

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 TERMPOL 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