine fishing and harvesting sites (Section 4.3.3 of this Report). Project related marine shipping traffic would utilize existing deep-sea navigational channels. The proponent would implement a range of mitigation measures that would reduce potential effects associated with Cowichan Tribes' marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups. The proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Cowichan Tribes community members to take measures to reduce potential disruptions from tankers and allow planning for fishing activities to take place that minimizes disturbance from Project-related tankers. Reduced harvests, while not expected to occur from temporary access restrictions, could impact Cowichan Tribes' cultural activities and sharing of marine food with the community.

In consideration of the information available to the Crown from the NEB process, consultation with Cowichan Tribes, Cowichan Tribes' engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project construction and routine maintenance during operation and project-related marine shipping are expected to result in minor impacts on Cowichan Tribes' marine and freshwater fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

As identified in the TMRU study, Cowichan Tribe community members identified gathering places, travelways, and spiritual and cultural sites. The locations and names of the travelways identified by Cowichan Tribes during the TMRU study are confidential; however, it was reported that some of the travelways cross the shipping lanes. Cowichan Tribes community members reported concerns about the effects of increased project-related tanker traffic on travelling to and from resource gathering sites and crossing the shipping lanes as many community members cross the shipping lanes in small canoes. Cowichan Tribes identified three gathering places (historic villages) within the Marine RSA during the TMRU study, of which shipping lanes are crossed to access an unnamed historic village at the southern arm of the Fraser River. Cowichan Tribes reported information pertaining to sacred areas (e.g., site type and location) to be confidential. No sacred areas were identified within the Marine RSA during the TMRU study. However, community members reported concerns that increased project-related tanker traffic would make it difficult to conduct any marine ceremonial practices. In *Volume 8B*, a summer base camp on Lulu Island and a sacred area at Mount Prevost were identified within the Marine RSA. The

extent of the fishing area associated with this site is unknown; it is unknown whether shipping lanes are crossed to access the site.

Cowichan Tribes raised concerns over potential Project impacts on their Aboriginal rights, such as the right to fish and their ability to travel, for the duration of Project construction and operations and during Project-related marine shipping. Cowichan Tribes also raised the issue of increased activity at WMT displacing smaller boats from the inlet and increasing the occupancy at anchorages in the Salish Sea and areas around Vancouver Island, in particular at Cowichan Bay.

Marine mammals are of importance to many Coast Salish Aboriginal groups, and killer whales specially hold strong spiritual and cultural importance for many Aboriginal groups. The NEB concluded that effects on the endangered southern resident killer whale and Aboriginal cultural use of southern resident killer whale from Project-related shipping activities would be significant. The Crown is not aware of any specific cultural use of or concerns regarding killer whales raised by Cowichan Tribes during the NEB and Crown consultation processes.

The general direct and indirect effects of the Project on other traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown understands that there will be temporary interruptions to Cowichan Tribes' traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities, including project-related marine shipping. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups interested in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Cowichan Tribes, Cowichan Tribes' engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project construction and routine maintenance and Project-related marine shipping are expected to result in negligible-to-minor impacts on Cowichan Tribes' other traditional and cultural practices.

Impacts on Aboriginal Title

Cowichan Tribes raised specific concerns related to the impacts of the Project on its Aboriginal title claims, including:

- The Cowichan people have sub-standard living, housing, health care, education, and economic opportunities, and they have no territory on which to base economic development. Cowichan Tribes stated that Cowichan territory was not ceded through a treaty and feel this issue must be addressed before addressing the Project itself; and
- Possibility of an accident or malfunction leading to a spill that impacts Cowichan Tribes' use of the Lower Fraser River.

The Crown provides a description of the potential impacts of the Project on Aboriginal title in Section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid/reduce Project impacts associated with the degree of disturbance to terrestrial, marine and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as well as NEB Conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved.

The Crown notes that Cowichan Tribes does not have a mutual benefits agreement with the Proponent.

Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in Section 4.3.5, it is the Crown's opinion that the Project is expected to have negligible-to-minor impacts on Cowichan Tribes' asserted Aboriginal title to the proposed Project area.

Impacts Associated with Accidental Pipeline, Terminal, and Tanker Spills

Cowichan Tribes raised a number of concerns regarding a potential accidental spill including:

- As a Vancouver Island community, concerns expressed by Cowichan Tribes primarily relate to marine shipping and the possibility of an accident or malfunction leading to a spill that impacts Cowichan Tribes' use of the Lower Fraser River, in particular for fishing and crabbing;
- Cowichan Tribes raised concerns over the adequacy of spill response mechanisms and risks facing first responders;
- Cowichan Tribes identified concerns that the proponent failed to fully consider the risk and effects of a marine tanker spill and is concerned the marine shipping risk assessment is unsubstantiated;
- Cowichan Tribes expressed concern that the proponent has not adequately considered how bitumen-based crude oils would respond in Salish Sea conditions, how it would impact the environment in the event of a spill, and be cleaned up. Cowichan Tribes requests additional verification of Trans Mountain's marine spill model;
- Compensation for "intangible" harms such as interference with culture and rights and psychological and emotional trauma in the event of a marine spill as referenced on pages 156 and 157 of the *NEB Recommendation Report*; and
- Assurance of compensation in the event of a spill so that Cowichan Tribes would not have to go to court to fight for it. Compensation principles would be developed in a forum other than the regular court system to determine fair, efficient and compassionate manner of compensation. If Canada commits to such a process, Cowichan Tribes would like to provide input in its development.

Cowichan Tribes also proposed accommodation measures that are included in this appendix. Section 4.3.6 of the main body of this Report sets out the impacts associated with accidental spills. The Crown acknowledges the numerous factors that would influence the severity and types of effects

associated with a spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. In consideration of this information and analysis, as well as information available to the Crown on Cowichan Tribes' Aboriginal Interests and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts on Cowichan Tribes' Aboriginal Interests. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.³

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline and marine safety regimes would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations of the pipeline and WMT, as well as for marine vessel use of the area between the WMT and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the Project on the exercise of Cowichan Tribes' Aboriginal Interests would be up to minor.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Cowichan Tribes' ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Cowichan Tribes in emergency response planning activities. Given existing use of the marine shipping corridor within areas proximate to the exercise of Cowichan Tribes' Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of Cowichan Tribes' Aboriginal Interests, the federal Crown is considering additional measures to further offset the potential impacts of the marine-shipping component of the Project on Cowichan Tribes. Please see Sections 4 and 5 of the main body of this Report for a discussion of proposed accommodation measures.

³ Trans Mountain Final Argument, p. 85 and 207

Appendix D.2 – Ditidaht First Nation

I – Background Information

Ditidaht First Nation's (Ditidaht) main community is located on the west coast of Vancouver Island, about 130 kilometers (km) northwest of Victoria, British Columbia (BC). Ditidaht (pronounced "Dee-tee-dat") has identified its asserted traditional territory in a *Statement of Intent* submitted as part of the BC Treaty process. Ditidaht is currently in Stage 4 of the BC Treaty process (i.e. developing an Agreement-in-Principle).

Ditidaht has 17 reserves, ranging in size from 3.8 hectares to 100.6 hectares, and a registered population of 774 (247 on-reserve and 527 off-reserve). Ditidaht members historically spoke a dialect of the Coast Salish language.

Ditidaht is culturally and linguistically a member of the Nuuchahnulth (pronounced "New-chah-nulth") group of First Nations and has close historical ties to the Pacheedaht First Nation. Notwithstanding these links, the community has acted on their own behalf in treaty negotiations and in the NEB panel review of the Project.

II – Preliminary Strength of Claim Assessment

- Approximately 6 km of the marine shipping route would pass within the southeastern part of Ditidaht's asserted traditional territory in the Juan de Fuca Strait and over a portion of the Swiftsure Bank closure area. The marine shipping corridor is located approximately 9 km off the coast.
- The Crown's preliminary assessment is that Ditidaht has a strong *prima facie* claim to Aboriginal rights to fish and harvest resources within the marine shipping corridor of the Project, in the coastal waters from Bonilla Point in the east to Pachena Point in the west and to Swiftsure Bank. These areas fall within what ethnographers considered to be the historic territory of the Ditidaht. There is also evidence of fishing (e.g. chum salmon, sockeye salmon, trout and coho salmon), hunting sea mammals (e.g. seals), whaling (e.g. humpbacks) and marine resource harvesting (e.g. marine vegetation) in the area at around the time of contact.¹
- The Crown's preliminary assessment is that Ditidaht has a strong *prima facie* claim for Aboriginal title to the upland areas between Bonilla Point and Pachena Point, proximate to the marine shipping corridor. This area of land falls within what ethnographers considered to be the historic territory of the Ditidaht. There were numerous permanent habitation sites located along the Pacific coast within Ditidaht territory at 1846. There is also information that shows evidence of intensive use in this area by the Ditidaht at 1846.²

¹Ministry of Justice, Legal Services Branch, Aboriginal Research Division. Ditidaht First Nation: Review of Ethnographic, Historical Archeological Sources. February 6, 2015; Bouchard, Randy.

² Ibid.

III – Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Ditidaht's Aboriginal Interests, the Crown is of the view that the legal duty to consult Ditidaht lies at the middle portion of the *Haida* consultation spectrum. Ditidaht was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office, which afforded Ditidaht opportunities to be consulted at a deeper level.

Ditidaht participated in the National Energy Board (NEB) review process as an intervenor, and submitted written evidence as well as a final written argument.

Ditidaht received funding from the NEB in the amount of \$30,000, plus travel for one to the hearings. The Major Projects Management Office (MPMO) offered Ditidaht \$6,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Ditidaht an additional \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Ditidaht signed contribution agreements with the MPMO in response to both of these offers, for a total of \$12,000 in allocated funding. On September 21, 2016, EAO issued \$5,000 in capacity funding to Ditidaht to assist with the consultation process.

Ditidaht met with the Crown on May 12, 2016, and September 12, 2016 to discuss the Project.

Ditidaht signed a letter of support with the proponent on July 11, 2014 ([A3Z3R7](#)). The letter states: "we express our support for the Project by formally withdrawing any objections to Trans Mountain's application for a Certificate of Public Convenience and Necessity ("CPCN") before the NEB and all other required approvals in respect of the Trans Mountain Expansion Project." The Crown is aware that the proponent has entered into a Mutual Benefits Agreement with Ditidaht First Nation in an attempt to offset potential impacts, should the Project proceed.

The Crown provided a first draft of the Consultation and Accommodation Report to Ditidaht for review and comment on August 17, 2016. Ditidaht provided comments on the draft Report to the Crown in a letter on September 16, 2016. In summary, Ditidaht's comments on the initial draft Report are as follows:

- The Crown hasn't shared its views on the mitigation and accommodation measures that Ditidaht has proposed;
- The Crown hasn't shared its views on how to address the NEB's lack of authority to address many of the marine shipping concerns identified by Ditidaht;
- The Crown hasn't commented on what mitigation measures are required to ensure that the approval of the Project promotes reconciliation;
- The Crown hasn't clarified how it will work with Ditidaht going forward should the Project be approved to address Ditidaht's marine shipping concerns; and
- No reason is given for not assessing the strength of Ditidaht's claim to Aboriginal title over aquatic areas, despite those areas being a core part of Ditidaht's territory.

A second draft of this Report was provided to Aboriginal groups for review and comment on November 2, 2016 and Ditidaht provided comments in a letter on November 15, 2016. Through the letter, Ditidaht expressed concern that the Crown Consultation Report is non-responsive to Ditidaht's specific comments and concerns. Ditidaht also believes that the Crown has not adequately addressed or accommodated Ditidaht's marine impact concerns relating to the Project. Ditidaht closed their letter by re-stating a previously articulated desire that the Crown and Ditidaht move towards a credible engagement process for marine shipping concerns by entering into a clear and effective marine shipping consultation protocol to deal with those measures set out in Appendix 1 of this Report where the Crown cannot provide a clear, binding commitment prior to mid-November.

Ditidaht provided a separate Aboriginal group submission to the Crown on November 17, 2016.

In a letter to both Chief Jeff Jones of Pacheedaht First Nation and Chief Robert Joseph of Ditidaht – dated November 8, 2016 – Transport Canada, together with their colleagues from Canadian Coast Guard, offered to meet with both First Nations in order to discuss and further understand the considerations around the location of shipping lanes and any potential measures to improve marine safety for community members who travel across and fish within the shipping lanes at Swiftsure Bank.

IV – Summary of Key Ditidaht Issues and Concerns Raised

The Crown has gained its understanding of Ditidaht's issues and concerns through the community's involvement in the NEB hearing process, including written evidence and additional correspondence with the NEB, and through consultation meetings. In addition, the Crown has considered information regarding the proponent's engagement with Ditidaht, as described in the proponent's Aboriginal Engagement Report (July 2016).

Ditidaht has indicated its support for the Project and is collaborating with the proponent to ensure that their outstanding concerns are addressed and risk to the Ditidaht community is minimized. Ditidaht's own assessment of the Project, filed as evidence with the NEB, sets out Ditidaht's views of the consequences of the Project proceeding to construction and operation.

This section offers a summary of the key issues raised by Ditidaht, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Ditidaht's key Project-related issues and concerns are summarized below:

Methodology, Process, and Consultations

Ditidaht expressed concerns with the depth of consultation afforded by the NEB process, especially with respect to spill response planning.

Environmental Impacts

Ditidaht expressed concerns with the possibility for further declines of fish stocks due to Project-associated increases in pollution and marine traffic.

Impacts to Aboriginal Interests

Ditidaht expressed concerns that the Project could potentially compromise Ditidaht's ability to hunt and fish in its traditional territory, due to increased marine traffic. Ditidaht have asked for affected sensitive fish habitat to be addressed by specific remediation plans.

Accidents and Malfunctions (marine/terrestrial)

Ditidaht expressed concerns that poor weather conditions increase the likelihood of collisions between tankers and Ditidaht fishing vessels. Ditidaht also identified concerns over the adequacy of spill response mechanisms, given the region's inclement weather, marine environment characteristics (e.g. strong tidal currents), and the remoteness of the Ditidaht community.

In June 2016, Ditidaht sent a letter to MPMO after the release of the NEB Report highlighting additional issues and concerns raised by the community. The Crown's understanding of additional key concerns identified in this letter include:

Consultation Process

Ditidaht expressed that they would like to have clear expectations regarding the consultation process including: a specific plan for how impacts to Ditidaht's Aboriginal rights will be assessed; adequate time to review the consultation report; and an understanding of how the Project will be considered in terms of overall marine shipping activities in Ditidaht's traditional territory.

Information Gaps Related to Marine Shipping Activities

Ditidaht described gaps in information that they believe should be considered by regulators in their decision-making: the disruption of fishing activities at Swiftsure Bank due to community members' avoidance of large vessels navigating shipping lanes; ships navigating outside designated shipping lanes; inability of pilots and captains to safely navigate extreme weather conditions; and the removal of navigational aids (e.g. lighthouses and whistle buoys) within Ditidaht's territory.

Improved Infrastructure

Ditidaht raised concerns regarding emergency and spill response preparedness, as well as the infrastructure and capacity within Ditidaht's community required to respond to accidents and malfunctions in a manner that mitigates the Project's potential adverse effects.

Spill Risk

While Ditidaht expressed that they do not object to the Project, they identified the disproportionate amount of risk that they believe their community will assume in the event of an accident or spill, if the Project is approved.

Ditidaht's Response to NEB Recommendation Report

Ditidaht's response to the *NEB Recommendation Report* is outlined in the September 16, 2016 letter sent to the Crown by JFK Law Corporation on behalf of Ditidaht. The letter notes that Ditidaht disagrees with the NEB's view that the adverse effects of the marine shipping aspect of the Project on Ditidaht traditional use and occupancy activities are short-term and of a low magnitude. Consequently, Ditidaht remains concerned that the NEB improperly discounted the ongoing adverse impacts to Ditidaht from the risk of spills and the disproportionate severity of spill impacts on Ditidaht's rights, title, and way of life. In Ditidaht's view, the NEB's conclusions underestimate the Project-related adverse impacts to Ditidaht's interests because the NEB:

- Overlooked flaws in Trans Mountain's methodology, as identified by Ditidaht;
- Does not appreciate local marine conditions within Ditidaht's territory and how this affects the ability to gather adequate baseline information regarding marine resources and conditions;
- Does not adequately appreciate the Aboriginal perspective on Project effects;
- Overly relied on vague commitments respecting emergency preparedness and shipping risks without considering Indigenous knowledge, infrastructure, and training gaps in Ditidaht's community, and local environmental conditions;
- Does not properly consider impacts to Ditidaht's Aboriginal rights and title, including title to water;
- Overlooked Ditidaht's requests for revisions to certain marine-related conditions; and
- Does not address the disproportionate risk and burden placed on Ditidaht in the event of a spill.

According to Ditidaht, the NEB also neglected to ensure that there is a regulatory requirement that relevant Aboriginal groups be consulted by the Crown and the proponent in the development and implementation of the marine plans and programs that are conditions on the Project. Thus, Ditidaht requests that the conditions pertaining to marine shipping and spill response be revised to require such consultation with relevant Aboriginal groups. A detailed commentary on the NEB Report can be read in Appendix 2 of the September 16, 2016 letter.

Ditidaht noted two strengths of the *NEB Recommendation Report*:

- The acknowledgement that traditional marine activities in and around Swiftsure Bank are very important to Aboriginal communities; and
- The acknowledgement that the NEB does not have the ability to impose specific mitigation conditions to address Project-related marine shipping effects.

From the perspective of Ditidaht, it is not enough for the Crown to rely on current shipping practices, ad hoc training workshops, and general commitments by the proponent and Western Canada Marine Response Corporation (WCMRC) in order to address Ditidaht's outstanding concerns.

Accommodation Proposals

Ditidaht's proposed mitigation measures for Crown consideration are outlined in letters dated June 6, 2016 and September 16, 2016. The measures proposed by Ditidaht include:

- Emergency response planning and capacity development for Ditidaht’s marine territory, developed with Canada and WCMRC, including:
 - A fully equipped marine response station in Nitinat;
 - A commitment to train Ditidaht members in marine response measures; and
 - Funding to establish and maintain a response plan.
- Consultation with Ditidaht in regards to emergency response planning;
- The installation of a WCMRC response base at Nitinat that will incorporate local Indigenous Knowledge as Ditidaht members possess unique knowledge regarding the Nitinat Narrows and Nitinat Lake;
- Support for Ditidaht’s local response capacity by committing to properly equip, train, and fund Ditidaht members as first responders in the event of a marine accident or spill;
- Road infrastructure improvements to enable first responders to access the coast by road;
- A requirement that a rescue tug be stationed in the Juan de Fuca Strait;
- Extend the escort tug zone beyond Race Rocks to Swiftsure Bank, while ensuring that all escort tugs meet minimum requirements for severe weather in the Juan de Fuca Strait;
- Changes to shipping lanes to require that tankers exit the Juan de Fuca Strait to the south to avoid Swiftsure Bank;
- Shipping restrictions on tankers travelling through Ditidaht territory during extreme weather events, defined with regard to Ditidaht Indigenous Knowledge;
- The provision of education and equipment in Nitinat for Ditidaht members to have access to the navigation monitoring systems used by the Marine Communication and Traffic Services (MCTS);
- A commitment to expand MCTS services in order to accommodate the increase in tanker traffic from the Project;
- Continued engagement on marine shipping;
- Amendment of NEB Conditions 90, 91, 131, 132, 133, 134, 136, 144, and 146 to require that all plans/programs be developed through and require early consultation with Aboriginal communities, incorporate Indigenous Knowledge, and demonstrably mitigate Aboriginal concerns;
- A commitment to develop and fund job training programs for Ditidaht members to obtain senior level marine positions; and
- Ongoing consultation regarding marine traffic issues in Ditidaht’s marine territory for any of the foregoing measures where the Crown cannot provide a clear, binding commitment prior to mid-November.

Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Ditidaht that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

V – Potential Impacts of the Project on Ditidaht’s Aboriginal Interests

A discussion of the Crown’s assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests are provided in Sections 2.4.3 and 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted or established traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Ditidaht’s Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Ditidaht’s ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g. fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in section 2.4.3 of this Report. The Crown’s conclusion on the seriousness of Project impacts on Ditidaht’s Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Ditidaht, Ditidaht’s engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant conditions of any Environmental Assessment Certificate (EAC) issued by the Province.

Ditidaht completed a traditional marine resource use (TMRU) study in 2015 titled *Ditidaht First Nation Traditional Marine Use and Occupancy Study* ([A4L5D4](#), [A4L5D5](#) and [A4L5D6](#)). The focus of the study was on Crown lands and waters within the asserted territory of Ditidaht crossed by the Marine Regional Study Area (RSA).³ Traditional land and marine uses identified by Ditidaht include hunting aquatic birds, coastal mammals and marine mammals; gathering plants; information on fishing sites, sacred sites, habitation sites, and gathering areas for community members; and trails and travelways. In its Supplemental Technical Reports ([A4S7I8](#), [A4F5D2](#), [A4A0W1](#), [A3S4K3](#)), the proponent estimated approximate distances and directions from the marine shipping lanes based on information in Ditidaht’s report.

Impacts on Hunting, Trapping, and Plant Gathering

Historically, Ditidaht community members hunted both terrestrial and marine mammals, and trapping was an important traditional activity. Currently, community members hunt aquatic birds (i.e., mallard

³ The area extending beyond the LSA boundary (i.e. the zone of influence or area where the element and associated indicators are most likely to be affected by Project-related marine vessel traffic.) where the direct and indirect influence of other activities could overlap with Project-specific effects and cause cumulative effects on the environmental or socio-economic indicator.

duck, surf scoter, common merganser, bufflehead duck, common goldeneye), coastal mammals (i.e., coastal deer, Roosevelt elk), and marine mammals (i.e., harbour seal). Western red cedar, sitka spruce, basketry grasses, American dune grass, salal, Pacific cinquefoil/silverweed, wild clover, stinging nettle, salmonberry, and huckleberry are currently harvested by community members.

Ditidaht identified 91 hunting sites and 48 plant gathering sites in the Marine RSA, concentrated at four locations: Bonilla Point, Pachena Point, Nitinat Lake, and Nitinat River. The shipping lanes do not need to be crossed to access these sites, with the exception of Swiftsure Bank which is located in the shipping lanes. During the TMRU study, Ditidaht First Nation identified 11 trapping sites within the Marine RSA; however the sites are confidential and it is not known where the sites are located in relation to the shipping lanes and if shipping lanes need to be crossed to access these sites. Ditidaht identified 48 plant gathering sites in the Marine RSA during the TMRU study. The plant gathering sites are concentrated at four locations: Bonilla Point, Pachena Point, Nitinat Lake, and Nitinat River. The shipping lanes do not need to be crossed to access these sites, and the nearest site is 8.7 km north of the shipping lanes.

In addition to providing traditional use information, Ditidaht raised specific concerns with potential Project impacts relating to their Aboriginal right to hunt, trap, and gather plants, specifically the potential for increased marine traffic to compromise Ditidaht's ability to hunt in its traditional territory.

The general direct and indirect effects of the Project on hunting, trapping, and gathering, along with key mitigation measures, are described in Sections 4.3.1 of the main body of this report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Sections 4.3.1 of this Report). The proponent would implement a range of mitigation measures that would reduce potential effects associated with Ditidaht's hunting, trapping, and plant gathering activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

In consideration of the information available to the Crown from the NEB process, consultation with Ditidaht, Ditidaht's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in a negligible-to-minor impact on Ditidaht's hunting, trapping and plant gathering activities.

Impacts on Marine Fishing and Harvesting

Ditidaht community members consider seafood gathering, fishing, and fish and fish habitat in the ocean and inland critical for food, cultural, and economic aspects of their society. Historically, Ditidaht community members fished species such as northern abalone, sea cucumber. Currently they fish species such as butter clam, horse clam, California mussel, blue mussel, gooseneck barnacle, acorn barnacle, black katy chiton, limpets, whelks, urchins (i.e., giant red sea urchin, purple sea urchin), red rock crab, Dungeness crab, prawn, pacific octopus, pile worm, salmon (i.e., sockeye salmon, coho salmon, pink

salmon, chum salmon, chinook salmon) steelhead, coastal cutthroat trout, herring, ling cod, yellow eye rockfish, surf smelt, night smelt, and halibut. Whaling has been central to Ditidaht, and species hunted include humpback, grey whales and northern right whales.

During the TMRU study, Ditidaht identified 242 fishing sites in the Marine RSA concentrated at five locations: Bonilla Point, Pachena Point, Nitinat Lake, Nitinat River and Swiftsure Bank. The shipping lanes need to be crossed to access Swiftsure Bank. The Crown understands that Swiftsure Bank is a rich fishing and harvesting area with particular cultural significance where Ditidaht share offshore fishing and harvesting rights with the Pacheedaht, and the Makah Nation. Today, a closed area has been established at Swiftsure Bank for retention of halibut, rockfish, lingcod and all finfish, other than for use by Aboriginal groups.

Ditidaht raised specific concerns with potential Project impacts relating to their Aboriginal right to fish and harvest marine resources:

- Declines of fish stocks due to increases in pollution and marine traffic associated with the Project;
- Potential for increased marine traffic to compromise the ability of Ditidaht community members to fish in their traditional territory, particularly at Swiftsure Bank; and
- Poor weather conditions that increase the likelihood of collisions between tankers and Ditidaht fishing vessels.

The general direct and indirect effects of the Project on Aboriginal rights to marine fishing and harvesting, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report. The proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Ditidaht community members to take measures to reduce potential disruptions from tankers and allow planning for fishing activities to take place that minimizes disturbance from Project-related tankers. Reduced harvests, while not expected to occur from temporary access restrictions, could impact Ditidaht's cultural activities and sharing of marine food with the community.

The conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with marine fishing and harvesting sites (Section 4.3.3 of this Report). The proponent would implement a range of mitigation measures that would directly or indirectly reduce potential project-related marine fishing impacts on Ditidaht's marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, and scheduling and notification of Project activities (via the proponent's marine public outreach program).

In consideration of the information available to the Crown from the NEB process, consultation with Ditidaht, Ditidaht's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC

issued by the Province, Project-related marine shipping activities are expected to result in minor impacts on Ditidaht's marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

Other traditional and cultural practices sites include trails and travelways, habitation sites, gathering places, and sacred areas. Historically, transportation routes were established and maintained throughout Ditidaht's asserted traditional territory. The use of trails and travelways was also important for participation in spiritual and ceremonial activities and to gather, hunt and fish. Trails and travelways continue to be used by community members. Historically, nine Ditidaht villages were located on the coast of Vancouver Island from Bonilla Point to Pachena Point. Although more permanent habitation sites were moved inland to Nitinat Lake, community members continue to use sites identified during the TMRU study along the coast in its asserted traditional territory. Sacred areas include sacred/ceremonial, burial, rock art panel and legendary being sites, as well as areas used for ritual bathing in preparation of ceremonies and other activities.

During the TMRU study, 58 trails and travelways, and two anchorage sites were identified by Ditidaht within the Marine RSA. The majority of the travelways and anchorage sites locations are confidential, and it not known where the sites are located in relation to the shipping lanes and if shipping lanes are crossed to access these sites. Shipping lanes are crossed to access the Swiftsure Bank travelway. Ditidaht identified a total of 146 gathering places and 68 sacred areas within the Marine RSA concentrated at Bonilla Point, Pachena Point, Nitinat Lake, and Nitinat River. The shipping lanes are not crossed to access the gathering places or sacred areas, of which the nearest is approximately 8.7 km north of the shipping lanes.

Ditidaht raised specific concerns with potential Project impacts relating to the use of marine travelways, specifically an increase in the likelihood of collisions between tankers and Ditidaht fishing vessels.

The general direct and indirect effects of the Project on other traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown understands that there will be temporary interruptions to Ditidaht's traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project. Marine mammals are of importance to many Coast Salish Aboriginal groups, and killer whales specially hold strong spiritual and cultural importance for many Aboriginal groups. The NEB concluded that effects on the endangered southern resident killer whale and Aboriginal cultural use of Southern Resident Killer Whale from Project-related shipping activities would be significant. The Crown is not aware of any specific cultural use of or concerns regarding killer whales raised by Ditidaht during the NEB and Crown consultation processes.

In consideration of the information available to the Crown from the NEB process, consultation with Ditidaht, Ditidaht's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in negligible-to-minor impacts on Ditidaht's other traditional and cultural practices.

Impacts Associated with Accidental Tanker Spills

Ditidaht expressed concerns regarding the impact of a potential oil spill on their Aboriginal Interests, including the effects on:

- Economic development interests and commercial harvesting rights;
- The environment, as well as Ditidaht culture, identity, and rights, including stewardship of Ditidaht's traditional lands and waters; and
- Shoreline heritage resources.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. Section 4.3.6 of the main body of this Report sets out the impacts associated with accidental spills from marine shipping vessels. In consideration of this information and analysis, as well as information available to the Crown on Ditidaht's Aboriginal Interests and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts, with low likelihood, on Ditidaht's Aboriginal Interests. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.⁴

VI – Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing marine safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for marine vessel use of the area between the Westridge Marine Terminal and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the marine-shipping component of the Project on the exercise of Ditidaht First Nation's Aboriginal Interests would be up to minor.

However, given existing use of the marine shipping corridor within areas proximate to the exercise of Ditidaht First Nation's Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of Ditidaht First Nation's Aboriginal Interests, the federal Crown is considering additional measures to further offset the potential impacts of the marine-shipping component of the Project on Ditidaht First Nation. Transport Canada has offered to meet with Ditidaht to discuss the issues

⁴ Trans Mountain Final Argument, p. 85 and 207

surrounding the location of the shipping lanes near Swiftsure Bank. Please see Sections 4 and 5 of the main body of this Report for a discussion of proposed accommodation measures.

In addition, the Crown is aware that the proponent has entered into a Mutual Benefits Agreement with Ditidaht First Nation in an attempt to offset potential impacts, should the Project proceed.

Appendix D.3 – Esquimalt Nation

I – Background Information

Esquimalt Nation (Esquimalt) is a Coast Salish community located on the eastern shore of Esquimalt Harbour in the Greater Victoria Region of British Columbia (BC). Esquimalt asserts that since time immemorial it has used and occupied the lands, waters and resources in its traditional territory for a multitude of purposes, including hunting, fishing, transportation, trade, traditional ceremonies and village sites.

Esquimalt has one reserve (Esquimalt IR) and 306 registered members, 200 of whom live on-reserve and 106 of whom live off-reserve. Approximately 50% of Esquimalt's 44.3 acres of reserve land has been identified for economic development. Reserve development is a balance of residential and commercial. Esquimalt members historically spoke a dialect of the Coast Salish language.

II – Preliminary Strength of Claim Assessment

- Approximately 45 kilometers (km) of the marine shipping route would pass within the southern part of Esquimalt's asserted traditional territory.
- The Province of BC understands Esquimalt to be to be a Douglas Treaty beneficiary. The Province of BC understands that Esquimalt has Douglas Treaty rights to fish as formerly and hunt on unoccupied lands within its historic traditional territory. No distinction is made between the Esquimalt and Songhees peoples in the ethnographic materials and no separate Esquimalt territory is identified by ethnographers, as both are considered Songhees. Ethnohistoric evidence indicates that Songhees territory extended "from Albert Head to Cordova Bay" on Vancouver Island, and included the American San Juan and Henry Islands at the time of the treaties in 1850.¹
- Canada recognizes the Douglas Treaties and understands that Esquimalt has members who are descendants of one or more signatories to one or more Douglas Treaties. Canada remains committed to working toward a common understanding of the content and scope of the Douglas Treaties with Esquimalt to implement the treaty through agreements with the Crown, and to explore opportunities to honour and recognize the Douglas Treaties.

III – Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Esquimalt's Aboriginal Interests, the Crown is of the view that the legal duty to consult Esquimalt lies at the middle portion of the *Haida* consultation spectrum. Esquimalt was placed on Schedule B of the Section 11 Order

¹ Te'mexw Treaty Association and Esquimalt Nation. Songhees, Beecher Bay, Esquimalt and Malahat First Nations, Esquimalt Nation: Review of Ethnographic and Historical Sources. Ministry of Justice, Legal Services Branch, Aboriginal Research Division. September 5, 2008. Revised to June 16, 2015; Proposed National Marine Conservation Area Reserve in the Southern Strait of Georgia: Review of Ethnographic and Historical Sources. Prepared by Ministry of Justice, Legal Services Branch, Aboriginal Research Division. December 19, 2012. Revised November 20, 2013.

issued by the Environmental Assessment Office, which afforded Esquimalt opportunities to be consulted at a deeper level.

Esquimalt participated in the National Energy Board (NEB) review process as an intervenor and submitted written evidence and a final written argument, sent additional correspondence to the NEB, and responded to the Crown's Issues Tracking Table Information Request by further elaborating their concerns ([A71202](#)).

Esquimalt was awarded \$24,910 in participant funding (plus travel for one to the hearing) from the NEB. The Major Projects Management Office (MPMO) offered Esquimalt \$8,400 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Esquimalt an additional \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Esquimalt signed contribution agreements with the MPMO in response to both of these offers, for a total of \$14,400 in allocated funding.

Esquimalt signed a letter of support with the proponent on March 10, 2015 ([A68380](#)) and has entered into a Mutual Benefits Agreement (MBA) with the proponent.

Esquimalt participated in meetings with the Crown consultation team on April 21, 2016 and on July 26, 2016.

The Crown provided a first draft of the Consultation and Accommodation Report (Report) to Esquimalt Nation for review and comment on August 17, 2016. The Crown did not receive comments from Esquimalt on the draft Report.

On October 26, 2016, the Crown sent a letter with two attachments to Chief Thomas and the Councillors of Esquimalt in order to respond to questions, outstanding issues, and proposed accommodation measures related to the Project as advanced during both Esquimalt's written final argument to the NEB and as discussed during the July 26, 2016 meeting.

A second draft of this Report was provided to Aboriginal groups for review and comment on November 2, 2016. The Crown has not received comments from Esquimalt.

Esquimalt provided a separate Aboriginal group submission to the Crown on November 15, 2016.

IV – Summary of Key Issues and Concerns Raised

The Crown has gained its understanding of Esquimalt's issues and concerns through Esquimalt's involvement in the NEB process, including the responses Esquimalt provided to the Crown on its Information Request (IR) addressed to them, and through other engagement with the Crown, including meetings held in April 2016 and July 2016. In addition, the Crown has considered information regarding the proponent's engagement with Esquimalt, as described in the proponent's Aboriginal Engagement Report (July 2016).

This section offers a summary of the key issues raised by Esquimalt, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Esquimalt's key Project-related issues and concerns are summarized below:

- Potential damage to sacred sites and/or resources via increased marine traffic and spill risk;
- Lack of effective cross-examination of proponent within the NEB process;
- An absence of the federal government, despite its legal duty to consult;
- Increased pollution damaging number, quality, and habitat of marine resources, thereby impairing Esquimalt's ability to harvest clams and oysters;
- Potential economic compromise of Esquimalt business interests due to increased marine traffic and possibility of a spill;
- Impacts from increased marine traffic, such as: restricting the times that community members can exercise their harvesting rights; disrupting travelways used by Esquimalt's members; potential for vessel collision; and wakes or grounding of vessels causing damage to sacred sites;
- Potential impacts from spills and/or contaminants, including: inability to exercise harvesting rights; reduced quality and quantity of marine resources; damage to marine habitat and food sources; damage to vessels or equipment used to exercise harvesting rights; contaminated traditional territory, including culturally or spiritually sensitive areas; interruption of traditional ceremonies for spill cleanup; human health impacts; and loss of property value, revenues, or loss of opportunity to develop Esquimalt's lands. These potential impacts illustrate the importance of ensuring an optimal spill response system that protects all parties suffering harm in the event of an environmental disaster;

Esquimalt has provided a letter of support for regulatory approval of the Project, but expressed a desire to see the NEB include a requirement for meaningful engagement by the federal government. Esquimalt also expressed interest in participating in the creation of a regional body including other First Nations, the proponent, and potentially affected parties to address and ensure ongoing environmental and cultural protection from potential marine spills.

Accommodation Proposals

Esquimalt proposed a series of accommodation proposals to the NEB in its written final argument ([A4X4A2](#)) on January 12, 2016. In summary, Esquimalt supports regulatory approval of the Project on the terms and conditions set out in the MBA. However, in order to better protect the environment and mitigate potential impacts on the environment, Esquimalt Nation's rights and interests and Esquimalt Nation culture, Esquimalt submitted that the following measures should be implemented prior to and as a condition to the Project proceeding:

Spill Prevention

- Emergency Response Towing Vessels should be stationed at strategic locations along the marine shipping route;

- A resident salvor and personnel as well as salvage equipment should be stationed at strategic locations along the marine shipping route;

Spill Preparedness and Response

- The federal government should commission independent research on the fate and behavior of diluted bitumen in the marine environment and current best practices for spill response in the event that it does;
- The federal government should provide Esquimalt Nation and other interested parties an opportunity to comment on that research;
- If the research concludes there is a risk that diluted bitumen will sink, the federal government should require Trans Mountain to reassess the risk of an oil spill involving a Project-related tanker, including proposed mitigation measures;
- A spill response base should be established near Victoria, ideally in Esquimalt Harbour and Esquimalt Nation should be further consulted regarding the establishment of that spill response base;
- Equipment should be located in the community and Esquimalt members should be trained for emergency situations;
- The spill response capacity should be increased to an amount considerably greater than 20,000 tonnes (21,277 m³) and this response capacity should be available at each of the major spill response bases including Esquimalt Harbour;
- Esquimalt Nation and other interested parties should be consulted regarding that increase and, if required, the federal government should commission independent research to assist in determining the amount it should be increased to;
- Trans Mountain should fund the establishment of a plan, in consultation with Esquimalt and other interested parties, for bringing together and training a shoreline cleanup and wildlife response workforce in the event of an oil spill involving a Project-related tanker; and
- The federal Crown and Trans Mountain should engage in meaningful consultations with Esquimalt and other First Nations with aboriginal or treaty rights in or around the Salish Sea regarding establishment of the Foundation, including the federal government and Trans Mountain's respective financial contributions to the Foundation.

Esquimalt Nation further submits that, regardless whether the Project proceeds, the federal government should implement the following regulatory improvements:

- 1) *Hearing Process*: Amending the environmental assessment process for future projects that may impact Esquimalt's rights and interests in consultation with Esquimalt and other interested parties; and
- 2) *Spill Compensation Regime*: Amending the compensation regime for marine-based oil spills to ensure that the total compensation available reflects the total costs likely to be incurred in the event of a major oil spill and to ensure that damages to Esquimalt's Harvesting Rights are compensable under the regime, in consultation with Esquimalt and other interested parties.

Esquimalt acknowledges that some of the above conditions are beyond the jurisdiction of the NEB; however, submits that, to the extent they are, they should be addressed through federal regulation.

Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Esquimalt that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests

Esquimalt's Response to NEB Recommendation Report

No specific comments were received on the *NEB Recommendation Report*.

V – Potential Impacts of the Project on Esquimalt's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), including by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Esquimalt's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Esquimalt's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g. fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Esquimalt's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Esquimalt, Esquimalt's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant conditions proposed by the Province of any Environmental Assessment Certificate issued.

Esquimalt completed a proponent-facilitated traditional marine and resource use (TMRU) study in 2013, which included a map review and community interviews that focused on Crown lands and waters within the asserted territory of Esquimalt crossed by the Marine Regional Study Area (RSA)². In its

² The area extending beyond the LSA boundary (i.e. the zone of influence or area where the element and associated indicators are most likely to be affected by Project-related marine vessel traffic.) where the direct and

Supplemental Technical Report ([A3Z4Z1](#)), the proponent estimated approximate distances and directions from the marine shipping lanes based on information in Esquimalt's report. Additional TMRU information for Esquimalt was presented in *Volume 5B* ([A3S4K3](#)) of the Project application. Traditional marine resource uses identified by Esquimalt include hunting, information on fishing sites, plant gathering, sacred sites, and habitation sites.

Impacts on Hunting, Trapping and Plant Gathering

As identified in the TMRU study, Esquimalt community members historically hunted black ducks, sea lions, humpback whale, and orcas, and harvested gull eggs. Currently, deer and elk are hunted around Shawinigan Lake, Cowichan Lake and Youbou. Eleven hunting sites were identified, of which five are within the Marine RSA (i.e., Sooke Inlet, Discovery Island, Chatham Island, Esquimalt Harbour and Salish Sea). Access to these sites is not restricted by the shipping lanes, with the exception of the Salish Sea hunting site which encompasses portions of the outbound shipping lane. No plant gathering sites were identified by Esquimalt within the Marine RSA. The nearest site is at Goldstream, approximately 25 km north of the Marine RSA, where salmon berries are harvested. Community members used to harvest seaweed, and continue to practice traditional healing using terrestrial plants.

In addition to providing traditional use information, Esquimalt raised specific concerns with potential Project-related impacts on their hunting, trapping and gathering activities including potential for increased pollution damaging number, quality, and habitat of marine resources, and impacts from increased marine traffic, including the restriction of harvesting.

The general direct and indirect effects of the Project on hunting, trapping, and gathering, along with key mitigation measures, are described in Sections 4.3.1 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Sections 4.3.1 of this Report). The proponent would implement a range of mitigation measures that would directly or indirectly reduce potential Project-related marine shipping impacts on Esquimalt's hunting, trapping, and plant gathering activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

In consideration of the information available to the Crown from the NEB process, consultation with Esquimalt, Esquimalt's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in a negligible impact on Esquimalt's hunting, trapping and plant gathering activities.

indirect influence of other activities could overlap with Project-specific effects and cause cumulative effects on the environmental or socio-economic indicator.

Impacts on Marine Fishing and Harvesting

As identified in the TMRU study, fish are a main food source for Esquimalt community members, including salmon, halibut, sole, cod, and perch. Clam, crab, sea urchin, abalone, gooey duck and lingcod eggs are also harvested. Twenty-one fishing sites were identified, of which 15 are within the Marine RSA. Access to these sites is not restricted by the shipping lanes, with the exception of the Salish Sea fishing site which encompasses portions of the outbound shipping lane. In *Volume 8B*, Craigflower Creek, Gorge Waterway, and Macaulay Point were also identified as marine resource harvesting and fishing sites within the Marine RSA. The shipping lanes are not crossed to access the sites.

In addition to providing traditional use information, Esquimalt raised specific concerns with potential Project-related impacts on their marine fishing and harvesting activities, including the potential for increased pollution damaging number, quality, and habitat of marine resources, which could impair Esquimalt's ability to harvest clams and oysters.

The general direct and indirect effects of the Project on marine fishing and harvesting activities, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report. As described in that section, Project-related marine shipping activities are not likely to cause significant adverse environmental effects on marine fish and fish habitat, including SARA-listed species and the proponent would implement several mitigation measures that would directly or indirectly reduce potential Project-related marine shipping impacts on Esquimalt's marine fishing and harvesting activities. These mitigations would include plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, and scheduling and notification of Project activities (via the proponent's marine public outreach program). The proponent has also committed to require all tankers to process and empty their bilges prior to arrival and lock the discharge valve of the bilge water while in Canadian waters (commitment 411).

In consideration of the information available to the Crown from the NEB process, consultation with Esquimalt, Esquimalt's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in negligible impacts on Esquimalt's marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

Historically, boats were the main mode of Esquimalt transportation, allowing access to different islands. No travelways were identified within the Marine RSA during the TMRU study. Several habitation sites (historic and current villages) were identified, none of which are located within the Marine RSA or require crossing shipping lanes to access the sites. Eight sacred areas were identified, including historical burial sites, caves, and rock art sites. One of the historical burial sites, Brothers Islands, is within the Marine RSA and is approximately 5.7 km northwest of the shipping lanes. In *Volume 8B*, the Gorge Rapids were also identified as a sacred site within the Marine RSA. The shipping lanes are not crossed to access this site.

In addition to providing traditional use information, Esquimalt raised specific concerns with potential Project-related impacts on other traditional and cultural practices:

- Potential damage to sacred sites resulting from increased marine traffic;
- Potential economic effects to Esquimalt's business interests resulting from increased marine traffic; and
- Potential impacts from increased marine traffic including the restriction of harvesting times, disruption of travelways used by community members, and damage to sacred sites from vessel wake or vessel grounding.

The general direct and indirect effects of the Project on traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this report. Marine mammals are of importance to many Coast Salish Aboriginal groups, and killer whales specially hold strong spiritual and cultural importance for many Aboriginal groups. The NEB concluded that effects on the endangered Southern Resident Killer Whale and Aboriginal cultural use of Southern Resident Killer Whale from Project-related shipping activities would be significant. The Crown is not aware of any specific cultural use of or concerns regarding killer whales raised by Esquimalt during the NEB and Crown consultation processes.

Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown understands that there will be temporary interruptions to Esquimalt's traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Esquimalt, Esquimalt's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in negligible impacts on Esquimalt's other traditional and cultural practices.

Impacts Associated with Accidental Tanker Spills

Esquimalt expressed concerns regarding the impact of a potential oil spill on their Aboriginal Interests, including the effects of a potential spill on:

- Potential impacts from spills that reduce the quality and quantity of marine resources and cause damage to marine habitat and food sources;
- Potential impacts from spills and/or contaminants including the restriction of harvesting, reduced quality and quantity of marine resources, damage to marine habitat and food sources, and damage to vessels or gear used to exercise harvesting rights;

- Potential impacts from spills and/or contaminants such as contaminated traditional territory (including culturally or spiritually sensitive areas), interruption of traditional ceremonies resulting from cleanup activities following a potential spill, human health impacts, and loss of property value, revenues, or loss of opportunity to develop Esquimalt's lands;
- Potential damage to sacred sites resulting from spills; and
- Potential economic effects to Esquimalt's business interests resulting from the possibility of a spill.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. Section 4.3.6 of the main body of this Report sets out the impacts associated with accidental spills from marine shipping vessels. In consideration of this information and analysis, as well as information available to the Crown on Esquimalt's Aboriginal Interests and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts, with low likelihood, on Esquimalt's Aboriginal Interests. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.³

VI – Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing marine safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for marine vessel use of the area between the Westridge Marine Terminal and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the marine-shipping component of the Project on the exercise of Esquimalt's Aboriginal Interests would be negligible.

However, given existing use of the marine shipping corridor within areas proximate to the exercise of Esquimalt's Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of Esquimalt's Aboriginal Interests, the federal Crown is considering additional measures to further offset the potential impacts of the marine-shipping component of the Project on Esquimalt. Please see Sections 4 and 5 of the main body of this Report for a discussion of proposed accommodation measures.

In addition, the Crown is aware that the proponent has entered into a MBA with Esquimalt Nation in an attempt to offset potential impacts, should the Project proceed.

³ Trans Mountain Final Argument, p. 85 and 207

Appendix D.4 – Halalt First Nation

I - Background Information

Halalt First Nation (Halalt) is a Coast Salish Nation whose asserted traditional territory includes part of Southeastern Vancouver Island and the Salish Sea to the Lower Mainland of British Columbia (BC), including Vancouver, Sunshine Coast, and the area northwest of Howe Sound.

Halalt has two reserves: *Halalt Island 1* and *Halalt 2*. As of July 2016, Halalt had a registered population of 212 members, with 100 members living on-reserve and 112 members living off-reserve.

Halalt is party to the Hul'qumi'num Treaty Group *Statement of Intent*. The Hul'qumi'num Treaty Group includes: Stz'uminus (Chemainus) First Nation, Lake Cowichan First Nation, Halalt First Nation, Penelakut Tribe, Cowichan Tribes and Lyackson First Nation. The Hul'qumi'num Treaty Group is currently in Stage 4 of the BC Treaty process (i.e. Agreement-in-Principle). Halalt is a party to the Hul'qumi'num Nation protective *Writ of Summons*, which was filed in the BC Supreme Court in December, 2003, asserting Aboriginal title to a territory identified in the writ.

Cowichan Tribes, Stz'uminus, Penelakut, and Halalt are also part of the Cowichan Nation Alliance focussed on resolution of Aboriginal rights, including title, on the south arm of the Fraser River.

Halalt members historically spoke the Hul'qumi'num (pronounced “*Hul-ka-MEE-num*”) language.

II – Preliminary Strength of Claim Assessment

- The right of way (RoW) transects the asserted traditional territory of the Hul'qumi'num, between the Westridge terminal and Surrey, and again between Chilliwack and Hope (approximately 72 kilometers [km] of new RoW). The following Project facilities are located within the asserted traditional territory of the Hul'qumi'num: Hope Station, Wahleach Station, Port Kells Station, Burnaby Terminal, and Westridge Marine Terminal (WMT). The marine shipping route would pass through approximately 265 km of Hul'qumi'num Treaty Group's traditional territory.
- The Crown's preliminary assessment of Halalt's Aboriginal rights in areas proximal to the marine shipping corridor of the Project, which transits the Strait of Georgia, is assessed as having a *prima facie* claim of Aboriginal rights ranging from weak to strong as follows. Areas of strong claims are areas within what ethnohistoric sources generally describe as pre-contact traditional territory of Halalt and where there is information of their historic use as part of their traditional seasonal round, including areas in the Strait of Georgia proximal to, and within the southern reaches of, the southern arm of the Fraser River and portions of the southern Gulf islands that lie to the west of Galiano Island and above Active Pass. Areas of weak claims include areas proximal to the Strait of Georgia north of Gabriola passage and north and south of the South arm of the Fraser River, the Strait of Georgia south of Active Pass, and areas within Haro and

Juan de Fuca Straits, which were not considered within the pre-contact traditional territory of the Halalt and/or Cowichan people¹.

- The Crown's preliminary assessment of the Halalt's *prima facie* claim of Aboriginal title to upland areas proximal to the marine shipping corridor of the Project ranges from weak to moderate with the higher end of the range (i.e. moderate) pertaining to exclusive areas of known Halalt habitation and use. The Crown does not have clarity regarding how Hul'qumi'num Treaty Group members are asserting Aboriginal title in certain areas where there is limited indication that any of the Hul'qumi'num Treaty Group member First Nations could have excluded each other at 1846. For example, upland areas proximal to the marine shipping corridor, including by the southern arm of the Fraser River, the Crown would assess the *prima facie* claim of Aboriginal title of the Halalt as ranging from weak to moderate, with the stronger (i.e. moderate) claims located in proximity to uplands in the vicinity of the large village site of Tl'ektines. The Crown also does not have clarity regarding how Hul'qumi'num Treaty Group members are asserting Aboriginal title in the southern Gulf Islands that lie to the west of Galiano Island and above Active Pass and to the west of Valdes and Gabriola; in these areas, the Crown would assess the *prima facie* claim of Aboriginal title of the Halalt to upland areas as ranging from weak to weak-to-moderate as there is some indication of habitation and resource gathering sites utilized by Cowichan people likely at 1846. The following areas are generally described by ethnohistoric sources as outside the traditional territory of the Cowichan people without evidence of their occupation or use, such that there is no support for a *prima facie* claim of Aboriginal title to upland areas: proximal to the Strait of Georgia north of Gabriola passage and north of the South arm of the Fraser River, the Strait of Georgia south of Active Pass and south of the south arm of the Fraser River, and within Haro and Juan de Fuca Straits².
- In November 2014, Cowichan Tribes, Stz'uminus First Nation, Penelakut Tribe and Halalt filed an *Amended Notice of Civil Claim* seeking a declaration of Aboriginal title to an area described as the Tl'uqtnus Lands and fishing rights to the South Arm of the Fraser River. The above assessment of the strength of claimed Aboriginal title to the upland area west of and proximate to the Tl'uqtnus/Tl'ektines site was conducted to inform the scope of consultation regarding this project. It is a preliminary assessment only, considering only information reasonably available at the time of consultation and is not based on an exhaustive review of all information and legal issues related to this potential claim, and does not reflect the Crown's opinion of whether the court will ultimately decide in favour of the First Nation in the litigation of this claim.

¹ Halalt First Nation: Review of Ethnographic, Historical and Archaeological Resources. Prepared by Aboriginal Research Division, Legal Services Branch, Ministry of Attorney General. February 15, 2007. Revised December 29, 2008; The Hul'qumi'num Treaty Group: Review of Ethnographic, Historical and Archaeological Resources: Cowichan, Lake Cowichan, Halalt, Chemainus, Lyackson, Penelakut and Hwlitsum First Nations. Prepared by Aboriginal Research Division, Legal Services Branch, Ministry of Attorney General. September 8, 2009.

² Ibid

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Halalt's Aboriginal Interests, the federal Crown is of the view that the legal duty to consult Halalt lies in the middle of the *Haida* consultation spectrum. Halalt was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which affords them opportunities to be consulted at a deeper level.

Halalt did not participate in the National Energy Board (NEB) hearing process and did not submit an application for participant funding from the NEB. No correspondence has been received from Halalt regarding the Project.

The Major Projects Management Office (MPMO) offered Halalt \$6,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Halalt an additional \$7,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Halalt signed a contribution agreement with the MPMO for a total of \$13,000 in allocated funding.

On October 20, 2016 EAO offered \$5,000 in capacity funding to Halalt to assist with the consultation process.

Halalt signed a mutual benefits agreement (MBA) with the proponent and filed a Letter of Support for the Project with the NEB on August 5, 2015.

Halalt and the Crown met on September 28, 2016 in regards to the Project (in conjunction with other members of the Cowichan Nation Alliance).

The Crown provided a first draft of this Report to Halalt for review and comment on August 17, 2016. The Crown did not receive comments from Halalt on the draft Report.

A second draft of this Report was provided to Aboriginal groups for review and comment on November 03, 2016. The Crown has not received comments from Halalt.

IV - Summary of Key Halalt Issues and Concerns Raised

This section offers a summary of the key issues raised by Halalt, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Halalt's key Project-related issues and concerns are summarized below.

The Crown has also considered information regarding the proponent's engagement with Halalt, as described in the proponent's *Aboriginal Engagement Report* (July 2016).

The Crown's understanding of Halalt's key Project-related issues and concerns is summarized below:

- Effects of an oil spill on fish, shellfish, waterfowl and plants;
- Remediation and restoration of fish stocks, herring spawn sites, shellfish and intertidal gathering areas and waterfowl populations in the event of a spill;
- Restoration of marine and riparian plants in the event of a spill;
- Impact on fishing, fish spawn collecting areas, shellfish and intertidal gathering areas, waterfowl hunting areas, plant harvesting sites, habitation and processing sites, recreation sites, and boundary marker sites;
- Impacts on food harvest for individual households, particularly around the mouth of the Fraser River;
- The need to develop full contingency plans and mitigation measures for the Fraser River that fully restores this region and Halalt's resource sites;
- The need to fully identify the risks posed to Halalt human health and their immediate environment in case of an oil spill;
- The need to develop policies and procedures to manage impacts that an oil spill would create upon Halalt cultural and economic life;
- The need to train Halalt community members to be fully marine response ready to help with clean-up if a spill occurs; and
- The need to establish financial support for Halalt employment opportunities related to the oil industry.

With respect to Project mitigation measures, Halalt also requested the development of a full collaborative working relationship between the proponent and the Halalt community.

Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Halalt that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

Halalt's Response to NEB Recommendation Report

No specific comments were received on the *NEB Recommendation Report*.

V - Potential Impacts of the Project on Halalt's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests are provided in Sections 2.4.3 and Section 4.3 of this report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Halalt's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Halalt's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g. fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Halalt's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Halalt, Halalt's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate (EAC) issued by the Province.

Halalt completed a third-party Traditional Marine and Resource Use (TMRU) study in 2013. The focus of the study was on Crown lands and waters within the asserted territory of Halalt crossed by the Marine Regional Study Area (RSA). In its Supplemental Technical Report ([A3Z4Z1](#)), the proponent estimated approximate distances and directions from the marine shipping lanes based on information in Halalt's report. Additional TMRU information for Halalt was presented in *Volume 8B* ([A3S4K3](#)) of the Project application. Traditional uses identified by Halalt include hunting aquatic mammals and birds, gathering plants, information on fishing sites, habitation sites, gathering areas for community members, and trails and travelways.

Impacts on Hunting, Trapping, and Plant Gathering

As summarized in the TMRU study, seals, porpoises, sea lions, ducks were historically hunted by Halalt. Community members would often use spears, nets and more recently shotguns to hunt waterfowl. Historically, Halalt gathered plants for food, medicines and multi-purpose materials for a variety of uses. Plants gathered include indigenous onions, chocolate lily or rice root, tiger lily, carrots, bracken fern, sea asparagus, wapato, bog blueberry, cranberry, round rushes, scouring rush, cattails, stinging nettles, cedar bark, salmon berries and black caps (blackcap berries). Community members noted that wapato and Indian hemp were used to trade with other First Nations. Plant gathering remains an important part of life for Halalt community members.

During the TMRU study, nine hunting sites, six of which are located within the Marine RSA, were identified by Halalt: Porlier Pass/Cowichan Gap, Galiano Island, Tent Island, Kuper Island, Shoal Islands, and Willy Island. In *Volume 8B*, a marine mammal and bird hunting site at Thetis Island was also identified in the Marine RSA. The shipping lanes are not crossed to access these hunting sites. During the TMRU study, Halalt identified seven plant gathering sites, of which four are within the Marine RSA: Canoe Pass, the confluence of Pitt and Fraser Rivers, Valdes Island and Kuper Island. Shipping lanes are crossed to access two of these sites: Canoe Pass and the confluence of Pitt and Fraser Rivers.

In addition to providing traditional use information, Halalt raised the following specific issues and concerns with potential Project impacts relating to their hunting and gathering activities:

- Effects of an oil spill on waterfowl and plants;
- Remediation of waterfowl populations;
- Restoration of riparian plants;
- Impact on waterfowl hunting areas and plant harvesting sites; and
- Impacts on food harvest for individual households.

The general direct and indirect effects of the Project on hunting, trapping, and gathering, along with key mitigation measures, are described in Sections 4.3.1 and 4.3.3 of the main body of this report.

As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, old growth forests, wetlands, and terrestrial wildlife and wildlife habitat (including species at risk), marine mammals, and marine birds.

Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Halalt's hunting, trapping, and plant gathering activities. The Crown appreciates that this short-term disruption could temporarily alter the behaviour of community members' hunting, trapping or plant gathering activities during construction, and that reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project, could have spiritual and cultural impacts on community members.

Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Sections 4.3.1 and 4.3.3 of this Report). The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP) and the vegetation and wildlife management plans. The proponent would implement a range of mitigation measures that would reduce potential effects associated with Halalt's hunting, trapping, and plant gathering activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

The proponent is committed to implementing weed management (as outlined in the Weed and Vegetation Management Plan) to reduce the potential for weed infestation following construction, and utilizing an Integrated Vegetation Management approach intended to reduce the use of herbicides and promote healthy ecosystems. The proponent will consult with Aboriginal groups regarding problem

vegetation management and methods of treatment. Measures outlined in the proponent's Reclamation Management Plan are intended to stabilize and revegetate affected lands to achieve land productivity along the construction RoW and footprint, equivalent to the adjacent land use. The proponent has also committed to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project

NEB Condition 81 would require the proponent to develop a WMT-specific EPP, including mitigation and monitoring plans, to be finalized in consultation with Fisheries and Oceans Canada and potentially affected Aboriginal groups. The proponent would also be required to conduct a post-construction monitoring program for marine mammals from the expansion of the WMT. The proponent has committed to various mitigation measures to reduce effects of construction and operation of the WMT on marine birds, further the proponent has committed to compile information regarding mortality and collision events and to include that information in post-construction monitoring reports.

In consideration of the information available to the Crown from the NEB process, consultation with Halalt, Halalt's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province, Project construction and routine maintenance during operation and Project-related marine shipping are expected to result in negligible impacts on Halalt's hunting and trapping activities and a minor impact on Halalt's plant gathering activities.

Impacts on Freshwater Fishing, and Marine Fishing and Harvesting

As described in the TMRU study, shellfish (crabs and mollusks) and fish were historically the main food staples for Halalt. Shellfish and intertidal gathering of species included clams, cockles, chitons, oysters, mussels, crabs, and sea urchin. Community members used various methods, including spearing, trolling, and fish traps and weirs to catch herring, sea bass, lingcod, rock cod, greenling cod, red snapper, halibut, flounder, octopus, salmon, as well as night fishing with fire and harpoons to catch trout. Historically, Halalt community members would fish with community members from the Cowichan Tribes, Lyackson First Nation, Penelakut First Nation, and Chemainus First Nation.

Halalt identified 35 fishing sites during the TMRU study, of which 26 fishing sites were identified within the Marine RSA. Two fishing sites, a marine harvest site and a hunting site were identified in the Strait of Georgia. Shipping lanes are crossed to access the six fishing sites identified: Strait of Georgia, Tsawwassen, Fraser River, Active Pass, Canoe Pass, and Point Roberts. The TMRU study reports that historically, Halalt community members would travel from their village site on Lulu Island, to as far up the Fraser River as the District of Hope with community members from the Cowichan Tribes and Lyackson First Nation, Penelakut First Nation and Chemainus First Nation. Halalt built canneries on the river where community members would troll commercially and fish with nets from small fishing boats. The TMRU study did not identify any traditional use sites by Halalt in Burrard Inlet in the vicinity of the WMT.

In addition to providing traditional use information, Halalt raised specific concerns with potential Project impacts relating to their freshwater fishing, and marine fishing and harvesting activities:

- Effects of an oil spill on fish and shellfish;
- Remediation and restoration of fish stocks, herring spawn sites, shellfish and intertidal gathering areas;
- Restoration of marine plants;
- Impact on fishing, fish spawn collection areas, and shellfish and intertidal gathering areas;
- Impacts on food harvest for individual households; and
- The need to develop full contingency plans and mitigation measures for the Fraser River that fully restores this region and Halalt's resource sites.

As described in the *NEB Recommendation Report*, Project-related construction and operation could result in low to moderate magnitude effects on fish and fish habitat and surface water. Moderate effects to fish and fish habitat would be localized to individual watercourse crossings where any potential serious harm would be compensated by offset measures. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Section 4.3.2 of this Report). A number of recommended NEB conditions require the proponent to file reports that will monitor Project-related impacts to fish, fish habitat and riparian habitats. With regards to specific concerns raised by Halalt, the proponent would implement several mitigation measures to reduce potential effects to species important for Halalt's fishing activities. The proponent has committed to time watercourse crossing construction activities to occur within the least risk biological windows in an attempt to avoid causing serious harm to fish, has committed to working with Aboriginal groups to identify the most appropriate means of offsetting serious harm to marine fish and fish habitat, and has proposed the implementation of channel and bank reclamation measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat.

The general direct and indirect effects of the Project on Aboriginal rights to marine fishing and harvesting, along with key mitigation measures, are described in Section 4.3.3 of the main body of this report. The conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with marine fishing and harvesting sites (Section 4.3.3 of this Report). The proponent would implement a range of mitigation measures that would reduce potential effects associated with Halalt's marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups. The proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Halalt community members to take measures to reduce potential disruptions from tankers and allow planning for fishing activities to take place that minimizes disturbance from Project-related tankers. Reduced harvests, while not expected to occur from temporary access restrictions, could impact Halalt's cultural activities and sharing of marine food with the community.

In consideration of the information available to the Crown from the NEB process, consultation with Halalt, Halalt's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project construction and routine maintenance during operation including Project-related marine shipping, are expected to result in minor impacts on Halalt's marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

As identified in the TMRU study, Halalt's gathering places include camp sites, historic summer camping sites, and historic villages (including winter and fishing). Gathering places were used for fishing, collecting shellfish on the beach, gathering medicinal plants and plants for sustenance, hunting waterfowl, and training for canoe races. Historically, some community members would stay in these seasonal villages year-round. In *Volume 8B*, settlement areas were also identified in the Fraser River and at Valdes Island during the desktop study and literature review conducted for the Project.

During the TMRU study 14 gathering places were identified, of which 11 are located within the Marine RSA. Shipping lanes must be crossed to access one gathering place (habitation site) at Lulu Island. The historic settlements identified are located within the Marine RSA; however shipping lanes are not crossed to access the sites. One set of historic trails were identified by Halalt in the Marine RSA during the TMRU study. The shipping lanes are crossed to access the historic trails at Lulu Island. No sacred areas were identified during the TMRU study for the Project.

In addition to providing traditional use information, Halalt raised specific concerns with potential Project impacts relating to their other traditional and cultural practices:

- Impact on habitation and processing sites, recreation sites, and boundary marker sites; and
- The need to develop policies and procedures to manage impacts that an oil spill would create upon Halalt's cultural life.

Marine mammals are of importance to many Coast Salish Aboriginal groups, and killer whales specially hold strong spiritual and cultural importance for many Aboriginal groups. The NEB concluded that effects on the endangered Southern Resident Killer Whale and Aboriginal cultural use of Southern Resident Killer Whale from Project-related shipping activities would be significant. The Crown is not aware of any specific cultural use of or concerns regarding killer whales raised by Halalt during the NEB and Crown consultation processes.

The general direct and indirect effects of the Project on other traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown understands that there will be temporary interruptions to Halalt's traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities, including project-related marine shipping. It is noted that the proponent has committed to

ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Halalt, Halalt's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project construction and routine maintenance during operation and Project-related marine shipping are expected to result in negligible-to-minor impacts on Halalt's other traditional and cultural practices.

Impacts on Aboriginal Title

Halalt raised the following specific concerns with potential Project impacts relating to their Aboriginal title claim:

- The need to establish financial support for Halalt employment opportunities related to the oil industry; and
- The need to develop policies and procedures to manage impacts that an oil spill would create upon Halalt's economic life.

The Crown provides a description of the potential impacts of the Project on Aboriginal title in Section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid/reduce Project impacts associated with the degree of disturbance to terrestrial, marine and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as well as NEB Conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved. The Crown notes that Halalt executed a MBA with the proponent. Although these agreements are confidential, the Crown understands they may contain provisions for financial, environmental and training benefits that could further reduce impacts to Aboriginal title claims if the Project proceeds.

Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in Section 4.3.5, it is the Crown's opinion that the Project is expected to have negligible impacts on Halalt's asserted Aboriginal title to the proposed Project area.

Impacts Associated with Accidental Pipeline, Terminal, and Tanker Spills

Halalt expressed concerns regarding the impact of a potential oil spill on their Aboriginal Interests, including:

- The need to train Halalt community members to be marine response ready to help with clean-up if a spill occurs, and

- The need to develop policies and procedures to manage impacts that an oil spill would create upon Halalt's economic life.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. A discussion of the potential impacts of an accidental spill on Aboriginal Interests is provided in Section 4.3.6 of this Report. In consideration of this information and analysis, as well as information available to the Crown on Halalt's Aboriginal Interests and concerns raised by Halalt during the Crown consultation process, a spill associated with the Project could result in minor to serious impacts on Halalt's Aboriginal Interests. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill³.

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline and marine safety regimes would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations of the pipeline and WMT, as well as for project-related marine vessel use of the area between the WMT and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the Project on the exercise of Halalt First Nation's Aboriginal Interests would be up to minor.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Halalt First Nation's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Halalt in emergency response planning activities. Given existing use of the marine shipping corridor within areas proximate to the exercise of Halalt's Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of Halalt's Aboriginal Interests, the federal Crown is considering additional measures to further offset the potential impacts of the marine-shipping component of the Project on Halalt. Please see Sections 4 and 5 of the main body of this report for a discussion of proposed accommodation measures.

In addition, the Crown is aware that the proponent has entered into a MBA with Halalt in an attempt to offset potential impacts, should the Project proceed.

³ Trans Mountain Final Argument, p. 85 and 207

Appendix D.7 – Lyackson First Nation

I - Background Information

Lyackson First Nation (Lyackson) is a Coast Salish community located on the east coast Vancouver Island about 20 kilometers (km) south of Nanaimo, British Columbia (BC). Lyackson asserts that it traditionally used the Gulf Islands and surrounding waters to conduct fishing and other activities.

Lyackson has three reserves: *Lyackson 3*, *Portier Pass 5*, and *Shingle Point 4*. Lyackson members live at Chemainus, as their main reserve on Valdes Island has no regular transportation service. Lyackson's registered population as of July 2016 is 213; 40 members live on-reserve and 173 live off-reserve.

Lyackson is a party to the Hul'qumi'num Nation protective *Writ of Summons*, which was filed in the BC Supreme Court in December 2003, asserting Aboriginal title to a territory identified in the *writ*. Lyackson is party to the Hul'qumi'num Treaty Group (HTG) Statement of Intent. The HTG includes: Stz'uminus (Chemainus) First Nation, Lake Cowichan First Nation, Halalt First Nation, Penelakut Tribe, Cowichan Tribes, and Lyackson.

The HTG is currently in Stage 4 of the BC Treaty process (i.e. Agreement-in-Principle). Lyackson members historically spoke the Hul'qumi'num (pronounced "*Hul-ka-MEE-num*") language.

II - Preliminary Strength of Claim Assessment

- The right of way (RoW) transects the asserted traditional territory of the Hul'qumi'num, between the Westridge terminal and Surrey, and again between Chilliwack and Hope (approximately 72 km of new RoW). The following Project facilities are located within the asserted traditional territory of the Hul'qumi'num: Hope Station, Wahleach Station, Port Kells Station, Burnaby Terminal, and Westridge Marine Terminal. The marine shipping route would pass through approximately 265 km of Hul'qumi'num Treaty Group's traditional territory.
- The Crown's preliminary assessment of Lyackson's Aboriginal rights in areas proximal to the marine shipping corridor of the Project, which transits the Strait of Georgia, is assessed as having a *prima facie* claim of Aboriginal rights ranging from weak to strong as follows. Areas of strong claims are areas within what ethno-historic sources generally describe as pre-contact traditional territory of the Lyackson and where there is information of their historic use as part of their traditional seasonal round, including areas in the Strait of Georgia proximal to, and within the southern reaches of, the southern arm of the Fraser River, portions of the southern Gulf islands that lie to the west of Galiano Island and above Active Pass and areas proximal to Valdes Island. Areas of weak claims include areas proximal to the Strait of Georgia north of Gabriola passage and north and south of the South arm of the Fraser River, the Strait of Georgia south of Active

Pass, and areas within Haro and Juan de Fuca Straits, which were not considered within the pre-contact traditional territory of the Lyackson and/or Cowichan people.¹

- The Crown's preliminary assessment of the Lyackson's *prima facie* claim of Aboriginal title to upland areas proximal to the marine shipping corridor of the Project ranges from weak to strong. Strong claims are supported in certain upland areas on the southern half of Valdes Island, proximate to Lyackson historic villages. In other areas where there is limited information supporting specific Lyackson sufficient and exclusive occupation use of areas at 1846, the claim is weak. The Crown does not have clarity regarding how HTG members are asserting Aboriginal title in certain areas where there is limited indication that any of the HTG member First Nations could have excluded each other at 1846. For example, in upland areas proximal to the marine shipping corridor, including by the southern arm of the Fraser River, the Province would assess the *prima facie* claim of Aboriginal title of the Lyackson as ranging from weak to moderate, with the stronger (i.e. moderate) claims located in proximity to uplands in the vicinity of the large village site of Tl'ektines. The Crown also does not have clarity regarding how HTG members are asserting Aboriginal title in the southern Gulf Islands that lie to the west of Galiano Island and above Active Pass and to the west of Valdes and Gabriola; in these areas, the Crown would assess the *prima facie* claim of Aboriginal title of the Lyackson to upland areas as ranging from weak to weak-to-moderate, as there is some indication of habitation and resource gathering sites utilized by Cowichan people likely at 1846. The following areas are generally described by ethnohistoric sources as outside the traditional territory of the Cowichan people without evidence of their occupation or use, such that there is no support for a *prima facie* claim of Aboriginal title to upland areas: proximal to the Strait of Georgia north of Gabriola passage and north of the South arm of the Fraser River, the Strait of Georgia south of Active Pass and south of the south arm of the Fraser River, and within Haro and Juan de Fuca Straits.²

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Lyackson's Aboriginal Interests, the Crown is of the view that the legal duty to consult Lyackson lies at the middle of the *Haida* consultation spectrum. Lyackson was placed on Schedule B of the Section 11 order issued by the BC Environmental Assessment Office (EAO), which afforded Lyackson opportunities to be consulted at a deeper level.

Lyackson participated in the National Energy Board (NEB) review process as an intervenor and submitted oral traditional evidence, written evidence, final oral summary and written arguments, as well as

¹ Lyackson First Nation: Review of Ethnographic, Historical and Archaeological Resources. Prepared by Aboriginal Research Division, Legal Services Branch, Ministry of Attorney General. December 31, 2008; and The Hul'qumi'num Treaty Group: Review of Ethnographic, Historical and Archaeological Resources: Cowichan, Lake Cowichan, Halalt, Chemainus, Lyackson, Penelakut and Hwlitsum First Nations. Prepared by Aboriginal Research Division, Legal Services Branch, Ministry of Attorney General. September 8, 2009.

² Ibid

responded to the Crown's Issues Tracking Table Information Request by further elaborating their concerns ([A71256](#)).

Lyackson signed a contribution agreement with the NEB for \$36,920 in participant funding plus travel for two to the hearing. The Major Projects Management Office (MPMO) offered Lyackson \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Lyackson an additional \$14,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Lyackson signed a contribution agreement with the MPMO for a total of \$12,000 in allocated funding.

On July 26, 2016 Lyackson was issued \$5,000 in capacity funding from the EAO to participate in consultations with the Crown.

Lyackson and Lake Cowichan First Nation met jointly with the Crown on April 20, 2016 to discuss the Project. Lyackson met again with the Crown on September 13, 2016.

The Crown provided a first draft of this Report to Lyackson for review and comment on August 17, 2016. Lyackson provided comments on the draft Report to the Crown in two letters on October 3 and 5, 2016. Those comments have been considered and integrated into this version of the Report. A second draft of this Report was provided to Aboriginal groups for review and comment on November 2, 2016. The Crown has not received comments from Lyackson.

IV - Summary of Key Lyackson Issues and Concerns Raised

The Crown gained its understanding of Lyackson's issues and concerns through the community's involvement in the NEB process, including submissions made through the NEB hearings process, the responses Lyackson provided to the Crown on its Information Request addressed to them, and through other engagement with the Crown. In addition, the Crown has considered information regarding the proponent's engagement with Lyackson, as described in the proponent's Aboriginal Engagement Report (July 2016).

Concerns raised by Lyackson include that the Project will lead to further negative environmental, economic, cultural, social, and spiritual impacts on Lyackson members and a reduction in their ability to pursue long-term governance and preservation objectives. This section offers a summary of the key issues raised by Lyackson, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Lyackson's key Project-related issues and concerns are summarized below:

Marine Impacts

- The effects of increased shipping on the Southern Resident Killer Whale (e.g. the higher likelihood of ship-source strikes);

- Increased pollution (including light and sound pollution), damaging marine resources and impairing the availability of fresh food;
- The potential for increased marine traffic to introduce invasive species, and through scouring and damaging wash created by ship engines;
- Tanker-generated waves, and light and noise disturbance, especially on the east side of Valdes Island and in nearby passes, resulting in disturbance of marine and foreshore habitat areas for octopus, sea lions, and a variety of other marine species;
- Effect on resource-rich areas in the event of a spill, which could be devastating to micro-ecosystems, the sturgeon food fishery, the Steller sea lion, and migratory birds biofilm; and
- Increased risk of accident and interference with small boat navigation (including Lyackson canoes and subsistence fishing boats).

Environmental and Cumulative Effects

- Cumulative effects of all projects in the area and the potential effects of projects on marine mammals, when there are no comprehensive studies;
- A greenhouse gas assessment that does not take into account downstream effects on climate change;
- Lack of understanding about the full spectrum of effects on Lyackson from the multiple projects being proposed, especially given the differential between current baselines relative to the pre-contact ecological state; and
- Assurance that the youth of Lyackson now, and in the future, will still be able to see their village sites.

Socio-economic Concerns

- Potential compromise of economic opportunities and existing economic activities, such as fisheries and tourism;
- Impacts to Lyackson governance and planning, including the ability of Lyackson leadership to uphold hereditary duties, particularly protection of values on Valdes Island, including ancestral sites and traditional harvesting rights and responsibilities; and
- Foreclosure of future community and economic development opportunities on Valdes Island, including ability for resettled Lyackson families to engage with confidence in island-based subsistence harvesting and business, and impacts to planned future use, including tourism based economic development, and other economic and community plans for Valdes Island.

Traditional Resource Use

- Lyackson is concerned that the effects on Traditional Marine Resource Use at Westridge Marine Terminal (WMT) are high and will impact Lyackson's rights, title and interests; and,
- The disruption of traditional marine uses will harm Lyackson's cultural identity by threatening to disrupt the transfer of intergenerational traditional knowledge, which is required to uphold the wellbeing of the First Nation in all aspects (physically, mentally, spiritually).

Impacts on Aboriginal Rights

- As a consequence of the potential negative impacts on marine resources, Lyackson is concerned that their ability to practice their Aboriginal rights and interests is threatened by the Project; and,
- Lyackson believes the Crown requires further information to fully understand Lyackson's interests.

Cultural and Social Impacts

- Potential adverse impact from the Project to Lyackson's traditional territory, including ancestral remains and sacred sites; travel ways and trails; hunting, harvesting and plant-gathering sites; gathering places; and submerged lands;
- Preservation and governance of traditional territory, and its interlinked lands, waterways, and ecosystems; and
- Social, cultural, mental, spiritual, and emotional adverse effects on Lyackson members from the compromise of traditional territory and ability to perform cultural practices.

Methodology, Process and Consultation

- Efficacy of the NEB process methodology, and its ability to define a meaningful scope; communicate clearly, fairly, and accessibly, in a government-to-government basis; and ensure enforcement and compliance with Project's terms and conditions.

The Crown is in receipt of an open letter sent to Prime Minister Trudeau, Alberta Premier Rachel Notley, and British Columbia Premier Christy Clark from a collective of Aboriginal groups, including Lyackson. This letter identifies interests and concerns related to Indigenous consent of the Project and the Project's consultation process.

Lyackson's Response to NEB Recommendation Report

Lyackson remains concerned regarding to the efficacy of the NEB process methodology, its ability to define a meaningful scope; communicate clearly, fairly, and accessibly, in a government-to-government basis; and ensure enforcement and compliance with Project's terms and conditions. In Lyackson's view, the review process has indicated poorly understood baseline conditions, lack of knowledge of cause and effect relationships, lack of scientific certainty in the review of Project specific data, high degree of subjectivity applied. Therefore, according to Lyackson, the NEB conditions have not adequately reduced or avoided the directly or indirect concerns advanced by Lyackson regarding potential impacts on other traditional and cultural practices.

Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups.

V - Potential Impacts of the Project on Lyackson's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and 4.3 of this report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), including by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Lyackson's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Lyackson's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g. fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Lyackson's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Lyackson, Lyackson's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant conditions proposed by the Province of any Environmental Assessment Certificate issued.

Lyackson conducted a third-party traditional use study (TUS) titled *The Lyackson Use and Occupancy Mapping Study* ([A4Q0I2](#)). The study provides information regarding Lyackson's use and occupancy within their current asserted traditional territory including use and occupancy mapping, ethnographic and archaeological information, as well as other data. In its Supplemental Technical Report ([A4F5D2](#)), the proponent estimated approximate distances and directions from the marine shipping lanes based on information in Lyackson's report. Additional information for Lyackson was presented in *Volume 8B* ([A3S4K3](#)) of the Project application.

Impacts on Hunting, Trapping, and Plant Gathering

As summarized in Lyackson's TUS, community members hunt a variety of marine and terrestrial species including ducks, water birds, seal, porpoise and sea lion. Community members also gather seaweed, kelp and berries in numerous places within their traditional territory. Lyackson identified four hunting sites and three plant gathering sites in their TUS. The following sites are located within the marine regional study area (RSA): three hunting sites at Shingle Point, Porlier Pass, and south of Porlier Pass and two plant gathering sites on the east coast of Le'eyqsun (Valdes Island) and Porlier Pass. None of the sites require Lyackson community members to cross the marine shipping lanes.

Lyackson raised the following specific concerns with potential Project impacts relating to hunting, trapping, and plant gathering activities:

- Potential effects of climate change, including the introduction of invasive species; and
- Potential adverse impacts from the Project to Lyackson's traditional territory, including hunting, harvesting and plant-gathering sites; and gathering places.

The general direct and indirect effects of the Project on hunting, trapping, and gathering, along with key mitigation measures, are described in Sections 4.3.1 of the main body of this Report. As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, old growth forests, wetlands, and terrestrial wildlife and wildlife habitat (including species at risk), marine mammals, and marine birds.

Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Sections 4.3.1 of this Report). The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP) and the vegetation and wildlife management plans. The proponent would implement a range of mitigation measures that would reduce potential effects associated with Lyackson's hunting, trapping, and plant gathering activities, including access management plans, plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

NEB Condition 81 would require the proponent to develop a WMT-specific EPP, including mitigation and monitoring plans, to be finalized in consultation with Fisheries and Oceans Canada (DFO) and potentially affected Aboriginal groups. The proponent would also be required to conduct a post-construction monitoring program for marine mammals from the expansion of the WMT. The proponent has committed to various mitigation measures to reduce effects of construction and operation of the WMT on marine birds, further the proponent has committed to compile information regarding mortality and collision events and to include that information in post-construction monitoring reports.

In consideration of the information available to the Crown from the NEB process, consultation with Lyackson, Lyackson's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation and Project-related marine shipping are expected to result in a negligible-to-minor impact on Lyackson's hunting, trapping and plant gathering activities.

Impacts on Freshwater Fishing, and Marine Fishing and Harvesting

As described in Lyackson's TUS, community members fish and harvest a wide variety of marine resources including clams, chiton, mussels, oysters, crabs, sea cucumber, sea urchin, octopus, pink, sockeye, coho and spring salmon, dogfish, flounder, ling cod, rock cod, sturgeon and herring. Two main regions are used for fishing and marine harvesting: Le'eyqsun (Valdes Island) and from the mouth of the Fraser River to Seabird Island. Salmon is the most important species fished by community members for subsistence, cultural, and commercial purposes.

Lyackson identified a total of 11 fishing and marine harvesting areas in their TUS, nine of which are located within the Marine RSA. Community members would be required to cross shipping lanes to access six of the sites including those locations along the Fraser River, Canoe Pass, Roberts Bank, Point Roberts, Steveston, and outside the BC Ferries causeway.

Lyackson raised specific concerns with potential Project impacts relating to freshwater fishing and marine fishing and harvesting activities:

- Lack of satisfaction with Project marine effects analysis during the NEB process;
- Potential effects of climate change, including the effects on salmon;
- Increased pollution (including light and sound pollution) damaging marine resources, thereby impairing availability of fresh food;
- Impacts from increased marine traffic, such as increased pollution;
- Cumulative effects of all projects in the area and the potential effects of projects on marine mammals, when there are no comprehensive studies;
- Potential adverse impacts from increased tanker traffic on the marine environment as a result of increased potential for introduction of invasive species, and through scouring and damaging wash created by ship engines;
- Tanker-generated waves, and light and noise disturbance, especially on the east side of Valdes Island and in nearby passes, resulting in disturbance of marine and foreshore habitat areas for octopus, sea lions, and a variety of other marine species; and
- Increased risk of accident and interference with small boat navigation (including Lyackson canoes and subsistence fishing boats).

As described in the *NEB Recommendation Report*, Project-related construction and operation could result in low to moderate magnitude effects on fish and fish habitat and surface water. Moderate effects to fish and fish habitat would be localized to individual watercourse crossings where any potential serious harm would be compensated by offset measures. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Section 4.3.1 of this Report). A number of recommended NEB conditions require the proponent to file reports that will monitor Project-related impacts to fish, fish habitat and riparian habitats. With regards to specific concerns raised by Lyackson, the proponent would implement several mitigation measures to reduce potential effects to species important for Lyackson's fishing activities. The proponent has committed to time watercourse crossing construction activities to occur within the least risk biological

windows in an attempt to avoid causing serious harm to fish, has committed to working with Aboriginal groups to identify the most appropriate means of offsetting serious harm to marine fish and fish habitat, and has proposed the implementation of channel and bank reclamation measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat.

The general direct and indirect effects of the Project on Aboriginal rights to marine fishing and harvesting, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report. The conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with marine fishing and harvesting sites (Section 4.3.3 of this Report). Project related marine shipping traffic would utilize existing deep-sea navigational channels. The proponent would implement a range of mitigation measures that would reduce potential effects associated with Lyackson's marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups. The proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Lyackson community members to take measures to reduce potential disruptions from tankers and allow planning for fishing activities to take place that minimizes disturbance from Project-related tankers. Reduced harvests, while not expected to occur from temporary access restrictions, could impact Lyackson's cultural activities such as sharing of marine food with the community.

In consideration of the information available to the Crown from the NEB process, consultation with Lyackson, Lyackson's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation and Project-related marine shipping are expected to result in minor impacts on Lyackson's marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

Trails and travelways were identified by Lyackson in their TUS. Those trails and travelways are between Le'eyqsun and various habitation and harvesting sites throughout their traditional territory. Those trails and travelways are important to the history and culture of Lyackson as they provide community members with access to important resources that are shared with other Hul'qumi'num Nations and the broader Coast Salish community. Areas around Roberts Bank and the mouth of the Fraser River were identified by Lyackson as culturally important meeting places where community members would meet other First Nations in the region. Sacred areas identified by Lyackson include ceremonial, religious, and burial sites.

Lyackson identified six trails/travelways, two gathering places, and two sacred areas in the TUS. All sites except three trails/travelways are located within the Marine RSA. The following areas require Lyackson community members to cross the marine shipping lanes to access the areas: three travelways between

Le'eyqsun (Valdes Island) and Vancouver, Lummi, and Fraser River; one gathering place at Roberts Bank. Shipping lanes are not crossed to access sacred areas.

Lyackson raised the following specific concerns with potential Project impacts relating to other traditional and cultural practices:

- Importance of the Southern resident killer whale to Lyackson and concerns that increased marine traffic will have negative effects on the species;
- Assurance that the youth of Lyackson now, and in the future, will still be able to see their village sites;
- Potential adverse impacts from the Project on Lyackson's traditional territory, including ancestral remains, sacred sites; travel ways and trails; hunting, harvesting and plant-gathering sites; gathering places; and submerged lands;
- Potential impacts from increased marine traffic and higher likelihood of whale strikes; and
- Social, cultural, mental, spiritual, and emotional adverse effects on Lyackson members from the compromise of traditional territory and ability to perform cultural practices.

The general direct and indirect effects of the Project on traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this Report.

Lyackson identified cultural use of or concerns regarding Southern resident killer whales during the NEB and Crown consultation processes. *The NEB Recommendation Report* concluded that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Aboriginal use associated with the Southern resident killer whale. The Crown understands that the Southern resident killer whale population is in decline, and that additional adverse environmental effects from project-related marine shipping would be considered significant.

Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown understands that there will be temporary interruptions to Lyackson's traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Lyackson, Lyackson's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operations and Project-related marine shipping are expected to result in minor to moderate impacts on Lyackson's other traditional and cultural practices. The moderate impacts would

arise from Project-related marine shipping activities on traditional Aboriginal use associated with the Southern resident killer whale.

Impacts on Aboriginal Title

Lyackson raised the following concerns with potential Project impacts relating to their Aboriginal title claim:

- Potential compromise of economic opportunities and existing economic activities, such as fisheries and tourism; and
- Preservation and governance of traditional territory, and its interlinked lands, waterways, and ecosystems.

The Crown provides a description of the potential impacts of the Project on Aboriginal title in Section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid/reduce Project impacts associated with the degree of disturbance to terrestrial, marine and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as well as NEB Conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved. The Crown understands that Lyackson has not entered into a Mutual Benefits Agreement with the proponent.

Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in Section 4.3.5, it is the Crown's opinion that the Project is expected to have negligible-to-minor impacts on Lyackson's asserted Aboriginal title to the proposed Project area.

Impacts Associated with Accidental Pipeline, Terminal, and Tanker Spills

Lyackson expressed concerns regarding the impact of a potential oil spill on their Aboriginal Interests, including:

- Potential effects on resource-rich areas in the event of a spill, which could be devastating to small micro- ecosystems, the sturgeon food fishery, the Steller sea lion, and migratory birds biofilm; and
- Impacts from increased marine traffic, such as the potential impacts of spills.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. Section 4.3.6 of the main body of this report sets out the impacts associated with accidental spills. In consideration of this information and analysis, as well as information available to the Crown on Lyackson's Aboriginal Interests and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts on Lyackson's Aboriginal Interests. In

making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.³

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions, and the existing pipeline and marine safety regimes would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations of the pipeline and WMT, as well as for marine vessel use of the area between the WMT and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the Project on the exercise of Lyackson's Aboriginal Interests would be up to moderate.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Lyackson's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Lyackson in emergency response planning activities. The federal Crown is considering incremental measures that would further accommodate the potential adverse impacts of the Project on Lyackson, as discussed in Sections 4 and 5 of the main body of this Report.

³ Trans Mountain Final Argument, p. 85 and 207

Appendix D.8 – Maa-nulth First Nations

I - Background Information

Maa-nulth First Nations (Maa-nulth) are comprised of the following five separate treaty First Nations that entered into the Maa-nulth First Nations Final Agreement, a modern comprehensive land claim agreement concluded with Canada and British Columbia (BC) under the BC Treaty Commission process that took effect April 1, 2011: Huu-ay-aht First Nations, Ka:'yu:'k't'h'/Che:k'tles7et'h' First Nations, Toquaht Nation, Uchucklesaht Tribe, and Yuułuʔiłʔatḥ First Nation.

Huu-ay-aht First Nations (Huu-ay-aht, pronounced “*Hoo-EYE-at*”) has a mission statement of the following: “As a leader among First Nations, the HUU-ay-aht will create certainty for its people and generate wealth for financial independence by providing economic opportunities, social, cultural and recreational programs for all HUU-ay-aht”. Pachena Bay (former Anacla Reserve) is located approximately 12 kilometres (km) from Bamfield, British Columbia (BC). The HUU-ay-aht community is located on their treaty settlement lands 75 km by gravel road away from Port Alberni, BC.

Ka:'yu:'k't'h'/Che:k'tles7et'h' First Nations (Ka:'yu:'k't'h'/Che:k'tles7et'h'). Ka:'yu:'k't'h' (pronounced “*Ky-YOU-cut*”) is amalgamated with Che:k'tles7et'h' (pronounced “*TSHEH-kleh-szet*”) members who reside in the Ka:'yu:'k't'h' territory. Their community is located on treaty settlement lands on the north western section of Vancouver Island south of the Brooks Peninsula and North or Nootka Island, and is only accessible by boat and plane. The Ka:'yu:'k't'h'/Che:k'tles7et'h' people have lived in this region for several millennia. Archaeological evidence shows the continuous occupation of their territory for at least 5,000 years. The Ka:'yu:'k't'h'/Che:k'tles7et'h' website states that “fishing is an important resource that the people depend on for their survival” and that “the ocean is their supermarket and where many Ka:'yu:'k't'h'/Che:k'tles7et'h' people earn their living”.

Toquaht Nation (Toquaht) is located on the western side of Barkley Sound near the town of Ucluelet. The stated vision of Toquaht is to “ensure a future that provides a safe and affordable environment to raise a family, while living in harmony within our hahuli: where health & well-being, social and spiritual needs are met...The balance between our cultural connection to the land and having a strong economic land base is the most important factor in future land use decision-making.”

Representatives from the Toquaht, Ahousaht, Hesquiaht, Tla-o-qui-aht, and Yuułuʔiłʔatḥ make up the Central Region Nuu-chah-nulth Language Society. They maintain that to feel proud of themselves, they need to encourage the revitalization of their First Nation heritage.

Traditionally, the Toquaht were whalers, hunters, and gatherers. Salmon, sea mammals, and shellfish were important for Toquaht diet and culture. The Toquaht people relied heavily on red and yellow cedar. It was used to house and clothe the population. Large canoes were carved for whaling and fishing, as well as moving the community from one village site to another at different times of the year. Cedar was also used in basket weaving and box making to store everything from personal possessions to food and hunting gear. Planks were pulled off living cedars for house construction. Cedar bark was used

in making clothing and mats for house floors. Berries, shoots and camas bulbs were gathered in the spring and summer.

Uchucklesaht Tribe (Uchucklesaht, pronounced “U-CHUK-le-sat”)

The Uchucklesaht Governing Structure "honours [their] past and embraces the future" ensuring the continued existence of the Uchucklesaht as a strong political, social and cultural community that aspires to grow as an organized, determined, successful and self-reliant peoples. Uchucklesaht strive to manage and protect their resources for future generations. The respectful use of Uchucklesaht territories and the practice of their traditional ways contribute to physical and spiritual health and cultural well-being.

Yuułuʔiłʔatḥ First Nation (Yuułuʔiłʔatḥ, pronounced “You-thloo-ith-at”) was formerly known as Ucluelet First Nation. Yuułuʔiłʔatḥ’s vision statement is as follows: “Yuułuʔiłʔatḥ are grounded in our history. Our citizens continue to learn from our elders, who share the teachings of our ancestors. We know who we are and where we come from and we will pass this knowledge on to our children. As Yuułuʔiłʔatḥ we understand and fulfill our traditional and historic roles and responsibilities as a Nation. We know that our language is essential to the practice of our culture and we continue to promote the use of our language and full understanding of our history and our culture”.

These five Nuu-chah-nulth communities located on the north and south western coast of Vancouver Island have used and occupied the lands, waters, and resources in their traditional territories for a multitude of purposes, including hunting, fishing, transportation, trade, traditional ceremonies, and village sites. The people of the Maa-nulth historically spoke the Nuu-chah-nulth language and many members still speak the language today.

II - Maa-nulth First Nations Treaty Rights

The marine shipping route would pass through 36.5 km of the southern portion of Maa-nulth’s Final Agreement Areas Boundary. The Maa-nulth First Nations are signatories to the *Maa-nulth First Nations Final Agreement*,¹ a modern treaty with BC and Canada that came into effect on April 1, 2011 which outlines all of the section 35 rights of each of the five Maa-nulth First Nations, including: the right to harvest fish and aquatic plants (including intertidal bivalves), for food, social and ceremonial purposes in the Maa-nulth Domestic Fishing Areas, which includes an area southeast of Barkley Sound, on the southwest coast of Vancouver Island. This overlaps a portion of the designated marine shipping lanes to be used by tankers associated with the Project. Under the Final Agreement, each Maa-nulth First Nation has the right to harvest wildlife and migratory birds within the Maa-nulth First Nations Areas set out in the Final Agreement.²

¹ https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-BC/STAGING/texte-text/mna_fa_mnafa_1335899212893_eng.pdf

² http://www.maanulth.ca/downloads/treaty/2009_maa-nulth_final_agreement_appendices_english.pdf

III - Involvement in the NEB and Crown Consultation Process

No component of the marine shipping route overlaps with any of the treaty settlement lands of any of the five Maa-nulth First Nations or falls within the defined “Maa-nulth First Nation Area”. However, given the overlap of a portion of the shipping route to the Domestic Fishing Area at Barkley Sound and potential impacts of the Project on each of the Maa-nulth First Nations’ treaty right to harvest fish and aquatic plants, the federal Crown is of the initial view that the legal duty to consult Maa-nulth is triggered and lies at the lower end of the consultation spectrum. Maa-nulth and BC entered into a Reasonable Opportunity Agreement on May 22, 2014,³ setting out a process through which the parties would fulfill the treaty provisions that relate to ensuring that Maa-nulth are not denied a reasonable opportunity to harvest fish and aquatic plants within the Domestic Fishing Area by any authorizations made by BC. The marine shipping route does not overlap with areas identified as an “Important Harvest Area” under the Reasonable Opportunity Agreement. Although engagement is not required by BC pursuant to the Reasonable Opportunity Agreement, all five Maa-nulth First Nations were placed on Schedule B of the Section 11 order issued by the BC Environmental Assessment Office (EAO), which affords them opportunities to be consulted at a deeper level.

Maa-nulth filed a late application to participate in the National Energy Board (NEB) review on April 24, 2015, and was granted intervenor status by the NEB on April 29, 2015. Maa-nulth did not submit an application for participant funding from the NEB. Maa-nulth actively engaged in the NEB review process by filing written evidence and a written final argument to the NEB^{4,5}. Maa-nulth also responded to the Crown’s Issues Tracking Table Information Request by further elaborating their concerns [A71204].

The Major Projects Management Office (MPMO) offered Maa-nulth \$30,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Maa-nulth an additional \$15,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Maa-nulth signed contribution agreements with the MPMO in response to both of these offers, for a total of \$45,000 in allocated funding. On October 13, 2016 Maa-nulth was issued \$10,000 in capacity funding by EAO to assist with the consultation process.

Maa-nulth met with the Crown Consultation team on May 11, 2016 to discuss the Project. In addition, the Crown and Maa-nulth met on September 29, 2016 to further discuss the Project.

³ http://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/maa-nulth_roa_side_agreement_signed_05_22_2014.pdf

⁴ Maa-nulth written evidence submitted to NEB: <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2784801&objAction=browse&viewType=1>

⁵ Maa-nulth Final Argument submitted to NEB: <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2905182&objAction=browse&viewType=1>

The Crown provided a first draft of this Consultation and Accommodation Report (the Report) to Maa-nulth for review and comment on August 17, 2016. The Crown did not receive written comments from Maa-nulth on the draft Report, but preliminary comments were given at a meeting between the Crown and Maa-nulth on September 29, 2016. These comments have been considered in the revisions to the draft Report.

A second draft of this Report was provided to Aboriginal groups for review and comment on November 2, 2016. The Crown has not received comments from Maa-nulth.

Maa-nulth provided a separate Aboriginal group submission to the Crown on November 16, 2016.

IV - Summary of Maa-nulth's Key Issues and Concerns Raised

The Crown has gained its understanding of Maa-nulth's issues and concerns through Maa-nulth's involvement in the NEB process, including the responses provided to the Crown on its Information Request (IR) addressed to Maa-nulth, a letter in response to the *Proponent Engagement Report*, and through other engagement with the Crown, including meetings.

This section offers a summary of the key issues raised by Maa-nulth, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Maa-nulth's key Project-related issues and concerns are summarized below:

Methodology, Process and Consultation

- Maa-nulth stated that the federal government should amend the environmental assessment process, in consultation with the Maa-nulth First Nations and other interested parties, to address concerns raised regarding the NEB hearing process;
- Maa-nulth stated that the federal government should require the NEB to revisit the Project and conduct further hearings to comply with the amended regime, including providing intervenors an opportunity to cross-examine Trans Mountain and expanding the list of issues in the hearing to include the environmental and socio-economic effects of upstream activities and downstream uses;
- Maa-nulth raised concerns about the level of engagement with the proponent; in particular, Maa-nulth is concerned because the proponent signed Mutual Benefit Agreements with other costal groups with similar Project impacts but no Mutual Benefit Agreement has been signed with them;
- Maa-nulth Nations have concerns around the mandate of the Crown consultation team leading the post-NEB consultation; and
- Maa-nulth stated that the consultation process is rushed without much real opportunity to affect change.

Capacity and Funding

- Lack of capacity and resources to “lead expert evidence” regarding the potential impacts of the Project on their rights and interests;
- Maa-nulth stated that they have been on the hook for all costs to maintain participation in the process and that, had they been better resourced, they may have chosen to go into greater depth with technical information; and
- Maa-nulth would like the issue of costs and funding to be addressed, especially with five communities getting together from relatively remote locations.

Impacts from Increased Marine Traffic

- Maa-nulth stated that increased marine traffic could interfere with treaty rights to harvest fish and aquatic plants;
- In the context of increased tanker traffic, even with the best risk mitigation and disaster response measures in place, Maa-nulth stated that there is no way that they are better off with the Project going ahead; and
- Maa-nulth stated that an increase in the magnitude of tanker traffic contemplated by the Project represents a potential threat to harvesting ability and capacity of Maa-nulth, and raises concerns about potential environmental impacts in the Domestic Fishing Area, including the impacts of a potential spill from either a tanker into the Salish Sea, or the proposed pipeline into the Fraser River.

Economic Impacts

- Maa-nulth noted that the Project would have immense economic impacts on First Nations as they would suffer exclusion from the country and from sharing in the wealth of the land;
- Maa-nulth hope that conversation with the Crown starts to address this issue and helps ensure growth in the political power of Maa-nulth to have a say in decisions affecting them or their lands and waters;
- Maa-nulth stated that they are concerned about damage to fishing vessels and gear from increased marine vessel traffic, leading to loss of income from commercial fishing; and
- Maa-nulth stated that First Nations have not benefited from the historical relationship with the Crown; rather, they have been disadvantaged. Maa-nulth stated that there have been numerous consequences of this, including political disempowerment and economic disempowerment.

Impacts on Treaty Rights

- Increased marine traffic could interfere with treaty rights to harvest fish and aquatic plants, inter-tidal bivalves, migratory birds, and wildlife, and the treaty right to trade and barter resources harvested;
- Maa-nulth sees their treaty as a “living treaty” that shapes the relationship with the Crown into the future;

- Potential impacts resulting from a spill or release of bunker fuel or contaminants on treaty lands, which would affect economic development interests and harvesting rights due to spill-related closures (both domestic and commercial); and
- Maa-nulth stated that the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) speaks to land rights of Indigenous Peoples, but noted that Vancouver Island groups treat water the same as land. Also, Maa-nulth states that there is no difference between UNDRIP talking about land rights and the use of water by First Nations on Vancouver Island.

Impacts on Culture and Identity

- A critical element is the maintenance of Maa-nulth's culture and identity;
- Maa-nulth has expressed concern around damage to cultural heritage sites; and
- In terms of reconciliation, there needs to be an awareness and acknowledgement of the uniqueness and importance of First Nations' presence in Canadian society. This Project in particular is a case where there is wealth in which First Nations have the right to share, as it is in their territory.

Accidents and Malfunctions

- Maa-nulth is deeply concerned about potential impacts from an accident or malfunction involving the pipeline or a Project related tanker, including the adequacy of spill prevention measures, spill response regime and spill compensation regime; and
- Maa-nulth is concerned about the devastating impacts that a potential accidental tanker spill could have over their lands, people, and treaty rights.

Accommodation Proposals

During the NEB process and the Crown consultation meeting of May 11, 2016, Maa-nulth asked for the following accommodation proposals to be considered:

General

- Development of a Salish Sea Stewardship Foundation.

Spill Prevention

- Emergency Response Towing Vessels should be stationed at strategic locations along the marine shipping route; and
- A resident salvor and personnel as well as salvage equipment should be stationed at strategic locations along the marine shipping route.

Spill Preparedness

- The federal government should commission independent research on the fate and behaviour of diluted bitumen in the marine environment and current best practices for spill response;
- The federal government should provide Maa-nulth and other interested parties an opportunity to comment on that research;

- If the research concludes there is a risk that diluted bitumen will sink, the federal government should require Trans Mountain to reassess the risk of an oil-spill involving a Project-related tanker including proposed mitigation measures;
- Locate one of the five planned West Coast Marine Response Corporation (WCMRC) sites, in Ucluelet due to its proximity to fishing territory;
- The Maa-nulth First Nations should be consulted regarding the establishment of that WCMRC site;
- The response time for incidents offshore of Buoy J should be reduced;
- The spill response capacity should be increased to an amount considerably greater than 20,000 tonnes (21,277 cubic metres [m³]) and this response capacity should be available at each of the major spill response bases including Barkley Sound;
- Maa-nulth and other interested parties should be consulted regarding that response capacity increase and, if required, the federal government should commission independent research to assist in determining the amount it should be increased to; and
- Trans Mountain should fund the establishment of a plan, in consultation with Maa-nulth and other interested parties, for bringing together and training a shoreline cleanup and wildlife response workforce in the event of an oil spill involving a Project-related tanker.

Spill Compensation Regime

- The federal government should amend the compensation regime for marine-based oil spills to increase the total amount of compensation available in the event of a major oil spill and to ensure that damages to the Maa-nulth First Nations' Domestic Harvesting Rights are compensable under the regime, in consultation with the Maa-nulth First Nations and other interested parties.

Economic Benefits

- Trans Mountain and/or the federal and provincial governments should enter into a binding agreement with Maa-nulth that provides economic benefits to the Maa-nulth First Nations in the event the Project proceeds.

Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Maa-nulth that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

Maa-nulth's Response to NEB Recommendation Report

No specific comments received by the Crown from Maa-nulth on the *NEB Recommendation Report*.

V - Potential Impacts of the Project on Maa-nulth's Treaty Rights

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and 4.3 of this Report, respectively. The Crown recognizes that areas proximal to marine fishing and harvesting areas set out in the Maa-nulth First Nations Final Agreement, including areas within the vicinity of marine shipping related to the Project, may be particularly important and valuable for specific qualities associated with traditional cultural, spiritual practices and the exercise of Maa-nulth's Treaty rights.

The discussion in this section focuses on potential impacts of the Project on Maa-nulth's Treaty rights and other interests. These potential impacts are characterized by considering how the Project could affect several factors important to Maa-nulth's ability to practice treaty rights and other interests.

Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Maa-nulth's Treaty rights (e.g., fish; migratory birds) that were assessed by the NEB;
- Impacts on the areas set out in the Maa-nulth Final Agreement, including the Domestic Fishing Area; and
- Impacts on Maa-nulth's culture and identity and experience.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Maa-nulth's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Maa-nulth, Maa-nulth's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province.

Maa-nulth submitted a 2004 study titled "*Cultural and Heritage Study, Marine Resource Sites and Activities, Maa-nulth First Nations*" as written evidence to the NEB in May 2015. Both confidential and redacted versions were filed. These traditional marine resource use (TMRU) studies, were completed for member communities including Huu-ay-aht First Nations ([A4L6D8](#)), Ka:'yu:'k't'h'/Che:k'tles7et'h First Nations ([A4L6D9](#)), Toquaht Nation ([A4L6E2](#)), Uchucklesaht Tribe ([A4L6E4](#)), and Yuułu?it'ath ([A4L6E8](#)) and provide an overview of the available information concerning traditional use sites and activities of Maa-nulth First Nations. In its Supplemental Technical Report ([A4S7I8](#)), the proponent estimated approximate distances and directions of traditional use sites from the marine shipping lanes, where possible, based on information in Maa-nulth's written evidence. Maa-nulth's TMRU studies did not reveal any TMRU sites within the Project's Marine Regional Study Area (RSA) although many of the locations of these sites were kept confidential. The Crown understands that the TMRU information provides valuable historical and contextual information to the assessment of the potential impacts on Maa-nulth First Nations' Treaty rights.

Impacts on Treaty Rights to Harvest Wildlife and Migratory Birds

In accordance with the Maa-nulth First Nations Final Agreement, Maa-nulth have the right to harvest wildlife and migratory birds, for domestic purposes, within the Wildlife Harvest Area and the Migratory Bird Harvest Area. The marine shipping route does not overlap with either of the Harvest Areas, but is closest to the areas set out at Barkley Sound. Also in accordance with the Maa-nulth First Nations Final Agreement, Maa-nulth have the right to harvest plants for food, social and ceremonial purposes, within provincial protected areas and within the treaty settlement lands of each of the five Maa-nulth First Nations. The marine shipping route does not overlap with any provincial protected areas or treaty settlement lands. The Final Agreement includes the right to trade and barter resources harvested with other Maa-nulth members or Aboriginal groups in BC. The Treaty sets out the right to sell inedible byproducts of these harvests, such as down from migratory birds harvested.

Maa-nulth historically hunted many marine and terrestrial wildlife species and migratory birds including seals, sea lions, sea otters, river otters, whales, porpoises, deer, elk, bears, geese, ducks, swans, sea-gulls, golden eye, martin, mink, beavers, and raccoons. Many of these species continue to be harvested by Maa-nulth community members today. In their TMRU study, Maa-nulth identified three hunting locations, which are not within the Project's Marine RSA.

Maa-nulth raised specific concerns with potential Project impacts relating to their Treaty harvesting rights and the right to trade and barter resources:

- Increased marine traffic could interfere with treaty rights to harvest migratory birds and wildlife, and the treaty right to trade and barter resources harvested.

The general direct and indirect effects of the Project on hunting and gathering activities, along with key mitigation measures, are described in Section 4.3.1 of the main body of this Report. Section 4.3.3 of the body of this Report sets out the potential effects and mitigations related to the Project-related marine shipping activity.

The proponent would implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

In consideration of the information available to the Crown from the NEB process, consultation with Maa-nulth, Maa-nulth's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province, Project-related marine shipping activities during operation are expected to result in a negligible impact on Maa-nulth's Treaty right to harvest wildlife and migratory birds for domestic purposes.

Impacts on Treaty Rights to Harvest Fish and Aquatic Plants

In accordance with the Maa-nulth First Nations Final Agreement, Maa-nulth have the Treaty right to harvest fish and aquatic plants for food, social and ceremonial purposes, within the Domestic Fishing

Area, a portion of which in the Barkley Sound area overlaps with the designated marine shipping lanes to be used by tankers associated with the Project. The Treaty also sets out designated shellfish aquaculture sites for each of the Maa-nulth First Nation, which do not overlap with the marine shipping route. The Final Agreement includes the right to trade and barter resources harvested with other Maa-nulth members or Aboriginal groups in BC. The Treaty also sets out the right for each of the Maa-nulth First Nations to benefit economically such as through commercial fishing licenses or shellfish aquaculture tenures. Although not a component of the treaty, Maa-nulth hold commercial fishing licenses in accordance with a Harvest Agreement and commercial shellfish aquaculture tenures.

As described in their TMRU, Maa-nulth community members historically harvested many species of fish, marine invertebrates, and shellfish including salmon, trout, dogfish, halibut, wolf eel, butter clams, oysters, mussels, sea urchins, and Dungeness crab, among others. Salmon is a staple in Maa-nulth's diet. Maa-nulth community members harvested various aquatic plants including eelgrass, sea grass, surf grass, giant kelp, and small seaweed roots. Maa-nulth identified 17 fishing sites and two marine plant gathering sites in their TMRU, none of which are located within the Project's Marine RSA.

Maa-nulth raised specific concerns with potential Project impacts on the Treaty right to harvest fish and aquatic plants for food, social and ceremonial purposes, within the Domestic Fishing Area:

- Increased marine traffic could interfere with treaty rights to harvest fish and aquatic plants;
- Potential impacts resulting from a spill or release of bunker fuel or contaminants on treaty lands, which would affect economic development interests and harvesting rights (both domestic and commercial);
- Maa-nulth stated that an increase in the magnitude of tanker traffic contemplated by the Project represents a potential threat to harvesting ability and capacity of Maa-nulth, and raises concerns about potential environmental impacts in the Domestic Fishing Area, including the impacts of a potential spill from either a tanker into the Salish Sea, or the proposed pipeline into the Fraser River;
- Maa-nulth stated that they are concerned about damage to fishing vessels and gear leading to loss of income from commercial fishing; and
- Increased marine traffic could interfere with treaty rights to harvest fish and aquatic plants, inter-tidal bivalves, and the treaty right to trade and barter resources harvested.

The general direct and indirect effects of the Project on marine fishing and harvesting, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report. Project-related marine vessels would increase the amount of marine traffic traveling in the established shipping lanes. The *NEB Recommendation Report* found that Project effects on marine fish and fish habitat are expected to be low to moderate and effects on marine mammals are expected to be low. Project-related marine vessels are expected to cause temporary disruptions to Maa-nulth's Treaty right to marine fishing and harvesting activities within the Domestic Fishing Area that overlaps with the existing shipping lanes. The Crown understands that community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross or enter the shipping lanes. As described in

Section 4.3.3, the proponent would be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Maa-nulth community members to take measures to reduce potential disruptions from tankers and allow planning for fishing activities to take place that minimizes disturbance from Project-related tankers. Reduced harvests are not expected to occur from temporary access restrictions, but Maa-nulth community members' experience of fishing or harvesting in that area could be impacted.

The conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with marine fishing and harvesting activities (Section 4.3.1 of this Report). The proponent would implement a range of mitigation measures that would reduce potential effects associated with Maa-nulth's Treaty right to harvest fish and aquatic plants for food, social and ceremonial purposes, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, and scheduling and notification of Project activities (via the proponent's marine public outreach program).

In consideration of the information available to the Crown from the NEB process, consultation with Maa-nulth, Maa-nulth's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in negligible-to-minor impacts on Maa-nulth's Treaty right to harvest fish and aquatic plants for food, social and ceremonial purposes, within the Domestic Fishing Area.

Impacts on Other Traditional and Cultural Practices

While outside of the terms of the Maa-nulth First Nations Final Agreement, the Crown has considered Project-related marine shipping on Maa-nulth's culture and experience. During consultation Maa-nulth raised specific concerns with potential Project impacts relating to culture:

- A critical element of the conversation with the Crown is the maintenance of Maa-nulth's culture and identity; and
- Maa-nulth has expressed concern around damage to cultural heritage sites.

Maa-nulth identified 23 gathering places in their TMRU including historic and current summer villages, archaeological village sites, and winter village sites, among others. One sacred area was identified in Maa-nulth's TMRU. Other sacred areas identified by Maa-nulth including burial caves, culturally modified trees, pictographs, bark stripped trees, historic native remains, cemeteries, box burials, and burials were kept confidential. No travelways were identified by Maa-nulth within the Marine RSA. None of the sites are located within the Project's Marine RSA.

The general direct and indirect effects of the Project on traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this Report.

Marine mammals are of importance to many Coast Salish Aboriginal groups, and killer whales specially hold strong spiritual and cultural importance for many Aboriginal groups. The NEB concluded that effects on the endangered Southern resident killer whale and Aboriginal cultural use of Southern resident killer whale from Project-related shipping activities would be significant. The Crown is not aware of any specific cultural use of or concerns regarding killer whales raised by Maa-nulth during the NEB and Crown consultation processes.

The Crown understands that there could be temporary interruptions to any of Maa-nulth's traditional and cultural practices associated with the treaty right to fish or harvest within the Domestic Fishing Area in the vicinity of the established shipping lanes. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups.

In consideration of the information available to the Crown from the NEB process, consultation with Maa-nulth, Maa-nulth's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in negligible-to-minor impacts on Maa-nulth's other traditional and cultural practices.

Impacts Associated with Accidental Tanker Spills

Maa-nulth expressed concerns regarding the impact of a potential spill on their Treaty rights and other interests, including the effects of a potential spill on:

- The Fraser River and Salish Sea;
- Land rights, which would affect their economic development interests and harvesting rights;
- Fishing vessels and gear, which would lead to a loss of income from commercial fishing;
- Environment, especially on the Domestic Fishing Area.; and
- The exercise of Treaty rights pursuant to the Maa-nulth First Nations Final Agreement.

Maa-nulth raised concerns about the potential impacts from an accident or malfunction involving the pipeline or a Project related tanker, including the adequacy of spill prevention measures, spill response regime and spill compensation regime. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. Section 4.3.6 of the main body of this Report sets out the impacts associated with accidental spills from marine shipping vessels. In consideration of this information and analysis, as well as information available to the Crown on Maa-nulth's Treaty rights and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts on Maa-nulth's Treaty rights. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at

greatest risk for adverse effects from an oil spill⁶. The Crown notes that a spill that impacts Maa-nulth's lands and other areas as set out in the Final Agreement would impact on Maa-nulth's Treaty rights including to the domestic and commercial aspects of resource harvesting.

VI - Conclusion

The Crown understands the Project-related marine shipping has the potential to adversely impact the ability of Maa-nulth First Nations to engage in their Treaty rights. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing marine safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for marine vessel use of the area between the Westridge Marine Terminal and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the marine-shipping component of the Project on the exercise of Maa-nulth's Treaty rights would be up to negligible-to-minor.

However, given existing use of the marine shipping corridor within areas proximate to the exercise of Maa-nulth's Treaty rights and the potential severity of the impacts of a marine spill on the exercise of Maa-nulth's Treaty rights, the federal Crown is considering additional measures to further offset the potential impacts of the marine-shipping component of the Project on Maa-nulth. Please see Sections 4 and 5 of the main body of this Report for a discussion of proposed accommodation measures.

⁶ Trans Mountain Final Argument, p. 85 and 207

Appendix D.9 - Malahat Nation

I – Background Information

Malahat Nation (Malahat) is located about half way between Duncan and Victoria, British Columbia (BC) on the east coast of Vancouver Island. Malahat asserts that they traditionally used Saanich Inlet, the adjacent Gulf Islands and surrounding waters to conduct fishing and other activities. Malahat has a registered population of 330 members (126 are living on their Reserve, 54 are living on other Reserves, and 151 are living off Reserve) and two reserves: Malahat Reserve no.11 (239 hectares [ha]) and Goldstream Reserve no.13 (8.9 ha). Malahat members historically spoke the Coast Salish language.

As a Coast Salish group, Malahat traditionally followed a seasonal round centered on hunting, fishing, and harvesting a variety of shellfish and plant resources; manufacturing houses, canoes, and a variety of weapons, nets, traps, and containers; and, utilizing preserving techniques of drying and smoking. Fish was undoubtedly the most important resource. Land mammals were hunted and were important to the economy in the Salish Sea and a wide variety of fruits, roots, berries and other vegetable foods were gathered.

Malahat is a member of the Te'mexw Treaty Association (TTA) along with the Nanoose First Nation, Scia'new (Beecher Bay) First Nation and Songhees First Nation. The TTA is currently in Stage 5 of the BC Treaty process (i.e. Final Agreement), having signed an agreement-in-principle in April 2015.

II - Preliminary Strength of Claim Assessment

- The marine shipping route would transect approximately 15 kilometres (km) along the east side of Malahat's asserted traditional territory;
- Malahat may include descendants of the South Saanich Tribe or the North Saanich Tribe, signatories of the Douglas Treaty signed February 7, 1852, and February 11, 1852, respectively. Malahat may also include descendants from Cowichan people from Somenos and Quamichan. It is not clear to the Province whether Malahat is or claims to be a Douglas Treaty beneficiary;
- Canada recognizes the Douglas Treaties and understands that Malahat has members who are descendants of one or more signatories to one or more Douglas Treaties. Canada remains committed to working toward a common understanding of the content and scope of the Douglas Treaties with Malahat, to implement the treaty through agreements with the Crown, and to explore opportunities to honour and recognize the Douglas Treaties;
- The Crown recognizes that Malahat asserts Aboriginal Interests, defined as asserted or established aboriginal or treaty rights, in the Project area and seeks information to inform this understanding through consultation with Malahat¹.

¹During the meeting with the Crown consultation team on September 15, 2016, Malahat informed the Crown that Malahat sources crab as their primary catch currently, which is captured off Tsawwassen Terminal (Roberts Bank). Consequently, the Crown has requested additional information from Malahat about an expanded boundary that is

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Malahat's Aboriginal Interests, the Crown is of the view that the legal duty to consult Malahat lies at the middle portion of the *Haida* consultation spectrum. Malahat was placed on Schedule B of the Section 11 order issued by the BC Environmental Assessment Office (EAO), which affords Malahat opportunities to be consulted at a deeper level.

Malahat applied to participate in the National Energy Board (NEB) review process as a commenter, but did not submit a letter of comment to the Board. Malahat did not participate in the NEB hearing process, and did not submit an application for funding to the NEB.

The Major Projects Management Office (MPMO) offered Malahat \$5,995 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Malahat an additional \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Malahat signed contribution agreements with the MPMO in response to both of these offers, for a total of \$11,995 in allocated funding. On July 26, 2016 Malahat was issued \$5,000 in capacity funding from EAO to participate in consultation with the Crown.

Malahat representatives met with the Crown consultation team on April 22, 2016, following the close of the NEB hearing record, as well as on September 15, 2016.

On July 17, 2014, Malahat signed a letter of support with the proponent. As part of the Mutual Benefit Agreement, the proponent will support the community with Aboriginal employment and training opportunities.

The Crown provided a first draft of the Consultation and Accommodation Report (Report) to Malahat for review and comment on August 17, 2016. The Crown did not receive comments from Malahat on the draft Report. A second draft of this Report was provided to Aboriginal groups for review and comment on November 2, 2016. The Crown has not received comments from Malahat.

IV - Summary of Key Malahat Issues and Concerns Raised

The Crown has gained its understanding of Malahat's issues and concerns through the community's involvement with the Crown consultation process. In addition, the Crown has considered information regarding the proponent's engagement with Malahat, as described in the proponent's Aboriginal Engagement Report (July 2016). This section offers a summary of the key issues raised by Malahat, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a

broader than captured by the Statement of Intent (Province's consultative areas database) in order to consider it in the assessment. The Crown has yet to receive a response from Malahat.

consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Malahat's key Project-related issues and concerns are summarized below:

Cultural and Socio-economic Impacts

- Cumulative environmental effects causing negative socio-economic impacts;
- Potential cultural and social impacts of the Project, including impacts to Malahat's ability to transfer knowledge within their community;
- Potential impacts of a spill on Malahat's way of life; and
- Concerns that the Project will bring an increased risk from oil tankers without providing direct financial benefit to their community.

Environmental Impacts

- Potential environmental impacts of the Project on Malahat's asserted traditional territory, including the potential risk to fisheries, mammals, marine environment and migratory birds (e.g. sound, disruption, ecosystem health).

Impacts from Increased Marine Shipping Vessels

- Potential for increased marine shipping to interfere with fishing vessels, potentially affecting marine habitat and wildlife in the Salish Sea; and
- Potential cumulative impacts of marine traffic in the Juan de Fuca Strait, as well as the cumulative impacts of other projects (e.g. LNG projects, Roberts Bank Terminal 2) in Malahat's asserted traditional territory.

Impacts on Aboriginal Interests

- Malahat asserts Aboriginal title in their claim area, including title to lands, waters, foreshores and other submerged lands within the boundary of the claim area; and
- Potential for the Project's construction and operations, and impacts which would result from a potential spill, to infringe on Malahat's Aboriginal Interests, including restricting ability of Malahat community members to access Malahat's asserted traditional territory.

NEB Process

- Concern that an assessment of the maximum use threshold for marine shipping along the coast was not completed;
- Malahat desires inclusion in decision making processes, and believes that such inclusion should be entrenched in processes; and
- Malahat noted that projects are long-term with opportunities for on-going consultation and monitoring and that resources are needed to help Aboriginal groups to participate in the opportunities provided (follow-up programs etc.).

Accidents and Malfunctions

- Potential impacts of a spill on marine habitat and wildlife;

- Potential spills/accidents negatively impacting sustainability, availability, and access to natural resources;
- Concern that although there is a planned increase in shipping activity, there may not be an associated increase in marine emergency response capacity and Coast Guard presence in areas that will have increased marine traffic;
- Malahat emphasized that the community is very concerned by the “what if’s” that come along with such a project; and
- Malahat lacks the capacity to respond to accidents and spills, however, they desire to develop the necessary capacity to respond and be involved; and
- Request for an Aboriginal spill response team.

Section 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups.

Malahat’s Response to the NEB Recommendation Report

No specific comments were received on the *NEB Recommendation Report*.

V - Potential Impacts of the Project on Malahat’s Aboriginal Interests

A discussion of the Crown’s assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), including by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Malahat’s Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Malahat’s ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown’s conclusion on the seriousness of Project impacts on Malahat’s Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Malahat, Malahat’s engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant conditions proposed by the Province of any Environmental Assessment Certificate issued.

Malahat completed a third-party *Traditional Marine Resource Use* (TMRU) study in 2014. The focus of the study was on Crown lands and waters within Malahat's asserted traditional territory crossed by the Marine Regional Study Area (RSA)². Traditional resource uses identified by Malahat include hunting deer and bear, gathering plants, information on fishing sites, sacred sites, habitation sites, gathering areas for community members and trails and travelways. In its Supplemental Technical Report ([A4F5D2](#)), the proponent estimated approximate distances and directions from the pipeline corridor based on information in Malahat's report. Additional information for Malahat was presented in Volume 5B ([A3S4K3](#)) of the Project application.

Impacts on Hunting, Trapping, and Gathering

As summarized in their TMRU, community members continue to harvest a variety of marine and terrestrial wildlife species such as seal, sea lions, harbour porpoise, deer, bear, pheasants, grouse, ducks, geese, coons, and loons. Throughout their asserted traditional territory, Malahat gather blueberries, salmon berries, thimble berries, strawberries, raspberries, cucumber, hops, cauliflower, kelp and seaweed for many purposes including food, fuel and materials.

During the TMRU study, Malahat identified 27 hunting sites, of which 23 are located within the Marine RSA. Locations were not provided for many additional hunting sites. The shipping lanes are crossed to access three hunting sites: Orcas Island and Inlet, and Sucia Island. Malahat identified 15 plant gathering sites, of which 11 are located in the Marine RSA. Specific locations were not provided for all plant gathering sites. Malahat members cross shipping lanes to access five plant gathering sites: Orcas Island, Puyallup, Lummi, and two sites in Miners Channel.

In addition to providing traditional use information, Malahat raised specific concerns with potential Project-related impacts on their hunting and gathering activities, including concerns related to the potential environmental impacts of the Project in their territory, and the potential risk to mammals and migratory birds (e.g. sound, disruption, ecosystem health).

The general direct and indirect effects of the Project on hunting, trapping, and gathering plants, along with key mitigation measures, are described in Sections 4.3.1 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Sections 4.3.1 of this Report). The proponent would implement a range of mitigation measures that would directly or indirectly reduce potential Project-related marine shipping impacts on Malahat's hunting, trapping, and plant gathering activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and

² The area extending beyond the LSA boundary (i.e. the zone of influence or area where the element and associated indicators are most likely to be affected by Project-related marine vessel traffic.) where the direct and indirect influence of other activities could overlap with Project-specific effects and cause cumulative effects on the environmental or socio-economic indicator.

notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

In consideration of the information available to the Crown from the NEB process, consultation with Malahat, Malahat's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province, Project-related marine shipping activities are expected to result in negligible-to-minor impacts on Malahat's hunting and trapping activities and a minor impact on Malahat's plant gathering activities.

Impacts on Marine Fishing and Harvesting

Malahat's TMRU identified that salmon is the most important species for subsistence; additional fish and marine species harvested included cod and cod roe, flounder, halibut, herring and herring eggs, ling, mud shark, octopus, perch, prawns, red snapper, sea bass, smelt, sole, steelhead, trout, barnacles, clam, cockles, crab, cucumbers, geoduck, mussels, oysters, rock stickers, and sea urchin. Although no longer harvested, Malahat consider whales an indicator species of marine ecosystem health. Viewing whales is also a cultural activity practiced by Malahat community members.

Malahat identified 89 fishing sites during the TMRU study, of which 74 are located within the Marine RSA. Locations were not provided for many additional fishing sites and therefore it is unknown if other sites are located in the Marine RSA. Malahat members must cross shipping lanes to access six fishing sites: Orcas Island, Fraser River, North Orcas Island, Patos Island, and two sites on the Fraser River and Orcas Island, respectively.

In addition to providing traditional use information, Malahat raised specific concerns with potential Project-related impacts on their marine fishing and harvesting activities, including concerns related to the potential environmental impacts of the Project in their territory, the potential risk to fisheries, mammals, and the marine environment (e.g. sound, disruption, ecosystem health), as well as increased marine shipping interfering with fishing vessels, and potentially affecting marine habitat and wildlife in the Salish Sea.

The general direct and indirect effects of the Project on marine fishing and harvesting activities, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report. Project-related marine vessels are expected to cause temporary disruptions to Malahat's marine fishing and harvesting activities. The Crown understands that community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Malahat community members to take measures to reduce potential disruptions from tankers and allow planning for fishing activities to take place that minimizes disturbance from Project-related tankers. Reduced harvests, while not expected to occur from

temporary access restrictions, could impact Malahat's cultural activities and sharing of marine food with the community.

The conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with marine fishing and harvesting sites (Section 4.3.3 of this Report). The proponent would implement a range of mitigation measures that would reduce potential effects associated with Malahat's marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, and scheduling and notification of Project activities (via the proponent's marine public outreach program).

In consideration of the information available to the Crown from the NEB process, consultation with Malahat, Malahat's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project-related marine shipping activities are expected to result in negligible-to-minor impacts on Malahat's marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

Other traditional and cultural practices sites include trails and travelways, habitation sites, gathering places, and sacred areas. Malahat's TMRU study notes that historically, travel routes on the west coast and into the interior were important for sustaining trade and social relationships with other First Nations. Traveling to other communities remains important for Malahat to continue the relationships among Salish communities. Community gatherings are considered integral to sustain Malahat cultural continuity and the transmission of Salish culture. A number of permanent and temporary habitation sites (e.g., camps and villages) are also located on the islands in the Salish Sea straits region. Sacred areas such as ceremonial sites, spiritual sites and burial sites were identified by Malahat during the TMRU study.

Two travelways and one trail were identified by Malahat during the TMRU study; however, locations were only provided for one trail and one travelway in the Marine RSA. The shipping lanes are not crossed to access the trail from Mayne Island to Galiano Island: however the travelway to Orcas Island crosses the shipping lanes. During the TMRU study, Malahat identified 26 gathering places, of which 22 are within the Marine RSA. The shipping lanes are crossed to access 10 gathering places: Anacortes, Coupeville, Neah Bay, Yakama, San Juan Island, and at three locations on the Fraser River and two locations on Orcas Island. Malahat identified eight sacred areas during the TMRU study, of which seven are located within the Marine RSA. The shipping lanes are crossed to access one sacred site at Orcas Island. Due to confidentiality, locations were not provided for additional gathering places (including habitation sites) and sacred areas identified within the Marine RSA. During the desktop study and literature review conducted for the Project, a burial site at Mill Bay Marina was identified within the Marine RSA; however shipping lanes are not crossed to access the site.

In addition to providing traditional use information, Malahat raised specific concerns with potential Project-related impacts on their other traditional and cultural practices, including concerns with cultural and social impacts of the Project, their ability to transfer knowledge within their community and participate in other cultural activities such as viewing whales.

The general direct and indirect effects of the Project on traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this Report. The conditions in the NEB Report, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown appreciates that there will be temporary interruptions to Malahat's traditional and cultural practices, or that their participation in traditional activities is curtailed during Project operational activities. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project.

Malahat identified cultural use of or concerns regarding Southern resident killer whales during the NEB and Crown consultation processes. The *NEB Recommendation Report* concluded that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Aboriginal use associated with the Southern resident killer whale. The Crown understands that the Southern resident killer whale population is in decline, and that additional adverse environmental effects from Project-related marine shipping would be considered significant.

In consideration of the information available to the Crown from the NEB process, consultation with Malahat, Malahat's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project-related marine shipping activities are expected to result in moderate impacts on Malahat's other traditional and cultural practices.

Impacts Associated with Accidental Tanker Spills

Malahat expressed concerns regarding the impact of a potential oil spill on their Aboriginal Interests, including concerns about the impact of a potential spill on their way of life, concerns about impact of a potential spill on marine habitat and wildlife, and concerns that potential spills/accidents will negatively impact sustainability, availability, and access to natural resources.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. Section 4.3.6 of the main body of this Report sets out the impacts associated with accidental spills from marine shipping vessels. In consideration of this information and analysis, as well as information available to the Crown on Malahat's Aboriginal Interests and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts, with low likelihood, on Malahat's Aboriginal Interests. In making this general conclusion, the Crown

acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill³.

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing marine safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for marine vessel use of the area between the Westridge Marine Terminal and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the marine-shipping component of the Project on the exercise of Malahat's Aboriginal Interests would be up to moderate.

However, given existing use of the marine shipping corridor within areas proximate to the exercise of Malahat's Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of Malahat's Aboriginal Interests, the federal Crown is considering additional measures to further offset the potential impacts of the marine-shipping component of the Project on Malahat. Please see Sections 4 and 5 of the main body of this Report for a discussion of proposed accommodation measures.

In addition, the Crown is aware that the proponent has entered into a Mutual Benefits Agreement with Malahat in an attempt to offset potential impacts, should the Project proceed.

³ Trans Mountain Final Argument, p. 85 and 207

Appendix D.10 – Pacheedaht First Nation

I - Background Information

Pacheedaht First Nation (Pacheedaht) is an Indigenous group whose traditional territory is located on the Southwest Coast of Vancouver Island and the waters of the Strait of Juan de Fuca. Pacheedaht filed a *Writ of Summons* in December 2003, asserting Aboriginal title to a territory identified in the *Writ*. Pacheedaht's asserted traditional territory would not be affected by the Project pipeline construction or expansion of the Westridge Marine Terminal. However, Pacheedaht's traditional territory is crossed by the marine shipping lanes in the Strait of Juan de Fuca that are used by tankers calling at Westridge.

There are 281 registered Pacheedaht members, of whom 93 live on Pacheedaht reserves, 30 live on a non-Pacheedaht reserve, and 158 live off reserve. There are four Pacheedaht reserves: *Pacheena 1*, *Gordon River 2*, *Cullite 3*, and *Queesidaquah 4*, all located in the southwest Corner of Vancouver Island near Port Renfrew, British Columbia (BC).

Pacheedaht is jointly participating in the BC Treaty Process with Ditidaht First Nation. They signed a Framework Agreement (Phase IV) with the federal and provincial Crowns in 1997.

While Pacheedaht is part of the Nuu-chah-nulth ethno-cultural group, they are not members of the Nuu-chah-nulth Tribal council. Pacheedaht has close cultural and familial ties with Ditidaht First Nation. Prior to European contact, Pacheedaht members lived in small villages and camps, moving several times throughout the year to take advantage of seasonally abundant resources.

Pacheedaht make extensive use of marine resources in their traditional territory, fishing in the Strait of Juan de Fuca in the area around Swiftsure Bank for salmon, halibut, yelloweye, and ling cod, as well as harvesting crabs, shellfish, marine plants, deer and other species near the shore. Their close ties to the sea and marine resources are demonstrated by their name, which in English means "people of the seafoam."

II - Preliminary Strength of Claim Assessment

- The marine shipping route would pass through the southern portion of Pacheedaht's traditional territory in the Juan de Fuca Strait for over 62 kilometers (km) and the southern portion of the Swiftsure Bank closure area.
- The Crown's preliminary assessment is that Pacheedaht has a strong *prima facie* claim to Aboriginal rights to fish and harvest resources within the marine shipping corridor of the Project in the coastal waters between Bonilla Point in the west and Sheringham Point in the east and to Swiftsure Bank. These areas fall within what ethnographers considered to be the historic territory of the Pacheedaht and there is evidence of fishing (e.g. salmon), hunting of sea

mammals, and marine resource harvesting (e.g clams, mollusks, barnacles, chitons) in the area at around the time of contact.¹

- The Crown's preliminary assessment is that Pacheedaht has a strong *prima facie* claim for Aboriginal title to the upland areas between Bonilla Point and Sheringham Point, proximate to the marine shipping corridor. This area of land falls within what ethnographers considered to be the historic territory of the Pacheedaht at 1846. There was numerous permanent habitation sites located along this section of Vancouver Island's coast, some of which were fortified, at 1846. There is also information that shows intensive use in this area by the Pacheedaht at 1846.²

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Pacheedaht's Aboriginal Interests, the Crown is of the view that the legal duty to consult Pacheedaht lies at the middle portion of the *Haida* consultation spectrum. Pacheedaht was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which afforded Pacheedaht opportunities to be consulted at a deeper level.

Pacheedaht participated in the National Energy Board (NEB) review process as an intervenor and submitted a written final argument, and responded to the Crown's Issues Tracking Table Information Request by further elaborating their concerns [[A71214](#)].

Pacheedaht has expressed concerns regarding the NEB's failure to consult them on the list of issues. Pacheedaht did not participate in an early engagement meeting with Crown officials, and did not meet with the Crown during the NEB hearing process. Pacheedaht expressed concern that they were not offered pre-NEB hearing Crown engagement with respect to Project impacts. Pacheedaht corresponded with the Major Projects Management Office (MPMO) outside of the formal NEB process. Responses have been provided to correspondence received.

Pacheedaht signed a contribution agreement with the NEB for \$150,000 in participant funding plus travel for three to the hearing. The MPMO offered Pacheedaht \$12,000 in participant funding for

¹ PACHEEDAHT FIRST NATION, Review of Ethnographic and Historical Sources, Ministry of Justice Legal Services Branch, Aboriginal Research Division, September 17, 2013; CLA YOQUOT SOUND INDIAN LAND USE, by: Randy Bouchard and Dorothy Kennedy, November 1990 [https://www.for.gov.bc.ca/hfd/library/Documents/Bouchard&Kennedy_\(1990\)_ClayoquotSoundIndianLandUse.pdf](https://www.for.gov.bc.ca/hfd/library/Documents/Bouchard&Kennedy_(1990)_ClayoquotSoundIndianLandUse.pdf); A Traditional Use Study of Pacheedaht First Nation Territory Volume 1: Report, Pacheedaht First Nation, March 1999; Summary Report (Draft) PFN Traditional Use and Occupancy Sites and the Proposed Pacific Gateway Marina, by Traditions Consulting Services Inc., Revised March 4th, 2013; Pacheedaht First Nation Traditional Marine Use and Occupancy Study (TMUOS) 2014 – Final Report, In relation to Kinder Morgan Canada Trans Mountain Expansion Project.

² Ibid.

consultations following the close of the NEB hearing record. MPMO offered Pacheedaht an additional \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Pacheedaht signed contribution agreements with the MPMO in response to both of these offers, for a total of \$18,000 in allocated funding.

On October 6, 2016 Pacheedaht was issued \$5,000 in capacity funding by EAO to assist with the consultation process.

Pacheedaht signed a letter of support with the proponent on January 22, 2016 and has entered into a Mutual Benefits Agreement with the proponent.

Pacheedaht met with the Crown consultation team on May 10, 2016 and September 30, 2016 to discuss their concerns with the Project.

The Crown provided a first draft of this Report to Pacheedaht for review and comment on August 17, 2016. Pacheedaht provided comments on the draft Report to the Crown on September 19, 2016. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016 and Pacheedaht provided comments on November 15. Pacheedaht provided a separate Aboriginal group submission to the Crown on November 15, 2016.

IV - Summary of Pacheedaht's Key Issues and Concerns Raised

The Crown has gained its understanding of Pacheedaht's issues and concerns through the community's involvement in the NEB process, including submissions made through the NEB hearings process, the responses Pacheedaht provided to the Crown on its Information Request (IR), the Traditional Marine Use study conducted by Pacheedaht in 2014 titled "Pacheedaht First Nation Traditional Marine Use and Occupancy Study (A4L5K4) redacted version; A4L5Q7 final redacted version, and through other engagement with the Crown.

This section offers a summary of the key issues raised by Pacheedaht, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Pacheedaht's key Project-related issues and concerns are summarized below

Cultural and Social Impacts

- Increases in marine vessel traffic could cause shoreline erosion, which Pacheedaht assert will damage archaeological sites and their ability to harvest marine resources along the shoreline. This damage may have an adverse impact on Pacheedaht's ability to engage in cultural practices and to fully experience their spiritual connectedness with their traditional territory;
- Pacheedaht people have a historical and spiritual connection to Pacheedaht Banks (Swiftsure Bank). Pacheedaht have stated that damage or a loss of access to their most valuable harvesting

site, Swiftsure Bank, either from a spill or increased tanker traffic, would be “genocidal” to the Pacheedaht people;

- Compensation is not available for indirect or non-economic losses due to an oil spill that impact the community’s social, cultural, or psychological well-being; and
- Identified travelways were not included in the updated Traditional Marine Resource Use (TMRU) study.

Methodology, Process, and Consultation

- Pacheedaht asserts that the NEB process cannot be used by the Crown to adequately fulfill the duty to consult;
- Disagreement with the NEB’s decision to establish a list of issues for the hearing without consulting Aboriginal groups;
- Pacheedaht disagreed with the NEB approach relating to: oral cross examination, the scheduling of oral traditional evidence hearings, and the knowledge gaps resulting from the Project;
- Pacheedaht highlighted concerns that the NEB had not conducted biophysical studies outside Burrard Inlet;
- Lack of sufficient participant funding contributions from NEB and the MPMO to ensure adequate community engagement; and
- Pacheedaht has articulated its disagreement with the Crown’s assessment of Musqueam’s preliminary strength of claim. Pacheedaht is of the view that the Crown’s legal duty to consult lies at the high end of the spectrum.

Economic Impacts

- Increased costs Pacheedaht will incur to harvest marine resources due to an increase in marine traffic (i.e. having to purchase radar systems or charter boats due to safety concerns);
- Potential damage tanker traffic and/or potential spills could have on Pacheedaht’s existing campground operations and future residential and commercial development plans; and
- Lack of information on level of employment opportunities that will be available to communities along the marine corridor, the type of contracting opportunities that will be available, whether training will be available, and whether community members will be prioritized in selection.

Marine Impacts

- Potential damage from ship traffic and noise to shoreline and marine ecosystems, including sea birds, mammals, fish, shellfish and marine invertebrates; and
- Knowledge gaps resulting from the proponent not undertaking biophysical studies outside Burrard Inlet, which is not representative of all Project-affected marine contexts.

Health and Human Safety

- Damage or a loss of access to Pacheedaht’s most valuable harvesting site, Swiftsure Bank (known as “Pacheedaht Bank” by the Pacheedaht people), either from a spill or increased tanker traffic;

- Health impacts of bilge dumping directly on communities and via contamination of marine food sources; and
- Safety risks to small fishing vessels posed by an increase in tanker traffic associated with the Project.

Impacts from Increased Vessel Traffic

- Potential impact of increased project-related tanker traffic on Pacheedaht's ability to engage in subsistence fishing and gathering, in particular on the Swiftsure Bank and a specific Pacheedaht-regulated area that is envisioned as a potential future marine protected area which would offer exclusive use to First Nations and U.S. Tribes;
- Increase in marine tanker traffic that could contribute to the already serious degradation of fisheries in the Strait of Juan de Fuca;
- Potential impacts of shoreline erosion resulting from increased marine shipping within Pacheedaht's traditional territory on archaeological sites, shoreline resources, harvesting practices, community wellbeing and social structures, transmission of knowledge, and spiritual connection to the land;
- Potential cumulative effects of a significant increase in the number of tankers and the effects of a potential oil spill on Pacheedaht's ability to harvest marine resources, including at Pacheedaht's hereditary fishing grounds at Swiftsure Bank;
- Increased tanker traffic, including the effects of ship wakes, pollution, bilge dumping, hull fouling and noise, and potential oil spills could be damaging to shorelines and marine species throughout Pacheedaht waters, including sea birds, land and marine mammals, fish, shellfish, marine invertebrates, plant and tree species, marine vegetation and the habitats for all the above;
- Increased tanker traffic and potential oil spills may negatively impact current campground income, as well as future plans to select lands for residential and commercial purposes, including tourism and ecotourism; and
- The location of and changes to designated shipping lanes are a concern to Pacheedaht's continued harvesting practices and their own vessel safety.

Accidents and Malfunctions

- Methodology the proponent used when modeling the impacts of marine accidents and malfunctions;
- The challenges posed to navigation and fishing activities result primarily from sea conditions, such as fog, tidal effects, winds and currents, which can affect fishing practices and the cultural/spiritual aspect of this practice;
- Potential adverse impacts that a marine oil spill could have on Pacheedaht's vision of a treaty, in particular the significant negative economic impact that an oil spill would have on Pacheedaht's ability to develop an eco-tourism industry;
- Inadequate assessment of the likelihood and consequences of a spill, and the need to develop specific response plans with clearly defined actions, roles, timelines, and priorities;

- Impacts of tanker traffic and a potential spill on marine life, including salmonids, halibut, marine mammals, abalone, etc.;
- Pacheedaht is concerned by the lack of communication infrastructure which could play an important role into oil spill response capacity;
- Pacheedaht requests that the proponent use an updated oil response plan and strategize specific response actions, roles, timelines, and priorities;
- Tanker traffic and the potential for oil spills will result in avoidance by Pacheedaht members from exercising harvesting rights;
- A marine oil spill could wipe out marine resource harvesting areas, including the Swiftsure Bank harvesting area, with areas of long-term oil residency; and
- The potential effects of an oil spill could be far greater than the impact to traditional foods and could strain the cultural fabric of Pacheedaht and cause extreme emotional distress and psychological stress.

Accommodation Proposals

Pacheedaht provided the federal and provincial Crown with proposed accommodation measures to consider in relation to accommodating potential impacts of the Project on Pacheedaht's Aboriginal Interests.

Pacheedaht identified the following outstanding issues: Interference of tanker traffic with harvesting activities at Swiftsure Bank, and lack of emergency response capacity to respond to an oil spill in Pacheedaht's asserted territory.

Pacheedaht's proposed accommodation measures are outlined below:

- Relocate existing Transport Canada regulated shipping lanes to avoid Swiftsure Bank;
- Implement an emergency response centre located in Port Renfrew, which would reduce response times in the event of an incident at that portion of the coastline;
- Year-round marina with spill response capacity of Western Canadian Marine Response Corporation;
- Potential port of entry fee for shipping within Pacheedaht's asserted traditional territory; and
- The enhancement of VHF Radio Communication Infrastructure in the Port Renfrew area to improve communications in relation to safety and emergency response.

Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Pacheedaht that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

The Crown is aware that the proponent has entered into a Mutual Benefits Agreement with Pacheedaht First Nation in an attempt to offset potential impacts, should the Project proceed.

Pacheedaht's Response to the NEB Recommendation Report

No specific comments were received by the Crown from Pacheedaht on *the NEB Recommendation Report*.

V - Potential Impacts of the Project on Pacheedaht's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group, including areas within the vicinity of marine shipping related to the Project, may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Pacheedaht's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Pacheedaht's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g. fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Pacheedaht's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Pacheedaht, Pacheedaht's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate (EAC) issued by the Province.

Pacheedaht completed a TMRU study in 2014 titled "*Pacheedaht First Nation Traditional Marine Use and Occupancy Study*" ([A4L5K4](#) redacted version; [A4L5Q7](#) final redacted version), which was submitted to the NEB. The focus of the study was on Crown lands and waters within the asserted territory of Pacheedaht crossed by the Marine Regional Study Area (RSA).³ The TMRU reports that there are currently 689 traditional use and occupancy sites documented in the Pacheedaht First Nation traditional use and occupancy site database, of which 500, comprising 73% of the total, are intersected by the Project Study Area.

³ The area extending beyond the LSA boundary (i.e. the zone of influence or area where the element and associated indicators are most likely to be affected by Project-related marine vessel traffic.) where the direct and indirect influence of other activities could overlap with project-specific effects and cause cumulative effects on the environmental or socio-economic indicator.

In its Supplemental Technical Report ([A4A0W1](#)), the proponent estimated approximate distances and directions from the marine shipping lanes based on information in Pacheedaht's report. Traditional marine and land uses identified by Pacheedaht include hunting aquatic birds, coastal mammals and marine mammals, gathering plants, and information on fishing sites, habitation sites and travelways.

Impacts on Hunting, Trapping, and Plant Gathering

As summarized in the TMRU study, Pacheedaht historically hunted raccoon, wolf, sea otter, river otter, northern sea lion, grey whale, and humpback whale. Community members currently hunt coastal deer, bufflehead duck, brant goose, common merganser, common goldeneye, Roosevelt elk, surf scoter, trumpeter swan, spruce grouse, mallard duck, rufous hummingbird, harbour seal, northern fur seal, California sea lion, harbour porpoise, and northern right whale. Plants gathered by Pacheedaht community members include western red cedar, Sitka spruce, basketry grasses, American dune grass, salal berries, silverwood, wild clover, stinging nettle, salmon berry, huckleberry, seaweed, red laver, bull kelp, eel grass, Scouler's surf grass, bladderwrack, leafy kelps, short kelp, sea palm, and sea lettuce.

Pacheedaht community members hunt and gather plants throughout their traditional territory. During the TMRU study, six hunting sites and one plant gathering site were identified within the Marine RSA. The shipping lanes are crossed to access Swiftsure Bank; however the shipping lanes are not crossed to access the other hunting sites or the plant gathering site identified. The nearest plant gathering site is approximately 8.5 km northeast of the shipping lanes.

Pacheedaht raised several specific concerns with potential Project impacts relating to their hunting, trapping, and gathering activities:

- Potential damage from ship traffic and noise to shoreline and marine ecosystems, including sea birds and mammals;
- Potential impacts of shoreline erosion resulting from increased marine shipping within Pacheedaht's traditional territory on harvesting practices;
- Increased tanker traffic, including the effects of ship wakes, pollution, bilge dumping, hull fouling and noise, and potential oil spills could be damaging to shorelines and marine species throughout Pacheedaht waters, including sea birds, land and marine mammals, plant and tree species, and the habitats for all the above; and
- Impacts of tanker traffic and a potential spill on marine mammals.

The general direct and indirect effects of the Project on hunting, trapping, and gathering, along with key mitigation measures, are described in Section 4.3.1 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Section 4.3.1 of this Report). The proponent would implement a range of mitigation measures that would reduce potential effects associated with Pacheedaht's hunting, trapping, and plant gathering activities, including plans to implement, monitor and comply with marine shipping-related commitments in

cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

In consideration of the information available to the Crown from the NEB process, consultation with Pacheedaht, Pacheedaht's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in a negligible-to-minor impact on Pacheedaht's hunting, trapping and plant gathering activities.

Impacts on Marine Fishing and Harvesting

As described in the TMRU study, fishing and harvesting activities are integral to community members' traditional connection to Pacheedaht territory. Fished and harvested species include salmon, sole, trout, sand lance, smelt, red tailed perch, skate, salmon, steelhead, flounder, sturgeon, cabezon, halibut, sablefish, rockfish, cod, greenling, pomfret, shad, Jack mackerel, skipjack tuna, Greenland turbot, dogfish, sea bass, lingcod, ratfish, sardine, octopus wolf eel, Humboldt squid, mussel, clam, geoduck barnacle, gooseneck barnacle, chiton, limpet, whelk, sea urchins, crab, prawn, shrimp, scallop, cockle, pile worms, and sea cucumber.

Pacheedaht community members fish and gather seafood throughout their traditional territory. During the TMRU study, 14 fishing sites were identified within the Marine RSA. Pacheedaht community members must cross the shipping lanes to access Swiftsure Bank, and the shipping lanes currently overlap with a portion of the Swiftsure Bank closure area. In consultation with the Crown, Pacheedaht emphasized the importance of access to Swiftsure Bank to the community and culture, which is described in Pacheedaht's TMRU study.

Pacheedaht raised several specific concerns with potential Project impacts relating to their marine fishing and harvesting activities:

- An increase in marine vessel traffic could cause shoreline erosion, which Pacheedaht asserts will damage their ability to harvest marine resources along the shoreline;
- Increase in marine tanker traffic will contribute to the already serious degradation of fisheries in the Strait of Juan de Fuca;
- An increase in marine vessel traffic is safety concern for Pacheedaht members exercising Aboriginal right to fish and harvest;
- Increased costs Pacheedaht will incur to harvest marine resources due to an increase in marine traffic (i.e. having to purchase radar systems or charter boats due to safety concerns);
- Ship traffic and noise are damaging to shoreline and marine ecosystems, including sea birds, mammals, fish, shellfish and marine invertebrates;
- Damage or a loss of access to Pacheedaht's to Swiftsure Bank would significantly impact Pacheedaht;
- Impact of increased tanker traffic on Pacheedaht's ability to engage in subsistence fishing and gathering, in particular on the Swiftsure Bank and a specific Pacheedaht-regulated area that is

envisioned as a potential future marine protected area which would offer exclusive use to First Nations and U.S. Tribes;

- Impacts of tanker traffic and a potential spill on marine life, including: salmonoids, halibut, marine mammals, abalone, etc.;
- Cumulative effects of a significant increase in the number of tankers and the effects of a potential oil spill on Pacheedaht's ability to harvest marine resources;
- Increased tanker traffic, including the effects of ship wakes, pollution, bilge dumping, hull fouling and noise, and potential oil spills could be damaging to shorelines and marine species throughout Pacheedaht waters, including sea birds, land and marine mammals, fish, shellfish, marine invertebrates, marine vegetation and the habitats for all the above; and
- The location of and changes to designated shipping lanes are a concern to Pacheedaht's continued harvesting practices and their own vessel safety.

The direct and indirect effects of the Project on Aboriginal rights to marine fishing and harvesting, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report. Project-related marine vessels would increase the amount of marine traffic traveling in the established shipping lanes. The *NEB Recommendation Report* found that project effects on marine fish and fish habitat are expected to be low to moderate and effects on marine mammals are expected to be low.

Project-related marine vessels are expected to cause temporary disruptions to Pacheedaht's marine fishing and harvesting activities. The Crown appreciates that community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Pacheedaht community members to take measures to reduce potential disruptions from tankers and allow planning for fishing activities to take place that minimizes disturbance from Project-related tankers.

The conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with marine fishing and harvesting sites (Section 4.3.3 of this Report). The proponent would implement a range of mitigation measures that would directly or indirectly reduce potential project-related marine fishing impacts on Pacheedaht's marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, and scheduling and notification of Project activities (via the proponent's marine public outreach program).

Pacheedaht expressed concern about the direct and indirect effects of Project-related marine shipping activities on social, cultural, spiritual, and experiential aspects of its marine fishing and harvesting activities. From Pacheedaht's perspective, an increase in tanker traffic may, discourage community members from travelling in the Strait of Juan de Fuca, interfere with travel in Pacheedaht's traditional territory, and adversely impact the ability of community members to exercise their fishing and

harvesting rights and cultural practices. This concern is heightened at Swiftsure Bank, an offshore fishing and harvesting area of historical significance to the Pacheedaht, and where the Pacheedaht share aboriginal rights and Interests with the Ditidaht First Nation and the Makah Nation. This area was exceptionally rich and heavily fished. Today, a closed area has been established at Swiftsure Bank for retention of halibut, rockfish, lingcod and all finfish, other than for use by Aboriginal groups. Pacheedaht's TMRU study indicates that Pacheedaht exercise their traditional practice of issuing intertribal fishing protocols to members from all other First Nations in order to manage the fishery at Swiftsure Bank.

Pacheedaht expressed concern that community members may not feel safe to take their small vessels out to fish at Swiftsure Bank due to the increase in project-related marine traffic that would be transiting the area. Pacheedaht shared with the Crown that the fish harvested in Pacheedaht's asserted traditional territory, and especially at Swiftsure Bank is shared among elders and other community members. Youth are taught the traditional culture and history by participating in fishing and harvesting in the traditional territory. Reduced harvests, while not expected to occur from temporary access restrictions, could impact Pacheedaht's cultural activities and sharing of marine food with the community. Pacheedaht expressed concern that the potential for reduced access and harvests would impact economic, cultural and social structures within the community through a lack of connection with historical and current traditions.

In consideration of the information available to the Crown from the NEB process, consultation with Pacheedaht, Pacheedaht's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in minor impacts on Pacheedaht's marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

Pacheedaht's TMRU study references other traditional and cultural sites, including archaeological, cultural, spiritual sites and travel site and routes; however, the locations of these sites in relation to the marine shipping route are not known as the map information was redacted. However, during the September 30, 2016 meeting with the Crown, Pacheedaht noted use of historic travelways, including canoe routes along the coast and across the straight to the United States to trade with Makah Nation. The Crown is not aware of the number and location of historic travelways that may cross the shipping lanes. Nineteen historical habitation sites (both villages and camp sites) were identified as important sites to community members for harvesting resources and cultural identity, along the coastline, although none are located in the Marine RSA. The nearest gathering place is approximately 8.3 km northeast of the shipping lanes.

Pacheedaht identified cultural use of or concerns regarding Southern resident killer whales during the NEB and Crown consultation processes. Pacheedaht's TMRU study describes sacred ceremonies and rituals to prepare for the rigorous and dangerous whale hunt. While Humpback whales, grey whales, and the northern right whale were the preferred species for Pacheedaht hunters, killer whales were also

hunted during training exercises to hone the hunters' agility and speed.⁴ Most of the rituals were done in remote or sacred places and Pacheedaht's TMRU does not indicate that any of these sites overlap with the marine shipping route. The *NEB Recommendation Report* concluded that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Aboriginal use associated with the Southern resident killer whale. The Crown understands that the Southern resident killer whale population is in decline, and that additional adverse environmental effects from project-related marine shipping would be considered significant.

Pacheedaht raised specific concerns with potential Project impacts relating to other traditional and cultural practices:

- An increase in marine vessel traffic causing shoreline erosion, which Pacheedaht asserts will damage archaeological sites which may have an adverse impact on Pacheedaht's ability to engage in cultural practices and to fully experience their spiritual connectedness with their traditional territory;
- Pacheedaht people have a historical and spiritual connection to Pacheedaht Banks (Swiftsure Bank). Pacheedaht asserts that damage or a loss of access to Swiftsure Bank would have a significant impact on their traditional and cultural practices;
- Potential effects of an oil spill could be far greater than the impact to traditional foods as it could strain Pacheedaht's cultural practices; and
- Potential damage tanker traffic and/or potential spills could have on Pacheedaht's existing campground operations and future residential and commercial development plans.

The general direct and indirect effects of the Project on other traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown understands that there will be temporary interruptions to Pacheedaht's traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Pacheedaht, Pacheedaht's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in moderate impacts on Pacheedaht's other traditional and cultural practices.

⁴ Pacheedaht First Nation Traditional Marine Use and Occupancy Study (TMUOS) 2014 – Final Report, In relation to Kinder Morgan Canada Trans Mountain Expansion Project.

Impacts Associated with Accidental Tanker Spills

Pacheedaht expressed the following concerns regarding the impact of a potential oil spill on their Aboriginal Interests:

- Potential impacts on coastline within Pacheedaht's asserted traditional territory;
- Potential impacts on species and marine resources harvested by Pacheedaht, including at Pacheedaht's hereditary fishing grounds at Swiftsure Bank;
- The community's social, cultural, or psychological well-being, linked to harvesting rights ;
- Pacheedaht's existing campground operations and future residential and commercial development plans;
- Shorelines and marine species throughout Pacheedaht waters, including sea birds, land and marine mammals, fish, shellfish, marine invertebrates, plant and tree species, marine vegetation and the habitats for all the above;
- Pacheedaht's vision of a treaty, in particular the significant negative economic impact that an oil spill would have on Pacheedaht's ability to develop an eco-tourism industry; and
- Impacts to traditional foods and could strain the cultural fabric of Pacheedaht and cause extreme emotional distress and psychological stress.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. Section 4.3.6 of the main body of this Report sets out the impacts associated with accidental spills from marine shipping vessels. In consideration of this information and analysis, as well as information available to the Crown on Pacheedaht's Aboriginal Interests and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts, with low likelihood, on Pacheedaht's Aboriginal Interests. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.⁵

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing marine safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for marine vessel use of the area between the Westridge Marine Terminal and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the marine-shipping component of the Project on the exercise of Pacheedaht First Nation's Aboriginal Interests would be up to moderate.

⁵ Trans Mountain Final Argument, p. 85 and 207

However, given existing use of the marine shipping corridor within areas proximate to the exercise of Pacheedaht First Nation's Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of Pacheedaht First Nation's Aboriginal Interests, the federal Crown is considering additional measures to further offset the potential impacts of the marine-shipping component of the Project on Pacheedaht First Nation. Transport Canada has offered to meet with Pacheedaht to further discuss the issues around the location of the shipping lanes near Swiftsure Bank. Please see Sections 4 and 5 of the main body of this Report discuss proposed accommodation and responsive measures.

Appendix D.11 – Pauquachin First Nation

I - Background Information

Pauquachin First Nation (Pauquachin) is an Aboriginal group whose traditional territory is located on southern Vancouver Island in British Columbia (BC), in the areas surrounding Victoria and the adjacent Salish Sea. Pauquachin (pronounced “*Pak-quw-chin*”) has filed a *Writ of Summons* as part of the Saanich Nation asserting Aboriginal title to a territory identified in the writ.

As of July 2016, there were 398 registered Pauquachin members, of whom 284 live on reserve and 114 live off reserve. There are three Pauquachin reserves: *Cole Bay 3*, *Hatch Point 12*, and *Goldstream 13*. *Cole Bay 3* is Pauquachin’s primary reserve, home to its band offices and the majority of its members.

As part of the Saanich/Senchothen ethno-cultural group, Pauquachin speaks a Salish dialect known as “North Straits Salish.” According to 2011 census data, approximately 10.9% of Pauquachin members speak North Straits Salish at home and a further 9.4% have some knowledge of the language.

II - Preliminary Strength of Claim Assessment

- The marine shipping route would pass through approximately 30 kilometers (km) of the eastern portion of Saanich Nation’s traditional territory.
- The Province of BC understands that Pauquachin has Douglas Treaty rights to carry out fisheries and hunt as formerly within its historic traditional territory. Ethnohistoric evidence indicates that the Pauquachin community was in Cole Bay on the western side of the Saanich Peninsula. Ethnographic sources associate the Pauquachin, Tsartlip, Tseycum and Pauquachin First Nations with the Saanich Peninsula, Goldstream River, and the southern Gulf Islands (including the southern portion of Saltspring Island, Sidney Island, Stuart Island, Pender Islands, Mayne and Saturna Islands).¹
- Canada recognizes the Douglas Treaties and understands that Pauquachin has members who are descendants of one or more signatories to one or more Douglas Treaties. Canada remains committed to working toward a common understanding of the content and scope of the Douglas Treaties with Pauquachin, to implement the treaty through agreements with the Crown, and to explore opportunities to honour and recognize the Douglas Treaties.

II - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Pauquachin’s Aboriginal Interests, the Crown is of the view that the legal duty to consult Pauquachin lies at the middle portion of the *Haida* consultation spectrum. Pauquachin was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which affords Pauquachin opportunities to be consulted at a deeper level.

¹ Pauquachin First Nation: Review of Ethnographic and Historical Sources. Prepared by Ministry of Justice, Legal Services Branch, Aboriginal Research Division. September 5, 2013.

Pauquachin participated in the National Energy Board (NEB) review process as an intervenor and submitted written evidence, sent additional correspondence to the NEB, and responded to the Crown's Information Tracking Table Information Request by further elaborating their concerns [[A71205](#)].

Pauquachin has had additional interaction with the Major Projects Management Office (MPMO) outside of the formal NEB process. Pauquachin has sent and received correspondence and emails and had an early engagement meeting in June 2014.

Pauquachin signed a contribution agreement with the NEB for \$24,910 in participant funding plus travel for one to the hearing. The MPMO offered Pauquachin \$5,400 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Pauquachin an additional \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Pauquachin signed a contribution agreement with the MPMO for a total of \$5,400 in allocated funding.

Pauquachin signed a letter of support with the proponent on May 27, 2015. The Crown is aware that the proponent has entered into a Mutual Benefits Agreement with Pauquachin in an attempt to offset potential impacts, should the Project proceed.

The Crown provided a first draft of this Report to Pauquachin for review and comment on August 17th, 2016. The Crown did not receive comments from Pauquachin on the draft Report.

A second draft of this Report was submitted to Aboriginal groups for review and comments on November 1, 2016. Pauquachin provided a separate Aboriginal group submission to the Crown on November 15, 2016. This letter provided the Crown with some comments for the second draft of this Report.

III - Summary of Pauquachin's Key Issues and Concerns Raised

The Crown has gained its understanding of Pauquachin's issues and concerns through the community's involvement in the NEB process, including responses provided to the Crown on its Information Request (IR) addressed to them, and through other engagement with the Crown. In addition, the Crown has considered information regarding the proponent's engagement with Pauquachin, as described in the proponent's *Aboriginal Engagement Report (2016)*.

This section offers a summary of the key issues raised by Pauquachin, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented on the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Pauquachin's key Project-related issues and concerns are summarized below.

Cultural and Spiritual Impacts

Pauquachin have expressed that culture is of great importance to the Pauquachin people. Pauquachin stated that SENCOTEN is not just a language, and each place name is not just a name; rather, each has a

story and history behind the name. Pauquachin stated that it is important to understand through the consultation process, and capture in the consultation Report, the significance this has on who the Pauquachin people are—that this is all of their territory, and it is where their history resides.

- Pauquachin is concerned that tanker traffic related noise and other disturbance will impact their cultural and ceremonial activities either through disruption or by alienating Pauquachin members from some parts of their territory;
- Pauquachin stated that this would complicate their ties with other closely related Indigenous communities and expose their territory, including important sacred sites, to Project-related risks;
- Pauquachin is concerned that archaeological sites may be impacted by vessel-wake caused shoreline erosion or by accidental oil contamination; and
- Pauquachin is concerned about effects, including sensory effects to the Southern Vancouver Island's orca population and marine species.

Methodology, Process, and Consultation

- Pauquachin has filed a letter in support of the Project but they remain concerned about the low level of direct engagement on the part of the federal Crown;
- Pauquachin is concerned about the NEB hearing process, including insufficient funding to meaningfully participate, NEB's refusal to permit oral cross-examination of the proponent, refusal to consider the environmental and socio-economic effects of upstream activities and downstream uses, and the lack of public confidence in the hearing process; and
- Pauquachin stated that they did not have sufficient funding to hire an expert to review and comment on the credibility of evidence submitted by the proponent and intervenors.

Cumulative Effects

- Pauquachin is seeking to protect their remaining traditional marine resources, which have been negatively impacted by increased traffic in Saanich Inlet and numerous barriers to access (i.e. pollution, over-harvesting elsewhere, travel costs, diminished relationship networks, and perception of trespassing near private property); and
- Pauquachin is concerned the Project, and the Project's contribution to cumulative effects, has the potential to negatively impact the environment, traditional territory, marine resources and waters.

Economic Impacts

- Pauquachin is also worried about the impact increased tanker traffic or a spill would have on their ability to develop a recreational and tourism industry; and
- Pauquachin stated that the wealth of the Project and benefits to Canada will be secure and long-term and, therefore, First Nations need a secure and long-term revenue stream that would allow them to plan and make long-term investments.

Impacts from Increased Marine Vessel Traffic

- Pauquachin is concerned that increased tanker traffic could induce changes in waterfowl behavior, thus limiting their ability to harvest preferred species;
- Pauquachin is worried about changes in air quality due to marine vessel venting;
- Pauquachin note that important harvesting locations for their preferred marine resource species are located within designated shipping lanes and thus would be adversely affected by increased tanker traffic; and
- Pauquachin is worried that increased tanker traffic would increase the likelihood of marine mammal strikes or other conflicts.

Health and Human Safety

- Pauquachin is worried that loss of access to, or contamination of, marine resources would adversely impact their health by limiting their access to nutritious country foods; and
- Pauquachin is concerned that increased tanker traffic will increase the likelihood of a collision between a tanker and a vessel owned or operated by Pauquachin members, which could result in damage or loss of the vessel, gear and injury or death of Pauquachin members.

Impacts on Hunting, Fishing, and Harvesting Rights

- Pauquachin assert Aboriginal and Douglas Treaty rights and note that their ability to exercise these rights would be negatively impacted by increased tanker traffic, especially their ability to harvest marine resources, and hunt deer and waterfowl;
- Pauquachin is concerned about effects to commercial fishing, changes in income patterns and economic impacts resulting from the Project; and
- Pauquachin is concerned about the introduction of invasive species, alteration of watersheds, and effects on water quality.

Accidents and Malfunctions

- Pauquachin understand that a major tanker spill would spread quickly given the regional currents, impacting hundreds of sites (including archaeological sites), and destroy most or the entire marine ecosystem and are also concerned about the potential adverse impacts associated with spill cleanup activities;
- Pauquachin is concerned that increased tanker traffic and the increased risk of an accidental spill will disrupt their Aboriginal commercial fishing activities;
- Pauquachin is concerned about changes in water quality due to accidental bilge dumping and shoreline contamination;
- Pauquachin is concerned about the possibility that diluted bitumen may sink and the lack of effective spill response measures in the event it does. Pauquachin is concerned about the probability of a spill, and has identified the need for mitigation measures to reduce the probability;
- Pauquachin is concerned an oil spill could reduce the quality and quantity of marine resources, damage habitat and food sources, damage sacred sites and impact health. Pauquachin is

concerned a tanker-related spill could have economic impacts, including a loss in property value, loss in revenues from or loss of an opportunity to develop reserve or other lands Pauquachin currently has or acquires an interest in; and

- Pauquachin is concerned that an accident or malfunction of Project-related tankers could potentially impact traditional marine use (TMU) by disrupting travelways, and restricting the times and locations in which Pauquachin can harvest marine resources, exercise traditional rights and engage in traditional ceremonies. Pauquachin is concerned about disruption of subsistence activities and cumulative effects on traditional subsistence activities.

Accommodation Proposals

During the Crown consultation meeting of May 13, 2016, Pauquachin asked for the following accommodation proposals to be considered:

- Development of a Salish Sea Stewardship Foundation; and
- Pauquachin would like to explore how the Project could benefit the Pauquachin.

Pauquachin provided the Crown with other accommodation proposals in their separate submission to Cabinet. In this document, Pauquachin states that the following recommendations should be implemented before the Project is approved:

- Emergency response towing vessels: In addition to escort tugs for Project-related tankers which the proponent has committed to and is ensured through the NEB proposed conditions for the Project; Pauquachin considers that emergency response towing vessels should be stationed at strategic locations along the marine shipping route. Pauquachin believes this measure is important to ensure a world-class spill prevention system;
- Salvage Personnel and Equipment: Pauquachin considers that a salvage resident personnel as well as salvage equipment should be stationed at strategic locations along the marine shipping route. Pauquachin believes this measure is important to ensure a world-class spill prevention system;
- Fate and behavior of Diluted Bitumen: Pauquachin requests the Crown to conduct, commission, fund, or require additional research on fate and behavior of diluted bitumen in marine environment. The Crown should consult Pauquachin about the outcome of that research. Pauquachin acknowledges the provincial government's condition #33 which will require the proponent to develop research on this matter; however, Pauquachin is concerned regarding the timing and independence of that research. Pauquachin believes that this research should be undertaken ideally before the Project is approved, and at a minimum before the Project is operational. Pauquachin considers that the proponent should not undertake or direct the research;
- Spill Response Base on Saanich Peninsula: Pauquachin acknowledges that the Western Canada Marine Response Corporation (WCMRC) is currently planning to establish a new response base on the Saanich Peninsula to improve spill response capacity. Pauquachin considers that regardless of whether the Project proceeds, a spill response base should be established on the Saanich Peninsula;

- **Spill Response Capacity:** Pauquachin considers that the Crown should engage in further consultations with Pauquachin regarding WCMRC's spill response capacity, directly or through other spill response agencies, and increase the capacity required under federal law to an appropriate level. Pauquachin is concerned that on the event of a spill the WCMRC will not have sufficient capacity to respond. Pauquachin states that this issue will be addressed through the Area Response Planning (ARP) initiative. Pauquachin asks that the recommendations from that initiative should be implemented at a minimum before the Project is operational;
- **Planning and Training:** Pauquachin states that the Crown should either recommend or implement improvements to address any deficiencies in the responses to the May2016 diesel spill in Esquimalt Harbour and the 2015 oil spill in English Bay. Pauquachin wants the Crown to consider the possibility of training one or more Pauquachin members in spill response measures. Pauquachin believes that First Nations could play an important role in early response to spills if they are equipped with appropriate training and gear; and
- **Spill Compensation Regime:** Pauquachin is concerned that the amount available for compensation in case of marine-based oil spills may not be adequate, and that any damages to Pauquachin's culture and Aboriginal and Treaty rights may not be sufficiently compensated under the regime.

Section 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Pauquachin that the Crown has not responded directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

Pauquachin's Response to NEB Recommendation Report

No specific comments received by the Crown from Pauquachin on the *NEB Recommendation Report*.

V - Potential Impacts of the Project on Pauquachin's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group, including areas within the vicinity of marine shipping related to the Project, may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Pauquachin's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Pauquachin's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;

- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown’s conclusion on the seriousness of Project impacts on Pauquachin’s Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Pauquachin, Pauquachin’s engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate (EAC) issued by the Province.

Pauquachin completed a traditional marine resource use (TMRU) study in 2015 entitled “*Pauquachin Traditional Marine Use Study*” for the Project ([A4L6I5](#)). The focus of the study was on Crown lands and waters within the asserted territory of Pauquachin crossed by the Marine Regional Study Area (RSA)². In its *Supplemental Technical Report* ([A4S7I8](#)), the proponent estimated approximate distances and directions from the marine shipping lanes based on information in Pauquachin’s report. Additional TMRU information for Pauquachin was presented in *Volume 8B* ([A3S4K3](#)) of the Project application.

As a coastal First Nation, Pauquachin’s identity is closely tied to the sea and their access to marine resources. Pauquachin people prefer eating marine species like: salmon, cod, halibut, herring, oysters, clams, and cockles. They also have a spiritual connection with orca whales, which they also view as a proxy for the health of the marine environment.

Impacts on Hunting, Trapping, and Plant Gathering

As summarized in the TMRU study, community members historically hunted deer, elk, grouse, rabbit, sea lions and seals to supplement the primary diet of salmon, and gathered cedar bark and logs, nettles, bullhead, seaweed, hog fennel, cranberries and blueberries. Community members currently hunt ducks, geese, bear and deer, and gather seaweed and berries.

During the TMRU study, Pauquachin identified 14 hunting sites, of which 12 are within the Marine RSA. The shipping lanes are crossed to access two of these sites: Salish Sea and Haro Strait, east of Moresby Island. Pauquachin identified 10 plant gathering sites within the Marine RSA, of which the shipping lanes are crossed to access sites at Blakey Island and the coast of the Salish Sea.

In addition to providing traditional use information, Pauquachin raised specific concerns with potential Project impacts relating to their hunting, trapping and plant gathering activities:

- Pauquachin is concerned that increased tanker traffic could induce changes in waterfowl behavior, thus limiting their ability to harvest preferred species; and

² The area extending beyond the LSA boundary (i.e. the zone of influence or area where the element and associated indicators are most likely to be affected by Project-related marine vessel traffic) where the direct and indirect influence of other activities could overlap with Project-specific effects and cause cumulative effects on the environmental or socio-economic indicator.

- Pauquachin note that their ability to exercise their rights would be negatively impacted by increased tanker traffic, especially their ability to hunt deer and waterfowl.

The general direct and indirect effects of the Project on hunting, trapping, and gathering, along with key mitigation measures, are described in Section 4.3.1 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Section 4.3.1 of this Report). The proponent would implement a range of mitigation measures that would reduce potential effects associated with Pauquachin's hunting, trapping, and plant gathering activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

In consideration of the information available to the Crown from the NEB process, consultation with Pauquachin, Pauquachin's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in negligible-to-minor impacts on Pauquachin's hunting, trapping and plant gathering activities.

Impacts on Freshwater Fishing, and Marine Fishing and Harvesting

As described in the TMRU study, Pauquachin community members regularly rely on inter-regional trade and kinship networks to access marine resources. Marine resources are the preferred part of Pauquachin diets; clams and salmon are important resources for community members. Species harvested by community members include bivalves (such as clams, cockles, butters, steamers, oysters, mussels and chitons), crab, sea urchins, salmon, rock cod, ling cod, red snapper, flounder, sole, halibut, squid, octopus, herring and herring roe. During the TMRU study, Pauquachin identified 27 fishing sites within the Marine RSA. The shipping lanes are crossed to access six fishing sites: Salish Sea, Stuart Island, San Juan Islands, Point Roberts, Johns Island, and Sucia Island. In Volume 8B, six additional fishing and marine harvesting sites were identified within the Marine RSA, of which shipping channels are crossed to access one site at Fulford Harbour.

In addition to providing traditional use information, Pauquachin raised specific concerns with potential Project impacts relating to their marine fishing and harvesting activities:

- Pauquachin is seeking to protect their remaining traditional marine resources, which have been negatively impacted by increased traffic in Saanich Inlet and numerous barriers to access (i.e. pollution, over-harvesting elsewhere, travel costs, diminished relationship networks, and perception of trespassing near private property);
- Pauquachin is worried that increased tanker traffic would increase the likelihood of a collision with Pauquachin fishing vessels, marine mammal strikes, or other conflicts;

- Pauquachin noted that important harvesting locations for preferred marine resource species are located within designated shipping lanes and thus would be adversely affected by increased tanker traffic;
- Pauquachin is worried that loss of access to, or contamination of, marine resources would adversely impact their health by limiting their access to nutritious country foods;
- Pauquachin notes that their ability to exercise their rights would be negatively impacted by increased tanker traffic, especially their ability to harvest marine resources;
- Pauquachin understand that a major tanker spill would spread quickly given the regional currents destroying most or the entire marine ecosystem;
- Pauquachin is concerned that increased tanker traffic and the increased risk of an accidental spill will disrupt their Aboriginal commercial fishing activities;
- Pauquachin is concerned about changes in water quality due to accidental bilge dumping and shoreline contamination; and
- Pauquachin is also concerned about the potential adverse impacts associated with spill cleanup activities.

The direct and indirect effects of the Project on Aboriginal rights to marine fishing and harvesting, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report. Project-related marine vessels would increase the amount of marine traffic traveling in the established shipping lanes. The *NEB Recommendation Report* found that project effects on marine fish and fish habitat are expected to be low to moderate and effects on marine mammals are expected to be low.

Project-related marine vessels are expected to cause temporary disruptions to Pauquachin's marine fishing and harvesting activities. The Crown appreciates that community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Pauquachin community members to take measures to reduce potential disruptions from tankers and allow planning for fishing activities to take place that minimizes disturbance from Project-related tankers.

The conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with marine fishing and harvesting sites (Section 4.3.3 of this Report). The proponent would implement a range of mitigation measures that would directly or indirectly reduce potential project-related marine fishing impacts on Pauquachin's marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, and scheduling and notification of Project activities (via the proponent's marine public outreach program).

In consideration of the information available to the Crown from the NEB process, consultation with Pauquachin, Pauquachin's engagement with the proponent, the proponent's proposed mitigation

measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in minor impacts on Pauquachin's marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

As described in the TMRU study, three travelways within the Marine RSA were identified: Salish Sea, Mayne Island to Cowichan, and Active Pass. The shipping lanes are crossed when using the travelways in the Salish Sea. Pauquachin identified 12 gathering places of which 11 are located within the Marine RSA. The shipping lanes are crossed to access four of these sites: Salish Sea, San Juan Islands, Point Roberts, and Stuart Island. One sacred area, on Samuel Island, was identified by Pauquachin within the Marine RSA during the TMRU study. The shipping lanes are not crossed to access this site. In *Volume 8B*, summer camps in the Gulf Islands were identified in the Marine RSA. Although the specific locations were not provided, shipping lanes are crossed to access the sites.

In addition to providing traditional use information, Pauquachin raised specific concerns with potential Project impacts relating to other traditional and cultural practices:

- Pauquachin is concerned that tanker traffic related noise and other disturbance will impact their cultural and ceremonial activities, through disruption/alienation of Pauquachin members from some parts of their territory and disturbance of their spiritual connection with the orca;
- Pauquachin is concerned that this would complicate their ties with other closely related Indigenous communities and expose their territory, including important sacred sites, to Project-related risks;
- Pauquachin is concerned that archaeological sites may be impacted by vessel-wake caused shoreline erosion or by accidental oil contamination; and
- Pauquachin is concerned that a major tanker spill would spread quickly given the regional currents, impacting hundreds of sites, including archaeological sites.

Pauquachin identified cultural use of or concerns regarding Southern resident killer whales during the NEB and Crown consultation processes. The *NEB Recommendation Report* concluded that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Aboriginal use associated with the Southern resident killer whale. The Crown understands that the Southern resident killer whale population is in decline, and that additional adverse environmental effects from project-related marine shipping would be considered significant.

The general direct and indirect effects of the Project on other traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown understands that there will be temporary interruptions to Pauquachin's traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities. It is noted that the proponent has committed to ongoing engagement with

Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Pauquachin, Pauquachin's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in moderate impacts on Pauquachin's other traditional and cultural practices.

Impacts Associated with Accidental Tanker Spills

Pauquachin expressed concerns regarding the impact of a potential oil spill on their Aboriginal Interests, including the effects of a potential spill on hundreds of sites (including archaeological sites), the marine ecosystem, their Aboriginal commercial fishing activities, water quality, reduction in the quality and quantity of marine resources, the damage on habitat and food sources, the damage on sacred sites, and health issues. Pauquachin is also concerned about the economic impacts a potential spill would have in their community, as well as the impacts in the TMU by disrupting travelways, and restricting the times and locations in which Pauquachin First Nation can harvest marine resources, exercise traditional rights and engage in traditional ceremonies. Additionally, Pauquachin First Nation is concerned about disruption of subsistence activities and cumulative effects on traditional subsistence activities.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. Section 4.3.6 of the main body of this Report sets out the impacts associated with accidental spills from marine shipping vessels. In consideration of this information and analysis, as well as information available to the Crown on Pauquachin's Aboriginal Interests and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts, with low likelihood, on Pauquachin's Aboriginal Interests. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.³

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing marine safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for marine vessel use of the area between the Westridge Marine Terminal and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the marine-shipping component of the Project on the exercise of Pauquachin's Aboriginal Interests would be up to moderate.

³ Trans Mountain Final Argument, p. 85 and 207

However, given existing use of the marine shipping corridor within areas proximate to the exercise of Pauquachin's Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of Pauquachin's Aboriginal Interests, the federal Crown is considering additional measures to further offset the potential impacts of the marine-shipping component of the Project on Pauquachin. Please see Sections 4 and 5 of the main body of this Report for a discussion of proposed accommodation measures.

In addition, the Crown is aware that the proponent has entered into a Mutual Benefits Agreement with Pauquachin in an attempt to offset potential impacts, should the Project proceed.

Appendix D.12 – Penelakut Tribe

I - Background Information

The main community of Penelakut Tribe (Penelakut) is located on Kuper Island, off the east coast of Vancouver Island, approximately 60 kilometres (km) north of Victoria, British Columbia (BC). Historically, Penelakut villages were found on Kuper Island, Galiano Island, and on Vancouver Island near the mouth of the Chemainus River. Today, Penelakut has four reserves: *Penelakut Island Indian Reserve no. 7* (556.7 hectares [ha]), *Tent Island no. 8* (34.4 ha), *Galiano Island no. 9* (29.1 ha), and *Tsussie no. 6* (15.5 ha). All reserves are location on the lower reaches of the Chemainus River. As of July 2016, Penelakut counts 952 registered band members: 525 living on their own reserves, 72 living on other reserves and 355 living off reserve.

Penelakut is a party to the Hul'qumi'num Nation protective *Writ* of Summons, which was filed in the BC Supreme Court in December, 2003, asserting Aboriginal title to a territory identified in the *writ*. Penelakut is party to the Hul'qumi'num Treaty Group *Statement of Intent*, which also includes Stz'uminus (Chemainus) First Nation, Lake Cowichan First Nation, Halalt First Nation, Cowichan Tribes, and Lyackson First Nation. The Hul'qumi'num Treaty Group is currently in Stage 4 of the BC Treaty process (i.e. Agreement-in-Principle).

Ethnographic sources, which inform the Province's assessment of strength of claim, often refer to Cowichan people, rather than individual groups. Traditionally, the Cowichan people were organized into politically and economically independent local groups, occupied winter villages, and followed a seasonal round of resource exploitation from early spring to late fall with overlapping or shared use of many resource sites. Please note that the term 'Cowichan people' as used in the following *Preliminary Strength of Claim Assessment* includes all six HTG member nations (Cowichan Tribes, Lake Cowichan, Halalt, Stz'uminus, Lyackson and Penelakut).

Cowichan Tribes, Stz'uminus, Penelakut, and Halalt are also part of the Cowichan Nation Alliance focussed on resolution of Aboriginal rights, including title, on the south arm of the Fraser River.

II - Preliminary Strength of Claim Assessment

- The right of way (RoW) transects the asserted traditional territory of the Hul'qumi'num, between the Westridge terminal and Surrey, and again between Chilliwack and Hope (approximately 72 km of new RoW). The following Project facilities are located within the asserted traditional territory of the Hul'qumi'num: Hope Station, Wahleach Station, Port Kells Station, Burnaby Terminal, and Westridge Marine Terminal (WMT). The marine shipping route would pass through approximately 265 km of Hul'qumi'num Treaty Group's traditional territory.
- The Crown's preliminary assessment of Penelakut's Aboriginal rights in areas proximal to the marine shipping corridor of the Project, which transits the Strait of Georgia, is assessed as having a *prima facie* claim of Aboriginal rights ranging from weak to strong as follows. Areas of strong claims are areas within what ethno historic sources generally describe as pre-contact traditional territory of the Penelakut and where there is information of their historic use as part

of their traditional seasonal round, including areas in the Strait of Georgia proximal to, and within the southern reaches of, the southern arm of the Fraser River, portions of the southern Gulf islands that lie to the west of Galiano Island and above Active Pass and areas proximal to Penelakut Island. Areas of weak claims include areas proximal to the Strait of Georgia north of Gabriola passage and north and south of the South arm of the Fraser River, the Strait of Georgia south of Active Pass, and areas within Haro and Juan de Fuca Straits, which were not considered within the pre-contact traditional territory of the Penelakut and/or Cowichan people¹.

- The Crown's preliminary assessment of Penelakut's *prima facie* claim of Aboriginal title to upland areas proximal to the marine shipping corridor of the Project ranges from weak to strong. Strong claims are supported in certain upland areas proximate to Penelakut Island, proximate to Penelakut historic villages. In other areas where there is limited information supporting specific Penelakut sufficient and exclusive occupation use of areas at 1846, the claim is weak. The Crown does not have clarity regarding how Hul'qumi'num Treaty Group members are asserting Aboriginal title in certain areas where there is limited indication that any of the Hul'qumi'num Treaty Group member First Nations could have excluded each other at 1846. For example, upland areas proximal to the marine shipping corridor, including by the southern arm of the Fraser River; in this area, the Crown would assess the *prima facie* claim of Aboriginal title of the Penelakut Tribe as ranging from weak to moderate, with the stronger claims located in proximity to uplands in the vicinity of the large village site of Tl'ektines. The Crown also does not have clarity regarding how Hul'qumi'num Treaty Group members are asserting Aboriginal title in the southern Gulf Islands that lie to the west of Galiano Island and above Active Pass and to the west of Valdes and Gabriola; in these areas, the Crown would assess the *prima facie* claim of Aboriginal title of the Penelakut Tribe to upland areas as ranging from weak to weak-to-moderate as there is some indication of habitation and resource gathering sites utilized by Cowichan people likely at 1846. The following areas are generally described by ethno historic sources as outside the traditional territory of the Cowichan people without evidence of their occupation or use, such that there is no support for a *prima facie* claim of Aboriginal title to upland areas: proximal to the Strait of Georgia north of Gabriola passage and north of the South arm of the Fraser River, the Strait of Georgia south of Active Pass and south of the south arm of the Fraser River, and within Haro and Juan de Fuca Straits².
- In November 2014, Cowichan Tribes, Stz'uminus First Nation, Penelakut Tribe and Halalt First Nation filed an *Amended Notice of Civil Claim* seeking a declaration of Aboriginal title to an area described as the Tl'uqtinus Lands and fishing rights to the South Arm of the Fraser River. The above assessment of the strength of claimed Aboriginal title to the upland area west of and proximate to the Tl'uqtinus/Tl'ektines site was conducted to inform the scope of consultation regarding this project. It is a preliminary assessment only, considering only information reasonably available at the time of consultation and is not based on an exhaustive review of all

¹ The Hul'qumi'num Treaty Group: Review of Ethnographic, Historical and Archaeological Resources: Cowichan, Lake Cowichan, Halalt, Chemainus, Lyackson, Penelakut and Hwlitsum First Nations. Prepared by Aboriginal Research Division, Legal Services Branch, Ministry of Attorney General. September 8, 2009.

² Ibid

information and legal issues related to this potential claim, and does not reflect the Crown's opinion of whether the court will ultimately decide in favour of the First Nation in the litigation of this claim.

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Penelakut's Aboriginal Interests, the Crown is of the view that the legal duty to consult Penelakut lies at the middle portion of the *Haida* consultation spectrum. Penelakut was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which afforded Penelakut opportunities to be consulted at a deeper level.

Penelakut participated as an intervenor in the National Energy Board (NEB) process as part of the Hul'qumi'num Treaty Group affiliation. The Crown understands that Penelakut did not participate in the Oral Traditional Evidence Hearing, Information Request rounds, nor did they file written evidence or written final arguments. Penelakut did not participate in the oral summary argument hearing, nor have they sent additional correspondence to the NEB. Penelakut signed a letter of support with the proponent on April 2, 2015.

Penelakut was awarded \$40,000 plus travel for two to the hearing from the NEB as part of its Participant Funding Program. The Major Projects Management Office (MPMO) offered Penelakut \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Penelakut an additional \$14,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Penelakut signed contribution agreements with the MPMO in response to both of these offers, for a total of \$26,000 in allocated funding. On October 6, 2016, EAO issued \$5,000 in capacity funding to Penelakut to assist with the consultation process.

Penelakut met with the Crown consultation team on September 28, 2016 as part of the Cowichan Nation Alliance, in order to discuss their concerns about the Project.

The Crown provided a first draft of this Report to Penelakut on August 17, 2016 and a second draft on November 3, 2016. The Crown did not receive comments from Penelakut on the draft Report.

IV - Summary of Key Penelakut Issues and Concerns Raised

The Crown has gained its understanding of Penelakut Tribe's issues and concerns through information provided to the NEB and through direct engagement with the Crown. In addition, the Crown has considered information regarding the proponent's engagement with Penelakut Tribe, as described in the proponent's *Aboriginal Engagement Report* (July 2016). The Crown's understanding of Penelakut's key Project-related issues and concerns are summarized in the sections below. This section offers a summary of the key issues raised by Penelakut Tribe, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views

and conclusions. The Crown's understanding of Penelakut's key Project-related issues and concerns are summarized below:

Penelakut places a strong cultural value on the natural resources within its territory. The Penelakut people travelled throughout their territory, fishing, hunting and gathering a rich variety of foods. At the onset of each winter, Penelakut ancestors returned to their villages and focused on the ceremonies and cultural traditions of the Coastal Salish peoples. They have a rich tradition of carving monumental art such as house posts; their carvers are also masters of smaller works, such as spindle whorls, sacred masks and rattles, and decorated tools. Clothing was woven from cedar bark and their Coast Salish mountain goat blankets are world renowned. Fishing — from salmon and cod to oysters, clams and crabs — continues to provide a critical food on their tables today. Penelakut continues to use plants for medicines and foods, as well as hunt for waterfowl and large game. The forest also provides the materials for on-going practices of building ceremonial houses and living spaces, providing firewood, and crafting tools, canoes, art and ceremonial gear.

Methodology, Process, and Consultations

- Penelakut stated that they did not have access to enough funding to participate in the NEB process;
- Penelakut has expressed their discontent with what was perceived as the Federal Government's absence from the consultation process; and
- Penelakut raised concerns that the current regulatory regime is inadequate in protecting Penelakut's Aboriginal rights and title interests from the risk of spills within its traditional territory.

Impacts on Access to Harvesting Areas

- Penelakut expressed concern with construction and operation phase impacts on lands, water, fish, wildlife and other habitat that they feel will lead to restricted harvesting access.

Cumulative Impacts

- Penelakut expressed concern with the lack of shellfish, as it is one of their traditional foods. This would potentially worsen the already alarming food insecurity that their community suffers today.

Impacts of Increased Marine Traffic

- Penelakut is concerned about the potential for collision between tankers and other marine traffic;
- Penelakut is concerned on the risks that tankers bring to the safety of their small vessels;
- Penelakut is concerned that increased tanker traffic will result in waves affecting places where Penelakut fish and gather marine resources; and
- Penelakut stated that they are concerned about anchorages on the coast.

Accidents and Malfunctions

- Penelakut is concerned about marine health and human safety throughout the construction and operation of the pipeline in close proximity to the Fraser River;
- Penelakut is concerned about the potential for oil spills to adversely impact marine resources; and
- A pipeline malfunction in proximity of the Fraser River or a tanker casualty near the Salish Sea is of paramount concern to Penelakut, as they view this risk as impacting their Aboriginal rights and title interests.

Accommodation Measures

- Penelakut asked for anchorages regulation to prevent/prohibit ships to anchor all around their reserves' coast; and
- Penelakut would like to seek to engage in the economic opportunities associated with the Project.

Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Penelakut that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

Penelakut's Response to NEB Recommendation Report

Penelakut did not provide comments specific to the *NEB Recommendation Report*.

V- Potential Impacts of the Project on Penelakut's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Section 2.4.3 and Section 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Penelakut's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Penelakut's ability to practice Aboriginal Interests.

Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional land use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Penelakut's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Penelakut, Penelakut's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate (EAC) issued by the Province.

Penelakut completed a third-party Traditional Marine Resource Use (TMRU) study in 2013. The focus of the study was on Crown lands and waters within the asserted territory of Penelakut crossed by the Marine Regional Study Area (RSA)³. In its Supplemental Technical Report ([A4A0W1](#)), the proponent estimated approximate distances and directions from the marine shipping lanes based on information in Penelakut's report. Additional TMRU information for Penelakut was presented in *Volume 8B* ([A3S4K3](#)) of the Project application. Traditional land uses identified by Penelakut include hunting aquatic birds, coastal mammals and marine mammals, gathering plants, information on fishing sites, sacred sites, habitation sites, gathering areas for community members, and trails and travelways.

Impacts on Hunting, Trapping, and Plant Gathering

As described in the TMRU study, Penelakut community members hunt species such as duck, seal, sea lion, mink, otter, porpoise, killer whale, deer, raccoon, beaver and grouse. Plants gathered include yellow cedar, seaweed, ochre, wild cherry, blackberries, black / red cap berries, huckleberries, salal berries, and soap berries.

Eleven hunting sites were identified within the Marine RSA during the TMRU study, of which 10 are located in the Marine RSA. In *Volume 8B*, two additional marine hunting sites (Chemainus Bay / Chemainus River Estuary and Willy Island) were identified in the Marine RSA. Nine plant gathering sites were identified during the TMRU study, all of which are located in the Marine RSA. Shipping lanes are not crossed to access any of the hunting sites; however shipping lanes are crossed to access the Strait of Georgia plant gathering site. The nearest hunting site is approximately 4.5 km west of the shipping lanes.

In addition to providing traditional use information, Penelakut raised the following specific concerns with potential Project impacts relating to their hunting and gathering activities:

- Construction and operation phase impacts on lands, wildlife and other habitat that Penelakut asserts will lead to restricted harvesting access; and
- Potential for oil spills to adversely impact marine resources.

³ The area extending beyond the LSA boundary (i.e. the zone of influence or area where the element and associated indicators are most likely to be affected by Project-related marine vessel traffic.) where the direct and indirect influence of other activities could overlap with Project-specific effects and cause cumulative effects on the environmental or socio-economic indicator.

The general direct and indirect effects of the Project on hunting, trapping, and gathering, along with key mitigation measures, are described in Section 4.3.1 of the main body of this Report.

As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, old growth forests, wetlands, and terrestrial wildlife and wildlife habitat (including species at risk), marine mammals, and marine birds.

Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Penelakut's hunting, trapping, and plant gathering activities. The Crown understands that this short-term disruption could temporarily alter the behaviour of community members' hunting, trapping or plant gathering activities during construction, and that reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project, could have spiritual and cultural impacts on community members.

Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Section 4.3.1 of this Report). The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP) and the vegetation and wildlife management plans. The proponent would implement a range of mitigation measures that would reduce potential effects associated with Penelakut's hunting, trapping, and plant gathering activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

The proponent is committed to implementing weed management (as outlined in the Weed and Vegetation Management Plan) to reduce the potential for weed infestation following construction, and utilizing an Integrated Vegetation Management approach intended to reduce the use of herbicides and promote healthy ecosystems. The proponent will consult with Aboriginal groups regarding problem vegetation management and methods of treatment. Measures outlined in the proponent's Reclamation Management Plan are intended to stabilize and revegetate affected lands to achieve land productivity along the construction RoW and footprint, equivalent to the adjacent land use. The proponent has also committed to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project

NEB Condition 81 would require the proponent to develop a WMT-specific EPP, including mitigation and monitoring plans, to be finalized in consultation with Fisheries and Oceans Canada and potentially affected Aboriginal groups. The proponent would also be required to conduct a post-construction

monitoring program for marine mammals from the expansion of the WMT. The proponent has committed to various mitigation measures to reduce effects of construction and operation of the WMT on marine birds, further the proponent has committed to compile information regarding mortality and collision events and to include that information in post-construction monitoring reports.

In consideration of the information available to the Crown from the NEB process, consultation with Penelakut, Penelakut's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province, Project construction and routine maintenance during operation as well as project-related marine shipping are expected to result in a negligible-to-minor impact on Penelakut's hunting, trapping and plant gathering activities.

Impacts on Freshwater Fishing, and Marine Fishing and Harvesting

As summarized in the TMRU study, Penelakut community members fish species such as salmon, cod, herring, scallop, flounder, surf smelt, lingcod, sturgeon, perch, dogfish, trout, rockfish, and ray. Marine harvested species include clam, cockle, sea urchin, crab, herring roe, oyster, and geoduck. Community members also identified locations with unspecified fishing and marine harvesting.

Thirty-three fishing sites were identified during the TMRU study, of which 30 are within the Marine RSA. In *Volume 8B*, three additional marine harvesting sites (Kulleet Bay, Kuper Island and Oyster Bay) were also identified in the Marine RSA. The shipping lanes are crossed to access two fishing sites: Strait of Georgia and the Fraser River area.

In addition to providing traditional use information, Penelakut raised specific concerns with potential Project impacts relating to their freshwater fishing and marine fishing and harvesting activities:

- Increased tanker traffic will result in waves affecting places where Penelakut fish and gather marine resources;
- Construction and operation phase impacts on water, fish, wildlife and other habitat that Penelakut asserts will lead to restricted harvesting access;
- Impacts on marine health throughout the construction and operation of the pipeline in close proximity to the Fraser River; and
- Potential for oil spills to adversely impact marine resources.

The general direct and indirect effects of the Project on freshwater fishing, along with key mitigation measures, are described in Section 4.3.2 of the main body of this Report. The general direct and indirect effects of the Project on marine fishing and harvesting, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report.

Project-related marine vessels are expected to cause temporary disruptions to Penelakut's marine fishing and harvesting activities. The Crown appreciates that community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping

lanes. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Penelakut community members to take measures to reduce potential disruptions from tankers and allow planning for fishing activities to take place that minimizes disturbance from Project-related tankers. Reduced harvests, while not expected to occur from temporary access restrictions, could impact Penelakut's cultural activities and sharing of marine food with the community.

The conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with marine fishing and harvesting sites (Section 4.3.3 of this Report). The proponent would implement a range of mitigation measures that would reduce potential effects associated with Penelakut's marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, and scheduling and notification of Project activities (via the proponent's marine public outreach program).

In consideration of the information available to the Crown from the NEB process, consultation with Penelakut, Penelakut's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project construction and routine maintenance during operation and project-related marine shipping are expected to result in minor impacts on Penelakut's marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

As described in the TMRU study, gathering places identified by Penelakut community members include historic village sites, cultural and spiritual sites, cultural secular sites, and unspecified cultural sites. Sacred areas identified include historical cultural and burial sites, cultural and spiritual sites, and cultural secular sites.

Seven travelways were identified by Penelakut during the TMRU study, all of which are within the Marine RSA. The shipping lanes are not crossed to access the travelways. The nearest travelway identified is approximately 9 km from the shipping lanes. Forty-three gathering places were identified during the TMRU study, of which 36 are within the Marine RSA. In *Volume 8B*, three settlement areas (Kulleet Bay, Oyster Bay and Kuper Island) were also identified. Shipping lanes are crossed to access two gathering places: Fraser River area and Boundary Bay. Ten sacred areas were identified during the TMRU study, of which nine are within the Marine RSA. Shipping lanes are not crossed to access any sacred area, and the nearest area is approximately 8 km from the shipping lanes.

The general direct and indirect effects of the Project on traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this Report.

Marine mammals are of importance to many Coast Salish Aboriginal groups, and killer whales specially hold strong spiritual and cultural importance for many Aboriginal groups. The NEB concluded that effects on the endangered Southern resident killer whale and Aboriginal cultural use of Southern resident killer whale from Project-related shipping activities would be significant. The Crown is not aware of any specific cultural use of or concerns regarding killer whales raised by Penelakut during the NEB and Crown consultation processes.

Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown understands that there will be temporary interruptions to Penelakut's traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Penelakut, Penelakut's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project construction and routine maintenance during operation and Project-related marine shipping are expected to result in negligible-to-minor impacts on Penelakut's other traditional and cultural practices.

Impacts on Aboriginal Title

Penelakut raised the following specific concerns with potential Project impacts relating to their Aboriginal title claim:

- The current regulatory regime is inadequate in protecting Penelakut's Aboriginal rights and title interests from the risk of spills within its traditional territory; and
- A pipeline malfunction in proximity of the Fraser River or a tanker accident near the Salish Sea is of paramount concern to Penelakut as they view this risk as impacting their Aboriginal rights and title interests.

The Crown provides a description of the potential impacts of the Project on Aboriginal title in Section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid/reduce Project impacts associated with the degree of disturbance to terrestrial, marine and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as well as NEB Conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved.

The Crown notes that Penelakut executed a Mutual Benefits Agreement with the proponent. Although these agreements are confidential, the Crown understands they may contain provisions for financial, environmental and training benefits that could further reduce or accommodate impacts to Aboriginal title claims if the Project proceeds.

Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in Section 4.3.5, it is the Crown's opinion that the Project is expected to have negligible impacts on Penelakut's asserted Aboriginal title to the proposed Project area.

Impacts Associated with Accidental Pipeline, Terminal, and Tanker Spills

Penelakut expressed concerns regarding the impact of a potential oil spill on their Aboriginal Interests, including the effects of a potential spill on:

- Marine resources; and
- The Fraser River and the Salish Sea.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. Section 4.3.6 of the main body of this Report sets out the impacts associated with accidental spills. In consideration of this information and analysis, as well as information available to the Crown on Penelakut's Aboriginal Interests and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts on Penelakut's Aboriginal Interests. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.⁴

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline and marine safety regimes would only partially address these ongoing burdens and risks.

Under the typical conditions for pipeline construction and operations and for marine vessel use of the area between the WMT and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of Project-related activities on the exercise of Penelakut's Aboriginal Interests would be up to minor.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Penelakut's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of

⁴ Trans Mountain Final Argument, p. 85 and 207

Penelakut in emergency response planning activities. The federal Crown is considering incremental measures that would further accommodate the potential adverse impacts of the Project on Penelakut, as discussed in Sections 4 and 5 of the main body of this Report.

In addition, the Crown is aware that the proponent has entered into a Mutual Benefits Agreement with the Penelakut in an attempt to offset potential impacts, should the Project proceed.

Appendix D.13 – Scia’new First Nation (Beecher Bay Indian Band)

I – Background Information

Scia’new First Nation (Scia’new) or Beecher Bay Indian Band is a Coast Salish community located on Vancouver Island, British Columbia (BC). Scia’new’s asserted traditional territory includes an area from west of the Saanich Inlet to the southern tip of Vancouver Island.

Scia’new is a member of the Te’mexw Treaty Association (TTA) along with the Nanoose First Nation, T’Sou-ke First Nation, Malahat First Nation and Songhees First Nation. The TTA was created to represent its member First Nations in treaty negotiations with the governments of BC and Canada. The TTA is currently in Stage 5 of the BC Treaty process (i.e. Final Agreement), having signed an agreement-in-principle in April 2015.

Scia’new is a signatory to the *First Nations Land Management Act*, with the Beecher Bay Lands Department overseeing the protection and management of the community’s lands and resources – as per Beecher Bay’s Land Code.

As of March 2016, Scia’new has a registered population of 253 members, of which 102 members live on a community reserve. Scia’new’s predominant language is Hul’q’umi’num.

II – Preliminary Strength of Claim Assessment

- Approximately 39 km of the marine shipping route would pass within the southern part of Scia’new’s traditional territory.
- The Province of BC understands that Scia’new has Douglas Treaty rights to carry out fisheries and hunt as formerly within its historic traditional territory.
- Canada recognizes the Douglas Treaties and understands that Scia’new has members who are descendants of one or more signatories to one or more Douglas Treaties. Canada remains committed to working toward a common understanding of the content and scope of the Douglas Treaties with Scia’new, to implement the treaty through agreements with the Crown, and to explore opportunities to honour and recognize the Douglas Treaties.

Ethnohistoric evidence suggests that the people at Beecher Bay are identified in the sources as Clallum from the Olympic Peninsula who moved to the Beecher Bay location in the middle of the 19th century, and that their territory encompassed areas between Sooke Inlet and Albert Head on Vancouver Island at the time of the signing of the Douglas Treaties in 1850.¹

¹ Te’mexw Treaty Association and Esquimalt Nation. Songhees, Beecher Bay, Scia’new (Beecher Bay) and Malahat First Nations, Esquimalt Nation: Review of Ethnographic and Historical Sources. Ministry of Justice, Legal Services Branch, Aboriginal Research Division. September 5, 2008. Revised to June 16, 2015; Proposed National Marine Conservation Area Reserve in the Southern Strait of Georgia: Review of Ethnographic and Historical Sources. Prepared by Ministry of Justice, Legal Services Branch, Aboriginal Research Division. December 19, 2012. Revised November 20, 2013.

III – Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Scia'new's Aboriginal Interests, the Crown is of the view that the legal duty to consult Scia'new lies at the middle portion of the *Haida* consultation spectrum. Scia'new was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which afforded Scia'new opportunities to be consulted at a deeper level.

Scia'new participated in the National Energy Board (NEB) review process as an intervenor and submitted written evidence, including a Traditional Marine Resource Use (TMRU) report, a written final argument, and corresponded with the NEB. Scia'new also responded to the Crown's Issues Tracking Table Information Request by further elaborating on their Project-related concerns ([A71207](#)).

Scia'new signed a contribution agreement with the NEB for \$24,910 in participant funding plus travel for one to the hearing. The Major Projects Management Office (MPMO) offered Scia'new \$7,650 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Scia'new an additional \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Scia'new signed contribution agreements with the MPMO in response to both of these offers, for a total of \$13,650 in allocated funding. On October 14, 2016 Scia'new was issued \$5,000 in capacity funding by EAO to assist with the consultation process.

Scia'new signed a letter of support with the proponent on March 26, 2015 ([A4J9Z7](#)), and formally withdrew any objection to the issuance of a Certificate of Public Convenience and Necessity for the Project.

Scia'new met with the Crown consultation team on April 21, 2016 and October 13, 2016.

The Crown provided a first draft of this Report to Scia'new First Nation for review and comment on August 17, 2016. The Crown did not receive comments from Scia'new on the draft Report. A second draft of this Report was provided to Aboriginal groups for review and comment on November 2, 2016. The Crown has not received comments from Scia'new.

Scia'new provided a separate Aboriginal group submission to the Crown on November 15, 2016.

IV – Summary of Key Issues and Concerns Raised

The Crown gained its understanding of Scia'new's issues and concerns through the community's involvement in the NEB review process and through correspondence and meetings with the Crown. In addition, the Crown has considered information regarding the proponent's engagement with Scia'new, as described in the proponent's Aboriginal Engagement Report (July 2016).

Throughout the NEB review and Crown consultation process, Scia'new set out the community's views of the consequences of the Project proceeding, as well as the potential impacts of increased marine shipping on their asserted rights and interests. As a coastal community, Scia'new expressed key

concerns focused on the marine shipping component of the Project. This section offers a summary of the key issues raised by Scia'new, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Scia'new's key Project-related issues and concerns are summarized below:

- The impact of marine traffic on social and familial relations with communities on the other side of the Strait;
- The cumulative effects of increased vessel traffic;
- The potential adverse effects of increased vessel traffic on shoreline erosion and culturally significant sites;
- The impacts of increased marine traffic on traditional fishing activities;
- The risks associated with a marine spill as well as the adequacy of spill response planning and the capacity of insurance companies to pay for damages in the event of a spill;
- The lack of a comprehensive liability and compensation regime in case of marine oil spill incidents in relation to cultural loss; and
- The potential effects of increased marine traffic on Scia'new's economic activities, including a community aquaculture project, marina and real estate development.

Scia'new also raised procedural concerns regarding the NEB review process, including the lack of oral cross-examination and the lack of direct government involvement in consultation with Scia'new during the NEB hearing process.

Scia'new's Response to NEB Recommendation Report

No specific comments were received from Scia'new on the *NEB Recommendation Report*.

Accommodation Proposals

Scia'new proposed a series of accommodation proposals to the NEB in its written final argument ([A75052](#)) on January 12, 2016. Scia'new noted in a letter dated June 16, 2016, that while Scia'new submitted a letter of support for the Project to the NEB and acknowledged the existence of an issues table that captures proposed measures for implementation, the proponent neglected to include the text of the proposals within the body of the document. Scia'new believes that such an oversight may mislead readers of the *Proponent Engagement Report* into thinking that Scia'new did not propose any additional mitigation measures.

Scia'new supports regulatory approval of this Project on the terms and conditions set out in the Mutual Benefits Agreement. However, in order better protect the environment and mitigate potential impacts on the environment, Scia'new's culture, rights and Interests, they submit that the following measures should be implemented prior to and as a condition of the Project proceeding.

Spill Prevention

- Emergency Response Towing Vessels should be stationed at strategic locations along the marine shipping route;
- A resident salvor and personnel as well as salvage equipment should be stationed at strategic locations along the marine shipping route;
- The proponent and the federal government should consult with pilots operating Project-related tankers in Canadian waters regarding whether a particular tanker satisfies the proponent's Tanker Acceptance Criteria and federal regulations; and
- If Project-related tankers in Canadian waters do not meet these criteria and regulations, the proponent and the federal government should take enforcement measures ensuring that either the deficiency is corrected or that the tanker no longer operates in Canadian waters.

Spill Preparedness

- The federal government should commission independent research on the fate and behavior of diluted bitumen in the marine environment and current best practices for spill response;
- The federal government should provide Scia'new and other interested parties an opportunity to comment on that research;
- If the research concludes there is a risk that diluted bitumen will sink, the federal government should require the proponent to reassess the risk of an oil spill involving a Project-related tanker including proposed mitigation measures;
- A spill response base should be established on or near Beecher Bay I.R. No 1;
- Scia'new should be further consulted regarding the establishment of that spill response base;
- The spill response capacity should be increased to an amount considerably greater than 20,000 tonnes (21,277m³) and this response capacity should be available at each of the major spill response bases, including Beecher Bay,
- Scia'new and other interested parties should be consulted regarding that increase and, if required, the federal government should commission independent research to assist in determining the amount it should be increased to;
- The proponent should fund the establishment of a plan, in consultation with Scia'new and other interested parties, for bringing together and training a shoreline cleanup and wildlife response workforce in the event of an oil spill involving a Project-related tanker; and
- The federal Crown and the proponent should engage in meaningful consultations with Scia'new and other First Nations with Aboriginal or treaty rights in or around the Salish Sea regarding establishment of a Foundation, including the federal government and Trans Mountain's respective financial contributions to the Foundation.

Scia'new further submits that, regardless whether the Project proceeds, the federal government should implement the following regulatory improvements:

Hearing Process

- Amend the environmental assessment process for future projects that may impact Scia'new's rights and Interests, as contemplated in the Liberal Party's 2015 election platform, in consultation with Scia'new and other interested parties.

Spill Compensation Regime

- Amend the compensation regime for marine-based oil spills to ensure that the total compensation available reflects the total costs likely to be incurred in the event of a major oil spill and to ensure that damages to Scia'new's harvesting rights are compensable under the regime, in consultation with Scia'new and other interested parties.

Scia'new acknowledges that some of the above conditions are beyond the jurisdiction of the NEB; however, submits that, to the extent they are, they should be addressed through federal regulation.

Section 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Scia'new that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

V – Potential Impacts of the Project on Scia'new's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), including by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Scia'new's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Scia'new's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g. fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Scia'new's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Scia'new, Scia'new's engagement with the proponent, proponent commitments, recommended

NEB conditions, as well as relevant conditions proposed by the Province of any Environmental Assessment Certificate (EAC) issued.

Scia'new completed a TMRU study and conducted an independent, third-party traditional marine and land use baseline study (TMLUS). The TMLUS, titled, *Beecher Bay First Nation: Traditional Marine and Land Use Baseline Documentation* ([A4Q1L1](#)), was completed in May 2015. The TMLUS summarizes information related to Scia'new's traditional knowledge, values, as well as potential effects and mitigations related to the Project.

Impacts on Hunting, Trapping and Plant Gathering

In their TMLUS, Scia'new identified that community members hunt black duck, sawbill, goldeneye, goose, harbour seal and bufflehead and harvest the following plants in their traditional territory: seaweed, lichen, berries, bark and nettles. A total of eight hunting and plant gathering sites were identified by Scia'new in their TMLUS. Although all sites are located within the Marine Regional Study Area (RSA),² none of the sites require community members to cross the marine shipping lanes.

The general direct and indirect effects of the Project on hunting, trapping, and gathering, along with key mitigation measures, are described in Sections 4.3.1 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Sections 4.3.1 of this Report). The proponent would implement a range of mitigation measures that would directly or indirectly reduce potential Project-related marine shipping impacts on Scia'new's hunting, trapping, and plant gathering activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

In consideration of the information available to the Crown from the NEB process, consultation with Scia'new, Scia'new's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in a negligible impact on Scia'new's hunting, trapping and plant gathering activities.

Impacts on Marine Fishing and Harvesting

As described in Scia'new's TMLUS, community members fish for numerous species including halibut, black bass, ling cod, rock cod, red snapper, herring, skate, salmon (i.e. sockeye, Coho, pink, and spring), crab, barnacle, abalone, urchins, clam, chitons, sea cucumber, and ground fish. Scia'new identified 23 marine fishing sites in their TMLUS, all of which are within the Marine RSA. Five of the fishing sites

² The area extending beyond the LSA boundary (i.e. the zone of influence or area where the element and associated indicators are most likely to be affected by Project-related marine vessel traffic.) where the direct and indirect influence of other activities could overlap with Project-specific effects and cause cumulative effects on the environmental or socio-economic indicator.

identified would require Scia'new community members to cross the marine shipping lanes: Constance Bank; Middle Bank; Border Bank; 18 Fathom Reef; and Swiftsure Bank. Swiftsure Bank, where community members fish for salmon and ground fish, lies within the shipping lane.

In addition to providing traditional use information, Scia'new raised specific concerns during the NEB process and Crown consultation process with potential Project-related impacts on their marine fishing and harvesting activities, including impacts of increased marine traffic on traditional fishing activities.

The general direct and indirect effects of the Project on marine fishing and harvesting activities, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report. The conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with marine fishing and harvesting activities (Section 4.3.3 of this Report). The proponent would implement a range of mitigation measures that would directly or indirectly reduce potential Project-related marine shipping impacts on Scia'new's marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, and scheduling and notification of Project activities (via the proponent's marine public outreach program).

In consideration of the information available to the Crown from the NEB process, consultation with Scia'new, Scia'new's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities expected are to result in negligible-to-minor impacts on Scia'new's marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

The Juan de Fuca Strait is an important travelway identified by Scia'new in their TMLUS. Scia'new community members use various routes throughout the Juan de Fuca Strait to access traditional marine use sites including fishing and gathering sites. Within the Marine RSA, Scia'new identified multiple travelways that intersect marine shipping lanes and thus community members would have to cross shipping lanes when using these travelways. Scia'new did not identify gathering or sacred areas in their TMLUS.

The general direct and indirect effects of the Project on traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown understands that there will be temporary interruptions to Scia'new's traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project.

Marine mammals are of importance to many Coast Salish Aboriginal groups, and killer whales specially hold strong spiritual and cultural importance for many Aboriginal groups. The NEB concluded that effects on the endangered Southern resident killer whale and Aboriginal cultural use of Southern resident killer whale from Project-related shipping activities would be significant. The Crown is not aware of any specific cultural use of or concerns regarding killer whales raised by Scia'new during the NEB and Crown consultation processes.

In consideration of the information available to the Crown from the NEB process, consultation with Scia'new, Scia'new's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in negligible-to-minor impacts on Scia'new's other traditional and cultural practices.

Impacts Associated with Accidental Tanker Spills

Scia'new expressed concerns regarding the impact of a potential oil spill on their Aboriginal Interests, including the risks associated with a marine spill, the adequacy of spill response planning, and the capacity of insurance companies to pay for damages in the event of a spill.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with an accidental tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. A discussion of the potential impacts of an accidental spill on Aboriginal Interests is provided in Section 4.3.6 of this Report.

In consideration of this information and analysis, as well as information available to the Crown on Scia'new's Aboriginal Interests and concerns raised by Scia'new during the NEB review and Crown consultation processes, a pipeline spill associated with the Project could result in minor to serious impacts on Scia'new's Aboriginal Interests. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.³

VI – Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing marine safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for marine vessel use of the area between the Westridge Marine Terminal and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the marine-shipping component of the Project on the exercise of Scia'new's Aboriginal Interests would be up to negligible-to- minor.

³ Trans Mountain Final Argument, p. 85 and 207

However, given existing use of the marine shipping corridor within areas proximate to the exercise of Scia'new's Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of Scia'new's Aboriginal Interests, the federal Crown is considering additional measures to further offset the potential impacts of the marine-shipping component of the Project on Scia'new. Please see Sections 4 and 5 of the main body of this Report for a discussion of proposed accommodation measures.

In addition, the Crown is aware that the proponent has entered into a Mutual Benefits Agreement with Scia'new in an attempt to offset potential impacts, should the Project proceed.

Appendix D.14 – Semiahmoo First Nation

I - Background Information

Semiahmoo First Nation (Semiahmoo) are Coast Salish people. Semiahmoo's asserted traditional territory includes part of the Lower Mainland area in British Columbia (BC), including sections of the Fraser River and the Strait of Georgia. In meeting with Crown officials, Semiahmoo described themselves as "ocean people" and part of a transboundary nation that includes the Lummi in the United States (US). Semiahmoo used to be reef fishers, with up to 27 fishing nets at one time in Boundary Bay. Semiahmoo members historically spoke the Halkomelem language.

Semiahmoo has one reserve (129.1 hectares [ha]) located near the US international boundary, along Semiahmoo Bay and bordering the cities of Surrey and White Rock, BC. As of March 2016, Semiahmoo's registered population totals 97 individuals with 51 living on-reserve.

II - Preliminary Strength of Claim Assessment

Aspects of the Project right-of-way (RoW) as well, as the marine shipping areas, are within Semiahmoo's asserted traditional territory:

- Approximately 64 kilometres (km) of the proposed pipeline and four pipeline facilities, including Sumas Station, Sumas Terminal, Border Traps, and Port Kells Station, would be located within Semiahmoo's traditional territory.
- Approximately 63 km of the marine shipping route would pass within the western part of Semiahmoo's asserted traditional marine territory.

The Crown's preliminary assessment of Semiahmoo's claims for Aboriginal rights over the section of the Project pipeline that spans the area from the TransCanada Highway corridor in Coquitlam to the valley west of Vedder Mountain is assessed as a *prima facie* range from weak to moderate. The claim is moderate in proximity to the Salmon River and Fort Langley and diminishes to the east and west of this area.

The Crown's preliminary assessment is that Semiahmoo has a weak *prima facie* claim for Aboriginal title over the section of the Project pipeline that spans the area from the TransCanada Highway corridor in Coquitlam to the valley west of Vedder Mountain.

The Crown's preliminary assessment of Semiahmoo's *prima facie* claim for Aboriginal rights to harvest marine resources within the marine shipping corridor of the Project that spans from the Strait of Georgia that is proximal to Richmond to the southern portion of Semiahmoo's traditional territory adjacent to Cordova Bay on Vancouver Island range from weak to moderate. Semiahmoo is assessed as having a weak Aboriginal rights claim along the shipping route adjacent to Richmond to Tsawwassen. The claim appears to be moderate along the portion of shipping route that follows the international boundary adjacent to Point Roberts and south towards Saanich on Vancouver Island. Ethnographers suggest that Semiahmoo's traditional territory at the time of contact was below the Canadian border in

Drayton and Birch Bay and also utilized the San Juan Islands. The Semiahmoo had important connections with Saanich groups on the Saanich peninsula and the Southern Gulf Islands, and there is some evidence to suggest that Semiahmoo had access to resources within these areas.

The Crown's preliminary assessment is that Semiahmoo has a weak *prima facie* claim for Aboriginal title over the marine shipping route upland areas for the Project that are proximal to Richmond to the southern portion of Semiahmoo's traditional territory adjacent to Cordova Bay on Vancouver Island. At 1846, Semiahmoo core territory is associated with Boundary Bay, Birch Bay, Point Roberts and Semiahmoo Bay. The Semiahmoo moved to this area before 1846 to assume the southern portion of Snokomish territory who had succumbed to epidemics. This area is approximately 30 km from the shipping route as it travels along the international boundary adjacent to Point Roberts.

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Semiahmoo's Aboriginal Interests, the Crown is of the view that the legal duty to consult Semiahmoo lies at the lower end of the *Haida* consultation spectrum. In consideration of the Project intersecting with Semiahmoo asserted traditional territory, Semiahmoo was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which afforded Semiahmoo opportunities to be consulted at a deeper level.

On August 27, 2014, the proponent filed a letter of support for the Project with the NEB from Semiahmoo which stated that Semiahmoo "acknowledges and agrees that it is satisfied with the mitigation measures provided by Trans Mountain in respect of the Expansion and further agrees that there has been adequate consultation for the Project on the understanding that Semiahmoo First Nation is still exploring adequate accommodation measures with government." ¹

Semiahmoo did not participate in the National Energy Board (NEB) hearing process, and did not submit an application for funding to the NEB. Semiahmoo's engagement in consultation activities with the Crown began with correspondence in the post-NEB hearing phase. The Crown met with Semiahmoo at the Semiahmoo reserve on April 14, 2016.

The Major Projects Management Office (MPMO) offered Semiahmoo \$6,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Semiahmoo an additional \$7,000 to support their participation in consultations following the release of the NEB Recommendation Report. Semiahmoo did not sign contribution agreements with the MPMO and did not make use of this funding opportunity.

¹ B271 - Trans Mountain Pipeline ULC - Letter of Support from Semiahmoo First Nation (A63175) <
<https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2525076&objAction=browse>>

Semiahmoo signed a letter of support with the proponent on August 27, 2014 formally withdrawing any objection to, and expressing support for the Project.

The Crown provided a first draft of this Report to Semiahmoo for review and comment on August 17th, 2016. The Crown did not receive comments from Semiahmoo on the draft Report.

A second draft of this Report was provided to Aboriginal groups for review and comment on November 3, 2016. The Crown has not received comments from Semiahmoo.

IV - Summary of Semiahmoo's Key Issues and Concerns Raised

The Crown has gained its understanding of Semiahmoo's issues and concerns through correspondence with Semiahmoo, and the information shared by Semiahmoo at the April 14, 2016 meeting. In addition, the Crown has considered information regarding the proponent's engagement with Semiahmoo, as described in the proponent's Aboriginal Engagement Report (2016).

This section offers a summary of the key issues raised by Semiahmoo, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Semiahmoo's key Project-related issues and concerns are summarized below:

Funding

Semiahmoo stated that they could not participate in the NEB review process because it was too expensive.

Emergency Response

Semiahmoo described their emergency response center and team and stated the importance to their community of having sufficient emergency response capacity. Semiahmoo stated that as a First Nation community, they have taken the initiative to deal with emergency response in a self-sufficient manner because there is currently no agreement in place with Surrey or White Rock. However, Semiahmoo stated that they are working with these municipalities to improve relations.

Access to Traditional territory

Councillor Charles detailed the difficulties accessing traditional territory experienced by Semiahmoo as a result of the location of their community and the fact that water access to the Salish Sea is only possible through US waters due to the enclosed nature of Boundary Bay.

Marine Traffic

Semiahmoo expressed concern with increased marine traffic that will result as projects are approved. Semiahmoo is involved in an estimated 12 to 13 consultation processes for projects that involve marine tankers in the Salish Sea. Semiahmoo has conducted a study of currents and flow in the Salish Sea, and the community has stated that in the event of a spill, Semiahmoo will be affected.

Marine Resource Harvesting

Semiahmoo stated that they are a fishing community. Semiahmoo described a permanent closure of the shellfish fishery on the Canadian side of the Georgia Strait, and expressed interest in having the fishery re-opened. Semiahmoo community members also fish for crab and described the supply of crab as non-existent by the end of the season due to the activities of commercial fishers.

Semiahmoo further stated that their members are no longer able to participate in reef net fishing because the US border encloses their bay, and they are not allowed to reef net fish in US waters. Semiahmoo stated that in the 1960's was the last time they attempted to reef net fish, and their members were arrested for being in US waters.

Semiahmoo stated that the fishery they do have left is vulnerable to adverse effects from the Project and other projects. Semiahmoo stated that they are commissioning their own studies because proponents have their own scope of work and values, and Semiahmoo has not had a say in how the studies are undertaken.

Environmental Effects

Semiahmoo expressed concern with respect to water, as their well water comes from a deep aquifer and is close to the ocean. If there is a spill, Semiahmoo stated they do not know where they will get their water from. Semiahmoo stated that the potential contamination of water is a higher concern for them than other concerns relating to occurrences in the northeastern portion of Semiahmoo territory (i.e. in the Fraser Valley where the pipeline is proposed to go) as they no longer hunt or gather medicines in the Fraser Valley. Semiahmoo stated that they are very fortunate to have interfamily relations with the Shuswap people of the interior of BC, as that is a place they can go hunting.

Human Health

Semiahmoo stated that food security is seen as a huge issue for Semiahmoo members, as they no longer eat the traditional foods they should be. Councillor Charles stated that Semiahmoo could be considered a species at risk because their critical habitat has been altered/changed by sources other than themselves, and the food they rely on for sustainability can no longer be accessed.

Cumulative Effects

Semiahmoo expressed concern that broader cumulative effects are not being considered because proponents view the international boundary as the geographic extent for which an assessment is needed. This is of concern to Semiahmoo as their location is enclosed by the US border, but that the environmental effects of marine vessel traffic or accidents for example, are not contained by political boundaries.

Aboriginal Rights and Title

Semiahmoo stated that they assert Aboriginal title around the whole of Boundary Bay. Semiahmoo expressed that they want the commercial fishery to be stopped and identified concerns that there are

20 Vietnamese companies with licenses. Semiahmoo are not allowed to fish on Roberts Bank in the US, and can only fish in Canada at Boundary Bay and Mud Bay.

Proposals for Accommodation

Semiahmoo had the following requests regarding potential accommodations for impacts on Semiahmoo right and interests:

- Clean up the foreshore;
- Close the commercial fishery in Semiahmoo Bay (Semiahmoo should have priority for access to the crab fishery in the bay);
- Provide assistance with emergency response; and
- Revenue sharing - for example placing a fixed fee on every ship that comes through Semiahmoo traditional territory.

Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Semiahmoo that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

Semiahmoo's Response to NEB Recommendation Report

No specific comments received by the Crown from Semiahmoo First Nation on the *NEB Recommendation Report*.

V - Potential Impacts of the Project on Semiahmoo's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and Section 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group, including areas within the vicinity of marine shipping related to the Project, may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Semiahmoo's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Semiahmoo's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Semiahmoo's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Semiahmoo, Semiahmoo's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate (EAC) issued by the Province.

Semiahmoo completed an interim third-party traditional land and marine use (TLMRU) study in 2014 titled *An Interim Report on the Traditional Land and Marine Resource Use (TLMRU) and Practices of the Semiahmoo First Nation for the Proposed Kinder Morgan Trans Mountain Pipeline Expansion Project (TMX) System*. The report included identification of traditional land uses in the segment of the proposed pipeline from Burnaby to Westridge. Traditional land uses identified by Semiahmoo include hunting, gathering plants, information on fishing sites, sacred sites, habitation sites, and gathering areas for community members. Traditional use findings were summarized in Volume 5B of the Project Application, *Volume 8B Technical Report*, and a supplemental technical report ([A3S4K3](#), [A4H1X0](#), [A3S1S0](#)).

Impacts on Hunting, Trapping and Plant Gathering

Historically, Semiahmoo community members hunted elk, black bear, mountain goat, beaver, duck, geese, crane, swan and other migratory birds. Plants used by Semiahmoo community members include fir, bulrush, red cedar, bitter cherry, tule rush, strawberry, Saskatoon wood, camus lily, raspberry, huckleberry, dewberry, gooseberry, and thimbleberry. Specific hunting, trapping or plant gathering sites were not identified by Semiahmoo in their TLMRU study for the Project.

Semiahmoo raised concerns related to environmental effects of the Project on hunting, trapping, and plant gathering activities, including impacts of the Project on Semiahmoo's food security and broader cumulative effects concerns. As described in the NEB Recommendation Report, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, old growth forests, wetlands, and terrestrial wildlife and wildlife habitat (including species at risk), marine mammals, and marine birds. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping, and gathering (Section 4.3.1 of this Report) and the proponent would implement several mitigation measures to reduce potential effects to species important for Semiahmoo's hunting, trapping, and plant gathering activities.

The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction of wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP) and the vegetation and wildlife management plans (including a marine mammal protection program). The proponent will also develop plans to implement,

monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups.

Semiahmoo raised concerns with potential Project-related impacts to locations and access to hunting, trapping, and plant gathering activities, including access to traditional foods. Project-related pipeline construction and routine maintenance is expected to cause short-term, temporary disruptions to Semiahmoo's access to hunting, trapping and plant gathering activities, largely confined to the Project footprint for the pipeline and associated facilities.

The Crown understands that with pipeline construction and reclamation activities, disruptions to access may result in a loss of harvesting opportunities for Semiahmoo. Project-related marine shipping is expected to disrupt Semiahmoo's marine vessels and harvesters, and this could disrupt activities or access to hunting, trapping, and plant gathering sites. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and gathering sites (Section 4.3.1 of this Report) and the proponent would implement several mitigation measures to reduce potential effects on Semiahmoo's hunting, trapping, and plant gathering activities. These mitigations include management plans that include access management, scheduling and notification of Project activities, and environmental monitoring programs. The Access Management Plan is intended to reduce disturbances caused by access, construction equipment and vehicle traffic, during and following construction in order to minimize disturbance to access to Semiahmoo's traditional lands.

The proponent has committed to minimizing the development of access routes, controlling public access along the construction RoW, selecting appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent has also committed to work with applicable resource managers, traditional land and resource users to define locations where access control is necessary, and what type(s) of access control will be implemented. In the event that hunting, trapping, and plant gathering sites are identified during ongoing engagement with Semiahmoo prior to construction, the sites will be assessed, and appropriate mitigation measures will be determined.

As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Semiahmoo community members to take measures to reduce potential disruptions from tankers and allow planning for hunting, trapping and plant gathering activities to take place that minimizes disturbance from Project-related tankers. Reduced harvests, while not expected to occur from temporary access restrictions, could impact Semiahmoo cultural activities and sharing of marine food with the community. The proponent committed to working with Semiahmoo to develop strategies to most effectively communicate the construction schedule and work areas to community members.

In terms of potential direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities, the Crown understands that

short-term, temporary disruptions to Semiahmoo's hunting, trapping, and plant gathering activities could temporarily alter the behaviour of community members' during construction. A reduction in community members' participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project could have spiritual and cultural impacts on community members. The Crown understands that Semiahmoo may experience interruptions to traditional activities due to Project-related marine shipping activities, and community members could be discouraged from travelling to hunting, trapping, and plant gathering sites that require these members to cross shipping lanes. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential social, cultural, spiritual, and experiential effects associated with hunting, trapping, and plant gathering activities (Section 4.3.1 of this Report) and the proponent would implement several mitigation measures to reduce potential effects to Semiahmoo's hunting, trapping, and plant gathering activities.

The proponent is committed to utilizing an Integrated Vegetation Management approach intended to reduce the use of herbicides and promote healthy ecosystems. Measures outlined in the proponent's Reclamation Management Plan are intended to stabilize and revegetate affected lands to achieve land productivity along the construction RoW and footprint, equivalent to the adjacent land use. The proponent has also committed to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project, and will communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program.

The Crown has considered available information from the NEB process, consultation with Semiahmoo, Semiahmoo's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province. In consideration of this information, the Crown expects impacts of Project construction and operation, and Project-related marine shipping activities on Semiahmoo's hunting, trapping and plant gathering activities would be negligible-to-minor. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related pipeline and facility construction and operation, and marine shipping activities are likely to have low to moderate magnitude environmental effects on terrestrial, aquatic, and marine species harvested by Semiahmoo;
- Construction of the pipeline and associated facilities are likely to cause short-term temporary disruptions to Semiahmoo's community members accessing traditional hunting, trapping and plant gathering sites within the Project footprint; Project-related marine shipping activities are likely to cause temporary disruptions to activities or access to sites during the period of time Project-related tankers are in transit through Semiahmoo's traditional territory; and
- Concerns identified by Semiahmoo regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their hunting, trapping and plant gathering activities.

Impacts on Freshwater and Marine Fishing and Harvesting

As described in Semiahmoo's TLMRU study, community members historically used reef nets in the ocean. Fished species identified by Semiahmoo include chum salmon, sockeye salmon, herring, halibut, eulachon, and sturgeon. During the desktop study and literature review conducted for the Project, fish and marine species harvested include: barnacles; butter, cockle, manila, horse and littleneck clams; Dungeness and red rock crab; giant red chiton; green and red sea urchin; mussels; native and Pacific oysters; northern abalone; octopus; prawns; sea cucumber; herring roe; grey whales; killer whales; Steller sea lions; Pacific white-sided dolphins; harbor seals; porpoises; skate; octopus; waterfowl; seaweed; sea lettuce; kelp; red lavers; salmon (sockeye, Chinook, chum, coho, pink); steelhead; anchovies; bullhead; dogfish; sole; halibut; herring; cod (rock and ling); and red snapper.

Semiahmoo identified concerns related to environmental effects of the Project on fishing activities including the cumulative effects of shipping, as well as potential adverse impacts on marine harvesting activities such as fishing and harvesting shellfish and crab. As described in the NEB Recommendation Report, Project-related activities could result in low to moderate magnitude effects on freshwater and marine fish and fish habitat, surface water and marine water quality. Moderate effects to fish and fish habitat in the terrestrial and aquatic environments would be localized to individual watercourse crossings, and effects to marine fish and fish habitat would be limited to a few or many individuals, where any potential serious harm would be compensated by offset measures.

NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Section 4.3.2 and 4.3.3 of this Report). A number of recommended NEB conditions require the proponent to file reports that will monitor Project-related impacts to freshwater fish and fish habitat, marine fish and fish habitat, and riparian habitats (NEB Conditions #71, #75, #92, #151, and #154). The proponent has committed to time watercourse crossing construction activities to occur within the least risk biological windows in an attempt to avoid causing serious harm to fish, has committed to working with Aboriginal groups to identify the most appropriate means of offsetting serious harm to marine fish and fish habitat, and has proposed the implementation of channel and bank reclamation measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat. For Project-related marine shipping activities, the proponent will require all tankers to process and empty their bilges prior to arrival and lock the discharge valve of the bilge water while in Canadian waters.

In Volume 8B, preliminary traditional fishing areas used for subsistence activities were identified by Semiahmoo. Traditional fishing areas identified in the Marine Regional Study Area (RSA)² include Semiahmoo Bay, Boundary Bay, Mud Bay, and the Strait of Georgia. The locations were not specified; therefore it is unknown whether the shipping lanes are crossed to access the sites. During the desktop

² The area extending beyond the LSA boundary (i.e. the zone of influence or area where the element and associated indicators are most likely to be affected by Project-related marine vessel traffic.) where the direct and indirect influence of other activities could overlap with project-specific effects and cause cumulative effects on the environmental or socio-economic indicator.

study and literature review conducted for the Project, 10 fishing and marine resource harvesting sites were identified within the Marine RSA. Shipping lanes are crossed to access seven of the sites: Fulford Harbour, Gulf Islands, Mayne Island, Pender Island, Salt Spring Island, Saturna Island, and Sidney Island.

Semiahmoo identified nine fishing and marine harvesting sites during the TLMRU for the Project, none of which are located within the proposed pipeline corridor. The nearest fishing sites are 2.7 km and 3.1 km southwest of the proposed pipeline corridor on the Serpentine River and Nicomekl River, respectively. Other fishing sites identified are more than 10 km from the proposed pipeline corridor, or the approximate distance from the Project area was not stated.

Semiahmoo raised concerns with potential Project-related impacts to locations and access on freshwater and marine fishing activities, including access to traditional foods. Project-related pipeline construction and routine maintenance activities are expected to cause short-term, temporary disruptions to Semiahmoo's access to freshwater fishing activities. If construction and reclamation occur during the fishing season, there could be a potential reduction in access to waterways, staging areas, and fishing sites for Semiahmoo community members. However, disruptions to access would largely be confined to the Project footprint for the pipeline and associated facilities during construction and reclamation. Project-related marine vessels are expected to cause temporary disruptions to Semiahmoo's marine fishing and harvesting activities. Community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes.

NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential access-related impacts associated with freshwater and marine fishing and harvesting (Section 4.3.2 and 4.3.3 of this Report) and the proponent would implement several mitigation measures to reduce potential effects on freshwater and marine fishing and harvesting activities. These mitigations include access management plans, scheduling and notification of Project activities including Project-related marine vessel traffic, and environmental monitoring programs. As previously discussed, the proponent is committed to minimize disturbance to access to Semiahmoo's traditional lands, as described in the Access Management Plan. The proponent committed to working with Semiahmoo to develop strategies to most effectively communicate the construction schedule and work areas to community members. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a marine public outreach program (NEB Condition 131). This communication would allow Semiahmoo community members to take measures to reduce potential disruptions from tankers and allow planning for marine fishing and harvesting activities to take place that minimizes disturbance from Project-related tankers.

In terms of potential direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of Semiahmoo's freshwater and marine fishing and harvesting activities, Project pipeline and facility construction and routine maintenance is expected to cause short-term, temporary disruptions to Semiahmoo's fishing activities. The Crown understands that this temporary interruption could mean that community members alter their fishing activities during construction, which could affect their participation in the traditional activity. Project-related marine vessels are expected to cause

temporary disruptions to Semiahmoo's marine fishing and harvesting activities and community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Semiahmoo community members to take measures to reduce potential disruptions from tankers and allow planning for cultural events to take place that minimizes disturbance from Project-related tankers.

The Crown has considered available information from the NEB process, consultation with Semiahmoo, Semiahmoo's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province. In consideration of this information, the Crown expects impacts of Project construction and operation, and Project-related marine shipping activities on Semiahmoo's freshwater fishing and marine fishing and harvesting activities would be minor. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related pipeline and facility construction and operation, and marine shipping activities are likely to have low to moderate magnitude environmental effects on freshwater and marine species harvested by Semiahmoo;
- Construction of the pipeline and associated facilities are likely to cause short-term temporary disruptions to Semiahmoo's community members accessing traditional freshwater fishing sites within the Project footprint; Project-related marine shipping activities are likely to cause temporary disruptions to activities or access to sites during the period of time Project-related tankers are in transit through Semiahmoo's traditional territory; and
- Concerns identified by Semiahmoo regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their freshwater fishing and marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

Semiahmoo were traditionally semi-nomadic people, with community members regularly travelling through the Fraser River Estuary to gather food, moving from permanent villages near Semiahmoo and Birch Bays to summer camps at Point Roberts, Cannery Point and Crescent Beach. Historically, Mount Baker was used for traditional and ceremonial practices.

As described in Section 4.3.4 of the Report, Project-related activities are not likely to result in significant adverse effects on the ability of Aboriginal groups to use land, waters or resources for traditional purposes. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental impacts on physical and cultural heritage resources (Section 4.3.4 of this Report) and the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources important for Semiahmoo's traditional and cultural practices. An environmental education program will be developed and implemented to ensure that all personnel working on the Project are informed of the location of known sacred sites and burial sites. The proponent has also committed to reduce potential disturbance to community assets and events by

implementing several measures that include avoiding important community features and assets during RoW finalization, narrowing the RoW in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments. No trails or travelways, or sacred areas were identified by Semiahmoo in their TLMRU study for the Project. Semiahmoo identified five gathering places within the Marine RSA during the TLMRU study for the Project, none of which are located in the proposed pipeline corridor. The nearest gathering place is a historic village approximately 12 km southwest of the proposed pipeline corridor at Campbell's River. During the desktop study and literature review conducted for the Project, one summer camp in the Gulf Islands and one sacred area at Saanich Inlet were identified within the Marine RSA. Although the locations are not specified, the shipping lanes are crossed to access both of these sites.

Semiahmoo raised access restrictions to their traditional territory as a concern associated with potential Project impacts relating to other traditional and cultural practices. Project-related activities are expected to cause short-term disruptions that temporarily affect the ability of Aboriginal groups to access land, waters or resources for traditional purposes. Semiahmoo's opportunities for certain traditional and cultural activities would be temporarily interrupted, and there could be reduced access to travelways, habitation sites, gathering sites, and sacred areas. However, temporary disruptions to Semiahmoo's traditional and cultural practices would be largely confined to sites within the Project footprint for the pipeline and associated facilities. Project-related marine shipping activities could potentially disrupt Semiahmoo's traditional activities.

Conditions in the NEB Recommendation Report, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The proponent will be required to manage access to culturally sensitive sites with an access management plan, and has committed to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project. The Crown notes that tankers will remain within existing shipping lanes and the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131).

Marine mammals are of importance to many Coast Salish Aboriginal groups, and killer whales specially hold strong spiritual and cultural importance for many Aboriginal groups. The NEB concluded that effects on the endangered Southern resident killer whale and Aboriginal cultural use of Southern resident killer whale from Project-related shipping activities would be significant. The Crown is not aware of any specific cultural use of or concerns regarding killer whales raised by Semiahmoo during the NEB and Crown consultation processes.

The Crown has considered available information from the NEB process, consultation with Semiahmoo, Semiahmoo's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province. In consideration of this information, the Crown expects impacts of Project construction

and operation, and Project-related marine shipping activities, on Semiahmoo's other traditional and cultural practices would be negligible-to-minor. In reaching this conclusion, the Crown has considered several factors that have been discussed above, which are summarized as follows:

- Project-related pipeline and facility construction and operation, and marine shipping activities are likely to have low to moderate magnitude environmental effects on traditional and cultural resources;
- Construction of the pipeline and associated facilities are likely to cause short-term temporary disruptions to Semiahmoo's community members accessing traditional and cultural practice sites within the Project footprint; Project-related marine shipping activities are likely to cause temporary disruptions to activities or access to sites during the period of time Project-related tankers are in transit through Semiahmoo's traditional territory; and
- Concerns identified by Semiahmoo regarding Project-related effects on social, cultural, spiritual, and experiential aspects of their other cultural and traditional practices.

Impacts on Aboriginal Title

Semiahmoo raised concerns related to Aboriginal title, including use and access restrictions to its asserted traditional territory including fisheries, and concerns regarding activities that have the potential to affect Semiahmoo's ability to manage and make decisions in their traditional territory.

The Crown provides a description of the potential impacts of the Project on Aboriginal title in Section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid/reduce Project impacts associated with the degree of disturbance to terrestrial, marine and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as well as NEB Conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved. The Crown notes that Semiahmoo executed a Mutual Benefits Agreement with the proponent. Although these agreements are confidential, the Crown understands they may contain provisions for financial, environmental and training benefits that could further reduce or accommodate impacts to Aboriginal title claims if the Project proceeds.

Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in Section 4.3.5, it is the Crown's opinion that the Project is expected to have negligible impacts on Semiahmoo's asserted Aboriginal title to the proposed Project area.

Impacts Associated with Accidental Tanker and Pipeline Spills

Semiahmoo expressed concerns regarding the impact of a potential oil spill on their Aboriginal Interests, including the effects of a potential spill on water quality; and terrestrial and aquatic environments.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with tanker and pipeline spills, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. Section 4.3.6 of the main body of this Report sets out the impacts associated with accidental spills. In consideration of this information and analysis, as well as information available to the Crown on Semiahmoo's Aboriginal Interests and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts on Semiahmoo's Aboriginal Interests. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill³.

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline and marine safety regimes would only partially address these ongoing burdens and risks.

Under the typical conditions for pipeline construction and operations and for marine vessel use of the area between the Westridge Marine Terminal and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of Project-related activities on the exercise of Semiahmoo's Aboriginal Interests would be up to minor.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Semiahmoo's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of the Semiahmoo First Nation in emergency response planning activities. The federal Crown is considering incremental measures that would further accommodate the potential adverse impacts of the Project on Semiahmoo First Nation, as discussed in Sections 4 and 5 of the main body of this Report.

In addition, the Crown is aware that the proponent has entered into a Mutual Benefits Agreement with Semiahmoo in an attempt to offset potential impacts, should the Project proceed.

³ Trans Mountain Final Argument, p. 85 and 207

Appendix D.15 – Snaw-naw-as (Nanoose) First Nation

I - Background Information

Snaw-naw-as First Nation (Snaw-naw-as), also known as Nanoose First Nation, is located in the Nanoose District on the south shore of Nanoose Harbour, on the east coast of Vancouver Island next to Nanoose Bay in British Columbia (BC). Snaw-naw-as' sole reserve covers 62.8 hectares (ha) and Snaw-naw-as has a total registered population of 250 as of July 2016.

As a Coast Salish group, Snaw-naw-as followed a seasonal round centered on hunting, fishing, and harvesting a variety of shellfish and plant resources; manufacturing houses, canoes, and a variety of weapons, nets, traps, and containers; and, utilizing preserving techniques of drying and smoking. Land mammals were hunted and were important in the Straits economy and a wide variety of fruits, roots, berries and other vegetable foods were gathered by the Straits Salish.

Snaw-naw-as people speak Hul'qumi'num, which is one of three branches of the Halkomelem dialect spoken from Nanoose down to Oregon.

Snaw-naw-as is part of the Te'mexw Treaty Association (TTA) along with Scia'new (Beecher Bay) Indian Band, Malahat First Nation, and Songhees First Nation. The TTA is part of the BC Treaty Process and is currently in Stage 5 of the BC Treaty process (i.e. Final Agreement), having signed an agreement-in-principle in April 2015.

Snaw-naw-as is involved with the Naut'sa Mawt Tribal Council along with Stz'uminus First Nation, Klahoose First Nation, Sliammon First Nation, Snuneymuxw First Nation, Halalt First Nation, Malahat First Nation, Tsleil-Waututh Nation, Tsawwassen First Nation and Homalco First Nation.

Snaw-naw-as also filed a *Writ of Summons* with the BC Supreme Court, asserting Aboriginal Title to an area identified in the writ.

II - Preliminary Strength of Claim Assessment

- The marine shipping route would pass within 53 kilometers (km) of Snaw-naw-as' asserted traditional territory, along the east side.
- Snaw-naw-as may include members from the Saalequun Tribe, signatory of the Douglas Treaty signed December 23, 1854. It is not clear to the Province whether Snaw-naw-as is or claims to be a Douglas Treaty beneficiary.
- Canada recognizes the Douglas Treaties and understands that Snaw-naw-as has members who may be descendants of one or more signatories to one or more Douglas Treaties. Canada remains committed to working toward a common understanding of the content and scope of the Douglas Treaties with Snaw-naw-as, to implement the treaty through agreements with the Crown, and to explore opportunities to honour and recognize the Douglas Treaties.

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Snaw-naw-as' Aboriginal Interests, the Crown is of the view that the legal duty to consult Snaw-naw-as lies at the low portion of the *Haida* consultation spectrum. In consideration of the Project intersecting with Snaw-naw-as' asserted traditional territory, Snaw-naw-as was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which affords Snaw-naw-as opportunities to be consulted at a deeper level.

Snaw-naw-as did not participate in the National Energy Board (NEB) hearing process, and did not submit an application for funding to the NEB. The Major Projects Management Office offered Snaw-naw-as \$3,000 to support their participation in consultations following the release of the *NEB Recommendation Report* but did not make use of this funding opportunity.

On October 20, 2016 Snaw-naw-as was issued \$5,000 in capacity funding by EAO to assist with the consultation process.

Snaw-naw-as and the Crown met on an early engagement meeting on June 17, 2014. In addition, the two parts met on September 28, 2016; to discuss the concerns and issues Snaw-naw-as has on the Project.

The Crown provided a first draft of this Report to Snaw-naw-as for review and comment on August 17, 2016. The Crown did not receive comments from Snaw-naw-as on the draft Report.

A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016. The Crown has not received comments from Snaw-naw-as.

IV - Summary of Key Snaw-naw-as Issues and Concerns Raised

The Crown has gained its understanding of Snaw-naw-as' issues and concerns through the engagement with the Crown and an open letter dated June 15, 2016 sent to Prime Minister Trudeau, Alberta Premier Rachel Notley, and British Columbia Premier Christy Clark from a collective of Aboriginal groups. This letter identifies interests and concerns related to Indigenous consent of the Project and the Project's consultation process. The Crown also understands that Snaw-naw-as contacted the proponent regarding procurement and employment issues.

This section offers a summary of the key issues raised by Snaw-naw-as, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Snaw-naw-as' key Project-related issues and concerns are summarized below:

Methodology, Process and Consultation

- Snaw-naw-as stated that they were left without sufficient funding to effectively even apply to participate on the NEB process; and
- Snaw-naw-as believes it is better for them to support the submissions of other First Nations with common interests and concerns to their own. They believe that the Tsleil-Waututh (Burrard) Nation's concerns most closely aligned with their own.

Economic Impacts

- Snaw-naw-as showed concern with the lack of economic benefits for them.

Cumulative Effects

- The Crown understands that Snaw-naw-as contacted the proponent regarding procurement and employment issues;
- Lack of mitigation plans for the effects of the Project on the Southern Resident Killer Whale;
- Lack of funding for detailed studies; and
- Snaw-naw-as is concerned for the development on the Salish Sea. Snaw-naw-as considers that there is a need to protect the environment for future generations.

Impacts on Treaty Rights

- Project impacts on fish and fish habitat, as well as the impact on Snaw-naw-as right to fish.

Impacts from Increased Vessel Traffic

- Snaw-naw-as is concerned about on-shore pollution from increased shipping traffic;
- Marine safety issues in general; and
- Insufficient tug capacity due to the increase on vessel traffic.

Accidents and Malfunctions

- Snaw-naw-as is concerned about any spills that could potentially directly impact their members and their fishing activities as well as damage the environment;
- The effectiveness of a spill response is of particular concern for Snaw-naw-as; and
- Snaw-naw-as demonstrated their concern with potential accidents related to the interaction between large and small vessels.

Accommodation Proposals

Snaw-naw-as provided the federal and provincial Crown with proposed accommodation measures to consider in relation to accommodating potential impacts of the Project on Snaw-naw-as' Aboriginal Interests.

Snaw-naw-as identified the following accommodation proposals:

- Increased tug capacity;
- Economic benefits to the community should the Project proceed;

- Funding for detailed studies to determine Project impacts on Snaw-naw-as;
- Ensure that current and increased tanker traffic does not impact their ability to fish (for commercial and traditional use);
- Compensation in the event of a spill for both economic/cultural losses; and
- Measures to address cumulative impacts of development.

Section 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Snaw-naw-as that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

Snaw-naw-as' Response to NEB Recommendation Report

No specific comments were received by the Crown from Snaw-naw-as on the *NEB Recommendation Report*.

V - Potential Impacts of the Project on Snaw-naw-as' Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and Section 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group, including areas within the vicinity of marine shipping related to the Project, may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Snaw-naw-as' Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Snaw-naw-as' ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Snaw-naw-as' Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Snaw-naw-as, Snaw-naw-as' engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate (EAC) issued by the Province.

It is the Crown's understanding that Snaw-naw-as did not participate in a traditional land and resource use study for the Project. However, Snaw-naw-as identified concerns throughout the NEB process and Crown consultation process related to potential Project impacts on Snaw-naw-as' Aboriginal Interests.

Impacts on Hunting, Trapping and Plant Gathering

The general direct and indirect effects of the Project on hunting, trapping, and gathering, along with key mitigation measures, are described in Section 4.3.1 of the main body of this Report. Conditions in the NEB Recommendation Report, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Section 4.3.1 of this Report). The proponent would implement a range of mitigation measures that would directly or indirectly reduce potential Project-related marine shipping impacts on Snaw-naw-as' hunting, trapping, and plant gathering activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

In consideration of the information available to the Crown from the NEB process, consultation with Snaw-naw-as, Snaw-naw-as' engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in a negligible-to-minor impact on Snaw-naw-as' hunting, trapping and plant gathering activities.

Impacts on Marine Fishing and Harvesting

Snaw-naw-as community members fish and gather seafood throughout their traditional territory. Snaw-naw-as raised several specific concerns with potential Project-related impacts on their marine fishing and harvesting activities:

- The Project will have an impact on fish and fish habitat;
- Impacts on Snaw-naw-as' right to fish; and
- Increased tanker traffic could impact Snaw-naw-as' ability to fish for commercial and traditional use.

The general direct and indirect effects of Project-related marine shipping activities on marine fishing and harvesting, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report. Project-related marine vessels are expected to cause temporary disruptions to Snaw-naw-as' marine fishing and harvesting activities. Community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Snaw-naw-as community members to take measures to reduce potential disruptions from tankers and allow planning for fishing activities to take place that minimizes disturbance from Project-related tankers. Reduced harvests, while not expected to occur from

temporary access restrictions, could impact Snaw-naw-as' cultural activities and sharing of marine food with the community. The proponent would implement a range of mitigation measures that would directly or indirectly reduce potential Project-related marine shipping impacts on Snaw-naw-as' marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, and scheduling and notification of Project activities (via the proponent's marine public outreach program).

In consideration of the information available to the Crown from the NEB process, consultation with Snaw-naw-as, Snaw-naw-as' engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in negligible-to-minor impacts on Snaw-naw-as' marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

Snaw-naw-as raised specific concerns with potential Project-related impacts on other traditional and cultural practices including cumulative impacts of development on the Salish Sea and the need to protect the environment for future generations, as well as concerns about economic and cultural losses in the event of a spill.

The general direct and indirect effects of the Project on other traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this Report. Conditions in the NEB Recommendation Report, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown understands that there will be temporary interruptions to Snaw-naw-as' traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

Marine mammals are of importance to many Coast Salish Aboriginal groups, and killer whales specially hold strong spiritual and cultural importance for many Aboriginal groups. The NEB concluded that effects on the endangered Southern resident killer whale and Aboriginal cultural use of Southern resident killer whale from Project-related shipping activities would be significant. The Crown is not aware of any specific cultural use of or concerns regarding killer whales raised by Snaw-naw-as during the NEB and Crown consultation processes.

In consideration of the information available to the Crown from the NEB process, consultation with Snaw-naw-as, Snaw-naw-as' engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in negligible-to-minor impacts on Snaw-naw-as other traditional and cultural practices.

Impacts Associated with Accidental Tanker Spills

Snaw-naw-as expressed concerns regarding the impact of a potential oil spill on their Aboriginal Interests, including the effects of a potential spill on

- The Fraser River;
- Clam and oyster beds, as well as economic benefits related to aquaculture;
- Environment, economy, food, group members, culture and ceremonies; and
- Snaw-naw-as land and water, as well as Snaw-naw-as small vessels.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. Section 4.3.6 of the main body of this Report sets out the impacts associated with accidental spills from marine shipping vessels. In consideration of this information and analysis, as well as information available to the Crown on Snaw-naw-as' Aboriginal Interests and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts, with low likelihood, on Snaw-naw-as' Aboriginal Interests. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill¹.

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing marine safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for marine vessel use of the area between the Westridge Marine Terminal and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the marine-shipping component of the Project on the exercise of Snaw-naw-as' Aboriginal Interests would be negligible-to-minor.

However, given existing use of the marine shipping corridor within areas proximate to the exercise of Snaw-naw-as' Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of Snaw-naw-as' Aboriginal Interests, the federal Crown is considering additional measures to further offset the potential impacts of the marine-shipping component of the Project on Snaw-naw-as. Please see Sections 4 and 5 of the main body of this Report for a discussion of proposed accommodation measures.

¹ Trans Mountain Final Argument, p. 85 and 207

Appendix D.17 – Songhees First Nation

I - Background Information

Songhees First Nation (Songhees), also known as the Lekwungen, is located on the southern tip of Vancouver Island near Victoria, British Columbia (BC). Songhees (pronounced “*Song-hees*”) has filed a *Writ of Summons* as part of the Saanich Nation asserting Aboriginal title to a territory identified in the writ. Songhees has four reserves, for a total of 138.1 hectares (ha): Deadman’s Halkett Island no. 2, Chatham Islands no. 4, Discovery Island no. 3, and New Songhees no. 1A. Songhees has a total of registered population of 565. Their traditional language is Lekwungen, a dialect of the North Straits Salish language.

Songhees is part of the Te’mexw Treaty Association (TTA) along with Beecher Bay, Nanoose First Nation, and Malahat First Nation. The TTA signed an agreement-in-principle on April 9, 2015, and are now in Stage 5 – Final Agreement Negotiations with the Province of BC.

II - Preliminary Strength of Claim Assessment

Approximately 37 kilometres (km) of the marine shipping route would pass through the eastern and southern portions of Songhees’s asserted traditional territory.

The Province of BC understands Songhees to be a Douglas Treaty beneficiary. Canada recognizes the Douglas Treaties and understands that Songhees has members who are descendants of one or more signatories to one or more Douglas Treaties. Canada remains committed to working toward a common understanding of the content and scope of the Douglas Treaties with Songhees to implement the treaty through agreements with the Crown, and to explore opportunities to honour and recognize the Douglas Treaties.

Songhees asserts Douglas Treaty rights to carry out fisheries as formerly and hunt on unoccupied lands within its historic traditional territory. No distinction is made between the Esquimalt and Songhees peoples in the ethnographic materials and no separate Esquimalt territory is identified by ethnographers, as both are considered Songhees. Ethnohistoric evidence indicates that Songhees territory extended “from Albert Head to Cordova Bay” on Vancouver Island, and included the American San Juan and Henry Islands at the time of the treaties in 1850¹.

¹ Te’mexw Treaty Association and Esquimalt Nation. Songhees, Beecher Bay, Songhees and Malahat First Nations, Esquimalt Nation: Review of Ethnographic and Historical Sources. Ministry of Justice, Legal Services Branch, Aboriginal Research Division. September 5, 2008. Revised to June 16, 2015; Proposed National Marine Conservation Area Reserve in the Southern Strait of Georgia: Review of Ethnographic and Historical Sources. Prepared by Ministry of Justice, Legal Services Branch, Aboriginal Research Division. December 19, 2012. Revised November 20, 2013.

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Songhees' Aboriginal Interests, the Crown is of the view that the legal duty to consult Songhees lies at the middle portion of the *Haida* consultation spectrum. Songhees was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office, which affords Songhees opportunities to be consulted at a deeper level.

Songhees did not participate in the National Energy Board (NEB) hearing process, and did not submit an application for funding to the NEB.

Songhees has not been active to date in the Crown consultation process, but has received multiple pieces of correspondence from the Major Projects Management Office (MPMO). The MPMO offered Songhees \$6,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Songhees an additional \$3,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Songhees did not sign contribution agreements with the MPMO and did not make use of this funding opportunity.

The Crown provided a first draft of this Report to Songhees for review and comment on August 17th, 2016. The Crown did not receive comments from Songhees on the draft Report.

A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016. The Crown has not received comments from Songhees.

IV - Summary of Songhees's Key Issues and Concerns Raised

As Songhees did not participate in the NEB review process, there is no information on the hearing record about their key issues or concerns. Songhees has also not participated to date in Crown consultation processes. As such, there is no information on hand that documents key Songhees issues and concerns related to the Project.

The Crown is in receipt of an open letter dated June 15, 2016 sent to Prime Minister Trudeau, Alberta Premier Rachel Notley, and British Columbia Premier Christy Clark from a collective of Aboriginal groups, including Songhees. This letter identifies interests and concerns related to Indigenous consent of the Project and the Project's consultation process.

Songhees's Response to *NEB Recommendation Report*

No specific comments received by the Crown from Songhees First Nation on the NEB Recommendation Report.

V - Potential Impacts of the Project on Songhees's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 of this Report. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important

and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

It is the Crown's understanding that Songhees did not participate in a traditional marine resource use study for the Project. The Crown also understands that Songhees has not identified Project-related issues or concerns during the NEB process or Crown consultation process. As a result, the Crown has limited information on the specific sites and resources used by Songhees for traditional purposes that could be impacted by the Project.

The general direct and indirect effects of the Project on Aboriginal Interests, along with key mitigation measures, are described in Section 4.3 of the main body of this Report. As described in that section, routine Project-related activities are likely to result in low to moderate impacts on the lands, waters and resources that Aboriginal groups use to exercise their hunting, trapping, plant gathering, fishing, and other traditional activities. The Crown understands that there will be temporary interruptions to Songhees's traditional activities, and there could be reduced access to traditional and cultural sites during Project operational activities. The proponent would implement mitigations that would include plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, and scheduling and notification of Project activities via the proponent's marine public outreach program (Section 4.3 of the main body of this Report).

Marine mammals are of importance to many Coast Salish Aboriginal groups, and killer whales specially hold strong spiritual and cultural importance for many Aboriginal groups. The NEB concluded that effects on the endangered Southern resident killer whale and Aboriginal cultural use of Southern resident killer whale from Project-related shipping activities would be significant. The Crown is not aware of any specific cultural use of or concerns regarding killer whales raised by Songhees during the NEB and Crown consultation processes.

In consideration of the information available to the Crown from the NEB and Crown consultation processes, Songhees' engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province, the Project is expected to result in a negligible-to-minor impact on Songhees' Aboriginal Interests.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. Section 4.3.6 of the main body of this Report sets out the impacts associated with accidental spills from marine shipping vessels. In consideration of this information and analysis, as well as information available to the Crown on Songhees' Aboriginal Interests and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts on Songhees' Aboriginal Interests. In making this general conclusion, the Crown acknowledges that

Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.²

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing marine safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for marine vessel use of the area between the Westridge Marine Terminal and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the marine-shipping component of the Project on the exercise of Songhees Nation's Aboriginal Interests would be negligible-to-minor.

However, given existing use of the marine shipping corridor within areas proximate to the exercise of Songhees Nation's Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of Songhees Nation's Aboriginal Interests, the federal Crown is considering additional measures to further offset the potential impacts of the marine-shipping component of the Project on Songhees Nation. Please see Sections 4 and 5 of the main body of this Report for a discussion of proposed accommodation measures.

² Trans Mountain Final Argument, p. 85 and 207

Appendix D.19 – Tsartlip First Nation

I - Background Information

Tsartlip First Nation (Tsartlip) is located in British Columbia (BC) on the south side of Vancouver Island, on the shore of the Saanich Inlet. Tsartlip (pronounced “Tsar-lip”) has four reserve lands: Goldstream no. 13 (shared with Malahat First Nation, Pauquachin, Tsartlip First Nation and Tseycum), Mayne Island no. 6, Senanus Island no. 10, and South Saanich no. 1. Tsartlip’s main community is located on the Saanich peninsula about 20 kilometres (km) north of Victoria. Their main reserve is South Saanich #1 located on the west side of the peninsula. Tsartlip’s total registered population as of July 2016 is 994, which includes: 524 living on Tsartlip reserves, 120 living on other reserves, and 350 living off reserve. Tsartlip members traditionally speak the Hul’qumi’num and Senc’oten languages.

The Province of BC understands Tsartlip to be a Douglas Treaty beneficiary and was a member of the Sencot’en Alliance, but is not part of the BC treaty process. Canada recognizes the Douglas Treaties and understands that Tsartlip has members who are descendants of one or more signatories to one or more Douglas Treaties.

Tsartlip is a party to a *Writ of Summons* as part of the Saanich Nation dated 2003.

II - Preliminary Strength of Claim Assessment

- Approximately 38 km of the marine shipping route would pass within the northeastern part of the asserted traditional territory of the Saanich Nation, of which Tsartlip is a member. The Project’s marine corridor is approximately 15 km from the main reserve, and approximately 12 km from the Mayne Island reserve.
- The Province of B.C. understands that Tsartlip has Douglas Treaty rights to fish as formerly and hunt on occupied lands within its historic traditional territory. Ethnographic sources associate the Tsartlip, Tsartlip, Tseycum and Pauquachin First Nations with the Saanich Peninsula, Goldstream River, and the southern Gulf Islands (including the southern portion of Saltspring Island, Sidney Island, Stuart Island, Pender Islands, Mayne and Saturna Islands). Tsartlip resided on the western side of the Saanich Peninsula in Brentwood Bay.
- Canada remains committed to working toward a common understanding of the content and scope of the Douglas Treaties with Tsartlip and to explore opportunities to honour and recognize the Douglas Treaties.

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Tsartlip’s Aboriginal Interests, the Crown is of the view that the legal duty to consult Tsartlip lies at the middle portion of the *Haida* consultation spectrum. Tsartlip was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office, which affords Tsartlip opportunities to be consulted at a deeper level.

Tsartlip participated in the NEB review process as an intervenor and submitted written evidence and final arguments, provided additional correspondence to the NEB, and responded to the Crown's Issues Tracking Table Information Request by further elaborating their concerns [\[A71236\]](#). Tsartlip was also present at the Oral Traditional Evidence Hearing in Victoria, BC.

Tsartlip received a total of \$20,347 in National Energy Board (NEB) participant funding during the review process. The Major Projects Management Office (MPMO) offered Tsartlip \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Tsartlip an additional \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Tsartlip did not sign contribution agreements and did not make use of this funding opportunity.

The Crown provided a first draft of the Consultation and Accommodation Report (Report) to Tsartlip for review and comment on August 17, 2016. The Crown received comments from Tsartlip on the draft Report on September 19, 2016. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016 and Tsartlip provided comments on November 16, 2016.

IV - Summary of Key Tsartlip Issues and Concerns Raised

This section offers a summary of the key issues raised by Tsartlip, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Tsartlip's key Project-related issues and concerns are summarized below:

Environmental Impacts

- Potential environmental impacts related to forests and lands within Tsartlip's asserted traditional territory, aquatic resources, water quality, as well as the importance of salmon in their cultural ceremonies;
- Potential environmental and socio-economic impacts of increased marine shipping traffic; and
- Potential for accidents and malfunctions leading to an oil spill, the ability to prevent and clean-up a spill, and the type of oil that would be shipped.

Impacts on Traditional and Cultural Practices

- Potential disruption to archeological artifacts, including burial sites.

Impacts on Aboriginal Interests

- Potential infringement from the proposed marine shipping effects on Tsartlip's Aboriginal Interests; and
- Potential impacts to Tsartlip members' ability to continue to hunt, fish and collect resources in the future.

Economic Impacts

- Interest in potential job opportunities, economic development and community capacity building.

Marine Impacts

- Interest in the navigation and navigation safety for the Project, including anchorage, pilotage, tugboat escort, ballasting, and types of fuel used;
- Potential effects of increased marine shipping on whales and salmon; and
- In its feedback to the first draft of this Report, and subsequent letter of November 16, 2016, Tsartlip emphasized the profound importance of and concern for the Southern Resident Killer Whale population due to Project impacts potentially leading to reduced prey availability, marine contamination, and acoustic disturbance. Tsartlip seeks a comprehensive, evidence-based plan that will be effective in mitigating such impacts on killer whales and encouraging their recovery.

Tsartlip's Response to the NEB Recommendation Report

To the Crown's knowledge, Tsartlip has not provided direct feedback on the *NEB Recommendation Report*. It is the Crown's understanding that Tsartlip chose instead to intervene in a judicial review of the Report dated May 19, 2016.

V - Potential Impacts of the Project on Tsartlip's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests are provided in Sections 2.4.3 and Section 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted or established traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Tsartlip's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Tsartlip's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Tsartlip's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Tsartlip, Tsartlip's engagement with the proponent, proponent commitments, recommended NEB

conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate (EAC) issued by the Province.

It is the Crown's understanding that Tsartlip completed an independent, third-party traditional marine resource use (TMRU) study for the Project ([A4J7W5](#)). The Crown hopes to discuss the information in this study to inform the Crown's understanding of the potential impacts on Tsartlip's Aboriginal Interests. Tsartlip also submitted Oral Aboriginal traditional evidence, including many exhibits, to the NEB ([A4F2C3](#), [A4F2C4](#), [A4F2C5](#), [A4F2C6](#)).

Impacts on Hunting, Trapping, and Plant Gathering

Tsartlip raised the following concerns with potential Project-related impacts relating to hunting, trapping and gathering activities:

- Potential environmental impacts related to lands within Tsartlip's traditional territory, aquatic resources, water quality, as well as the importance of salmon in Tsartlip's cultural ceremonies;
- Potential impacts to Tsartlip members' ability to continue to hunt and collect resources in the future; and
- Potential effects of increased marine shipping on whales.

The general direct and indirect effects of the Project on hunting, trapping, and gathering activities, along with key mitigation measures, are described in Section 4.3.1 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Section 4.3.1 of this Report). The proponent would implement a range of mitigation measures that would reduce potential effects associated with Tsartlip's hunting, trapping, and plant gathering activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

In consideration of the information available to the Crown from the NEB process, consultation with Tsartlip, Tsartlip's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in a negligible-to-minor impact on Tsartlip's hunting, trapping and plant gathering activities.

Impacts on Marine Fishing and Harvesting

Tsartlip raised the following concerns with potential Project-related impacts on their marine fishing and harvesting activities:

- Potential environmental and socio-economic impacts of increased marine shipping traffic;
- Potential impacts to Tsartlip members' ability to continue to fish and collect resources in the future; and
- Potential effects of increased marine shipping on salmon.

The general direct and indirect effects of the Project on marine fishing and harvesting activities, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report. Project-related marine vessels are expected to cause temporary disruptions to Tsartlip's marine fishing and harvesting activities. The Crown understands that community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes.

As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Tsartlip community members to take measures to reduce potential disruptions from tankers and allow planning for fishing activities to take place that minimizes disturbance from Project-related tankers. Reduced harvests, while not expected to occur from temporary access restrictions, could impact Tsartlip's cultural activities and sharing of marine food with the community. The proponent would implement a range of mitigation measures that would reduce potential effects associated with Tsartlip's marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, and scheduling and notification of Project activities (via the proponent's marine public outreach program).

In consideration of the information available to the Crown from the NEB process, consultation with Tsartlip, Tsartlip's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in negligible-to-minor impacts on Tsartlip's marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

Tsartlip raised the following concerns with potential Project-related impacts on other traditional and cultural practices:

- Potential disruption to archeological artifacts, including burial sites;
- Potential environmental impacts related to forests and lands within Tsartlip's traditional territory, aquatic resources, water quality, as well as the importance of salmon in Tsartlip's cultural ceremonies; and
- Cultural impacts on the Southern Resident Killer Whale.

The general direct and indirect effects of the Project on traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (section 4.3.4 of this Report). The Crown understands that there will be temporary interruptions to Tsartlip's traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project.

Tsartlip identified cultural use of or concerns regarding Southern resident killer whales during the NEB and Crown consultation processes. The *NEB Recommendation Report* concluded that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Aboriginal use associated with the Southern resident killer whale. The Crown understands that the Southern resident killer whale population is in decline, and that additional adverse environmental effects from Project-related marine shipping would be considered significant.

In consideration of the information available to the Crown from the NEB process, consultation with Tsartlip, Tsartlip's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in moderate impacts on Tsartlip's other traditional and cultural practices.

Impacts Associated with Accidental Tanker Spills

Tsartlip expressed concerns regarding the impact of a potential oil spill on its Aboriginal Interests, including the effects of a spill on the Southern Resident Killer Whale and its habitat and the ability to prevent and clean-up a spill, and the type of oil that would be shipped.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. Section 4.3.6 of the main body of this Report sets out the impacts associated with accidental spills from marine shipping vessels. In consideration of this information and analysis, as well as information available to the Crown on Tsartlip's Aboriginal Interests and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts on Tsartlip's Aboriginal Interests. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill¹.

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing marine safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for marine vessel use of the area between the Westridge Marine Terminal and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the marine-shipping component of the Project on the exercise of Tsartlip's Aboriginal Interests would be up to moderate.

¹ Trans Mountain Final Argument, p. 85 and 207

However, given existing use of the marine shipping corridor within areas proximate to the exercise of Tsartlip's Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of Tsartlip's Aboriginal Interests, the federal Crown is considering additional measures to further offset the potential impacts of the marine-shipping component of the Project on the Tsartlip First Nation. Please see Sections 4 and 5 of the main body of this Report for a discussion of proposed accommodation measures.

Appendix D.20 – Tsawout First Nation

I - Background Information

Tsawout First Nation (Tsawout) is located in British Columbia (BC) on the southeastern shore of Vancouver Island in the Saanich Peninsula (near the Cordova Channel). Tsawout (pronounced “Tsa-woot”) has filed a *Writ of Summons* as part of the Saanich Nation asserting Aboriginal title to a territory identified in the writ. Tsawout has six reserve lands: Bare Island no. 9 (10.5 hectares [ha], shared with Tseycum), East Saanich no. 2 (237.7 ha), Fulford Harbour no. 5 (17.4 ha), Goldstream no. 13 (8.9 ha, shared with four Groups – Malahat FN, Pauquachin, Tsartlip and Tseycum), Pender Island no. 8 (3.2 ha, shared with Tseycum) and Saturna Island no. 7 (145.7 ha, shared with Tseycum). The Tsawout population totals 895 registered members (530 are living on their Reserve, 98 are living on other Reserves, 278 are living off reserves).

Tsawout had a Comprehensive Land Claim submitted in 1987 as part of the Saanich Tribal Council. This submission was not accepted for review since the BC Treaty Commission was subsequently established. Tsawout is not involved in the BC Treaty process within the BC Treaty Commission Six-Stage process.

II - Preliminary Strength of Claim Assessment

- Approximately 30 kilometres (km) of the marine shipping route would pass through the eastern portion of an area understood to be Saanich Nation’s traditional territory. Through consultation, Tsawout identified a broader geographic area where subsistence harvesting activities and other traditional uses and travel occurred, identifying an area of approximately 70 km that would overlap with the marine shipping route.
- The Province of BC understands Tsawout to be a Douglas Treaty beneficiary. The Province of BC understands that Tsawout has Douglas Treaty rights to fish as formerly and hunt on occupied lands within its historic traditional territory. Tsawout is composed of communities which formerly lived on Mayne, Salt Spring, Pender and Stuart Islands who moved to Saanichton Bay early in the 19th century. Ethnographic sources associate the Tsawout, Tsartlip, Tseycum and Pauquachin First Nations with the Saanich Peninsula, Goldstream River, and the southern Gulf Islands (including the southern portion of Salt Spring, Sidney, Stuart, Pender, Mayne and Saturna Islands).
- Canada recognizes the Douglas Treaties and understands that Tsawout has members who are descendants of one or more signatories to one or more Douglas Treaties. Canada remains committed to working toward a common understanding of the content and scope of the Douglas Treaties with Tsawout and to explore opportunities to honour and recognize the Douglas Treaties.

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Tsawout’s Aboriginal Interests, the Crown is of the view that the legal duty to consult Tsawout lies at the middle portion of the *Haida* consultation spectrum. Tsawout was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office, which affords Tsawout opportunities to be consulted at a deeper level.

Tsawout participated in the National Energy Board (NEB) review process as an intervenor and submitted written evidence and a written final argument, sent additional correspondence to the NEB, participated in the Oral Traditional Evidence Hearing in Victoria, and responded to the Crown's Issues Tracking Table Information Request by further elaborating their concerns [[A71233](#)].

Tsawout received \$10,000 in NEB funding, for which a contribution agreement was signed, and was also offered travel for two to the NEB hearings, for which no contribution agreement was signed. The Major Projects Management Office (MPMO) offered Tsawout \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Tsawout an additional \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Tsawout signed contribution agreements with the MPMO in response to both of these offers, for a total of \$18,000 in allocated funding. On November 14, 2016 Tsawout accepted \$5,000 in capacity funding from EAO to assist with the consultation process.

Tsawout met with the Crown for an early engagement meeting on June 24, 2014. In addition, the Crown consultation team and Tsawout met on April 29, 2016.

The Crown received a letter dated October 4, 2016. In this letter, Tsawout expressed their concerns and discontent with the consultation process and the Project.

The Crown provided a first draft of the Consultation and Accommodation Report (Report) to Tsawout for review and comment on August 17, 2016. In a letter dated October 13, 2016, Tsawout asked the Crown to extend the deadline for the submission of their comments on the draft until October 28, 2016. The Crown responded to encourage Tsawout to provide comments as soon as possible to allow the Crown time to consider the comments in advance of providing the second draft. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016. Tsawout provided comments on November 18, 2016.

Tsawout provided a separate Aboriginal group submission to the Crown on November 18, 2016.

IV - Summary of Key Tsawout Issues and Concerns Raised

The Crown has gained its understanding of Tsawout's Aboriginal issues and concerns through the community's involvement in the NEB process, including submissions made through the NEB hearings process, the responses Tsawout provided to the Crown on its Information Request, and through other engagement with the Crown, including a meeting held in April 2016.

This section offers a summary of the key issues raised by Tsawout, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented on the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Tsawout's key Project-related issues and concerns are summarized below.

Tsawout raised concerns related to the Project and review process, potential impacts to their Aboriginal rights and sites of cultural and social significance, and cumulative impacts of prior and on-going development activities in their traditional territory. Tsawout also noted their disappointment at being excluded from the TERMPOL (Technical Review Process of Marine Terminal Systems and Transshipments Sites) process.

Methodology, Process, and Consultation

- Tsawout believes that the NEB process is not an appropriate means of fulfilling Canada's duty to consult, and that the NEB's list of issues was not comprehensive enough;
- Tsawout is concerned that the NEB did not consider environmental and socio-economic impacts of increased greenhouse gases (GHGs) and climate change;
- Tsawout does not believe that the NEB fully understands the issues affecting the marine and coastal environment and their impacts, and is concerned that the NEB has no jurisdiction over marine shipping;
- Tsawout noted their view that the timeframe for consultation and decision making on the Project is too short, and raised concerns that participant funding amounts were insufficient; and
- Tsawout believes that their consent is required for the Project under international law.

Cultural and Social Impacts

- Tsawout is concerned by potential disturbances to burial sites and other cultural and spiritual sites due to increased marine traffic (including ancestral remains on several nearby islands);
- Tsawout noted that cultural impacts would not only occur in the event of a Project accident or malfunction, but from the Project's regular operation, which could prevent fishing and hunting activities, as well as the gathering of medicinal plants;
- Tsawout is concerned about the impacts that the Project could have on culturally significant marine invertebrates;
- Tsawout is concerned about disruption to the use of historic, modern and future marine travel ways and marine access throughout their territory, including areas now considered to be part of the United States, as well as the cumulative disruption to all types of travelways; and
- Tsawout is concerned about disruption to their way of life, including the loss of traditional knowledge, diminishment of community culture and cohesion, diminishment of relations with other Salish communities, inter-generational alienation, loss of the medicinal value of traditional foods and loss of confidence in the healthiness of traditional foods.

Increased Vessel Traffic

- Tsawout raised issues regarding traditional use activities, commercial interests, and tourism interests that could be impacted by increased marine traffic and vessel wake;
- Tsawout is concerned about increased tanker traffic in the shipping lanes, resulting in disturbance to food gathering locations (fishing, harvesting, plant gathering and hunting) from increased vessel wake;

- Tsawout is concerned about disruption to marine ecosystems from vessel wake, noise, emissions and lighting due to increased marine vessel traffic;
- Tsawout is concerned about increased risk of collisions, groundings and other incidents due to increased marine vessel traffic;
- Tsawout is concerned about disturbance to distribution, health, abundance and long-term sustainability of fisheries and all other resources; and
- Tsawout is concerned about decreased marine water quality and increased pollution, including introductions of non-native species, due to increased marine vessels traffic.

Environmental Impacts

- Tsawout views the ecological environment of the Salish Sea as intricately connected. This is tied into their concerns over Project anchoring sites and possible damage to the ocean bed from Project activities; and
- Tsawout is concerned about marine mammals, including the southern resident orca population.

Economic Impacts

- Tsawout is concerned that ecotourism opportunities could be limited in the Tsawout community due to Project impacts; and
- Tsawout is interested in what the economic, employment and/or training opportunities could be related to the Project.

Impacts on Fishing Rights

- Tsawout expressed concerns that the Project could impact their rights to fish, including travel to fishing sites, as well as concerns about water quality;
- Tsawout is concerned that the Project will disrupt the ability of community members to access reef net fishery locations and may disrupt their ability to use those locations due to wave action and other effects;
- Tsawout is concerned about adequate compensation from lost fishing opportunity; and
- Tsawout is concerned that the Project will adversely affect Tsawout individuals and the future planned fishing and aquaculture activities of Salish Sea Foods, and that these effects are not assessed within the application as aspects of the Project's likely effects on the exercise of Douglas Treaty rights.

Cumulative Impacts

- Tsawout noted concerns regarding the lack of consideration of GHGs and climate change impacts on fisheries and marine resources, and how this Project could contribute to those impacts;
- Tsawout has ongoing concerns with respect to continued and cumulative effects throughout their territory as a result of development activities;
- Tsawout expressed that cumulative impacts need to be better understood and assessed;

- Tsawout is concerned that the proponent’s assessment of cumulative impacts in the marine environment is not adequate;
- Tsawout is concerned that the Project would add to currently experienced impacts, and impacts to future prospective use;
- Cumulative effects assessment should include the development of community-based research on cumulative impacts to Tsawout’s traditional marine territory;
- Tsawout raised concerns with continued cumulative effects to Tsawout’s marine territory, including cumulative effects on marine resources, and cumulative impact to marine ecology affecting marine foods; and
- Tsawout expressed concern with continued and increasing cumulative effects throughout their territory, including contributing to climate change impacts, ecosystem effects and carbon emissions.

Health and Human Safety

- Tsawout expressed concerns related to impacts on diet and community members’ health due to water, air, and/or cultural food contamination;
- Tsawout expressed concerns regarding the potential impacts of the Project on access to spiritual locations;
- Tsawout states that the Project could increase negative health effects related to reduced access to and availability of subsistence food;
- Tsawout believes that the Project could increase negative mental health effects related to disruption of community members’ ability to carry out traditional roles and responsibilities of harvesting, to pass on knowledge and to continue to practice traditional knowledge of these activities;
- Tsawout states that the Project could increase the risk to safety in both accessing and practicing subsistence hunting, fishing, and marine gathering in preferred locations; and
- Tsawout states that there are long-term community fears that in the event of a spill, cultural foods would not be safe to eat again, leading to disease and/or mental health issues in the Tsawout community.

Accidents and Malfunctions

- Tsawout is concerned about potential accidents and malfunctions and would like to learn about navigation and navigation safety for the Project, as well as contingency planning for potential accidents or malfunctions;
- Tsawout is concerned about potential disturbance or destruction of archeological and heritage sites from oil contamination from accidents and malfunctions, whether small or large; and impacts associated with cleanup measures following a spill¹;

¹ https://docs.neb-one.gc.ca/II-eng/IIisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2451057/2786251/C355-15-18_-

- Tsawout is concerned about an increased perception of contamination of subsistence foods;
- Tsawout believes that a malfunction would be catastrophic due to the prevailing currents throughout the southern Gulf and San Juan Islands; and
- Tsawout is concerned about increased risk of impacts from oil spills because of insufficient knowledge and capacity to contain and clean-up diluted bitumen in the marine environment.

Accommodation Proposals

Tsawout identified a number of mitigation and accommodation measures. These measures are:

- Undertake a cumulative effects study of marine traffic;
- Decrease the number of vessels permitted for the Project;
- Create a forum to discuss and develop mitigations to address the possible effects of the Project on Tsawout's marine use and exercise of Aboriginal Interests;
- Reduce vessel speed in the shipping lanes in the Salish Sea, including from Active Pass to Race Rocks and from, San Juan de Fuca Strait to the 12 mile nautical limit;
- Ensure robust monitoring and enforcement of tanker standards and safety if the Project is approved;
- Undertake research for all types of hydrocarbon products to be shipped to facilitate appropriate spill response preparedness;
- Engage in Area Response planning and emergency response, including appropriate training and long term capacity funding to participate;
- Involve Tsawout in identifying and protecting important marine areas by designating marine conservation within Tsawout's territory;
- Provide capacity funding to Tsawout to address impacts to spiritual and cultural sites from increases vessel wake, including funds for long term monitoring and mitigation of burial sites;
- Provide capacity to Tsawout to monitor, research and address impacts to important eelgrass beds within the marine waters in our territory;
- Provide training and capacity funding to Tsawout to be first responders in the event of marine spills;
- Establish proposed marine protection zones specific sites including key cultural heritage and archeological sites;
- Revenue share with Tsawout for the life of the Project;
- Provide a significant monetary bond to be paid up front by Trans Mountain to cover the cost of spill response, spill recovery and clean-up and compensation to affected marine Nations in the event of an oil spill in the marine environment;

- Compensate Tsawout for past infringements from marine shipping to its Aboriginal title and rights and Douglas Treaty right, given the last fifty years of the operation of the Trans Mountain pipeline line 1; and
- Regarding reconciliation, establish an honourable table between the Crown and Tsawout to address Tsawout Aboriginal title and rights, and Douglas treaty rights, and to address the many projects and developments that are impacting Tsawout's territory, including but not limited to the marine shipping from this and other projects.

Section 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Tsawout that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

Tsawout's Response to NEB Recommendation Report

No specific comments were received by the Crown from Tsawout First Nation on the *NEB Recommendation Report*.

V - Potential Impacts of the Project on Tsawout's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group, including areas within the vicinity of marine shipping related to the Project, may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Tsawout's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Tsawout's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Tsawout's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Tsawout, Tsawout's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate (EAC) issued by the Province.

Tsawout completed a traditional marine resource use (TMRU) study in 2015 titled, *Tsawout First Nation Marine Use Study* (MUS) ([A4Q1F5](#), [A4Q1F7](#), [A4Q1F8](#), [A4Q1F9](#)). Tsawout stated that the focus of the MUS was on the intersection of the Project LSA and the shipping lanes with Tsawout's marine use and exercise of Tsawout's Douglas Treaty and other Aboriginal rights.² The MUS relies on traditional marine use interviews, community harvest surveys, and secondary research methods and presents a snapshot, however incomplete, of Tsawout's use of the Salish Sea for the purposes of fishing, gathering, hunting, harvesting, travelling, and the exercise of their Douglas Treaty rights. The MUS focuses on traditional land and marine use in the Local Study Area (LSA) and Regional Study Area (RSA) of the marine shipping component of the Project. In its Supplemental Technical Report ([A4S7I8](#)), the proponent estimated approximate distances and directions from the marine shipping lanes based on information in Tsawout's report. Additional TMRU information for Tsawout was presented in *Volume 8B* ([A3S4K3](#)) of the Project application.

In their comments on the draft Consultation and Accommodation Report submitted to the Crown on November 18, 2016, Tsawout raised concerns with the traditional marine resource use information in the draft appendix, particularly the information obtained from the proponent's Supplemental Technical Report. The Crown has responded to this concern by revising the information in this section to focus on the traditional marine resource use information Tsawout provided in its MUS. As a result, the Crown has relied on Tsawout's information in its MUS to assess Project impacts on their Aboriginal Interests and has revised the conclusions on the potential impacts on Tsawout's Aboriginal Interests where necessary.

Impacts on Hunting and Gathering

As summarized in the MUS, Tsawout community members historically hunted seals and sea lions, collected seagull eggs, and gathered cedar bark and logs, hog fennel, seaweed, cranberries and blueberries. Presently, community members gather seaweed year-round for both food and medicinal purposes, and hunt deer and various species of ducks and geese including: surf scoter, goldeneye, pintail, mallard, American black duck, sea pigeon, sawbill, merganser, murre, bufflehead, widgeon, brant, and Canada geese.

In their MUS, Tsawout described and mapped locations in the RSA and LSA where its community members hunt and gather. The Crown did not identify any sites used by Tsawout for trapping terrestrial animals during its review of the MUS. A summary of traditional uses and locations related to hunting and gathering are provided below.

Marine Birds

Tsawout identified traditional hunting locations at Boat Pass and Mitchell Bay in the San Juan Islands, Saanichton Bay, Saanich Inlet, the waters surrounding Sidney Island, James Island and D'Arcy Island, and

² The area extending beyond the LSA boundary (i.e. the zone of influence or area where the element and associated indicators are most likely to be affected by Project-related marine vessel traffic.) where the direct and indirect influence of other activities could overlap with project-specific effects and cause cumulative effects on the environmental or socio-economic indicator.

generally in the open water. The 2002 SENĆOŦEN Alliance Study identified hunting areas on the south side of Saturna Island, at sites south and west of South Pender Island, surrounding Sidney and James Islands, and clustered heavily in Saanichton Bay, and extending south down the east coast of Vancouver Island towards Cordova Bay. Currently, Tsawout members concentrate duck hunting activities on the eastern waters of Sidney Island, Sidney Spit, Sidney Channel, the water surrounding James Island, the spit at Tsawout, and Saanichton Bay.

Deer

The 2002 SENĆOŦEN Alliance study reports 397 kill sites for Tsawout harvesters hunting deer, elk and bear. Sites identified include East Point and an area nearly the entire length of the east side of Saturna Island, the southern tip of South Pender Island, and the south ends of Salt Spring, Sidney and James Islands. Contemporary deer hunting takes place on East Saturna Island, Tumbo Island, and South Pender Island on tracts of land that appear to be within or adjacent to the LSA. A hunting area on Haro Island is approximately three km from the LSA, while a hunting area on Sidney Island sits roughly two km from the LSA. Other hunting areas exist beyond the shipping lanes, on Stuart Island, Spieden Island, Johns Island, and San Juan Islands.

Seal and Sea Lion

Tsawout members reported 14 seal or sea lion kill sites during the SENĆOŦEN Alliance Study in 2002, located southeast of both Tumbo and South Pender Islands. No respondents in the MUS reported recent sea lion or seal harvesting during interviews.

Seagull Eggs

According to the 2002 SENĆOŦEN Alliance study, Tsawout members gathered seagull eggs within or adjacent to the LSA at the south side of the Java Islets south of Saturna Island, numerous sites on Imrie, Reay, Pender, Mandarte, Halibut, and Seagull Islands, and a site in the Little Group Islands.

Seaweed

In its MUS, Tsawout identified a current seaweed gathering site surrounding Gooch Island and extending into the LSA, as well as numerous sites within the RSA. These sites include all shores and the smaller islands surrounding both Portland and D'Arcy Islands, the southwest shore of Moresby Island, the western shores of both Sidney and James Island, along the shore in Saanichton Bay and at the northern tip of the Saanich Peninsula. In the 2002 SENĆOŦEN Alliance study, Tsawout interviewees indicated 132 seaweed harvest sites/events. Sites include those along the southern shores of Saturna, South Pender, Moresby, Rubly, Gooch, Sidney, and James Islands, surrounding Reay, Brethour, Sheep, Domville, Forrest, and the Little Group Islands, and along the east side of Coal Island.

In addition to providing traditional use information, Tsawout raised specific concerns with potential Project-related impacts relating to their hunting and gathering activities:

- Concerns that the Project could impact community members' health due to water, air, and/or cultural food contamination, and that this could lead to long term community fears that cultural

foods would never be safe to eat again, leading to disease and/or mental health issues in the Tsawout community; and

- Potential cultural impacts would not only occur in the event of a Project accident or malfunction, but from the Project's regular operation, which could prevent subsistence fishing and hunting activities, as well as the gathering of medicinal plants and food.

The general direct and indirect effects of the Project on hunting, trapping, and gathering, along with key mitigation measures, are described in Section 4.3.1 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Section 4.3.1 of this Report). The proponent would implement a range of mitigation measures that would reduce potential effects associated with Tsawout's hunting and gathering activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

In consideration of the information available to the Crown from the NEB process, consultation with Tsawout, Tsawout's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in a minor impact on Tsawout's hunting and gathering activities.

Impacts on Marine Fishing and Harvesting

As described in Tsawout's MUS, crab and salmon are primarily harvested by Tsawout community members. Crab is an important source of protein for Tsawout families whereas salmon (i.e. sockeye, Chinook, coho, chum, and pink) are critical cultural keystone species to Tsawout not only for its nutritional value but also for its subsistence, economic, spiritual, and social value. Community members also harvest species such as halibut, cod, clams, herring and herring roe, sturgeon, flounder, sole, octopus, mussels, oysters, cockles, sea cucumber, chitons, sea urchins, rockfish, and shrimp. Currently, there is a group in the community that share or barter their harvests with households or at community gatherings.

In their MUS, Tsawout identified locations in the RSA and LSA where its community members fish and harvest certain marine species. These areas are mapped by Tsawout and presented in their MUS. A summary of these traditional uses and locations are provided below.

Crab

All of Tsawout's crab harvesting activities are located within the RSA including Saanichton Bay and water surrounding Sidney Island, James Island, Saturna Island, Stuart Island and Mandarte Island. Within the LSA, preferred crab harvesting areas are located at Saturna Island between East Point and Taylor's Beach. According to Tsawout, the LSA and shipping lane bisects the travel route to the crabbing destination at Stuart Island, and could make harvesting at this location less accessible and desirable.

Salmon

Currently, a considerable portion of Tsawout community members fish for salmon in areas within or contiguous with the LSA including Henry Island, Stuart Island, the northern end of San Juan Island, Happy Island, Bedwell Harbour, Saltspring Island, Satellite Channel, Dawson Channel, Saturna Island, as well as areas around Moresby and Pender islands. Community members favour the open channel off the eastern shores of the gulf islands of Saturna, Pender, and Sidney Islands and south to Cordova Bay. Tsawout still uses traditional harvesting areas on the east side of Georgia Strait from Bowen Island to Point Roberts and this use extends south of Burrard Inlet at Point Grey to the international boundary. Tsawout indicated that 17 of the 19 WSÁNEĆ reefnet sites are located within or near the LSA. These sites represent a fishery community members have focused on reviving for cultural and economic reasons and which they regard as foundational to their society.

Sea Urchin

Tsawout community members gathered urchin in areas exposed to the LSA near the southern tips of both Saturna, Saltspring and South Pender Islands, and dotting the waters from the south-eastern shore of Moresby Island to Gooch Island, along the east sides of both Mandarte and Halibut Islands, as well as north and east of both D'Arcy and Little D'Arcy Islands. According to Tsawout, the most reliable urchin harvesting site is located across the shipping lane within the LSA, along the north-western shores of Stuart Island, where the giant red urchin is harvested. Community members also identified numerous sites for urchin gathering throughout the Little Group Islands, and the islets west of Coal Island, east of Piers Island, and along the southern edge of Portland Island. Two additional urchin harvesting sites were identified within the LSA and the shipping lane, between Sidney and Henry Islands, and the reef along the eastern shore of Gooch Island.

Bivalves

Tsawout members currently harvest bivalves from a number of locations, including the shores surrounding Sidney and James Island, the spit at Tsawout, Bare Island, and Island View Beach, Willis Point, Saturna Island, Pender Island, D'Arcy and Little D'Arcy Island. East Point, Saturna Island is a harvesting area within the LSA. Locations in the vicinity of the LSA include, Tumbo Island, East Sidney Island, Little D'Arcy Island, North Henry Island, and Bruce Bight Saturna Island. Tsawout identified the following areas that requiring crossing the LSA: San Juan Island including Friday Harbour, and; East side of Stuart Island.

Chitons

According to Tsawout Elders, chitons were collected at sites throughout the Gulf Islands, including Pender, Saturna, Sidney, Gooch, the smaller islands off Sidney such as Coal and Piers Island, and at 10 Mile Point. The 2002 SENĆOŦEN Alliance study identifies sites at southern Saturna Island, the north side of D'Arcy Island, and multiple sites at the southern tip of James Island. Tsawout also identified sites on the east and west sides of James Island, in Saanichton Bay, as well as Bedwell Harbour.

Sea Cucumber

Sea cucumber is harvested at several sites including southern Saturna Island, the north side of D'Arcy Island, and multiple sites at the southern tip of James Island, as well as sites on the east and west sides of James Island, and in Saanichton Bay.

Cod

Tsawout harvesters identified many productive harvesting areas within or adjacent to the shipping lane and LSA, including areas between San Juan and Sidney islands, on a reef between Moresby and Pender, around Gootch Island and Sidney Islands, East Bay, at Saturna in Narves Bay and East Point over to Taylor's Bay, as well as in the Straits, near Stuart Island. One of the most important cod harvesting areas for Tsawout is in the area of the shipping lanes around D'Arcy, Big, and Little Zero islands.

Halibut

In the MUS, Tsawout harvesters identified using several locations partly within or adjacent to the LSA including East Point, Saturna Island, south of Pender Island, south of Moresby Island, and southwest of D'Arcy Island, as well as in the waters near Halibut Island (a W SÁNEĆ reserve). Tsawout identified a fishing area at Reid Harbour on Stuart Island that is located across the shipping lane.

Octopus

Tsawout mapped two octopus collection locations during the MUS study for this project. One location lies a few kms west of Sidney Island, west of Mandarte and Halibut islands, and the other sits south off Taylor Beach on Saturna Island. Both are partly or wholly within the LSA. Areas identified in previous studies include East Point and Monarch Point on Saturna Island, facing the shipping lanes and lying within the LSA, as well as Gooch Island, partly within and adjacent to the LSA, and Stuart Island and the San Juan's, on the eastern side of the shipping channel and LSA.

Flounder and Sole

Flounder/sole are typically caught incidentally by Tsawout fishermen when pursuing other species, especially bottom-fishing for cod or using traps. The SENĆOŦEN Alliance Study identified sites in an area extending from the southeastern tip of James Islands towards the northwestern side of D'Arcy Island, and another area extending south from Saanichton Bay along the east side of Vancouver Island. Multiple flounder fishing sites were also identified in Saanichton Bay, surrounding James Island, northwest of Sidney Island, and along the south side of Salt Spring Island.

Herring and Herring Eggs

Tsawout fishermen currently use herring for bait, food, and roe but the herring harvesting by individuals in their usual, preferred locations has declined in recent decades. Tsawout identified the following places where respondents caught herring, including Active Pass, Fulford Harbour, Ganges, Saanich Inlet, Long Harbour and Pat Bay, between James and Sidney Islands, Dawson Channel, Boundary Pass. The SENĆOŦEN Alliance Study identified herring harvesting sites at the eastern end of Active Pass, the south side of Salt Spring Island just outside of Fulford Harbour, and in Saanichton Bay, as well on the east side

of Vancouver Island extending south from Saanichton Bay to a point almost directly west of D'Arcy Island.

Sturgeon

According to the MUS, Tsawout harvesters have recently fished for sturgeon near the mouth or in the estuary of the Fraser. All sturgeon fishing was conducted by Tsawout on the far side of the shipping lanes.

In addition to providing traditional use information, Tsawout raised the following concerns with potential Project-related impacts relating to their marine fishing and harvesting activities:

- Tsawout is concerned about the impacts that the Project could have on nursery habitat, restricting the access to harvesting areas, increasing interference to harvesting areas and disrupting gathering sites;
- Tsawout is concerned about the impacts that the Project could have on salmon and halibut fishery;
- Tsawout noted that cultural impacts would not only occur in the event of a Project accident or malfunction, but from the Project's regular operation, which could prevent fishing activities;
- Tsawout is concerned that the Project could impact their rights to fish, including travel to fishing sites;
- Tsawout is concerned about increased tanker traffic in the shipping lanes, resulting in disturbance to food gathering locations (fishing, harvesting, plant gathering and hunting) from increased vessel wake;
- Tsawout is concerned about disruption to marine ecosystems from vessel wake, noise, emissions and lighting due to increased marine vessel traffic;
- Tsawout is concerned about disturbance to distribution, health, abundance and long-term sustainability of fisheries and all other resources;
- Tsawout is concerned about decreased marine water quality and increased pollution, including introductions of non-native species, due to increased marine vessels traffic;
- Tsawout is concerned about Project anchoring sites and possible damage to the ocean bed from Project activities; and
- Tsawout noted concerns regarding the lack of consideration of GHG's and climate change's impacts on fisheries and marine resources, and how the Project could contribute to those impacts.

The general direct and indirect effects of the Project on marine fishing and harvesting, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report. Project-related marine vessels are expected to cause temporary disruptions to Tsawout's marine fishing and harvesting activities. The Crown understands that community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This

communication would allow Tsawout community members to take measures to reduce potential disruptions from tankers and allow planning for fishing activities to take place that minimizes disturbance from Project-related tankers. Reduced harvests, while not expected to occur from temporary access restrictions, could impact Tsawout's cultural activities and sharing of marine food with the community. The proponent would also implement a range of mitigation measures that would reduce potential effects associated with Tsawout's marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, and scheduling and notification of Project activities (via the proponent's marine public outreach program).

In consideration of the information available to the Crown from the NEB process, consultation with Tsawout, Tsawout's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in minor impacts on Tsawout's marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

In their MUS, Tsawout describes marine travel routes and maps year round travel routes that interact with the LSA and shipping lanes. According to the MUS, Tsawout community members access fishing, gathering, and hunting locations as part of the seasonal patterns and many of Tsawout's active harvesters have specific seasonal routes that they rely on. Tsawout also stated in their comments on the draft Consultation and Accommodation Report that dozens of village, harvesting, and sacred locations were identified that can only be reached by crossing the shipping lanes. Travel routes, as well as anchorage sites, are mapped by Tsawout and presented in their MUS. As Tsawout describes in their comments on the draft Consultation and Accommodation Report, the map in the MUS map identifies dozens of travelways used routinely by Tsawout harvesters. The exact number of travelways that either cross or are adjacent to marine shipping lanes is difficult to determine from the map.

Tsawout's MUS identifies archaeological sites, place names, and reef net sites within and adjacent to the LSA. Archeological sites include Burial Cairns, canoe runs, clam gardens, cultural depressions, culturally modified trees, defensive sites, fish traps, lithic scatters, middens, pictographs, petroglyphs, and wet sites (i.e. fish weirs, basketry and cordage). Maps in Tsawout's MUS show archaeological, place name and reef net sites located within the LSA. Tsawout identified 17 of 19 reef net sites – a sacred fishery which Tsawout members have been working to revive for cultural and economic reasons, and which they regard as foundational to their society – are contiguous with, within, or on the far side of the LSA. The MUS describes ethnographically and ethnohistorically recorded Saanich village sites and resource procurements places scattered throughout the San Juan and Southern Gulf Islands and 11 of these sites and places on Sidney, D'Arcy, and James Islands. In *Volume 8B*, a summer camp in the Gulf Islands, settlement site in the San Juan Islands and a sacred area in the Saanich Inlet were identified in the Marine RSA, of which the shipping lanes are crossed to access the summer camp and settlement site.

Tsawout members also identify the importance of whales in their MUS, particularly the special relationship that Tsawout has with orca. The MUS tells the story of an event held by Tsawout to reestablish the traditional reefnet fishery on Pender Island, where a pod of orca whales passed over the old and future reef net site, just as Tsawout members arrived to begin setting the anchors and net. According to the MUS this was the first time orca had done this in several generations and their presence was considered a great blessing, as attendees felt the whales were there to join them in the common purpose of hunting salmon.

In addition to providing traditional use information, Tsawout raised specific concerns with potential Project-related impacts on other traditional and cultural practices:

- Tsawout is concerned by potential disturbances to archeological, heritage, and burial sites and other cultural and spiritual sites due to increased marine traffic;
- Tsawout is concerned about disturbance to special places, the reef net fishery, and reserves;
- Tsawout is concerned with the impacts that the Project could potentially have on heritage sites;
- Tsawout brought up issues regarding traditional use activities, commercial interests, and tourism interests that could be impacted by increased marine traffic;
- Tsawout expressed concern that the 10 anchorage sites identified beyond the shipping lanes will become relatively inaccessible;
- Tsawout is concerned about disruption to the use of historic, modern and future marine travel ways and marine access throughout their territory, including areas now considered to be part of the United States, as well as the cumulative disruption to all types of travelways;
- Tsawout is concerned about disruption to their way of life, including the loss of traditional knowledge, diminishment of community culture and cohesion, diminishment of relations with other Salish communities, inter-generational alienation, loss of the medicinal value of traditional foods and loss of confidence in the healthiness of traditional foods;
- Tsawout identified that there will be cultural and social impacts on reserves and reef net locations and believes that they will become relatively inaccessible as a result of the Project; and
- Tsawout expressed the concern that all disruption and disturbance to their subsistence activities and spiritual areas will have negative social and cultural effects. These issues include effects to multiple use sites, disruption of travelways, disruption of plant gathering activities, and disturbance of gathering places, disruption of subsistence, commercial fishing activities, and hunting activities.

The general direct and indirect effects of the Project on traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown understands that there will be temporary interruptions to Tsawout's traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups

that are interested in providing traditional knowledge related to the location and construction of the Project.

Tsawout identified cultural use and significance of Southern Resident Killer Whales and concerns about potential impacts of the Project during the NEB and Crown consultation processes. The *NEB Recommendation Report* concluded that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Aboriginal use associated with the Southern Resident Killer Whale. The Crown understands that the Southern Resident Killer Whale population is in decline, and that additional adverse environmental effects from project-related marine shipping would be considered significant.

In consideration of the information available to the Crown from the NEB process, consultation with Tsawout, Tsawout's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in moderate impacts on Tsawout's other traditional and cultural practices.

Impacts Associated with Accidental Tanker Spills

Tsawout expressed the following concerns regarding the impact of a potential oil spill on their Aboriginal Interests:

- Tsawout is concerned about oil spills within their traditional territory and potential impacts on shorelines of the Gulf Islands and on areas that Tsawout rely on for traditional harvesting of marine species, including marine birds;
- Tsawout is concerned about the effects associated to with water contamination, shoreline contamination, and physical contact between a tanker's hull and marine sub-tidal habitat from vessel grounding;³ and
- Tsawout is concerned about the increased risk of impacts from oil spills because of insufficient knowledge and capacity to contain and clean-up diluted bitumen in the marine environment.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. Section 4.3.6 of the main body of this Report sets out the impacts associated with accidental spills from marine shipping vessels. In consideration of this information and analysis, as well as information available to the Crown on Tsawout's Aboriginal Interests and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts, with

³ https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2451057/2786251/C355-15-27_-Tsawout_First_Nation_Expert_Report.__An_Assessment_of_Spill_Risk_for_the_TMEP_-_A4Q1G5.pdf?nodeid=2786049&vernum=-2

low likelihood, on Tsawout's Aboriginal Interests. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.⁴

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing marine safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for marine vessel use of the area between the Westridge Marine Terminal and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the marine-shipping component of the Project on the exercise of Tsawout's Aboriginal Interests would be up to moderate.

However, given existing use of the marine shipping corridor within areas proximate to the exercise of Tsawout's Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of Tsawout's Aboriginal Interests, the federal Crown is considering additional measures to further offset the potential impacts of the marine-shipping component of the Project on Tsawout. Please see Sections 4 and 5 of the main body of this Report for a discussion of proposed accommodation and responsive measures.

⁴ Trans Mountain Final Argument, p. 85 and 207

Appendix D.21 – Tseycum First Nation

I - Background Information

Tseycum First Nation (Tseycum) is located in British Columbia (BC) on the northwest side of the Saanich Peninsula on Vancouver Island, adjacent to the Saanich Inlet. Tseycum is a party to a *Writ of Summons* as part of the Saanich Nation dated 2003. Tseycum has five reserve lands: Bare Island no. 9 (shared with Tseycum First Nation), Goldstream no. 13 (shared with Malahat First Nation, Pauquachin, Tsartlip and Tseycum First Nation), Pender Island no. 8 (shared with Tseycum First Nation), Saturna Island no. 7 (shared with Tseycum First Nation) and Union Bay no. 4. Cumulatively, Tseycum territory covers 196.3 hectares. As of July 2016, Tseycum's registered population totals 187. Tseycum speak the Sencoten language.

II - Preliminary Strength of Claim Assessment

- Approximately 30 kilometers (km) of the marine shipping route would pass through the eastern portion of the asserted traditional territory of the Saanich Nation. The distance from the main Tseycum community to the marine shipping lane is approximately 2 km.
- The Province of BC understands that Tseycum has Douglas Treaty rights to fish as formerly and hunt on occupied lands. Ethnohistoric evidence suggests that the Tseycum originated from Tsehum Harbour and later moved to Patricia Bay on the western side of Saanich Peninsula. Ethnographic sources associate the Tseycum, Tsartlip, Tseycum and Pauquachin First Nations with the Saanich Peninsula, Goldstream River, and the southern Gulf Islands (including the southern portion of Saltspring Island, Sidney Island, Stuart Island, Pender Islands, Mayne and Saturna Islands).
- Canada recognizes the Douglas Treaties and understands that Tseycum has members who are descendants of one or more signatories to one or more Douglas Treaties. Canada remains committed to working toward a common understanding of the content and scope of the Douglas Treaties with Tseycum and to explore opportunities to honour and recognize the Douglas Treaties.

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Tseycum's Aboriginal Interests, the Crown is of the view that the legal duty to consult Tseycum lies at the middle portion of the *Haida* consultation spectrum. Tseycum was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office, which affords Tseycum opportunities to be consulted at a deeper level.

Tseycum participated in the National Energy Board (NEB) review process as an intervenor, but did not submit an application for NEB participant funding or actively participate in the process aside from the Oral Traditional Evidence Hearing in Victoria, BC. The Crown understands that Tseycum did not provide information requests, a final written argument, or an oral summary argument to the NEB.

The Major Projects Management Office (MPMO) offered Tseycum \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Tseycum \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Tseycum did not make use of these funds.

The Crown provided a first draft of the Consultation and Accommodation Report (Report) to Tseycum for review and comment on August 17, 2016. The Crown did not receive comments from Tseycum on the draft Report. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016. The Crown has not received comments from Tseycum.

IV - Summary of Key Tseycum Issues and Concerns Raised

This section offers a summary of the key issues raised by Tseycum, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Tseycum's key Project-related issues and concerns are summarized below:

Cultural and Social Impacts

- Potential for vessel wakes from tankers and increased marine shipping to impact gravesites vis-a-vis shoreline erosion.

Methodology, Process and Consultation

- Concern that the NEB-led consultation process was inadequate and inconsistent with a traditional First Nations approach, where First Nations would typically take a more consensus-based approach if they wanted to traverse or otherwise utilize the traditional territory of another First Nation.

Cumulative Effects

- Pollution from past industrial development projects has already reduced coastal bird populations and made oyster beds less productive and edible.

Economic Impacts

- Interest in revenue sharing arrangements for all socio-economic issues, such as placing a monetary charge on tankers passing through their traditional territory.

Impacts on Harvesting Rights

- Potential infringement on Tseycum's Aboriginal Interests relating to seafood harvesting.

Marine Impacts and Accidents and Malfunctions

- Interest in spill prevention and response; and

- Potential impacts from a spill on Tseycum's traditional food sources (particularly seafood due to Tseycum's heavy reliance on seafood), way of life, and future economic opportunities.

Tseycum's Response to NEB Recommendation Report

No specific comments were received on the *NEB Recommendation Report*.

V - Potential Impacts of the Project on Tseycum's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests are provided in Sections 2.4.3 and 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted or established traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Tseycum's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Tseycum's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Tseycum's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Tseycum, Tseycum's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate (EAC) issued by the Province.

Impacts on Hunting, Trapping, and Plant Gathering

Tseycum raised the following concerns regarding potential Project-related impacts on hunting, trapping and plant gathering activities:

- Cumulative impacts from the Project and pollution from past industrial development projects that have reduced coastal bird populations; and
- Potential impacts on traditional food sources.

The general direct and indirect effects of the Project on hunting, trapping, and gathering activities, along with key mitigation measures, are described in Sections 4.3.1 and 4.3.3 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or

indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Sections 4.3.1 and 4.3.3 of this Report). The proponent would implement a range of mitigation measures that would reduce potential effects associated with Tseycum's hunting, trapping, and plant gathering activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

In consideration of the information available to the Crown from the NEB process, consultation with Tseycum, Tseycum's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in a negligible-to-minor impact on Tseycum's hunting, trapping and plant gathering activities.

Impacts on Marine Fishing and Harvesting

Tseycum raised the following concerns regarding potential Project-related impacts on marine fishing and harvesting activities:

- Cumulative impacts from the Project and pollution from past industrial development projects that have made oyster beds less productive and edible;
- Potential infringement on Tseycum's Aboriginal Interests relating to seafood harvesting; and
- Potential impacts on Tseycum's traditional food sources, particularly seafood.

The general direct and indirect effects of the Project on marine fishing and harvesting activities, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report. The conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations associated with marine fishing and harvesting sites (Section 4.3. 3 of this Report). With regards to specific concerns raised by Tseycum, the proponent would implement a range of mitigation measures to reduce potential effects associated with Tseycum's marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, and scheduling and notification of Project activities (via the marine public outreach program).

In consideration of the information available to the Crown from the NEB process, consultation with Tseycum, Tseycum's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in negligible-to-minor impacts on Tseycum's marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

Tseycum raised concerns regarding potential Project-related impacts on other traditional and cultural practices, including potential for wake from tankers and increased marine shipping to impact gravesites vis-a-vis shoreline erosion.

The general direct and indirect effects of the Project on traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this Report. Marine mammals are of importance to many Coast Salish Aboriginal groups, and killer whales specially hold strong spiritual and cultural importance for many Aboriginal groups. The NEB concluded that effects on the endangered Southern Resident Killer Whale and Aboriginal cultural use of Southern Resident Killer Whale from Project-related shipping activities would be significant. The Crown is not aware of any specific cultural use of or concerns regarding killer whales raised by Tseycum during the NEB and Crown consultation processes.

Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown understands that there will be temporary interruptions to Tseycum's traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Tseycum, Tseycum's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in negligible-to-minor impacts on Tseycum's other traditional and cultural practices.

Impacts Associated with Accidental Tanker Spills

Tseycum identified concerns related to accidental oil spills, including potential impacts from a spill on Tseycum's traditional food sources (particularly seafood due to Tseycum's heavy reliance on seafood), way of life, and future economic opportunities.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. Section 4.3.6 of the main body of this Report sets out the potential impacts associated with accidental spills from Project-related marine shipping vessels. In consideration of this information and analysis, as well as information available to the Crown on Tseycum's Aboriginal Interests and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts on Tseycum's Aboriginal Interests. In making this general conclusion, the Crown

acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.¹

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing marine safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for marine vessel use of the area between the Westridge Marine Terminal and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the marine-shipping component of the Project on the exercise of Tseycum's Aboriginal Interests would be negligible-to-minor.

However, given existing use of the marine shipping corridor within areas proximate to the exercise of Tseycum's Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of Tseycum's Aboriginal Interests, the federal Crown is considering additional measures to further offset the potential impacts of the marine-shipping component of the Project on the Tseycum First Nation. Please see Sections 4 and 5 of the main body of this Report for a discussion of proposed accommodation measures.

¹ Trans Mountain Final Argument, p. 85 and 207

Appendix D.22 – T'Sou-ke First Nation

I - Background Information

T'Sou-ke First Nation (T'Sou-ke) is located on Southern Vancouver Island, British Columbia (BC), in the coastal areas surrounding the Sooke Basin on the Juan de Fuca Strait. T'Sou-ke has two reserves: T'Sou-ke Indian Reserve no. 1 (near Sooke Harbour) and T'Sou-ke Indian Reserve no. 2 (further east on Sooke Bay). T'Sou-ke's total registered population is 259 (131 are living on their Reserves, 2 living on other Reserves and 126 living off the Reserves).

The T'Sou-ke community historically spoke a dialect of the SENĆOŦEN language, associated with the Saanich peoples of southern Vancouver Island. There are five such dialects, referred to as the Northern Straits Salish, with each one identified by the name of the community that speaks it. As such, T'Sou-ke members speak the 'T'Sou-ke' dialect, though there are few remaining speakers today. The name "T'Sou-ke" is derived from the SENĆOŦEN word for the Stickleback fish found in the nearby estuary.

T'Sou-ke is part of the Te'mexw Treaty Association (TTA) along with four other Aboriginal groups: Beecher Bay, Nanoose, Malahat and Songhees. The TTA is part of the BC Treaty Process and is currently in Stage 5 of the BC Treaty process (i.e. Final Agreement), having signed an agreement-in-principle in April 2015.

II - Preliminary Strength of Claim Assessment

- Approximately 40 kilometres (km) of the marine shipping route would pass within the southern part of T'Sou-ke's asserted traditional territory.
- The Province of BC understands that T'Sou-ke has Douglas Treaty rights to carry on fisheries as formerly and hunt over unoccupied lands within its historic traditional territory.
- Canada recognizes the Douglas Treaties and understands that T'Sou-ke has members who are descendants of one or more signatories to one or more Douglas Treaties. Canada remains committed to working toward a common understanding of the content and scope of the Douglas Treaties with T'Sou-ke, to implement the treaty through agreements with the Crown, and to explore opportunities to honour and recognize the Douglas Treaties.
- The Crown understands that ethnohistoric evidence suggests that former T'Sou-ke fishing was conducted at Sooke River, Sooke Harbour, in the vicinity of Sooke Inlet, De Mamiel Creek and likely Sooke Lake.¹

III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on T'Sou-ke's Aboriginal Interests, the Crown is of the view that the legal duty to consult T'Sou-ke lies at the middle

¹ Te'mexw Treaty Association and Esquimalt Nation. Songhees, Beecher Bay, T'Sou-ke and Malahat First Nations, Esquimalt Nation: Review of Ethnographic and Historical Sources. Ministry of Justice, Legal Services Branch, Aboriginal Research Division. September 5, 2008. Revised to June 16, 2015.

portion of the *Haida* consultation spectrum. T'Sou-ke was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which afforded T'Sou-ke opportunities to be consulted at a deeper level.

As an intervenor in the National Energy Board (NEB) hearing process, T'Sou-ke submitted written evidence, final written argument, and oral summary argument. T'Sou-ke also provided additional correspondence to the NEB, participated in the Oral Traditional Evidence Hearing in Victoria, and responded to the Crown's Issues Tracking Table Information Request by further elaborating on their concerns [[A71224](#)].

T'Sou-ke was awarded \$40,000 in participant funding (plus travel for two to participate in the hearing) from the NEB. The Major Projects Management Office (MPMO) also offered T'Sou-ke \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered T'Sou-ke an additional \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. T'Sou-ke signed contribution agreements with the MPMO in response to both of these offers, for a total of \$18,000 in allocated funding. On August 19, 2016, EAO provided T'Sou-ke with \$5,000 in capacity funding to support their participation in consultation with the Crown.

On June 16, 2016, the proponent and T'Sou-ke signed a confidential mutual benefit agreement (MBA), which included a Letter of Support for the Project.

T'Sou-ke met with the Crown consultation team on April 18, 2016, July 25, 2016, and September 14, 2016 to discuss the Project. The Crown provided a first draft of the Consultation and Accommodation Report (Report) to T'Sou-ke for review and comment on August 17, 2016. T'Sou-ke provided comments on the draft Report to the Crown on September 18, 2016. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016 and T'Sou-ke provided comments on November 15, 2016. T'Sou-ke also provided a separate Aboriginal group submission to the Crown on November 15, 2016.

IV - Summary of Key T'Sou-ke Issues and Concerns Raised

This section offers a summary of the key issues raised by T'Sou-ke, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown has gained its understanding of T'Sou-ke's issues and concerns through the community's involvement in the NEB process (including T'Sou-ke's submissions to the NEB and responses to the Crown's Information Request) as well as through correspondence and consultation meetings with the Crown. In addition, the Crown has considered information regarding the proponent's engagement with T'Sou-ke, as described in the proponent's [Aboriginal Engagement Report](#) (July 2016).

The Crown's assessment of the impacts of the Project presented in the subsequent section considers these issues and includes the Crown's views and conclusions. The Crown's understanding of T'Sou-ke's key Project-related issues and concerns is summarized below.

Methodology, Process and Consultation

T'Sou-ke raised procedural concerns with respect to the NEB review, stating that:

- Information requests are less effective at obtaining information than cross-examination of Project witnesses, the latter of which the NEB did not allow;
- The hearing schedule conflicted with marine harvesting activities, thereby creating a cultural and economic barrier to participation in the process; and
- Insufficient capacity funding prevented full and meaningful participation in the NEB review process.

Moreover, T'Sou-ke felt that the NEB process had gaps in its assessment of the marine shipping component of the Project. For example, T'Sou-ke does not think that the proponent conducted a comprehensive risk assessment for Project-related marine shipping. As a result, T'Sou-ke asserts that a complete understanding of the risks and effects of a potential marine oil spill is lacking.

T'Sou-ke also raised concerns about the Crown consultation process. From T'Sou-ke's perspective:

- Participant funding from the MPMO was insufficient, particularly in light of the complexity of the Project and the potential seriousness of Project impacts on Aboriginal Interests and Aboriginal rights;
- The Crown cannot rely on the NEB process to fulfill its duty to consult and accommodate; and
- The Crown needs to consult with T'Sou-ke about federal initiatives, such as a proposed Indigenous Advisory and Monitoring Committee and the Oceans Protection Plan, before a decision is made on the Project.

In a letter dated November 15, 2016, T'Sou-ke states that the Crown's consultation on the Project is incomplete. For these reason, T'Sou-ke requested an extension to the consultation period, beyond December 2016.

T'Sou-ke disagrees with the Crown's depth of consultation assessment afforded to T'Sou-ke, noting that T'Sou-ke has established fishing and hunting rights under the Douglas Treaties; as such, they assert, the duty to consult T'Sou-ke is at the strong end of the *Haida* spectrum. T'Sou-ke also made an assertion of title to the marine waters through which the tankers associated with the Project would travel and also because two of its reserves border on the marine waters, and thus stand to be adversely affected by a major oil spill. T'Sou-ke expressed concerns regarding the lack of transparency in how the federal Cabinet reaches its decisions. T'Sou-ke has also found information sharing to be inadequate in the Crown consultation process and raised concerns about the Crown consultation team's mandate to discuss accommodation with Aboriginal groups.

Lastly, T'Sou-ke has noted that applications for permits and authorizations from the various levels of government make it difficult for T'Sou-ke to effectively assert its Aboriginal Interests.

Environmental Impacts

T'Sou-ke identified the following concerns regarding the adverse effects of the Project on the environment and T'Sou-ke's environmental objectives:

- Large vessel wake action could result in erosion and damage to intertidal and shoreline areas, potentially affecting members' ability to exercise their rights in foreshore areas;
- Vessel traffic could adversely affect water quality, increasing the risk of pollution associated with vessel garbage, fuel leaks, and ballast water;
- Marine vessel traffic could adversely affect local air quality; and
- The Project could negatively impact T'Sou-ke's ecosystem restoration and stewardship efforts.²

T'Sou-ke also noted how Project-related tanker traffic could adversely affect marine animals and T'Sou-ke's key marine resources. T'Sou-ke indicated that increased vessel traffic could pose risks for the migration paths and habitat of salmon and other marine species. Reduced quality of culturally and economically significant species as well as reduced opportunities to harvest these species would negatively impact T'Sou-ke.

Similarly, T'Sou-ke asserts that the environmental assessment has not fully considered the Project's adverse effects on killer whales and their critical habitat, nor has it identified measures to address all adverse effects. The killer whale is culturally and spiritually significant for the T'Sou-ke People; T'Sou-ke fears that tanker traffic from the Project could harm the species, which is already under serious threat. According to the proponent's Aboriginal Engagement Report, T'Sou-ke indicated that adverse effects from the Project on the marine environment may also include injury or mortality of marine mammals resulting from a vessel strike, increased underwater sound levels that result in sensory impacts on marine life, and the introduction of invasive species from the transport of ballast water.

T'Sou-ke indicated that mitigation measures for marine resources and uses are not adequate and that they were not developed in consultation with T'Sou-ke.

Cultural and Social Impacts

T'Sou-ke identified the following concerns as they relate to potential impacts of the Project on T'Sou-ke culture and spirituality:

- Routine Project operations could damage cultural heritage sites or result in the loss of invaluable sites;
- The Project could adversely affect T'Sou-ke's subsistence harvesting practices, interfere with ceremonial practices, and disrupt the daily practice of T'Sou-ke's knowledge and culture;
- The Project could have negative implications for cultural continuity in the T'Sou-ke community, disrupting members' ability to transmit knowledge and practices to younger generations; and

² For example, one of T'Sou-ke's aims is to revitalize shellfish in T'Sou-ke's territory. To do so, T'Sou-ke is working to improve water quality in the region.

- The Project could impact T'Sou-ke's spiritual connection with the land and water as well as their identity as T'Sou-ke People.

Health and Human Safety

Concerns were raised with respect to the health and safety of T'Sou-ke members, should the Project proceed, including:

- A collision between a tanker and cruise ship could occur in a high wind areas (including the Juan de Fuca Strait);
- Small vessels could be at risk, discouraging some members from travelling in the Strait given the increase in tanker traffic;
- Tanker-related pollution and/or a spill could contaminate T'Sou-ke's marine resources, with potential human health implications with respect to seafood consumption; and
- Increased tanker traffic and the risk of a spill may adversely affect the psychological well-being of T'Sou-ke members in light of sensory disturbance for marine users, acoustic disturbance, impaired view, loss of privacy, on-water hazards, perceived pollution, physical obstruction, and perceived danger.

Accidents and Malfunctions

In T'Sou-ke's view, releases of crude oil would adversely impact marine ecosystems, which would hinder T'Sou-ke's conservation and habitat restoration efforts. Moreover, a major spill could have adverse effects on coastal ecosystems, including the shorelines of T'Sou-ke's reserve lands. A spill could destroy T'Sou-ke's way of life, with major implications for T'Sou-ke culture, domestic harvesting, and commercial harvesting.

Specifically, T'Sou-ke is concerned that the Sooke basin and harbor – which remain critical harvesting areas for fish, crab, commercial shellfish, and shoreline birds – are not nearly as productive as they used to be. T'Sou-ke identified Race Rocks as a culturally and spiritually significant site. T'Sou-ke noted that Race Rocks is also an environmentally sensitive area given the heightened potential for the dispersion of spilled oil from this location. A potential spill in this area would be devastating for T'Sou-ke, impacting members' cultural, spiritual, and economic connection to these areas.

For these reasons, an oil spill in T'Sou-ke's territory would be extremely traumatic for the community. T'Sou-ke members are experiencing deep uncertainty and anxiety about the Project. From T'Sou-ke's perspective, spill response, spill modelling, and spill mitigation is inadequate to address the risks of a spill. Moreover, T'Sou-ke has concerns that the existing marine liability and compensation regime would not provide T'Sou-ke with compensation for non-pecuniary harms, such as cultural or spiritual losses in the event of a spill.

T'Sou-ke's Response to NEB Recommendation Report

T'Sou-ke is concerned that there is a lack of compliance mechanisms built into the NEB conditions. They observed that some of the NEB's conditions, including those related to the marine shipping component

of the Project, require the proponent to file reports or plans with the NEB (e.g. NEB conditions 91, 131, 133, and 134) rather than have those submissions approved by the relevant authorities. Consequently, T'Sou-ke feels that there will be limited opportunities to ensure that the proponent's submissions are robust and that they adequately take Aboriginal concerns into account. For these reasons, T'Sou-ke recommended that the applicable government authority sign off on the proponent's reporting submissions as a safeguard (see discussion of accommodation measures below).

T'Sou-ke also indicated that the NEB conditions do not reflect T'Sou-ke's heightened perception of environmental risks. In particular, T'Sou-ke disagreed with the "clinical" approach the NEB took when assessing the risk and impacts of an oil spill. From T'Sou-ke's perspective, the NEB did not effectively consider how a spill would impact the community culturally and spiritually.

Although NEB condition 52 requires the development of an air emissions management plan for the Westridge Terminal, T'Sou-ke identified the lack of an NEB condition for air quality monitoring along the shipping route as a problem.

Accommodation Proposals

At the April 18, 2016 meeting, T'Sou-ke presented a preliminary list of its outstanding issues and proposed accommodation measures. On July 25, 2016, T'Sou-ke provided an updated version of its proposals and outstanding issues to the Crown consultation team.

The Crown responded to T'Sou-ke's accommodation proposals in writing on September 12, 2016. A follow-up consultation meeting also took place on September 14, 2016, during which T'Sou-ke requested more in-depth responses to T'Sou-ke's proposals. The Crown sent T'Sou-ke a revised written response on November 4, 2016.

A summary of T'Sou-ke's proposed accommodation measures are outlined below. T'Sou-ke is requesting:

- A comprehensive risk assessment of oil and fuel spills in the Juan de Fuca Strait;
- New marine emergency response standards embedded in regulation;
- Regular emergency response training exercises (for a range of spill sizes) in the Juan de Fuca Strait (including simulations on the water and as part of the Incident Command Structure);
- The completion of a local emergency response program and emergency response training for T'Sou-ke members before the Project begins;
- Compensation for Aboriginal rights and Aboriginal Interests in the event of a spill;
- Consideration of additional measures to make marine navigation safer and less intimidating for T'Sou-ke members;
- Prompt finalization and implementation of an effective *Species at Risk Act* Killer Whale Action Plan;
- A moratorium on upcoming or ongoing environmental assessments for projects that would increase vessel traffic in killer whale critical habitat by more than a trivial amount;

- An air quality monitoring and management plan along the shipping route;
- A commitment from Canada to secure better emission standards for marine vessels at an international level;
- Modifications to the NEB conditions that build oversight mechanisms into conditions; and
- Federal support for a marine research and education centre at Muir Creek (a proposal for which is appended to T'Sou-ke's two-page submission to Cabinet).

Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by T'Sou-ke that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

V - Potential Impacts of the Project on T'Sou-ke's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group, including areas within the vicinity of marine shipping related to the Project, may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering) by individual members or families.

The discussion in this section focuses on potential impacts of the Project on T'Sou-ke's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to T'Sou-ke's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g., fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on T'Sou-ke's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with T'Sou-ke, T'Sou-ke's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate (EAC) issued by the Province.

T'Sou-ke completed a third-party traditional marine and resource use (TMRU) study titled, *Traditional Marine Resource Knowledge and Use Study Report* [[A4L5U3](#)] in 2015. The focus of the study was on

Crown lands and waters within the asserted territory of T'Sou-ke crossed by the Marine Regional Study Area (RSA).³ Traditional marine resource uses identified by T'Sou-ke include hunting waterfowl and wildlife, gathering plants, information on fishing sites and marine harvesting, sacred sites, trapping sites, gathering areas for community members, and trails and travelways. In its Supplemental Technical Report [A4S718], the proponent estimated approximate distances and directions from the marine shipping lanes based on information in T'Sou-ke's report.

Impacts on Hunting, Trapping and Plant Gathering

T'Sou-ke community members identified in their TMRU study that waterfowl (e.g. ducks and geese) and wildlife (e.g. black-tailed deer, elk, bears, seals, mink, raccoons and sea otters) are important for the subsistence and culture of T'Sou-ke. Trapped species include mink, raccoon, and sea otter. Community members gather medicinal and other plants, harvest berries, and collect firewood, cedar bark and cedar poles. Common plants and berries include salmon berry shoots, rhubarb, sweet grass, blackberries, blueberries, Oregon grapes, salmon berries, salal berries, thimbleberries, strawberries, huckleberries, black caps, and red caps.

T'Sou-ke identified the following concerns related to environmental effects of the Project on hunting, trapping, and plant gathering activities:

- The potential for reduced harvesting and quality of species traditionally harvested by community members, including marine and land-based resources;
- Impacts to hunting, trapping and gathering for subsistence, cultural and economic purposes;
- Introduction of invasive species could affect their ability to harvest preferred species and harvest in preferred locations; and
- Project effects that could exacerbate existing cumulative impacts on ecologically and culturally sensitive areas.

T'Sou-ke identified a total of 10 hunting, trapping and plant gathering sites in their TMRU study that are located within the Marine RSA. Five hunting sites identified are the Strait of Juan de Fuca, Sooke Harbour, Sooke Basin, Sooke River and the coastal area near Sia-o-sun. Point No Point and the coastal area of the Strait of Juan de Fuca were identified as two trapping sites. Three plant gathering sites identified are the Strait of Juan de Fuca, Sooke Harbour and Sooke Basin. T'Sou-ke is not required to cross shipping lanes to access the trapping or plant gathering sites; however, shipping lanes are crossed to access the hunting site in the Strait of Juan de Fuca. The nearest plant gathering site is 8 km north of the shipping lanes.

³ The area extending beyond the LSA boundary (i.e. the zone of influence or area where the element and associated indicators are most likely to be affected by Project-related marine vessel traffic) where the direct and indirect influence of other activities could overlap with project-specific effects and cause cumulative effects on the environmental or socio-economic indicator.

Some of T'Sou-ke's concerns relate to specific locations and access for hunting, trapping, and plant gathering activities, including Sooke Basin and Sooke Harbor, which remain critical areas for harvesting birds along the shoreline. T'Sou-ke identified concerns with the direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities. These concerns include the potential for reduced harvests and the resulting impact on T'Sou-ke's economic, cultural and social structures within the community through lack of connection with historical and current traditions.

The general direct and indirect effects of the Project on hunting, trapping, and gathering, along with key mitigation measures, are described in Section 4.3.1 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Section 4.3.1 of this Report). The proponent would implement a range of mitigation measures that would reduce potential effects associated with T'Sou-ke's hunting, trapping, and plant gathering activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

In consideration of the information available to the Crown from the NEB process, consultation with T'Sou-ke, T'Sou-ke's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in negligible impacts on T'Sou-ke's plant gathering and trapping activities and a minor impact on T'Sou-ke's hunting activities.

Impacts on Marine Fishing and Harvesting

As described in their traditional marine use information, T'Sou-ke has stated that sockeye salmon is the most important species to community members. Gathering clams is a traditional activity regularly practiced by T'Sou-ke community members. Harvested marine and freshwater shellfish include limpets, mussels, oysters, abalone, chiton, sea cucumber, scallops, gooseneck barnacles, sea urchins; clams (manila clams, littleneck clams, butter clams, geoduck clams and cockles), kelp, crab, octopus, squid, smelt, trout, salmon, lingcod, halibut, dogfish, and herring. T'Sou-ke currently holds commercial clam and oyster farm tenures in the Marine RSA.

T'Sou-ke identified many concerns related to the environmental effects of the Project on marine fishing and harvesting activities, including the potential introduction of invasive species through the transport of ballast water, the impacts of increased vessel traffic on salmon and other marine species, injury or mortality of marine mammals resulting from a vessel strike, increased sensory impacts to marine life, erosion and damage to intertidal and shoreline habitat from large wake action, and cumulative impacts on ecologically sensitive areas.⁴ As described in Section 4.3.3 of this Report, Project-related marine

⁴ Supplemental Filing: Part 2, Aboriginal Engagement Report. (2016). Trans Mountain Expansion Project.

shipping activities are not likely to cause significant adverse environmental effects on marine fish and fish habitat, including *SARA*-listed species, and the proponent would implement several mitigation measures to reduce potential effects on marine fish and fish habitat. Key mitigations include the proponent's commitment (411) to require all tankers to process and empty their bilges prior to arrival and lock the discharge valve of the bilge water while in Canadian waters. Based on this information and the species identified by T'Sou-ke as important for marine fishing and harvesting activities, Project-related marine shipping activities are likely to have negligible environmental effects on species harvested by T'Sou-ke.

In their traditional marine use information, T'Sou-ke identified the following four locations within the Marine RSA where community members engage in fishing and harvesting activities: the Strait of Juan de Fuca, Race Rocks, the foreshore region near Sia-o-sun, Sooke Basin, Harbour and the flats, and Port Renfrew. T'Sou-ke identified fishing sites located in the Strait of Juan de Fuca that require community members to cross marine shipping lanes.

T'Sou-ke's concerns relate to specific locations and access for marine fishing and harvesting activities, including the potential implications of increased tanker traffic on the safety of T'Sou-ke members on the water and the ability of T'Sou-ke members to fish (particularly for salmon). As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow T'Sou-ke community members to take measures to reduce potential disruptions from tankers and allow planning for fishing activities to take place that minimizes disturbance from Project-related tankers. Reduced harvests, while not expected to occur from temporary access restrictions, could impact T'Sou-ke's cultural activities and sharing of marine food with the community.

T'Sou-ke is concerned about the direct and indirect effects of Project-related marine shipping activities on social, cultural, spiritual, and experiential aspects of its marine fishing and harvesting activities. From T'Sou-ke's perspective, an increase in tanker traffic may discourage community members from travelling in the Strait of Juan de Fuca, interfere with travel in T'Sou-ke's traditional territory, and adversely impact the ability of community members to exercise their fishing and harvesting rights and cultural practices. T'Sou-ke expressed concern that community members may not be able to continue traditional practices, such as clam harvesting. Moreover, T'Sou-ke is concerned that the potential for reduced harvests would impact economic, cultural and social structures within the community through a lack of connection with historical and current traditions.

Project-related marine vessels are expected to cause temporary disruptions to T'Sou-ke's marine fishing and harvesting activities. The Crown understands that community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow T'Sou-ke community members to take measures to reduce potential disruptions from tankers and allow planning for cultural events to take place that minimizes disturbance

from Project-related tankers. Reduced harvests, while not expected to occur from temporary access restrictions, could impact T'Sou-ke's cultural activities and sharing of marine food with the community.

The conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with marine fishing and harvesting sites (Section 4.3.3 of this Report). The proponent would implement a range of mitigation measures that would reduce potential effects associated with T'Sou-ke's marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, and scheduling and notification of Project activities (via the proponent's marine public outreach program).

In consideration of the information available to the Crown from the NEB process, consultation with T'Sou-ke, T'Sou-ke's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in minor impacts on T'Sou-ke's marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

In their TMRU study, T'Sou-ke identified that trails located adjacent to beaches are used by community members to collect seafood and harvest berries. T'Sou-ke community members actively travel on the Sooke River, San Juan River, Sooke Basin, Sooke Harbour and the Strait of Juan de Fuca. Travelways are used for Tribal Journeys, and to access crab trapping locations, camping sites, shellfish gathering locations, and fishing and gaffing locations. Gathering places and sacred areas are important for the continuity of T'Sou-ke culture and community. Gathering places are used by community members as teaching places, housing, campsites, ceremonies, feasts, traditional drumming, picnics, and Elder and youth gathering. Sacred areas are used for a range of purposes such as birth places and burial sites, ceremonial places for dances and feasts, funerals and weddings, and Tribal Journeys.

T'Sou-ke identified six travelways during the TMRU study, of which four are located in the Marine RSA: Strait of Juan de Fuca, Sooke Harbour, Sooke Basin, and San Juan River. Three gathering places were identified by T'Sou-ke, all of which are within the Marine RSA: Strait of Juan de Fuca, Sooke Harbour and Sooke Basin. Nine sacred areas were identified, of which three are located in the Marine RSA: coast of Juan de Fuca Strait, Sooke Harbour, and Sooke Basin. The Strait of Juan de Fuca travelway and gathering place is located within the shipping lane. The shipping lanes are not crossed to access the sacred areas identified by T'Sou-ke. The nearest sacred area is located 8 km north of the shipping lane.

In addition to providing traditional use information, T'Sou-ke raised specific concerns with potential Project-related impacts relating to other traditional and cultural practices, including:

- Disruptions to the ability of T'Sou-ke members to travel within their territory and reduced enjoyment and experience of community members' use of areas in its asserted traditional territory;

- Project impacts on the Southern Resident Killer Whale population resulting from physical and acoustic disturbances associated with increased vessel traffic;
- Reductions in the harvesting of marine resources, particularly seals and salmon, impacting cultural and social structures in the community;
- Disruptions to the transmission of knowledge and culture, resulting from a decrease in community members' subsistence harvesting practices, lost teaching areas, and lost wildlife species; and
- Increased vessel traffic that could negatively impact economic structures within the community.

The general direct and indirect effects of the Project on traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this Report. T'Sou-ke identified concerns regarding Southern Resident Killer Whales during the NEB and Crown consultation processes. The *NEB Recommendation Report* concluded that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Aboriginal use associated with the Southern Resident Killer Whale. The Crown understands that the Southern Resident Killer Whale population is in decline, and that additional adverse environmental effects from project-related marine shipping would be considered significant.

Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown understands that there will be temporary interruptions to T'Sou-ke's traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with T'Sou-ke, T'Sou-ke's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in moderate impacts on T'Sou-ke's other traditional and cultural practices.

Impacts Associated with Accidental Tanker Spills

T'Sou-ke expressed concern with direct and indirect effects of a Project-related tanker spill on their Aboriginal Interests. These concerns include:

- Lack of a full understanding of the risks and effects of a potential marine oil spill;
- Adverse impacts on marine ecosystems, which would hinder T'Sou-ke's conservation and habitat restoration efforts;
- Adverse effects on T'Sou-ke's cultural and traditional activities;
- Adverse impacts on critical harvesting areas at Sooke Basin, Sooke Harbour, and Race Rocks; and

- Impacts to T'Sou-ke's way of life, as a result of impacts to the shoreline of reserve land, T'Sou-ke culture, domestic harvesting, as well as commercial harvesting.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. Section 4.3.6 of the main body of this Report sets out the impacts associated with accidental spills from marine shipping vessels. In consideration of this information and analysis, as well as information available to the Crown on T'Sou-ke's Aboriginal Interests and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts, with low likelihood, on T'Sou-ke's Aboriginal Interests. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.⁵

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that recommended NEB conditions and the existing marine safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for marine vessel use of the area between the Westridge Marine Terminal and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the marine-shipping component of the Project on the exercise of T'Sou-ke's Aboriginal Interests would be up to moderate.

However, given existing use of the marine shipping corridor within areas proximate to the exercise of T'Sou-ke's Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of T'Sou-ke's Aboriginal Interests, the federal Crown is considering additional measures to further offset the potential impacts of the marine-shipping component of the Project on T'Sou-ke First Nation. Please see Sections 4 and 5 of the main body of this Report for a discussion of proposed accommodation measures.

In addition, the Crown is aware that the proponent has entered into a MBA with T'Sou-ke in an attempt to offset potential impacts, should the Project proceed.

⁵ Trans Mountain Final Argument, p. 85 and 207

Appendix E.5 – Métis Nation of British Columbia

I - Background Information

The Métis Nation of British Columbia (MNBC) is a non-profit organization which describes itself as the official governing organization of Métis people in the province of British Columbia (BC). The MNBC states it represents the interests of nearly 70,000 Métis in BC, including more than 8,300 Métis citizens who are registered with the organization. There are thirty-five Métis chartered communities in BC and the MNBC is mandated to develop and enhance opportunities for Métis communities by implementing culturally relevant social and economic programs and services.

The MNBC states that thirteen of their chartered communities are located within the Project footprint and that ongoing traditional harvesting (hunting, fishing, and plant harvesting for foods and medicines) occurs in the Project area.

The MNBC signed a letter of support with the proponent on November 14, 2014 [\[A64327\]](#).

II - Preliminary Strength of Claim Assessment

- The MNBC indicates that they have member communities in the vicinity of the pipeline route, although their filings to the NEB do not indicate which of the chartered communities are in the vicinity of the pipeline corridor. MNBC members likely include those in the area of Kamloops, BC, north of the Thompson River from kilometre post (KP) 820 north to KP 650. The MNBC would likely also have members in Lower Mainland and on Vancouver Island. The MNBC claims members exercise fishing rights which may intersect with the marine shipping lanes associated with the Project.
- The preliminary assessment of the Crown is that the MNBC is likely to have a weak claim to Aboriginal rights within the Project activity zone.

III - Involvement in the NEB and Crown consultation process

Métis have Aboriginal rights to hunt, trap and fish where they had settled communities that were established before they came under the effective control of European laws and customs as established by the Supreme Court of Canada in the Powley decision of 2003. At present, the Government of British Columbia has not acknowledged any Métis right to harvest within British Columbia and it is of the view that no Métis community is capable of successfully asserting site specific Section 35 rights in British Columbia based on the Powley test. The federal Crown approached consultation at the lower end of the consultation spectrum where there were clear Project interactions with the exercise of Métis harvesting, and other traditional and cultural use rights. See Section 4 for further analysis of the potential impacts of the Project on each of the Métis' rights and other interests.

The MNBC was an Intervenor in the NEB review of the Project and provided correspondence and written evidence to the NEB panel. The MNBC communicated to the NEB that it is satisfied with the proponent's consultation and mitigation activities in a letter of support for the Project dated November 2014. The

MNBC also responded to the Crown's Issues Tracking Table Information Request by further elaborating their concerns [[A4Q8J7](#)].

In a letter filed January 12, 2016 to the NEB [[A75135](#)], the MNBC requested that all draft NEB conditions that spoke to Aboriginal Interests needed to be understood to be inclusive of Métis people.¹ The MNBC also requested that a number of the NEB draft conditions be clarified.² Furthermore, the MNBC recommended there should be incidental wildlife reporting during the construction phase and that adherence to local Land and Resource Management Plan (LRMPs) in BC should have a legal basis.

The MNBC signed a contribution agreement with the NEB for \$11,960 in participant funding, plus travel for two to the hearing. The Major Projects Management Office (MPMO) offered MNBC \$1,500 in participant funding for consultations following the close of the NEB hearing record. MPMO offered MNBC an additional \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. MNBC signed contribution agreements with the MPMO in response to both of these offers, for a total of \$7500 in allocated funding.

The Crown offered to meet with the MNBC, but a meeting did not occur.

The Crown provided a first draft of the Consultation and Accommodation Report to MNBC for review and comment on August 26, 2016. The Crown did not receive comments from MNBC on the draft report. A second draft of this Report was provided to Aboriginal groups for review and comment on November 4, 2016. The Crown has not received comments from the MNBC.

IV - Summary of Key Métis Nation of British Columbia Issues and Concerns Raised

This section offers a summary of the key issues raised by the MNBC, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of the MNBC's key Project-related issues and concerns are summarized below.

The Crown has gained its understanding of the MNBC's interests and concerns through their engagement in the NEB process. The MNBC has stated: "Métis have a long and storied presence in the project region, and still use the resources extensively for sustenance purposes today. MNBC will work cooperatively to ensure that its citizen's Aboriginal rights are respected and appropriately addressed. MNBC will work diligently and in good faith to protect all the natural resources that Métis people have and continue to rely on as a way of life and cultural connection" [[A75135](#)].

¹ Listed as NEB draft conditions: #13, 14, 16, 17, 19, 20, 21, 22, 23, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 62, 63, 64, 65, 78, 80, 81, 83, 84, 85, 88, 94, 98, 100, 101, 110, 126, 127, 128, 138, 139, 140, 141, 142, and 143

² #7, 8, 20, 2, 0, 31, 32, 53, 62, 63, 64, and 111.

The MNBC noted in their written argument that their concerns were focused on their land use activities occurring in the proposed Project area. These included hunting, trapping, fishing, harvesting shellfish, gathering plants/berries for food, gathering plants/berries for medicine, gathering of firewood, use of cultural sites, participation in spiritual practices, camping, hiking, drinking from water aquifer, and end use for hunters/trappers of collected of hair, hide, and bone.

Methodology, Process, and Consultation

The MNBC states in correspondence to the NEB that it is satisfied with the proponents consultation and mitigation activities [[A64327](#)].

Cultural and Social Impacts

The MNBC has raised concerns that parts of the Project will be near, or on, lands where traditional Métis harvesting, gathering, and other cultural practices are carried out. However, the MNBC has since stated they are satisfied with the proponent's proposed mitigation measures in the letter of support filed with the NEB.

Cumulative Effects

The MNBC has raised concerns related to the cumulative impacts to air quality in certain Project areas. The MNBC is concerned that the proponent will not ensure that air quality will remain within acceptable limits.

Environmental Impacts

The MNBC has raised concerns regarding the impact of the Project on Lake Sturgeon.

Métis Nation of British Columbia's Response to NEB Recommendation Report

No specific comments were received from MNBC on the *NEB Recommendation Report*.

V - Potential Impacts of the Project on Métis Nation of British Columbia's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on the MNBC's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to MNBC's ability to practice Aboriginal Interests.

The general direct and indirect effects of the Projects on Aboriginal rights, along with key mitigation measures, are described in Section 4.3 of the main body of this Report. As described in that section, routine Project-related activities are likely to result in minor to moderate impacts on land, waters and

resources that Aboriginal groups use to exercise their hunting, trapping, plant gathering, fishing, and other traditional activities. Short-term, temporary access disruptions to traditional activities are expected, although these impacts would be localized within the Project footprint for the pipeline and associated facilities.

The Crown's current understanding regarding potential impacts is as follows:

Impacts on Hunting, Trapping and Plant Gathering

As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, wetlands, and wildlife and wildlife habitat (including species at risk) listed species. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping, and gathering (section 4.3.1 of this Report). The proponent would implement several mitigation measures to reduce potential effects to species important for the MNBC's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP), and the vegetation and wildlife management plans.

Project-related construction and routine maintenance are expected to cause short-term, temporary disruptions to the MNBC's access to hunting, trapping and plant gathering activities, largely confined to the Project footprint for the pipeline and associated facilities. Construction and reclamation activities may result in disruptions to access and a loss of harvesting opportunities for the MNBC. The Crown understands that cumulative effects of development activities may have impacted the MNBC's ability to exercise its hunting, trapping and gathering rights. Project-related impacts on access to or use of culturally sensitive sites and practices are viewed as additive to the current baseline which reflects cumulative effects of past development activities.

NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access to hunting, trapping, and gathering sites (section 4.3.1 of this Report). The Access Management Plan is intended to reduce disturbances caused by access, construction equipment and vehicle traffic, during and following construction in order to minimize impediments to access of the MNBC's traditional lands. The proponent is committed to minimizing the development of new access routes, controlling public access along the construction right-of-way, selecting appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent has also committed to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with the MNBC, the MNBC's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, Project construction and routine maintenance during operation are expected to result in a negligible-to-minor impact on MNBC's hunting, trapping, and plant gathering activities

Impacts on Freshwater Fishing

Project-related construction and routine maintenance activities are expected to cause short-term, temporary disruptions to the MNBC's access to fishing activities. As described in the *NEB Recommendation Report*, Project-related construction and operation could result in low to moderate magnitude effects on fish and fish habitat and surface water. The Crown understands that if construction and reclamation occur during the fishing season, there could be a potential reduction in access to waterways, staging areas, and fishing sites for the MNBC community members.

However, disruptions to access would largely be confined to the Project footprint for the pipeline and associated facilities during construction and reclamation. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific locations and access to fishing sites (section 4.3.2 of this Report). As previously discussed, the proponent is committed to minimize disturbance to access to the MNBC's traditional lands, as described in the Access Management Plan. The proponent is committed to working with MNBC to develop strategies to most effectively communicate the construction schedule and work areas to community members.

In consideration of the information available to the Crown from the NEB process, consultation with the MNBC, the MNBC's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, Project construction and routine maintenance during operation are expected to result in a negligible-to-minor impact on the MNBC's freshwater fishing activities.

Impacts on Other Traditional and Cultural Practices

As described in section 4.3.4 of the Report, Project-related activities are not likely to result in significant adverse effects on the ability of Aboriginal groups to use land, waters or resources for traditional purposes, and Project-related activities are expected to cause short-term disruptions that temporarily affect the ability of Aboriginal groups to access land, waters or resources for traditional purposes.

The Crown understands that the MNBC's opportunities for certain traditional and cultural activities will be temporarily interrupted during construction and routine operation, and there could be reduced access to travelways, habitation sites, gathering sites, and sacred areas. However, temporary disruptions to the MNBC's traditional and cultural practices would be largely confined to sites within the Project footprint for the pipeline and associated facilities. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on specific sites and access to physical and cultural heritage resources (section 4.3.4 of this Report). The Crown notes the proponent's commitment to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with the MNBC, the MNBC's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, Project construction and routine maintenance during operation are expected to result in a negligible-to-minor impact on the MNBC's other traditional and cultural practices.

Impacts Associated with Accidental Pipeline Spill

A discussion of the potential impacts of a pipeline spill on Aboriginal Interests is provided in Section 4.3.6 of this Report. In consideration of this information and analysis, as well as information available to the Crown on the MNBC's Aboriginal Interests and concerns raised by the MNBC during the NEB process and Crown consultation process, a pipeline spill associated with the Project could result in minor to serious impacts on the MNBC's Aboriginal Interests. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who live nearby and rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill³.

VI - Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations, the Crown expects impacts of the Project on the exercise of MNBC's Aboriginal Interests would range from negligible-to-minor.

The Crown is supportive of consultation requirements provided by the NEB in the various conditions, which would support MNBC's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of MNBC in emergency response planning activities. The federal Crown is also considering incremental measures that would further accommodate the potential adverse impacts of the Project on MNBC, as discussed in Sections 4 and 5 of the main body of this Report.

In addition, the Crown is aware that the proponent has entered into a Mutual Benefits Agreement with MNBC in an attempt to offset potential impacts, should the Project proceed.

³ Trans Mountain Final Argument, p. 85 and 207