

Appendix D.5 – Hwlitsum

I - Background Information

The Hwlitsum self-identify as descendants of the historic Lamalchi or Lamalcha Tribe and as close relatives of Penelakut Tribe from Kuper Island. Hwlitsum reports having over 300 members, some of whom are individually registered Indians under the *Indian Act*, but are not collectively recognized as a “band” under the *Indian Act* and do not have any reserves. In or around 1877, the Lamalcha and two other local groups on Kuper Island (Penelakut Island) were amalgamated under the *Indian Act* with the Penelakut and became the Penelakut Indian Band. Hwlitsum members claim descendancy from Lamalcha who did not join with or who left the Penelakut Indian Band in the early part of the twentieth century.

The “Island” dialect of Halkomelem (pronounced “Hul-ka-MEE-num”) is Hwlitsum’s ancestral language. Some Hwlitsum members reside in the area of Canoe Pass in Delta, and carry the Halkomelem name for this location (e.g., Hwlits’um, Xwulit’sum). Hwlitsum claim that early ethnographic use of the term “Cowichan”, that refers to a set of linked Halkomelem speaking communities, includes Hwlitsum but that Hwlitsum are related to, but independent of, the broader Cowichan community.

On November 7, 2014, Hwlitsum filed proceedings in the BC Supreme Court in which they claim to be an “identifiable group of indigenous people,” and seek a declaration of Aboriginal title “to all of their traditional village sites and territories” – an area very similar to the asserted traditional territory of the Hul’qumi’num Treaty Group members, which includes Penelakut Tribe, Stz’uminus (Chemainus) First Nation, Lake Cowichan First Nation, Halalt First Nation, Cowichan Tribes, and Lyackson First Nation. A portion of the pipeline right of way (RoW), several stations, the Burnaby Terminal, and Westridge Marine Terminal and the marine shipping route would pass through traditional area identified by Hwlitsum.

II - Preliminary Strength of Claim Assessment

The Crown considered its strength of claim assessment for Penelakut Tribe, of whom the Crown considers Hwlitsum to be a sub-group, when determining how to engage with Hwlitsum. The Penelakut Tribe preliminary strength of claim assessment is discussed in Appendix D.6. Hwlitsum was provided with the draft preliminary strength of claim assessment for Penelakut Tribe for comment.

III - Involvement in the NEB and Crown Consultation Process

The Crown is of the view that Hwlitsum is a family group/component of Penelakut Tribe. However, the Crown is aware of Hwlitsum’s views that it is an Aboriginal group independent of the Penelakut Tribe or any other Cowichan community. The Crown also understands that Hwlitsum does not believe its interests are represented by Penelakut or any other Cowichan group.

To ensure that information about potentially affected Aboriginal Interests of descendants of the historic Cowichan community is available and considered for the purposes of the Crown’s assessment, the Crown included Hwlitsum on Schedule B of the section 11 Order issued by the BC Environmental

Assessment Office (EAO), which affords them opportunities to be consulted at a deeper level. The Crown notes that the engagement undertaken with Hwlitsum for this assessment is not intended to signify any change in the position that the Crown takes in other contexts in relation to the duty to consult with Hwlitsum. During the National Energy Board (NEB) process, Trans Mountain notes that Hwlitsum participated as a member of the Cowichan Nation Alliance.

On December 11, 2012, Hwlitsum and Trans Mountain executed a confidential Letter of Understanding (LOU), which included capacity funding to support Project engagement. An amendment to the LOU was executed on October 24, 2013. On February 12, 2014, Hwlitsum and Trans Mountain executed a confidential Mutual Benefits Agreement, and on July 31, 2015, Hwlitsum filed a Letter of Support with the NEB.

Hwlitsum participated in the NEB hearing process as a registered intervenor. Hwlitsum participated in the Aboriginal Oral Traditional Evidence Hearings, and provided Aboriginal oral evidence to the NEB on October 24, 2014 in Chilliwack, BC. Hwlitsum submitted evidence to the NEB, however their evidence was withdrawn at their request and on July 31, 2015, they withdrew as an intervenor from the NEB Hearing Process. Hwlitsum expressed concern about the NEB Hearing Process, particularly insufficient funding to participate and to respond to Information Requests. Hwlitsum was awarded \$84,720 plus travel for four to the hearing from the NEB as part of its Participant Funding Program.

On August 22, 2016, the Crown notified Hwlitsum of the distribution of a first draft of this Report to Penelakut and other Aboriginal groups on August 17, 2016, and also provided a copy to Hwlitsum for review and comment. These actions followed the process outlined by EAO in a letter sent to Hwlitsum on June 17, 2016. A second draft of this Report was provided to Hwlitsum for review and comment on November 2, 2016. The Crown has not received comments from Hwlitsum.

On September 19, 2016, Hwlitsum sent a response to EAO and indicated that there were no concerns with the draft Report, but they objected to being considered a component of the Penelakut Tribe and included in the same Appendix as Penelakut Tribe. Hwlitsum reiterated that they consider themselves to be entirely independent of Penelakut Tribe and requested that future correspondence refer to Hwlitsum as a separate entity. The Crown has considered this request, and while the Crown's position remains unchanged, drafted this separate Appendix section for Hwlitsum.

IV - Summary of Key Hwlitsum Issues and Concerns Raised

The Crown has gained its understanding of Hwlitsum's issues and concerns through their involvement in the NEB process, engagement with proponent, and correspondence with the Crown. This section offers a summary of the key issues raised by Hwlitsum, 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 Hwlitsum's key Project-related issues and concerns are summarized below:

Impacts on Harvesting Areas

- Hwlitsum expressed concern with potential effects from the Project to Canoe Pass, a key marine resource harvesting area for community members.

Environmental Impacts

- Hwlitsum expressed concerns about effects to marine species, migration patterns, water flow patterns, water quality and quantity, erosion and deposition from Project activities; and
- Hwlitsum is concerned that increased tanker traffic will adversely affect marine species such as, sockeye salmon, pink salmon, chum salmon, spring salmon and dogfish.

Cultural and Social Impacts

- Hwlitsum is concerned that the inter-generational sharing of knowledge will be disrupted due to the Project; and
- Hwlitsum is interested in employment and business opportunities specifically focused on reducing the chances of spills, increasing the chance for effective clean up and ensuring spiritual, cultural and fish habitat sites are remediated.

Impacts Associated with Spills

- Hwlitsum is concerned that Trans Mountain's spill response and preparedness will not be able to protect harvesting, cultural and spiritual locations.

Hwlitsum's Response to NEB Recommendation Report

No specific comments were received regarding the *NEB Recommendation Report*.

V - Potential Impacts of the Project on Hwlitsum's Aboriginal Interests

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and Section 4.3 of this report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Hwlitsum's exercise of its Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Hwlitsum's ability to practice Aboriginal Interests.

Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g. fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to of 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 Hwlitsum's exercise of Aboriginal Interests considers information available to the Crown from the NEB process, Hwlitsum's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province.

It is the Crown's understanding that Hwlitsum participated in the NEB process and the Aboriginal Oral Traditional Evidence Hearings, but they withdrew from the NEB process and submitted a Letter of Support for the Project. The Crown understands that Hwlitsum did not complete a Traditional Land Use Study for this Project.

The Lamalcha and other Cowichan people traditionally followed a seasonal round of resource use and regional settlement that involved spending summers on the Lower Mainland (March to November). Hwlitsum assert that the ancestors of individuals who currently identify as Hwlitsum began living year-round at Canoe Pass, reported as the centre of fishing for the Lamalcha, after 1863, when the Lamalcha winter settlement on Kuper Island was fired upon by the Royal Navy. While part of the salmon fishing season was also spent at *Tl'uqtinus*, all species of salmon, cutthroat, Dolly Varden, dogfish, flounder, steelhead, smelt oysters, crab, sturgeon, eulachon, and trout are or have reportedly been obtained by Lamalcha and other Cowichan people traditionally at Canoe Pass or at nearby locations.

The general direct and indirect effects of the Project on Aboriginal Interests, along with key mitigation measures, are described in Section 4.2 of the main body of this Report. As described in that section, routine Project-related activities are likely to result in low to moderate impacts on the lands, waters and resources that Aboriginal groups use to exercise their hunting, trapping, plant gathering, fishing, and other traditional activities. Short-term, temporary access disruptions to traditional activities are expected. These impacts would be localized within the Project footprint for the pipeline and associated facilities and from marine shipping.

Impacts on Hunting, Trapping, and Plant Gathering

As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, 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 Hwlitsum's hunting, trapping, and plant gathering activities. The Crown understands that this short-term disruption could temporarily alter the behaviour of community members' hunting, trapping or plant gathering activities during construction, and that reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project, could have spiritual and cultural impacts on community members.

Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Sections 4.3.1 and 4.3.3 of this Report). The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP) and the vegetation and wildlife management plans. The proponent would implement a range of mitigation measures that would reduce potential effects associated with hunting, trapping, and plant gathering activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

The proponent is committed to implementing weed management (as outlined in the Weed and Vegetation Management Plan) to reduce the potential for weed infestation following construction, and utilizing an Integrated Vegetation Management approach intended to reduce the use of herbicides and promote healthy ecosystems. The proponent will consult with Aboriginal groups regarding problem vegetation management and methods of treatment. Measures outlined in the proponent's Reclamation Management Plan are intended to stabilize and revegetate affected lands to achieve land productivity along the construction ROW and footprint, equivalent to the adjacent land use. The proponent has also committed to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project

NEB Condition 81 would require the proponent to develop a Westridge Marine Terminal (WMT)-specific EPP, including mitigation and monitoring plans, to be finalized in consultation with Fisheries and Oceans Canada (DFO) and potentially affected Aboriginal groups. The proponent 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.

Impacts on Freshwater Fishing, and Marine Fishing and Harvesting

The general direct and indirect effects of the Project on freshwater fishing, along with key mitigation measures, are described in Section 4.3.2 of the main body of this Report. The general direct and indirect effects of the Project on marine fishing and harvesting, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report.

Project-related marine vessels are expected to cause temporary disruptions to community members' marine fishing and harvesting activities. The Crown appreciates that community members could be

discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow 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 cultural activities and sharing of marine food with the community.

The conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with marine fishing and harvesting sites (Section 4.3.1 of this Report). The proponent would implement a range of mitigation measures that would reduce potential effects associated with marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, and scheduling and notification of Project activities (via the proponent's marine public outreach program).

Impacts on Other Traditional and Cultural Practices

The general direct and indirect effects of the Project on traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this report.

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 Hwlitsum during the NEB and Crown consultation processes.

Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown understands that there will be temporary interruptions to traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups in providing traditional knowledge related to the location and construction of the Project.

Hwlitsum expressed concerns regarding the impact of a potential oil spill on their Aboriginal Interests, including the effects of a potential spill on:

- Marine resources; and
- The Fraser River and the Salish Sea.

A discussion of the potential impacts of a pipeline or tanker spill on Aboriginal Interests is provided in Section 4.3.6 of this Report. In consideration of this information and analysis, as well as information available to the Crown on Hwlitsum's exercise of Aboriginal Interests, concerns raised by Hwlitsum during the Crown consultation process, and the location of Hwlitsum's asserted traditional territory to the Project area, a pipeline or tanker spill associated with the Project could result in minor to serious impacts on Hwlitsum's exercise of Aboriginal Interests, depending on the characteristics and severity of the spill. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline or tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty.

As stated previously, on November 7, 2014, Hwlitsum filed proceedings in the BC Supreme Court, in which they seek (among other relief) declarations that they have Aboriginal title "to all of their traditional village sites and territories", which overlaps portions of the pipeline and marine shipping corridors. Hwlitsum's asserted traditional territory in the court proceedings also overlaps and extends beyond the entire traditional territory asserted by the Hul'qumi'num Treaty Group.

The general effects of the Project on Aboriginal title are described in Section 4.3.5 of the main body of this Report.

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. In consideration of the information available to the Crown from the NEB process, Crown consultation with Hwlitsum, Hwlitsum's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province, the Project is expected to result in a minor impact on Hwlitsum's exercise of Aboriginal Interests.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Hwlitsum's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests.

Given existing use of the marine shipping corridor within areas proximate to Hwlitsum's exercise of Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of Aboriginal Interests, the federal Crown is considering incremental measures that would further accommodate the potential adverse impacts of the Project on Aboriginal Interests as discussed in Sections 4 and 5 of the main body of this Report.

In addition, the Crown is aware that Trans Mountain has entered into a Mutual Benefits Agreement with Hwlitsum in an attempt to offset potential impacts, should the Project proceed.