

## Appendix 1

**These are the National Energy Board’s (Board or NEB) reasons for its decision in its [letter of 12 October 2018](#) to, on a principled basis, include Trans Mountain Expansion Project- (Project-) related marine shipping between the Westridge Marine Terminal (WMT) and the 12-nautical-mile territorial sea limit in the “designated project” to be assessed under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012).**

### *Views of Trans Mountain Pipeline ULC (Trans Mountain)*

#### *Inclusion of Project-related marine shipping in the “designated project”*

Trans Mountain said that the specific facts of this case, the application of the Canadian Environmental Assessment Agency’s (CEA Agency) Guide to Preparing a Description of a Designated Project under the *Canadian Environmental Assessment Act, 2012* (CEA Agency Guidance)<sup>1</sup>, and the need for certainty of process, can reasonably lead the Board to conclude that Project-related marine shipping is “incidental” to the Project and part of the “designated project” under the CEAA 2012.

#### *Extent of Project-related marine shipping*

Trans Mountain said that the “designated project” should include Project-related marine shipping between the WMT and the territorial sea limit. It said that Canada does not have jurisdiction over shipping beyond the territorial sea limit. Further, Trans Mountain’s ability to impose and enforce requirements on tankers in Canada’s 200 nautical mile exclusive economic zone (EEZ) is extremely limited. Trans Mountain pointed out that comparable environmental assessments (EAs) have included shipping to the territorial sea limit.

Trans Mountain also said that there are no established shipping lanes in the EEZ. An assessment of effects from routine shipping operations in the EEZ would be impractical and results would be subject to a high degree of inaccuracy, rendering the effort largely ineffectual. Trans Mountain said that the risk of marine shipping accidents is higher in coastal waters, and that an assessment of effects within the 12-nautical-mile territorial sea limit reasonably balances risk and value. It interpreted the Federal Court of Appeal’s decision in *Tsleil-Waututh Nation v. Canada (Attorney General)*,<sup>2</sup> as a confirmation that Trans Mountain’s assessment of effects – which considered Project-related tanker traffic to the territorial sea limit – was adequate.

---

<sup>1</sup> (Updated March 2015), online: <<https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/guide-preparing-description-designated-project-under-canadian-environmental-assessment-act-2012.html>>.

<sup>2</sup> 2018 FCA 153 at para 770 [*Tsleil-Waututh Nation*].

### *Views of participants<sup>3</sup>*

#### *Inclusion of Project-related marine shipping in the “designated project”*

Participants were in agreement that Project-related marine shipping should be included in the “designated project” to be assessed under the CEAA 2012. Arguments raised by the participants in support of this include the language in [Order in Council P.C. 2018-1177](#) (OIC), findings of the Federal Court of Appeal in *Tsleil-Waututh Nation*, the dictionary definition of “incidental,” the purposes of the CEAA 2012 and the *Species at Risk Act* (SARA), and the CEA Agency Guidance.

#### *Extent of Project-related marine shipping*

The Government of Canada and the Government of Alberta support including Project-related marine shipping up to the territorial sea limit. The Government of Alberta said that the Federal Court of Appeal specifically did not criticize the Board’s decision to limit its assessment of Project-related marine shipping to the 12-nautical-mile territorial sea limit, and that any reconsideration should be limited in scope. It said that the legislative scheme of the CEAA 2012 suggests that there must be a certain level of proximity connecting the incidental physical activities to the designated project itself.

Most participants said that Project-related marine shipping between the WMT and EEZ should be included in the “designated project.” Certain participants said that the assessment should extend beyond the EEZ. For example, BC Nature and Nature Canada said that the spatial limit of Project-related marine shipping should not be restricted, but, in the alternative, it should extend to the EEZ. Stk’emlupsemc te Secwepemc of the Secwepemc Nation also said that potential adverse effects of carbon and carbon equivalent emissions must be considered for the entire route of the marine tankers, from the WMT to the end destination terminal for the oil.

Many participants said that including the EEZ is consistent with the scheme and object of the CEAA 2012 and the intention of Parliament. In particular, a broader assessment is supported by the purposes of the CEAA 2012 to protect components of the environment that are within the legislative authority of Parliament and to consider designated projects in a careful and precautionary manner. Some participants also referenced the purpose of the SARA to prevent wildlife species from being extirpated or becoming extinct and to provide for the recovery of wildlife species. Other participants noted that the definition of “environmental effects” in the CEAA 2012 mentions “components of the environment that are within the legislative authority of Parliament” and includes effects on federal lands (which includes the EEZ) and outside Canada. Many participants also relied on the plain meaning of “designated project” and “incidental.” Some submitted that the reference to “federal lands” in the definition of “designated project” is relevant to determining the scope of what is “incidental.” However, other participants had a differing interpretation and said that incidental activities are not restricted to the boundary of Canada or the EEZ.

---

<sup>3</sup> For the purposes of this document, the term “participants” includes intervenors and interested members of the public that filed comments relevant to the issues discussed in these reasons.

Many participants said that Parliament has legislative authority within the EEZ. Some participants pointed to Canada's sovereign rights for conserving and managing living resources within the EEZ and its jurisdiction over the protection and preservation of the marine environment within the EEZ under the *United Nations Convention on the Law of the Sea* and the *Oceans Act*. In addition to the CEEA 2012, participants provided other examples of Parliament's authority in the EEZ including the SARA; *Canada Shipping Act, 2001*; *Canadian Environmental Protection Act, 1999*; *Fisheries Act*; *Migratory Birds Convention Act, 1994*; and *Constitution Act, 1867*. The Washington Department of Ecology also provided some examples from the United States.

Some participants said that the CEA Agency's five criteria regarding "incidental" physical activities make no distinction with respect to where activities occur. Participants said that the Federal Court of Appeal's findings regarding these criteria apply equally to Project-related marine shipping within Canada's territorial sea, the EEZ, and beyond.

Several Indigenous groups said that extending the designated project to the outer boundary of the EEZ is necessary to ensure impacts on their Treaty rights and the environment within their traditional territories are thoroughly assessed and adequately accommodated. Pacheedaht First Nation said that Swiftsure Bank is a critical fishing area that appears to be partially outside of the territorial sea limit.

Many participants expressed concerns about potential effects on wildlife and species at risk, including the Southern resident killer whale, which use the spatial area beyond the territorial sea limit or have critical habitat in the EEZ. Some participants said that large marine spills within the EEZ can occur, which could impact wildlife throughout the EEZ and territorial sea. Participants said that the effects of an oil spill within the territorial sea could be felt well beyond that zone, into the EEZ itself. Living Oceans Society and Raincoast Conservation Foundation said that the Board should request up-to-date information from Fisheries and Oceans Canada about fisheries activities, and the extent of the range and habitats of species at risk within the EEZ.

Some participants said that limiting the assessment of Project-related marine shipping to the territorial sea limit would hinder the Board's ability to adequately collect the information and conduct the assessment necessary for the Governor in Council (GIC) to properly make a final determination.

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

### **1. Introduction**

In accordance with paragraph (a) of the OIC, and paragraph 770 of the Federal Court of Appeal's decision in *Tsleil-Waututh Nation*, the Board must reconsider, on a principled basis, whether Project-related marine shipping should be included in the "designated project" to be assessed under the CEEA 2012.<sup>4</sup> This issue turns on whether Project-related marine shipping is a "physical activity that is incidental" to the pipeline component of the Project, as that phrase is

---

<sup>4</sup> *Supra* note 2.

used in section 2 of the CEAA 2012.<sup>5</sup> The Court stated that “[t]his is not a pure issue of statutory interpretation. Rather, it is a mixed question of fact and law heavily suffused by evidence.”<sup>6</sup>

If Project-related marine shipping is to be included as part of the defined designated project, a subsidiary question arises as to the geographic extent of Project-related marine shipping. Neither *Tsleil-Waututh Nation*, nor the OIC, expressly define “Project-related marine shipping” and, in particular, its geographic extent. In the Board’s [OH-001-2014 Report](#), it assessed, under the *National Energy Board Act*, the environmental effects of Project-related marine shipping to the territorial sea limit, using a similar approach to the EA conducted under the CEAA 2012 for the pipeline component to the extent appropriate.<sup>7</sup> The study areas applied by the Board to carry out its assessment centered around established inbound and outbound shipping lanes.<sup>8</sup>

## 2. Executive summary

The Project includes a new onshore pipeline longer than 40 kilometres and is, therefore, a “designated project” subject to an EA by the Board under the CEAA 2012. Subsection 2(1) of the CEAA 2012 defines “designated project” as including any “incidental” physical activity.

First, the Board must determine whether Project-related marine shipping should be included in the “designated project.” When the OIC is considered in combination with the views of the Federal Court of Appeal in *Tsleil-Waututh Nation*, it strongly suggests that Project-related marine shipping should be included in the “designated project.”

The Board finds that the statutory scheme of the CEAA 2012 also supports the conclusion that Project-related marine shipping should be included in the “designated project.” The term “incidental” is not defined in the CEAA 2012. However, in the Board’s view, the additional tanker loads at the WMT are tied to and dependent on the pipeline component of the Project. Further, the purposes of the CEAA 2012 include the protection of the components of the environment within the legislative authority of Parliament from significant adverse environmental effects, and ensuring that designated projects are considered in a careful and precautionary manner. The inclusion of Project-related marine shipping will provide the GIC with a more fulsome understanding of the potential environmental effects of this marine shipping, and how those effects can be mitigated to reduce or avoid environmental harm.

The Board finds that the CEA Agency’s criteria are not decisive, but viewed together with *Tsleil-Waututh Nation*, the OIC, and the statutory scheme, the criteria support the inclusion of Project-related marine shipping in the “designated project.”

---

<sup>5</sup> *Ibid* at para 391.

<sup>6</sup> *Ibid* at para 391.

<sup>7</sup> National Energy Board, *Trans Mountain Expansion Project* - OH-001-2014 (May 2016) online: NEB <<https://apps.neb-one.gc.ca/REGDOCS/File/Download/2969681>> at 332 [*OH-001-2014 Report*].

<sup>8</sup> *Ibid*. The spatial boundaries (or study areas) for the Board’s assessment of Project-related marine shipping are described in Appendix 11 of the OH-001-2014 Report.

Secondly, having reached the conclusion that Project-related marine shipping is “incidental” to the “designated project,” the Board must determine the appropriate geographic extent of Project-related marine shipping.

The Board is of the view that that geographic extent should not be so broad as to frustrate the CEAA 2012’s purpose of timely EAs, or to produce results that are not useful in protecting the environment and reducing harm. The Board is of the view that the CEA Agency Guidance provides limited clarity with respect to the appropriate geographic extent of Project-related marine shipping. However, relevant case law suggests that the word “incidental” should be interpreted to require a “certain level of proximity as well as possibly a causal connection between activities and the designated project.”<sup>9</sup> The Board is not persuaded that a sufficient “level of proximity” exists once the tankers exit the territorial sea.

A key fact that the Board must consider in conducting any EA is the geographical extent of the project, and the spatial boundaries within which that project is expected to have potential effects on the selected valued components. In order to define the spatial boundaries, knowing the project location or route is fundamental.

There is a marked and material difference between marine shipping within the territorial sea limit and the EEZ. Given that there are no defined shipping lanes in the EEZ – a vast area of ocean – no shipping “route” for the Project can be identified with any degree of certainty. Destinations can vary from Washington State, California, or Asia. The lack of a certain route means, in turn, that appropriate spatial boundaries cannot be identified with certainty. It is not possible to predict the project-environment interactions and the full impacts of that project, nor can one adequately evaluate technically and economically feasible mitigation as required by the CEAA 2012.<sup>10</sup> It would produce speculative, as opposed to meaningful, information about project impacts. Such an EA would not be useful as a planning and decision-making tool for the GIC.

The Board assessed Project-related marine shipping to the territorial sea limit in its OH-001-2014 Report. The Board finds it compelling that the Federal Court of Appeal, in *Tsleil-Waututh Nation*, did not raise concerns with this geographic scope, and was able to conclude, among other things, that “[g]iven the Board’s approach to the assessment and its findings, the Board’s report was adequate for the purpose of informing the GIC about the effects of Project-related marine shipping on the Southern resident killer whales and their use by Indigenous groups.”<sup>11</sup>

Several other EAs carried out under the CEAA 2012 have included consideration of project-related marine shipping; however, only to a maximum geographical extent of the territorial sea limit.<sup>12</sup> It is telling that other expert tribunals have consistently limited the assessment of project-related marine shipping to the territorial sea limit or to a lesser limit.

---

<sup>9</sup> *Canada (Canadian Environmental Assessment Agency) v Taseko Mines Limited*, 2018 BCSC 1034 at para 66 [Taseko].

<sup>10</sup> For example, the CEAA 2012, s 19(1)(a), (b) & (d).

<sup>11</sup> *Supra* note 2 at para 439.

<sup>12</sup> See Section 4.4 of these reasons for specific project information.

These other EAs solidify the Board’s view that incremental marine shipping within the EEZ is not “incidental” and should not be included in the “designated project.”

The Board has considered the applicable statutory scheme, the Federal Court of Appeal’s decision in *Tsleil-Waututh Nation*, the OIC, case law, the CEA Agency Guidance, and practical EA considerations. The Board has applied all of this to the specific facts in this case and has concluded that Project-related marine shipping between the WMT and the 12-nautical-mile territorial sea limit is “incidental” to the pipeline component of the Project.

The Board’s full reasons are below.

### **3. Overview of relevant facts**

#### **3.1 Project facts**

The proposed Project would result in the looping (or twinning) of the existing 1,147-kilometre-long Trans Mountain Pipeline system between Edmonton, Alberta and Burnaby, British Columbia, increasing the system’s capacity from 300,000 bbl/d to 890,000 bbl/d of crude petroleum and refined products.<sup>13</sup> Up to 71 per cent (630,000 bbl/d) of that capacity could be loaded onto tankers at the WMT for transport to Pacific Rim destinations, such as Washington State, California, and Asia.<sup>14</sup>

Trans Mountain would not own or operate the tankers loaded at the WMT.<sup>15</sup> However, Trans Mountain’s Tanker Acceptance Standard would prevent any tanker not approved by it from loading at the WMT.<sup>16</sup> The existing WMT loads approximately five tankers per month. The expanded system associated with the Project would increase the WMT’s loads to approximately 34 Aframax tankers per month, with actual demand driven by market conditions.<sup>17</sup> The whole sailing route from the WMT to the Juliet Buoy outside the Strait of Juan de Fuca (in the vicinity of the territorial sea limit) has a Traffic Separation Scheme that encompasses inbound and outbound shipping lanes.<sup>18</sup> Figure 1 below shows the inbound and outbound shipping lanes for Project-related marine shipping within the territorial sea.

---

<sup>13</sup> *Supra* note 7 at 1-2.

<sup>14</sup> *Ibid* at 298.

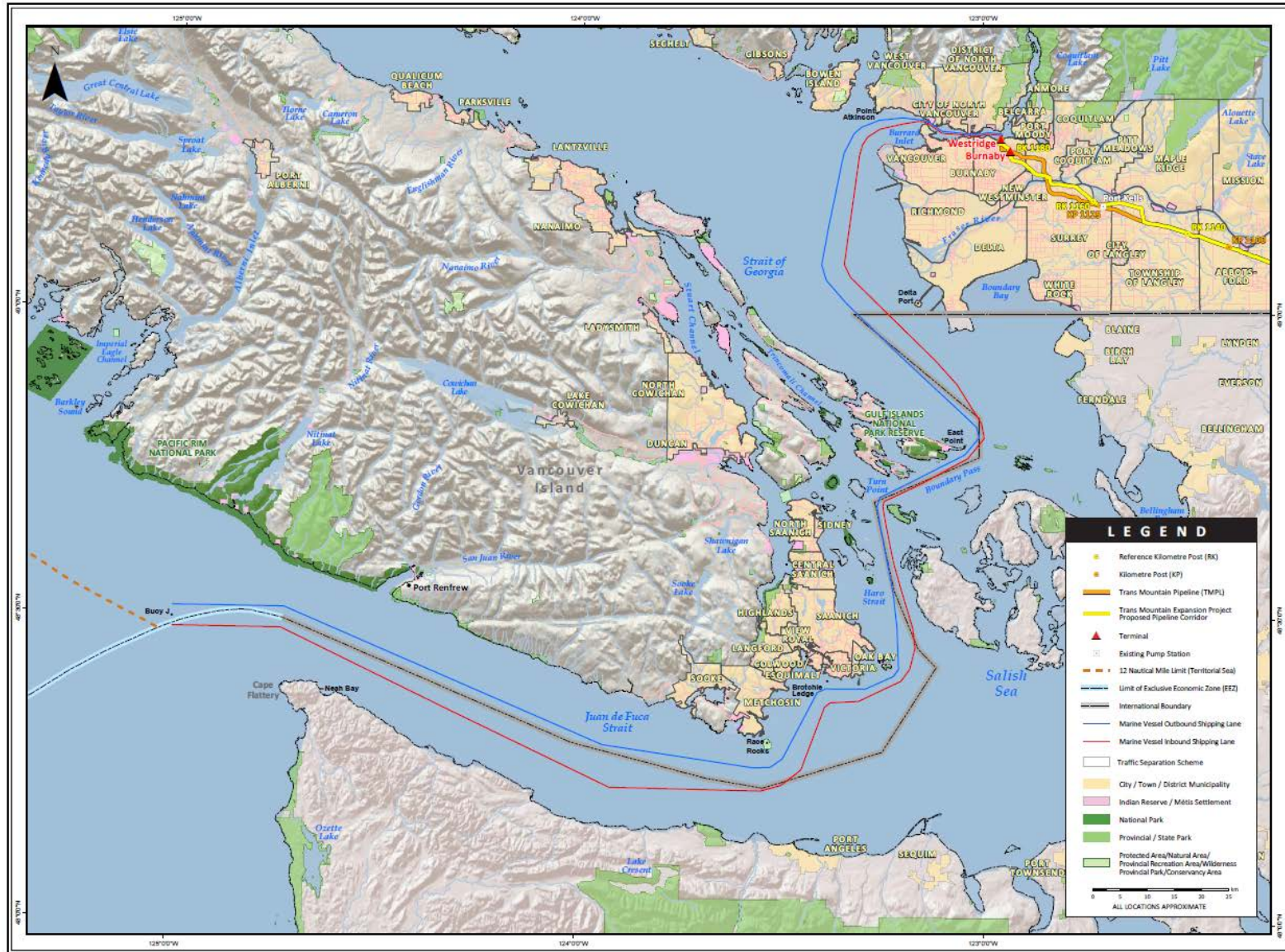
<sup>15</sup> *Ibid* at 324.

<sup>16</sup> *Ibid* at 369 and Transport Canada, TERMPOL Review Process Report on the Trans Mountain Expansion Project, Exhibit C353-4-3 at 34, online: <<https://docs2.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2584073&objaction=download&viewType=1>>.

<sup>17</sup> *Ibid* OH-001-2014 Report at 327.

<sup>18</sup> Trans Mountain, [Trans Mountain Expansion Project Volume 8C Part 2, Exhibit B21-1](#) at 10.

Figure 1 – Inbound and outbound shipping lanes for Project-related marine shipping within the territorial sea



### 3.2 Regulatory framework

The territorial sea begins at the baseline (low-water mark) and extends 12 nautical miles into the ocean.<sup>19</sup> The territorial sea is part of Canada, and is subject to a broad and detailed Canadian regulatory framework governing safety, security, and environmental protection in relation to marine shipping.<sup>20</sup> For example, parts of the *Canada Shipping Act, 2001* relating to personnel, safety, incidents, accidents and casualties, and navigation apply to Canadian vessels everywhere and in respect of foreign vessels in Canadian waters.<sup>21</sup> Canadian waters means the territorial sea of Canada and all internal waters of Canada;<sup>22</sup> it does not include the EEZ. Furthermore, the *Canada Shipping Act, 2001* allows for the establishment of vessel traffic service zones, which can involve traffic separation schemes and shipping lanes, within Canadian waters.<sup>23</sup> Under the *Pilotage Act*, the regions which the pilotage authorities operate are all within Canadian waters.<sup>24</sup> Another example is the *Marine Transportation Security Act*, which applies to vessels and marine facilities in Canada and Canadian ships outside Canada.<sup>25</sup>

Transport Canada has primary responsibility for regulating marine vessels, including shipping lanes and marine traffic safety measures. Several other government agencies, including the Vancouver Fraser Port Authority, Pacific Pilotage Authority, and the Canadian Coast Guard, also impose legal and regulatory requirements in the territorial sea.

Beyond the territorial sea limit is Canada's EEZ. The EEZ is a creation of the *United Nations Convention on the Law of the Sea* (UNCLOS), now reflected in Canadian domestic law, and extends to 200 nautical miles from the baseline.<sup>26</sup> Under the *Oceans Act*, Canada has limited rights and jurisdiction within the EEZ that are generally related to "managing the natural resources, whether living or non-living" and the "protection and preservation of the marine environment."<sup>27</sup> These rights are not unqualified, and must be exercised in a manner consistent with generally accepted international rules and standards. Furthermore, there are no established shipping lanes within the EEZ.

Examples of Canada's authority within the EEZ include pollution prevention and pollution response under the *Canada Shipping Act, 2001*.<sup>28</sup> Similarly, prohibitions and requirements relating to disposal at sea under the *Canadian Environmental Protection Act, 1999* apply to the EEZ.<sup>29</sup> The EEZ is also referenced in the SARA in the context of emergency orders and

---

<sup>19</sup> *Oceans Act*, s 4.

<sup>20</sup> See Section 14.2 of the Board's OH-001-2014 Report for a description of the regulatory framework.

<sup>21</sup> See Parts 1, 3, 4, and 6; *Navigation Safety Regulations*.

<sup>22</sup> *Interpretation Act*, s 35(1).

<sup>23</sup> *Canada Shipping Act, 2001*, ss 125-127 & 136(1)(a)-(d) and *Vessel Traffic Services Zones Regulations*.

<sup>24</sup> Ss 2, 18 & schedule.

<sup>25</sup> s 4. Under subsection 35(1) of the *Interpretation Act*, Canada includes the internal waters of Canada and the territorial sea of Canada.

<sup>26</sup> *Oceans Act*, s.13.

<sup>27</sup> s 14.

<sup>28</sup> Parts 8 & 9 and *Ballast Water Control and Management Regulations*.

<sup>29</sup> Part 7, Division 3.



prohibition regarding the destruction of critical habitat.<sup>30</sup> The CEAA 2012 refers to the EEZ in its definition of “federal lands,” which is discussed in more detail below.

#### **4. Analysis**

Since the Project includes a new onshore pipeline longer than 40 kilometres in length, it is a “designated project” subject to an EA by the Board under the CEAA 2012.<sup>31</sup> Subsection 2(1) of the CEAA 2012 defines “designated project” as including any “incidental” physical activity.

The Board must determine whether Project-related marine shipping is a physical activity that is “incidental” to the pipeline component of the Project. If Project-related marine shipping is to be included as part of the defined “designated project,” the Board must also determine the geographic scope and extent of marine shipping.

“Incidental” is not defined in the CEAA 2012. The interpretation of that term must be based on the modern principle of statutory interpretation, which requires that the words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, and the intention of Parliament.<sup>32</sup>

Also relevant to the analysis is the Federal Court of Appeal’s decision in *Tsleil-Waututh Nation*, the OIC, case law, the CEA Agency Guidance, and EA considerations.

##### **4.1 *Tsleil-Waututh Nation* and the OIC**

The Federal Court of Appeal, in *Tsleil-Waututh Nation*, indicated that “marine shipping is, at the least, an element that accompanies the Project.”<sup>33</sup> The Court went on to say that the Board’s view that it was required to have regulatory authority over shipping in order to include marine shipping as part of the Project is inconsistent with the purposes of the CEAA 2012 and impermissibly restrictive.<sup>34</sup> The Court stated that “[t]he Board’s reasons do not well-explain its scoping decision, do not grapple with the relevant criteria, and appear to be based on a rationale that is not supported by the statutory scheme.”<sup>35</sup>

Accordingly, the resulting OIC:

- (b) directs that the Board conduct the reconsideration taking into account the following factors:
  - (i) the environmental effects of Project-related marine shipping in view of the requirements of the CEAA 2012, and

---

<sup>30</sup> Ss 58(1)(a) & 80.

<sup>31</sup> *Regulations Designating Physical Activities*, s 46.

<sup>32</sup> *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 SCR 27 at para 21.

<sup>33</sup> *Supra* note 2 at para 396.

<sup>34</sup> *Ibid* at para 402.

<sup>35</sup> *Ibid* at para 409.

- (ii) the adverse effects of Project-related maritime shipping on species at risk, including the Northeast Pacific southern resident killer whale population, and their critical habitat, in view of any requirements of section 79 of the SARA that may apply to the Project;

The OIC, in combination with the views of the Federal Court of Appeal in *Tsleil-Waututh Nation*, strongly suggest that Project-related marine shipping should be included in the “designated project.” However, under the CEAA 2012, the Board is the responsible authority with respect to the designated project, and must ensure an EA of the designated project is conducted.<sup>36</sup> As a result, the Board must conduct a principled analysis of this issue. The OIC also instructs the Board to address paragraph 770 of *Tsleil-Waututh Nation*, which requires such an analysis.

The Board must also determine the geographic extent of the marine shipping to be included in the “designated project.” The OIC and *Tsleil-Waututh Nation* do not give express instruction on this point. However, the Board notes that Project-related marine shipping was assessed to the territorial sea limit in its OH-001-2014 Report. The Board finds it compelling that the Federal Court of Appeal did not raise concerns with this geographic scope, and was able to conclude, among other things, that, “[g]iven the Board’s approach to the assessment and its findings, the Board’s report was adequate for the purpose of informing the GIC about the effects of Project-related marine shipping on the Southern resident killer whales and their use by Indigenous groups.”<sup>37</sup> This conclusion of the Court was also referenced in the GIC’s [explanatory note](#) to the OIC.<sup>38</sup>

## 4.2 Statutory interpretation

Environmental legislation, such as the CEAA 2012, should be given a generous interpretation to allow effective response to environmental harm, in keeping with the precautionary principle and the role of EA as a planning tool.<sup>39</sup>

In their comments, several participants pointed to the fact that the definition of “designated project” in subsection 2(1) of the CEAA 2012 makes reference, in paragraph (a), to physical activities that are carried out “on federal lands.”

*designated project* means one or more physical activities that

- (a) are carried out in Canada or **on federal lands**;
- (b) are designated by regulations made under paragraph 84(a) or designated in an order made by the Minister under subsection 14(2); and
- (c) are linked to the same federal authority as specified in those regulations or that order.

---

<sup>36</sup> CEAA 2012 s 15(1)(b) & 22.

<sup>37</sup> *Supra* note 2 at para 439.

<sup>38</sup> Canada Gazette Part I, Vol 152, No 39 (29 Sept 2018) at 3279.

<sup>39</sup> *Taseko*, *supra* note 9 at para 38 citing *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 71 and *Castonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52 at paras 9, 20.

It includes any physical activity that is **incidental** to those physical activities [emphasis added].

*federal lands* means

- (a) lands that belong to Her Majesty in right of Canada, or that Her Majesty in right of Canada has the power to dispose of, and all waters on and airspace above those lands...;
- (b) the following lands and areas:
  - (i) the internal waters of Canada, in any area of the sea not within a province,
  - (ii) the territorial sea of Canada, in any area of the sea not within a province,
  - (iii) the *exclusive economic zone of Canada*, and
  - (iv) the continental shelf of Canada... [Emphasis added]

Some participants said that this means that Project-related marine shipping in the EEZ should be included in the scope of the “designated project.” Other participants submitted that the reference to federal lands in paragraph (a) of the definition only applies to the primary project activities (in this case, the pipeline), and not those that are “incidental” to them. For example, the Federation of BC Naturalists and Nature Canada commented as follows:<sup>40</sup>

This definition distinguishes between two types of physical activities. The first type encompasses those physical activities that meet the three criteria under the definition. Particularly, such physical activities must be “carried out in Canada or on federal lands.” These physical activities form the core of the designated project. The second type consists of incidental activities, which are defined as “any physical activity that is incidental *to those physical activities*.” The words “*to those physical activities*” refer to those physical activities that meet the three criteria and form the core of the designated project. None of the three criteria applicable to the core physical activities applies to incidental activities.

The CEAA 2012 clearly allows for the possibility that a “designated project” *could* take place in the EEZ and be subject to an EA. Certain offshore drilling projects are an obvious example.<sup>41</sup> However, there appears to be a degree of ambiguity in the definition of “designated project” with respect to what is “incidental.” Therefore, the Board’s analysis must look beyond the definition of “designated project.”

Some participants referred the Board to the fact that paragraph 5(1)(b) of the CEAA 2012 requires that the “environmental effects” to be taken into account in an EA include changes to the environment that are on federal lands (which is defined as including the EEZ), as well as outside Canada:

---

<sup>40</sup> Comments of BC Nature and Nature Canada on the spatial limit of Project-related marine shipping (9 October 2018) at pp 2-3. Living Oceans Society and Raincoast Conservation Foundation made a similar argument.

<sup>41</sup> *Regulations Designating Physical Activities*, ss 40-42.

- 5 (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are...
- (b) a change that may be caused to the environment that would occur
- (i) on federal lands...or
- (iii) outside Canada;

The Board is not questioning that environmental *effects* of a “designated project” can extend outside of Canada, including in the EEZ. However, this does not address the issue of the geographical extent of the “*designated project*” *itself*, including its incidental activities.

In looking at the CEAA 2012 as a whole, the Board finds its purposes to be instructive. These purposes include the protection of the components of the environment within the legislative authority of Parliament from significant adverse environmental effects, ensuring that designated projects are considered in a careful and precautionary manner, and ensuring EAs are completed in a timely manner.<sup>42</sup> Additionally, responsible authorities must exercise their powers in a manner that protects the environment and human health and applies the precautionary principle, in the administration of the CEAA 2012.<sup>43</sup>

The Board is of the view that the purposes of the CEAA 2012 support the conclusion that Project-related marine shipping is “incidental” to the pipeline, and included in the “designated project.” The inclusion of Project-related marine shipping will provide the GIC with a more fulsome understanding of the potential environmental effects of this marine shipping, and how those effects can be mitigated to reduce or avoid environmental harm. However, the Board also notes that the extent of what is “incidental” should not be too broad as to frustrate the other the CEAA 2012 purpose of timely EAs. The other limitation of an overly broad assessment is that results may not be useful in protecting the environment and reducing harm.

In the specific context of the CEAA 2012, the term “incidental” has been judicially considered by the Supreme Court of British Columbia in *Canada (Canadian Environmental Assessment Agency) v. Taseko Mines Limited*. The Court noted that the word “incidental” has been judicially construed to mean “occurring or liable to occur in fortuitous or subordinate conjunction with something else.”<sup>44</sup> The Court also referred to the *Shorter Oxford English Dictionary* definition of “incidental” as “liable to happen,” “naturally attaching to,” “occurring as something causal or of secondary importance,” and “following upon as a subsequent circumstance.”<sup>45</sup>

The Court was “not persuaded that the word ‘incidental’ should be interpreted to include all physical activities that are in subordinate conjunction with and or consequent upon” the project. The Court concluded that the “above definitions, read within the scheme of the CEAA 2012, support that “incidental” requires a **certain level of proximity** as well as possibly causal connection between activities and the designated project” [emphasis added].<sup>46</sup>

---

<sup>42</sup> CEAA 2012 at s 4(1).

<sup>43</sup> *Ibid* at s 4(2).

<sup>44</sup> *Taseko, supra* note 9 at para 65.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid* at para 66.

*Tsleil-Waututh Nation* notes that the primary purpose of the Project is “to provide additional transportation capacity for crude oil from Alberta to markets in the Pacific Rim.”<sup>47</sup> In the Board’s view, the addition of up to approximately 29 tanker loads from the WMT is tied to and dependent on the pipeline component of the Project. This supports an interpretation of “incidental” that includes Project-related marine shipping. The Board also finds that the “level of proximity” identified by the Federal Court of Appeal is an important consideration in determining the geographic extent of Project-related marine shipping. Based on the analysis below, the Board is not persuaded that a sufficient level of proximity exists once the tankers exit the territorial sea.

### 4.3 CEA Agency Guidance

The interpretation of the term “incidental” can be assisted by reference to the CEA Agency Guidance. While such guidance documents are not legally binding nor determinative, they can assist in understanding the meaning of “incidental.” The CEA Agency Guidance provides a set of five criteria relevant to the question of whether certain activities should be considered “incidental” to a project:

- i. The nature of the proposed activities and whether they are subordinate or complementary to the designated project*

The additional tanker loads at the WMT are tied to and dependent on the pipeline component of the Project. Accordingly, the Board finds that marine shipping is subordinate and complimentary to the pipeline. This criterion points towards marine shipping being incidental.

- ii. Whether the activity is within the care and control of the proponent*

Marine shipping is undertaken by third parties, not Trans Mountain. Shipping cannot, therefore, be said to be within the care or ultimate control of Trans Mountain. This points against marine shipping being incidental.

- iii. If the activity is to be undertaken by a third party, the nature of the relationship between the proponent and the third party and whether the proponent has the ability to “direct or influence” the carrying out of the activity*

With respect to this criterion, in *Tsleil-Waututh Nation* the Court noted:

In this regard, Trans Mountain stated...that while it did not own or operate the vessels calling at the Westridge Marine Terminal, “it is an active member in the maritime community and works with BC maritime agencies to promote best practices and facilitate improvements to ensure the safety and efficiency of tanker traffic in the Salish Sea.” Trans Mountain also referenced its Tanker Acceptance Standard whereby it can prevent any tanker not approved by it from loading at the Westridge Marine Terminal. The Board

---

<sup>47</sup> *Supra* note 2 at para 395.

recognized Trans Mountain's ability to give directions to tanker operators in Conditions 133, 134 and 144...<sup>48</sup>

However, the Board notes that pipeline shippers own the product shipped on the Trans Mountain Pipeline system and the shippers are responsible for chartering tankers to transport the product that arrives at the WMT. Pipeline shippers have their own screening and selection process to ensure that tankers calling on the WMT meet international regulations and Trans Mountain's Tanker Acceptance Standard. It is also the pipeline shipper that arranges for a local shipping agent to assist the vessel with local logistical and regulatory requirements.<sup>49</sup>

The Board accepts that Trans Mountain does have the ability to direct or influence the carrying out of *some* aspects of marine shipping, primarily through its Tanker Acceptance Standard. Some requirements of the Tanker Acceptance Standard only apply within the territorial sea,<sup>50</sup> while a couple of requirements also apply in the EEZ.<sup>51</sup> However, this is far from the level of direction Trans Mountain exerts over the pipeline component of the Project (for example, the ability to direct the shutdown of the pipeline, at any point in time, in the event of a safety concern). Once a tanker leaves the WMT, Trans Mountain's ability to enforce any requirements is very minimal.

This criterion is inconclusive in terms of marine shipping being incidental within the territorial sea and slightly leans against being incidental outside of the territorial sea.

*iv. Whether the activity is solely for the benefit of the proponent or is available for other proponents as well*

The oil delivered to the WMT is not owned by Trans Mountain, but by a variety of shippers. In this sense, the marine shipping benefits other proponents (i.e., oil producers in Western Canada).

At the same time, there are no other pipelines or sources that deliver oil to the WMT for the purpose of export.

The Board finds this criterion to be equivocal, but is slightly persuaded that it leans towards marine shipping being incidental.

*v. The federal and/or provincial regulatory requirements for the activity*

---

<sup>48</sup> *Supra* note 2 at para 405 & 406.

<sup>49</sup> *Supra* note 7 at 369.

<sup>50</sup> For example, section 4.8.1 of the Tanker Acceptance Standard states that "all vessels shall conduct operations within Canada, specifically PMV [Port Metro Vancouver], in accordance with any additional guidance provided by the Terminal." Section 4.8.3 states that the "vessel shall always navigate within the designated marine traffic corridors and comply with relevant rules of the Pacific Pilotage Authority and Port Metro Vancouver."

<sup>51</sup> Section 4.8.4 of the Tanker Acceptance Standard states that "a vessel planning to depart Canada via the Juan de Fuca Straits shall agree that, upon exiting the Juan de Fuca Straits, it will steer a course no more northerly than due West (270°) till the vessel is outside Canadian EEZ". Section 4.8.5 states that "the Terminal may monitor the vessel's position from the time her nomination to load is accepted until she leaves the Canadian EEZ."

The Board does not have the legislative mandate to regulate marine shipping. Parliament, however, does have such authority, and its control over marine shipping is more extensive than Trans Mountain's. Within the territorial sea, save for the exception of allowing for the right of innocent passage, Canada exercises full authority over marine shipping through a comprehensive legal and regulatory regime addressing safety, security, and environmental protection. This includes confinement of marine traffic to shipping lanes.

Beyond the territorial sea, Parliament's authority is materially reduced. Parliament does not have the ability to regulate shipping traffic in the EEZ beyond what is consistent with international rules and standards, and there are no established shipping lanes in this area.

This criterion points towards marine shipping being incidental within the territorial sea, but slightly leans against being incidental outside of the territorial sea.

### ***Conclusion***

The Board finds that the criteria do not decisively favor one side, but, when viewed together with *Tsleil-Waututh Nation*, the OIC, and the statutory scheme, the criteria support a finding that Project-related marine shipping is "incidental" and included in the "designated project." Criteria i), iv), and v) point towards marine shipping being incidental, Criterion ii) does not, and Criterion iii) is inconclusive.

The Board is also of the view that this guidance provides limited clarity with respect to the appropriate geographic extent of Project-related marine shipping. However, the circumstances of Criteria iii) and v) change with distance and slightly lean against incremental marine shipping being incidental outside of the territorial sea.

## **4.4 EA considerations**

As noted above, the determination of whether Project-related marine shipping is incidental to the pipeline is "a mixed question of fact and law heavily suffused by evidence."<sup>52</sup> A key fact that the Board must consider in conducting any EA is the geographical extent of the project, and the spatial boundaries within which that project is expected to have potential effects on the selected valued components. There are usually several scales of spatial boundaries that are relevant to an assessment. Typically, the scale ranges from the project footprint to the regional study area. Well-defined spatial boundaries result in useful and meaningful data regarding project effects.

In order to define the spatial boundaries, knowing the project location or route is fundamental. The CEA Agency Guidance requires proponents to provide the project location, identify project-environment interactions, and describe the potential effects of the project.<sup>53</sup>

The Board accepts that all project EAs involve some level of uncertainty and the outcomes when a project is built can differ, to some degree, from the predictions made in the EA. However, given that there are no defined shipping lanes in the EEZ – a vast area of ocean – no shipping

---

<sup>52</sup> Supra note 2 at para 391.

<sup>53</sup> Supra note 1.

“route” for the Project can be identified with any degree of certainty. Even if tankers exiting the Juan de Fuca Strait are assumed to take the most direct route out of the EEZ, the routes and speeds of incoming and outgoing vessels in the EEZ are still uncertain given that destinations can vary from Washington State, California, or Asia.

The lack of a certain route means, in turn, that appropriate spatial boundaries cannot be identified. It is not possible to predict the project-environment interactions and the full impacts of that project, nor can one adequately evaluate technically and economically feasible mitigation as required by the CEAA 2012.<sup>54</sup> Attempting to conduct an EA in the EEZ would be akin to conducting an EA for a pipeline without knowing the proposed path or corridor for that pipeline. It would produce speculative, as opposed to meaningful, information about project impacts and, accordingly, would not be useful as a planning and decision-making tool for the GIC. No participant adequately explained to the Board how an EA could be carried out in a meaningful way in the EEZ in the circumstances where the route of the tankers is uncertain. This is a marked and material difference from marine shipping within the territorial sea limit. As noted previously, the Board’s study areas for its original assessment of Project-related marine shipping centered around established inbound and outbound shipping lanes.

Several other EAs carried out under the CEAA 2012 have included consideration of project-related marine shipping; however, only to a maximum geographical extent of the territorial sea limit. Most only considered shipping to a pilotage station (which is within the territorial sea) or closer to shore.

<b>Project</b>	<b>Spatial boundary for project-related marine shipping assessment</b>
Roberts Bank Terminal 2 Project	Marine traffic within the Port Metro Vancouver area only <sup>55</sup>
Enbridge Northern Gateway Project	Up to the 12-nautical-mile territorial sea limit <sup>56</sup>
Wespac Tilbury Marine Jetty Project	Up to the pilotage station <sup>57</sup>
Pacific NorthWest LNG Project	Up to Triple Island pilotage station <sup>58</sup>
LNG Canada Export Terminal Project	Up to Triple Island pilotage station <sup>59</sup>

<sup>54</sup> For example, the CEAA 2012, s 19(1)(a), (b) & (d).

<sup>55</sup> CEA Agency, [Updated Guidelines for the Preparation of an Environmental Impact Statement for the Roberts Bank Terminal 2 Project](https://www.ceaa-acee.gc.ca/050/documents/p80054/101303E.pdf), cover note, section 17.1.2 (17 April 2015) at 36, online: CEAA <<https://www.ceaa-acee.gc.ca/050/documents/p80054/101303E.pdf>>.

<sup>56</sup> Canada, National Energy Board, [Considerations – Report of the Joint Review Panel for the Enbridge Northern Gateway Project](https://www.ceaa.gc.ca/050/documents/p21799/80935E.pdf), vol 2, section 8.6.1 (December 2013) at 182, online: NEB <<https://apps.nerb-one.gc.ca/REGDOCS/File/Download/2396478>>. <https://www.ceaa.gc.ca/050/documents/p21799/80935E.pdf>

<sup>57</sup> CEA Agency, [Notice of Commencement of an Environmental Assessment and Substitution Approval](https://www.ceaa-acee.gc.ca/050/evaluations/document/101960?culture=en-CA) (10 July 2015), online: CEAA <<https://www.ceaa-acee.gc.ca/050/evaluations/document/101960?culture=en-CA>>.

<sup>58</sup> Canadian Environmental Assessment Agency, [Pacific NorthWest LNG Project - Environmental Assessment Report](https://www.ceaa.gc.ca/050/documents/p80032/115668E.pdf), appendix 11.1 (September 2016) at 181, online: CEAA <<https://www.ceaa.gc.ca/050/documents/p80032/115668E.pdf>>.

<sup>59</sup> BC Environmental Assessment Office, [LNG Canada Export Terminal Project Assessment Report](https://www.ceaa.gc.ca/050/documents/p80038/101852E.pdf), section 5.6.1 (6 May 2015) at 86, online: CEAA <<https://www.ceaa.gc.ca/050/documents/p80038/101852E.pdf>>.



<b>Project</b>	<b>Spatial boundary for project-related marine shipping assessment</b>
Prince Rupert LNG Project	Up to Triple Island pilotage station <sup>60</sup>
Woodfibre LNG Project	Howe Sound <sup>61</sup>
Marine Terminal Project on the North Shore of the Saguenay	Downstream as far as the mouth of the Saguenay river <sup>62</sup>
Saguenay Energy Project – Liquefied Natural Gas Export Terminal	As far as the mouth of the Saguenay river <sup>63</sup>
Port of Quebec Deep-Water Multipurpose Wharf Project – Beauport 2020	Within the Port of Quebec area <sup>64</sup>

The above EAs were all conducted by the CEA Agency or the BC Environmental Assessment Office as permitted by Canada’s Minister of the Environment under a substitution decision. Specific reasons for these scoping decisions were generally not given, with the exception of Pacific Northwest LNG:

The spatial scope of assessment of marine shipping for the Project was determined based on consideration of the potential environmental effects, care and control by the proponent as it pertains to the Agency’s ability to establish enforceable conditions, and comparable scoping to other LNG Project EAs.<sup>65</sup>

<sup>60</sup> CEA Agency, [Environmental Impact Statement Guidelines for the Prince Rupert LNG Project](https://www.ceaa-acee.gc.ca/050/documents/p80042/93670E.pdf) (20 August 2013) at 12, online: CEAA <<https://www.ceaa-acee.gc.ca/050/documents/p80042/93670E.pdf>>.

<sup>61</sup> BC Environmental Assessment Office, [Woodfibre LNG Project Assessment Report](https://projects.eao.gov.bc.ca/api/document/58869291e036fb01057690bc/fetch), section 7.3.1 (19 August 2015) at 145, online: BCEAO <<https://projects.eao.gov.bc.ca/api/document/58869291e036fb01057690bc/fetch>>.

<sup>62</sup> CEA Agency, [Guidelines for the Preparation of an Environmental Impact Statement – Marine Terminal Project on the North Shore of the Saguenay](https://www.ceaa-acee.gc.ca/050/documents/p80103/102207E.pdf), section 9.2 (21 August 2015) at 32, online: CEAA <<https://www.ceaa-acee.gc.ca/050/documents/p80103/102207E.pdf>>. Note that the mouth of the Saguenay river is not as far as the Les Escoumins pilot station or territorial sea limit.

<sup>63</sup> CEA Agency, [Guidelines for the Preparation of an Environmental Impact Statement – Saguenay Energy Project Liquefied Natural Gas Export Terminal](https://www.ceaa-acee.gc.ca/050/documents/p80115/108257E.pdf), section 9.2 (14 March 2016) at 37, online: CEAA <<https://www.ceaa-acee.gc.ca/050/documents/p80115/108257E.pdf>>.

<sup>64</sup> CEA Agency, [Guidelines for the Preparation of an Environmental Impact Statement – Port of Quebec Deep-Water Multipurpose Project – Beauport 2020](https://www.ceaa-acee.gc.ca/050/documents/p80107/103179E.pdf), section 3.1 (16 October 2015) at 3, online: CEAA <<https://www.ceaa-acee.gc.ca/050/documents/p80107/103179E.pdf>>.

<sup>65</sup> *Supra* note 58 at 169. Reasons for scoping marine shipping well within the territorial sea limit were also provided in the [Marine Terminal Project on the North Shore of the Saguenay – Environmental Assessment Report](https://www.ceaa-acee.gc.ca/050/documents/p80103/125802E.pdf) (October 2018) at 6, online: CEAA <<https://www.ceaa-acee.gc.ca/050/documents/p80103/125802E.pdf>>. The Board did not rely on this EA report as it was released after the Board’s 12 October 2018 decision, but is referencing it for completeness on this topic. The CEA Agency concluded that marine shipping that would occur outside the Saguenay Port Authority’s area of jurisdiction is not an incidental physical activity and therefore is not part of the designated project: “Although shipping outside the proponent’s area of jurisdiction is still an activity that is complementary to the Project, shipping outside the area of jurisdiction is not within the care and control of the proponent and the degree of influence that the proponent could exert on the third parties shipping outside its area of jurisdiction is not sufficient to make it an incidental activity to the Project. In addition, marine shipping outside the proponent’s area of jurisdiction is an activity regulated under various laws and would not be solely for the benefit of the proponent.”

The Board is not aware of an EA that considered project-related marine shipping outside of the territorial sea<sup>66</sup> (this can be distinguished from EAs of designated projects where the primary activities themselves have an identified location in the EEZ, such as offshore drilling).

The EAs for these projects support the inclusion of Project-related marine shipping as an “incidental” activity and provide insight into its appropriate geographic extent. The Board finds persuasive the consistent approach taken by expert tribunals in other EAs, which have not considered project-related marine shipping beyond the territorial sea limit. This points to a sufficient “level of proximity” as discussed in *Taseko* and strongly indicates that this approach is reasonable within the context of the CEAA 2012 statutory scheme. These other EAs solidify the Board’s view that incremental marine shipping within the EEZ is not “incidental” and should not be included in the “designated project.”

The Board acknowledges and appreciates the concerns expressed by participants about environmental effects of marine shipping in the EEZ, including adverse effects on species at risk. However, project-specific EAs are not meant to accomplish what might be considered akin to a regional study of marine shipping in a large area such as the EEZ. The authority for conducting a regional study lies with the Minister of Environment and Climate Change and the process is set out in a separate part of the CEAA 2012.<sup>67</sup> Furthermore, the Board notes that the probability and consequence of a marine incident declines with distance from the coast, in light of traffic volume and navigational hazards.<sup>68</sup> Thus, risk reduction measures such as pilotage, tug escorts, and traffic separation schemes are focused within the territorial sea.<sup>69</sup>

Lastly, it is important to distinguish the effects from the designated project from the extent of the designated project itself. Under paragraph 5(1)(b) of the CEAA 2012, effects can be considered even if they occur in the EEZ or elsewhere outside of Canada. For example, effects of a spill from the Project having an impact in the EEZ can be considered. Thus, although only Project-related marine shipping within the territorial sea is to be considered as part of the “designated project,” effects from that shipping that occur outside of the territorial sea can still be considered by the Board, including certain trans-boundary effects.

## 5. Conclusion

The Board has considered the applicable statutory scheme, the Federal Court of Appeal’s decision in *Tsleil-Waututh Nation*, the OIC, case law, the CEA Agency Guidance, and practical EA considerations. The Board has applied all of this to the specific facts in this case and has concluded that Project-related marine shipping between the WMT and the 12-nautical-mile territorial sea limit is “incidental” to the pipeline component of the Project.

---

<sup>66</sup> Nor did any participant provide such an example.

<sup>67</sup> Ss 73-77.

<sup>68</sup> Trans Mountain, *Comments on Spatial Limit of Project-Related Marine Shipping* (9 October 2018) at 6-7.

<sup>69</sup> [Trans Mountain Expansion Project Volume 8C Part 2, Exhibit B21-1 at 1.](#)