

Appendix D.8 – Maa-nulth First Nations

I - Background Information

Maa-nulth First Nations (Maa-nulth) are comprised of the following five separate treaty First Nations that entered into the Maa-nulth First Nations Final Agreement, a modern comprehensive land claim agreement concluded with Canada and British Columbia (BC) under the BC Treaty Commission process that took effect April 1, 2011: Huu-ay-aht First Nations, Ka:'yu:'k't'h'/Che:k'tles7et'h' First Nations, Toquaht Nation, Uchucklesaht Tribe, and Yuułuʔiłʔatḥ First Nation.

Huu-ay-aht First Nations (Huu-ay-aht, pronounced “*Hoo-EYE-at*”) has a mission statement of the following: “As a leader among First Nations, the HUU-ay-aht will create certainty for its people and generate wealth for financial independence by providing economic opportunities, social, cultural and recreational programs for all HUU-ay-aht”. Pachena Bay (former Anacla Reserve) is located approximately 12 kilometres (km) from Bamfield, British Columbia (BC). The HUU-ay-aht community is located on their treaty settlement lands 75 km by gravel road away from Port Alberni, BC.

Ka:'yu:'k't'h'/Che:k'tles7et'h' First Nations (Ka:'yu:'k't'h'/Che:k'tles7et'h'). Ka:'yu:'k't'h' (pronounced “*Ky-YOU-cut*”) is amalgamated with Che:k'tles7et'h' (pronounced “*TSHEH-kleh-szet*”) members who reside in the Ka:'yu:'k't'h' territory. Their community is located on treaty settlement lands on the north western section of Vancouver Island south of the Brooks Peninsula and North or Nootka Island, and is only accessible by boat and plane. The Ka:'yu:'k't'h'/Che:k'tles7et'h' people have lived in this region for several millennia. Archaeological evidence shows the continuous occupation of their territory for at least 5,000 years. The Ka:'yu:'k't'h'/Che:k'tles7et'h' website states that “fishing is an important resource that the people depend on for their survival” and that “the ocean is their supermarket and where many Ka:'yu:'k't'h'/Che:k'tles7et'h' people earn their living”.

Toquaht Nation (Toquaht) is located on the western side of Barkley Sound near the town of Ucluelet. The stated vision of Toquaht is to “ensure a future that provides a safe and affordable environment to raise a family, while living in harmony within our hahuli: where health & well-being, social and spiritual needs are met...The balance between our cultural connection to the land and having a strong economic land base is the most important factor in future land use decision-making.”

Representatives from the Toquaht, Ahousaht, Hesquiaht, Tla-o-qui-aht, and Yuułuʔiłʔatḥ make up the Central Region Nuu-chah-nulth Language Society. They maintain that to feel proud of themselves, they need to encourage the revitalization of their First Nation heritage.

Traditionally, the Toquaht were whalers, hunters, and gatherers. Salmon, sea mammals, and shellfish were important for Toquaht diet and culture. The Toquaht people relied heavily on red and yellow cedar. It was used to house and clothe the population. Large canoes were carved for whaling and fishing, as well as moving the community from one village site to another at different times of the year. Cedar was also used in basket weaving and box making to store everything from personal possessions to food and hunting gear. Planks were pulled off living cedars for house construction. Cedar bark was used

in making clothing and mats for house floors. Berries, shoots and camas bulbs were gathered in the spring and summer.

Uchucklesaht Tribe (Uchucklesaht, pronounced “U-CHUK-le-sat”)

The Uchucklesaht Governing Structure "honours [their] past and embraces the future" ensuring the continued existence of the Uchucklesaht as a strong political, social and cultural community that aspires to grow as an organized, determined, successful and self-reliant peoples. Uchucklesaht strive to manage and protect their resources for future generations. The respectful use of Uchucklesaht territories and the practice of their traditional ways contribute to physical and spiritual health and cultural well-being.

Yuułuʔiłʔatḥ First Nation (Yuułuʔiłʔatḥ, pronounced “You-thloo-ith-at”) was formerly known as Ucluelet First Nation. Yuułuʔiłʔatḥ’s vision statement is as follows: “Yuułuʔiłʔatḥ are grounded in our history. Our citizens continue to learn from our elders, who share the teachings of our ancestors. We know who we are and where we come from and we will pass this knowledge on to our children. As Yuułuʔiłʔatḥ we understand and fulfill our traditional and historic roles and responsibilities as a Nation. We know that our language is essential to the practice of our culture and we continue to promote the use of our language and full understanding of our history and our culture”.

These five Nuu-chah-nulth communities located on the north and south western coast of Vancouver Island have used and occupied the lands, waters, and resources in their traditional territories for a multitude of purposes, including hunting, fishing, transportation, trade, traditional ceremonies, and village sites. The people of the Maa-nulth historically spoke the Nuu-chah-nulth language and many members still speak the language today.

II - Maa-nulth First Nations Treaty Rights

The marine shipping route would pass through 36.5 km of the southern portion of Maa-nulth’s Final Agreement Areas Boundary. The Maa-nulth First Nations are signatories to the *Maa-nulth First Nations Final Agreement*,¹ a modern treaty with BC and Canada that came into effect on April 1, 2011 which outlines all of the section 35 rights of each of the five Maa-nulth First Nations, including: the right to harvest fish and aquatic plants (including intertidal bivalves), for food, social and ceremonial purposes in the Maa-nulth Domestic Fishing Areas, which includes an area southeast of Barkley Sound, on the southwest coast of Vancouver Island. This overlaps a portion of the designated marine shipping lanes to be used by tankers associated with the Project. Under the Final Agreement, each Maa-nulth First Nation has the right to harvest wildlife and migratory birds within the Maa-nulth First Nations Areas set out in the Final Agreement.²

¹ https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-BC/STAGING/texte-text/mna_fa_mnafa_1335899212893_eng.pdf

² http://www.maanulth.ca/downloads/treaty/2009_maa-nulth_final_agreement_appendices_english.pdf

III - Involvement in the NEB and Crown Consultation Process

No component of the marine shipping route overlaps with any of the treaty settlement lands of any of the five Maa-nulth First Nations or falls within the defined “Maa-nulth First Nation Area”. However, given the overlap of a portion of the shipping route to the Domestic Fishing Area at Barkley Sound and potential impacts of the Project on each of the Maa-nulth First Nations’ treaty right to harvest fish and aquatic plants, the federal Crown is of the initial view that the legal duty to consult Maa-nulth is triggered and lies at the lower end of the consultation spectrum. Maa-nulth and BC entered into a Reasonable Opportunity Agreement on May 22, 2014,³ setting out a process through which the parties would fulfill the treaty provisions that relate to ensuring that Maa-nulth are not denied a reasonable opportunity to harvest fish and aquatic plants within the Domestic Fishing Area by any authorizations made by BC. The marine shipping route does not overlap with areas identified as an “Important Harvest Area” under the Reasonable Opportunity Agreement. Although engagement is not required by BC pursuant to the Reasonable Opportunity Agreement, all five Maa-nulth First Nations were placed on Schedule B of the Section 11 order issued by the BC Environmental Assessment Office (EAO), which affords them opportunities to be consulted at a deeper level.

Maa-nulth filed a late application to participate in the National Energy Board (NEB) review on April 24, 2015, and was granted intervenor status by the NEB on April 29, 2015. Maa-nulth did not submit an application for participant funding from the NEB. Maa-nulth actively engaged in the NEB review process by filing written evidence and a written final argument to the NEB^{4,5}. Maa-nulth also responded to the Crown’s Issues Tracking Table Information Request by further elaborating their concerns [A71204].

The Major Projects Management Office (MPMO) offered Maa-nulth \$30,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Maa-nulth an additional \$15,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Maa-nulth signed contribution agreements with the MPMO in response to both of these offers, for a total of \$45,000 in allocated funding. On October 13, 2016 Maa-nulth was issued \$10,000 in capacity funding by EAO to assist with the consultation process.

Maa-nulth met with the Crown Consultation team on May 11, 2016 to discuss the Project. In addition, the Crown and Maa-nulth met on September 29, 2016 to further discuss the Project.

³ http://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/maa-nulth_roa_side_agreement_signed_05_22_2014.pdf

⁴ Maa-nulth written evidence submitted to NEB: <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2784801&objAction=browse&viewType=1>

⁵ Maa-nulth Final Argument submitted to NEB: <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2905182&objAction=browse&viewType=1>

The Crown provided a first draft of this Consultation and Accommodation Report (the Report) to Maa-nulth for review and comment on August 17, 2016. The Crown did not receive written comments from Maa-nulth on the draft Report, but preliminary comments were given at a meeting between the Crown and Maa-nulth on September 29, 2016. These comments have been considered in the revisions to the draft Report.

A second draft of this Report was provided to Aboriginal groups for review and comment on November 2, 2016. The Crown has not received comments from Maa-nulth.

Maa-nulth provided a separate Aboriginal group submission to the Crown on November 16, 2016.

IV - Summary of Maa-nulth's Key Issues and Concerns Raised

The Crown has gained its understanding of Maa-nulth's issues and concerns through Maa-nulth's involvement in the NEB process, including the responses provided to the Crown on its Information Request (IR) addressed to Maa-nulth, a letter in response to the *Proponent Engagement Report*, and through other engagement with the Crown, including meetings.

This section offers a summary of the key issues raised by Maa-nulth, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Maa-nulth's key Project-related issues and concerns are summarized below:

Methodology, Process and Consultation

- Maa-nulth stated that the federal government should amend the environmental assessment process, in consultation with the Maa-nulth First Nations and other interested parties, to address concerns raised regarding the NEB hearing process;
- Maa-nulth stated that the federal government should require the NEB to revisit the Project and conduct further hearings to comply with the amended regime, including providing intervenors an opportunity to cross-examine Trans Mountain and expanding the list of issues in the hearing to include the environmental and socio-economic effects of upstream activities and downstream uses;
- Maa-nulth raised concerns about the level of engagement with the proponent; in particular, Maa-nulth is concerned because the proponent signed Mutual Benefit Agreements with other costal groups with similar Project impacts but no Mutual Benefit Agreement has been signed with them;
- Maa-nulth Nations have concerns around the mandate of the Crown consultation team leading the post-NEB consultation; and
- Maa-nulth stated that the consultation process is rushed without much real opportunity to affect change.

Capacity and Funding

- Lack of capacity and resources to “lead expert evidence” regarding the potential impacts of the Project on their rights and interests;
- Maa-nulth stated that they have been on the hook for all costs to maintain participation in the process and that, had they been better resourced, they may have chosen to go into greater depth with technical information; and
- Maa-nulth would like the issue of costs and funding to be addressed, especially with five communities getting together from relatively remote locations.

Impacts from Increased Marine Traffic

- Maa-nulth stated that increased marine traffic could interfere with treaty rights to harvest fish and aquatic plants;
- In the context of increased tanker traffic, even with the best risk mitigation and disaster response measures in place, Maa-nulth stated that there is no way that they are better off with the Project going ahead; and
- Maa-nulth stated that an increase in the magnitude of tanker traffic contemplated by the Project represents a potential threat to harvesting ability and capacity of Maa-nulth, and raises concerns about potential environmental impacts in the Domestic Fishing Area, including the impacts of a potential spill from either a tanker into the Salish Sea, or the proposed pipeline into the Fraser River.

Economic Impacts

- Maa-nulth noted that the Project would have immense economic impacts on First Nations as they would suffer exclusion from the country and from sharing in the wealth of the land;
- Maa-nulth hope that conversation with the Crown starts to address this issue and helps ensure growth in the political power of Maa-nulth to have a say in decisions affecting them or their lands and waters;
- Maa-nulth stated that they are concerned about damage to fishing vessels and gear from increased marine vessel traffic, leading to loss of income from commercial fishing; and
- Maa-nulth stated that First Nations have not benefited from the historical relationship with the Crown; rather, they have been disadvantaged. Maa-nulth stated that there have been numerous consequences of this, including political disempowerment and economic disempowerment.

Impacts on Treaty Rights

- Increased marine traffic could interfere with treaty rights to harvest fish and aquatic plants, inter-tidal bivalves, migratory birds, and wildlife, and the treaty right to trade and barter resources harvested;
- Maa-nulth sees their treaty as a “living treaty” that shapes the relationship with the Crown into the future;

- Potential impacts resulting from a spill or release of bunker fuel or contaminants on treaty lands, which would affect economic development interests and harvesting rights due to spill-related closures (both domestic and commercial); and
- Maa-nulth stated that the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) speaks to land rights of Indigenous Peoples, but noted that Vancouver Island groups treat water the same as land. Also, Maa-nulth states that there is no difference between UNDRIP talking about land rights and the use of water by First Nations on Vancouver Island.

Impacts on Culture and Identity

- A critical element is the maintenance of Maa-nulth's culture and identity;
- Maa-nulth has expressed concern around damage to cultural heritage sites; and
- In terms of reconciliation, there needs to be an awareness and acknowledgement of the uniqueness and importance of First Nations' presence in Canadian society. This Project in particular is a case where there is wealth in which First Nations have the right to share, as it is in their territory.

Accidents and Malfunctions

- Maa-nulth is deeply concerned about potential impacts from an accident or malfunction involving the pipeline or a Project related tanker, including the adequacy of spill prevention measures, spill response regime and spill compensation regime; and
- Maa-nulth is concerned about the devastating impacts that a potential accidental tanker spill could have over their lands, people, and treaty rights.

Accommodation Proposals

During the NEB process and the Crown consultation meeting of May 11, 2016, Maa-nulth asked for the following accommodation proposals to be considered:

General

- Development of a Salish Sea Stewardship Foundation.

Spill Prevention

- Emergency Response Towing Vessels should be stationed at strategic locations along the marine shipping route; and
- A resident salvor and personnel as well as salvage equipment should be stationed at strategic locations along the marine shipping route.

Spill Preparedness

- The federal government should commission independent research on the fate and behaviour of diluted bitumen in the marine environment and current best practices for spill response;
- The federal government should provide Maa-nulth and other interested parties an opportunity to comment on that research;

- If the research concludes there is a risk that diluted bitumen will sink, the federal government should require Trans Mountain to reassess the risk of an oil-spill involving a Project-related tanker including proposed mitigation measures;
- Locate one of the five planned West Coast Marine Response Corporation (WCMRC) sites, in Ucluelet due to its proximity to fishing territory;
- The Maa-nulth First Nations should be consulted regarding the establishment of that WCMRC site;
- The response time for incidents offshore of Buoy J should be reduced;
- The spill response capacity should be increased to an amount considerably greater than 20,000 tonnes (21,277 cubic metres [m³]) and this response capacity should be available at each of the major spill response bases including Barkley Sound;
- Maa-nulth and other interested parties should be consulted regarding that response capacity increase and, if required, the federal government should commission independent research to assist in determining the amount it should be increased to; and
- Trans Mountain should fund the establishment of a plan, in consultation with Maa-nulth and other interested parties, for bringing together and training a shoreline cleanup and wildlife response workforce in the event of an oil spill involving a Project-related tanker.

Spill Compensation Regime

- The federal government should amend the compensation regime for marine-based oil spills to increase the total amount of compensation available in the event of a major oil spill and to ensure that damages to the Maa-nulth First Nations' Domestic Harvesting Rights are compensable under the regime, in consultation with the Maa-nulth First Nations and other interested parties.

Economic Benefits

- Trans Mountain and/or the federal and provincial governments should enter into a binding agreement with Maa-nulth that provides economic benefits to the Maa-nulth First Nations in the event the Project proceeds.

Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Maa-nulth that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

Maa-nulth's Response to NEB Recommendation Report

No specific comments received by the Crown from Maa-nulth on the *NEB Recommendation Report*.

V - Potential Impacts of the Project on Maa-nulth's Treaty Rights

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and 4.3 of this Report, respectively. The Crown recognizes that areas proximal to marine fishing and harvesting areas set out in the Maa-nulth First Nations Final Agreement, including areas within the vicinity of marine shipping related to the Project, may be particularly important and valuable for specific qualities associated with traditional cultural, spiritual practices and the exercise of Maa-nulth's Treaty rights.

The discussion in this section focuses on potential impacts of the Project on Maa-nulth's Treaty rights and other interests. These potential impacts are characterized by considering how the Project could affect several factors important to Maa-nulth's ability to practice treaty rights and other interests.

Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Maa-nulth's Treaty rights (e.g., fish; migratory birds) that were assessed by the NEB;
- Impacts on the areas set out in the Maa-nulth Final Agreement, including the Domestic Fishing Area; and
- Impacts on Maa-nulth's culture and identity and experience.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Maa-nulth's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Maa-nulth, Maa-nulth's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province.

Maa-nulth submitted a 2004 study titled "*Cultural and Heritage Study, Marine Resource Sites and Activities, Maa-nulth First Nations*" as written evidence to the NEB in May 2015. Both confidential and redacted versions were filed. These traditional marine resource use (TMRU) studies, were completed for member communities including Huu-ay-aht First Nations ([A4L6D8](#)), Ka:'yu:'k't'h'/Che:k'tles7et'h First Nations ([A4L6D9](#)), Toquaht Nation ([A4L6E2](#)), Uchucklesaht Tribe ([A4L6E4](#)), and Yuułu?it'ath ([A4L6E8](#)) and provide an overview of the available information concerning traditional use sites and activities of Maa-nulth First Nations. In its Supplemental Technical Report ([A4S7I8](#)), the proponent estimated approximate distances and directions of traditional use sites from the marine shipping lanes, where possible, based on information in Maa-nulth's written evidence. Maa-nulth's TMRU studies did not reveal any TMRU sites within the Project's Marine Regional Study Area (RSA) although many of the locations of these sites were kept confidential. The Crown understands that the TMRU information provides valuable historical and contextual information to the assessment of the potential impacts on Maa-nulth First Nations' Treaty rights.

Impacts on Treaty Rights to Harvest Wildlife and Migratory Birds

In accordance with the Maa-nulth First Nations Final Agreement, Maa-nulth have the right to harvest wildlife and migratory birds, for domestic purposes, within the Wildlife Harvest Area and the Migratory Bird Harvest Area. The marine shipping route does not overlap with either of the Harvest Areas, but is closest to the areas set out at Barkley Sound. Also in accordance with the Maa-nulth First Nations Final Agreement, Maa-nulth have the right to harvest plants for food, social and ceremonial purposes, within provincial protected areas and within the treaty settlement lands of each of the five Maa-nulth First Nations. The marine shipping route does not overlap with any provincial protected areas or treaty settlement lands. The Final Agreement includes the right to trade and barter resources harvested with other Maa-nulth members or Aboriginal groups in BC. The Treaty sets out the right to sell inedible byproducts of these harvests, such as down from migratory birds harvested.

Maa-nulth historically hunted many marine and terrestrial wildlife species and migratory birds including seals, sea lions, sea otters, river otters, whales, porpoises, deer, elk, bears, geese, ducks, swans, sea-gulls, golden eye, martin, mink, beavers, and raccoons. Many of these species continue to be harvested by Maa-nulth community members today. In their TMRU study, Maa-nulth identified three hunting locations, which are not within the Project's Marine RSA.

Maa-nulth raised specific concerns with potential Project impacts relating to their Treaty harvesting rights and the right to trade and barter resources:

- Increased marine traffic could interfere with treaty rights to harvest migratory birds and wildlife, and the treaty right to trade and barter resources harvested.

The general direct and indirect effects of the Project on hunting and gathering activities, along with key mitigation measures, are described in Section 4.3.1 of the main body of this Report. Section 4.3.3 of the body of this Report sets out the potential effects and mitigations related to the Project-related marine shipping activity.

The proponent would implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

In consideration of the information available to the Crown from the NEB process, consultation with Maa-nulth, Maa-nulth's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province, Project-related marine shipping activities during operation are expected to result in a negligible impact on Maa-nulth's Treaty right to harvest wildlife and migratory birds for domestic purposes.

Impacts on Treaty Rights to Harvest Fish and Aquatic Plants

In accordance with the Maa-nulth First Nations Final Agreement, Maa-nulth have the Treaty right to harvest fish and aquatic plants for food, social and ceremonial purposes, within the Domestic Fishing

Area, a portion of which in the Barkley Sound area overlaps with the designated marine shipping lanes to be used by tankers associated with the Project. The Treaty also sets out designated shellfish aquaculture sites for each of the Maa-nulth First Nation, which do not overlap with the marine shipping route. The Final Agreement includes the right to trade and barter resources harvested with other Maa-nulth members or Aboriginal groups in BC. The Treaty also sets out the right for each of the Maa-nulth First Nations to benefit economically such as through commercial fishing licenses or shellfish aquaculture tenures. Although not a component of the treaty, Maa-nulth hold commercial fishing licenses in accordance with a Harvest Agreement and commercial shellfish aquaculture tenures.

As described in their TMRU, Maa-nulth community members historically harvested many species of fish, marine invertebrates, and shellfish including salmon, trout, dogfish, halibut, wolf eel, butter clams, oysters, mussels, sea urchins, and Dungeness crab, among others. Salmon is a staple in Maa-nulth's diet. Maa-nulth community members harvested various aquatic plants including eelgrass, sea grass, surf grass, giant kelp, and small seaweed roots. Maa-nulth identified 17 fishing sites and two marine plant gathering sites in their TMRU, none of which are located within the Project's Marine RSA.

Maa-nulth raised specific concerns with potential Project impacts on the Treaty right to harvest fish and aquatic plants for food, social and ceremonial purposes, within the Domestic Fishing Area:

- Increased marine traffic could interfere with treaty rights to harvest fish and aquatic plants;
- Potential impacts resulting from a spill or release of bunker fuel or contaminants on treaty lands, which would affect economic development interests and harvesting rights (both domestic and commercial);
- Maa-nulth stated that an increase in the magnitude of tanker traffic contemplated by the Project represents a potential threat to harvesting ability and capacity of Maa-nulth, and raises concerns about potential environmental impacts in the Domestic Fishing Area, including the impacts of a potential spill from either a tanker into the Salish Sea, or the proposed pipeline into the Fraser River;
- Maa-nulth stated that they are concerned about damage to fishing vessels and gear leading to loss of income from commercial fishing; and
- Increased marine traffic could interfere with treaty rights to harvest fish and aquatic plants, inter-tidal bivalves, and the treaty right to trade and barter resources harvested.

The general direct and indirect effects of the Project on marine fishing and harvesting, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report. Project-related marine vessels would increase the amount of marine traffic traveling in the established shipping lanes. The *NEB Recommendation Report* found that Project effects on marine fish and fish habitat are expected to be low to moderate and effects on marine mammals are expected to be low. Project-related marine vessels are expected to cause temporary disruptions to Maa-nulth's Treaty right to marine fishing and harvesting activities within the Domestic Fishing Area that overlaps with the existing shipping lanes. The Crown understands that community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross or enter the shipping lanes. As described in

Section 4.3.3, the proponent would be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Maa-nulth community members to take measures to reduce potential disruptions from tankers and allow planning for fishing activities to take place that minimizes disturbance from Project-related tankers. Reduced harvests are not expected to occur from temporary access restrictions, but Maa-nulth community members' experience of fishing or harvesting in that area could be impacted.

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

In consideration of the information available to the Crown from the NEB process, consultation with Maa-nulth, Maa-nulth's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in negligible-to-minor impacts on Maa-nulth's Treaty right to harvest fish and aquatic plants for food, social and ceremonial purposes, within the Domestic Fishing Area.

Impacts on Other Traditional and Cultural Practices

While outside of the terms of the Maa-nulth First Nations Final Agreement, the Crown has considered Project-related marine shipping on Maa-nulth's culture and experience. During consultation Maa-nulth raised specific concerns with potential Project impacts relating to culture:

- A critical element of the conversation with the Crown is the maintenance of Maa-nulth's culture and identity; and
- Maa-nulth has expressed concern around damage to cultural heritage sites.

Maa-nulth identified 23 gathering places in their TMRU including historic and current summer villages, archaeological village sites, and winter village sites, among others. One sacred area was identified in Maa-nulth's TMRU. Other sacred areas identified by Maa-nulth including burial caves, culturally modified trees, pictographs, bark stripped trees, historic native remains, cemeteries, box burials, and burials were kept confidential. No travelways were identified by Maa-nulth within the Marine RSA. None of the sites are located within the Project's Marine RSA.

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

Marine mammals are of importance to many Coast Salish Aboriginal groups, and killer whales specially hold strong spiritual and cultural importance for many Aboriginal groups. The NEB concluded that effects on the endangered Southern resident killer whale and Aboriginal cultural use of Southern resident killer whale from Project-related shipping activities would be significant. The Crown is not aware of any specific cultural use of or concerns regarding killer whales raised by Maa-nulth during the NEB and Crown consultation processes.

The Crown understands that there could be temporary interruptions to any of Maa-nulth's traditional and cultural practices associated with the treaty right to fish or harvest within the Domestic Fishing Area in the vicinity of the established shipping lanes. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups.

In consideration of the information available to the Crown from the NEB process, consultation with Maa-nulth, Maa-nulth's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation are expected to result in negligible-to-minor impacts on Maa-nulth's other traditional and cultural practices.

Impacts Associated with Accidental Tanker Spills

Maa-nulth expressed concerns regarding the impact of a potential spill on their Treaty rights and other interests, including the effects of a potential spill on:

- The Fraser River and Salish Sea;
- Land rights, which would affect their economic development interests and harvesting rights;
- Fishing vessels and gear, which would lead to a loss of income from commercial fishing;
- Environment, especially on the Domestic Fishing Area.; and
- The exercise of Treaty rights pursuant to the Maa-nulth First Nations Final Agreement.

Maa-nulth raised concerns about the potential impacts from an accident or malfunction involving the pipeline or a Project related tanker, including the adequacy of spill prevention measures, spill response regime and spill compensation regime. The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. Section 4.3.6 of the main body of this Report sets out the impacts associated with accidental spills from marine shipping vessels. In consideration of this information and analysis, as well as information available to the Crown on Maa-nulth's Treaty rights and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts on Maa-nulth's Treaty rights. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at

greatest risk for adverse effects from an oil spill⁶. The Crown notes that a spill that impacts Maa-nulth's lands and other areas as set out in the Final Agreement would impact on Maa-nulth's Treaty rights including to the domestic and commercial aspects of resource harvesting.

VI - Conclusion

The Crown understands the Project-related marine shipping has the potential to adversely impact the ability of Maa-nulth First Nations to engage in their Treaty rights. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing marine safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for marine vessel use of the area between the Westridge Marine Terminal and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the marine-shipping component of the Project on the exercise of Maa-nulth's Treaty rights would be up to negligible-to-minor.

However, given existing use of the marine shipping corridor within areas proximate to the exercise of Maa-nulth's Treaty rights and the potential severity of the impacts of a marine spill on the exercise of Maa-nulth's Treaty rights, the federal Crown is considering additional measures to further offset the potential impacts of the marine-shipping component of the Project on Maa-nulth. Please see Sections 4 and 5 of the main body of this Report for a discussion of proposed accommodation measures.

⁶ Trans Mountain Final Argument, p. 85 and 207