

Appendix D.13 – Scia’new First Nation (Beecher Bay Indian Band)

I – Background Information

Scia’new First Nation (Scia’new) or Beecher Bay Indian Band is a Coast Salish community located on Vancouver Island, British Columbia (BC). Scia’new’s asserted traditional territory includes an area from west of the Saanich Inlet to the southern tip of Vancouver Island.

Scia’new is a member of the Te’mexw Treaty Association (TTA) along with the Nanoose First Nation, T’Sou-ke First Nation, Malahat First Nation and Songhees First Nation. The TTA was created to represent its member First Nations in treaty negotiations with the governments of BC and Canada. The TTA is currently in Stage 5 of the BC Treaty process (i.e. Final Agreement), having signed an agreement-in-principle in April 2015.

Scia’new is a signatory to the *First Nations Land Management Act*, with the Beecher Bay Lands Department overseeing the protection and management of the community’s lands and resources – as per Beecher Bay’s Land Code.

As of March 2016, Scia’new has a registered population of 253 members, of which 102 members live on a community reserve. Scia’new’s predominant language is Hul’q’umi’num.

II – Preliminary Strength of Claim Assessment

- Approximately 39 km of the marine shipping route would pass within the southern part of Scia’new’s traditional territory.
- The Province of BC understands that Scia’new has Douglas Treaty rights to carry out fisheries and hunt as formerly within its historic traditional territory.
- Canada recognizes the Douglas Treaties and understands that Scia’new has members who are descendants of one or more signatories to one or more Douglas Treaties. Canada remains committed to working toward a common understanding of the content and scope of the Douglas Treaties with Scia’new, to implement the treaty through agreements with the Crown, and to explore opportunities to honour and recognize the Douglas Treaties.

Ethnohistoric evidence suggests that the people at Beecher Bay are identified in the sources as Clallum from the Olympic Peninsula who moved to the Beecher Bay location in the middle of the 19th century, and that their territory encompassed areas between Sooke Inlet and Albert Head on Vancouver Island at the time of the signing of the Douglas Treaties in 1850.¹

¹ Te’mexw Treaty Association and Esquimalt Nation. Songhees, Beecher Bay, Scia’new (Beecher Bay) and Malahat First Nations, Esquimalt Nation: Review of Ethnographic and Historical Sources. Ministry of Justice, Legal Services Branch, Aboriginal Research Division. September 5, 2008. Revised to June 16, 2015; Proposed National Marine Conservation Area Reserve in the Southern Strait of Georgia: Review of Ethnographic and Historical Sources. Prepared by Ministry of Justice, Legal Services Branch, Aboriginal Research Division. December 19, 2012. Revised November 20, 2013.

III – Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Scia'new's Aboriginal Interests, the Crown is of the view that the legal duty to consult Scia'new lies at the middle portion of the *Haida* consultation spectrum. Scia'new was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which afforded Scia'new opportunities to be consulted at a deeper level.

Scia'new participated in the National Energy Board (NEB) review process as an intervenor and submitted written evidence, including a Traditional Marine Resource Use (TMRU) report, a written final argument, and corresponded with the NEB. Scia'new also responded to the Crown's Issues Tracking Table Information Request by further elaborating on their Project-related concerns ([A71207](#)).

Scia'new signed a contribution agreement with the NEB for \$24,910 in participant funding plus travel for one to the hearing. The Major Projects Management Office (MPMO) offered Scia'new \$7,650 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Scia'new an additional \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Scia'new signed contribution agreements with the MPMO in response to both of these offers, for a total of \$13,650 in allocated funding. On October 14, 2016 Scia'new was issued \$5,000 in capacity funding by EAO to assist with the consultation process.

Scia'new signed a letter of support with the proponent on March 26, 2015 ([A4J9Z7](#)), and formally withdrew any objection to the issuance of a Certificate of Public Convenience and Necessity for the Project.

Scia'new met with the Crown consultation team on April 21, 2016 and October 13, 2016.

The Crown provided a first draft of this Report to Scia'new First Nation for review and comment on August 17, 2016. The Crown did not receive comments from Scia'new on the draft Report. A second draft of this Report was provided to Aboriginal groups for review and comment on November 2, 2016. The Crown has not received comments from Scia'new.

Scia'new provided a separate Aboriginal group submission to the Crown on November 15, 2016.

IV – Summary of Key Issues and Concerns Raised

The Crown gained its understanding of Scia'new's issues and concerns through the community's involvement in the NEB review process and through correspondence and meetings with the Crown. In addition, the Crown has considered information regarding the proponent's engagement with Scia'new, as described in the proponent's Aboriginal Engagement Report (July 2016).

Throughout the NEB review and Crown consultation process, Scia'new set out the community's views of the consequences of the Project proceeding, as well as the potential impacts of increased marine shipping on their asserted rights and interests. As a coastal community, Scia'new expressed key

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

- The impact of marine traffic on social and familial relations with communities on the other side of the Strait;
- The cumulative effects of increased vessel traffic;
- The potential adverse effects of increased vessel traffic on shoreline erosion and culturally significant sites;
- The impacts of increased marine traffic on traditional fishing activities;
- The risks associated with a marine spill as well as the adequacy of spill response planning and the capacity of insurance companies to pay for damages in the event of a spill;
- The lack of a comprehensive liability and compensation regime in case of marine oil spill incidents in relation to cultural loss; and
- The potential effects of increased marine traffic on Scia'new's economic activities, including a community aquaculture project, marina and real estate development.

Scia'new also raised procedural concerns regarding the NEB review process, including the lack of oral cross-examination and the lack of direct government involvement in consultation with Scia'new during the NEB hearing process.

Scia'new's Response to NEB Recommendation Report

No specific comments were received from Scia'new on the *NEB Recommendation Report*.

Accommodation Proposals

Scia'new proposed a series of accommodation proposals to the NEB in its written final argument ([A75052](#)) on January 12, 2016. Scia'new noted in a letter dated June 16, 2016, that while Scia'new submitted a letter of support for the Project to the NEB and acknowledged the existence of an issues table that captures proposed measures for implementation, the proponent neglected to include the text of the proposals within the body of the document. Scia'new believes that such an oversight may mislead readers of the *Proponent Engagement Report* into thinking that Scia'new did not propose any additional mitigation measures.

Scia'new supports regulatory approval of this Project on the terms and conditions set out in the Mutual Benefits Agreement. However, in order better protect the environment and mitigate potential impacts on the environment, Scia'new's culture, rights and Interests, they submit that the following measures should be implemented prior to and as a condition of the Project proceeding.

Spill Prevention

- Emergency Response Towing Vessels should be stationed at strategic locations along the marine shipping route;
- A resident salvor and personnel as well as salvage equipment should be stationed at strategic locations along the marine shipping route;
- The proponent and the federal government should consult with pilots operating Project-related tankers in Canadian waters regarding whether a particular tanker satisfies the proponent's Tanker Acceptance Criteria and federal regulations; and
- If Project-related tankers in Canadian waters do not meet these criteria and regulations, the proponent and the federal government should take enforcement measures ensuring that either the deficiency is corrected or that the tanker no longer operates in Canadian waters.

Spill Preparedness

- The federal government should commission independent research on the fate and behavior of diluted bitumen in the marine environment and current best practices for spill response;
- The federal government should provide Scia'new and other interested parties an opportunity to comment on that research;
- If the research concludes there is a risk that diluted bitumen will sink, the federal government should require the proponent to reassess the risk of an oil spill involving a Project-related tanker including proposed mitigation measures;
- A spill response base should be established on or near Beecher Bay I.R. No 1;
- Scia'new should be further consulted regarding the establishment of that spill response base;
- The spill response capacity should be increased to an amount considerably greater than 20,000 tonnes (21,277m³) and this response capacity should be available at each of the major spill response bases, including Beecher Bay,
- Scia'new and other interested parties should be consulted regarding that increase and, if required, the federal government should commission independent research to assist in determining the amount it should be increased to;
- The proponent should fund the establishment of a plan, in consultation with Scia'new and other interested parties, for bringing together and training a shoreline cleanup and wildlife response workforce in the event of an oil spill involving a Project-related tanker; and
- The federal Crown and the proponent should engage in meaningful consultations with Scia'new and other First Nations with Aboriginal or treaty rights in or around the Salish Sea regarding establishment of a Foundation, including the federal government and Trans Mountain's respective financial contributions to the Foundation.

Scia'new further submits that, regardless whether the Project proceeds, the federal government should implement the following regulatory improvements:

Hearing Process

- Amend the environmental assessment process for future projects that may impact Scia'new's rights and Interests, as contemplated in the Liberal Party's 2015 election platform, in consultation with Scia'new and other interested parties.

Spill Compensation Regime

- Amend the compensation regime for marine-based oil spills to ensure that the total compensation available reflects the total costs likely to be incurred in the event of a major oil spill and to ensure that damages to Scia'new's harvesting rights are compensable under the regime, in consultation with Scia'new and other interested parties.

Scia'new acknowledges that some of the above conditions are beyond the jurisdiction of the NEB; however, submits that, to the extent they are, they should be addressed through federal regulation.

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

V – Potential Impacts of the Project on Scia'new's Aboriginal Interests

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

The discussion in this section focuses on potential impacts of the Project on Scia'new's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Scia'new's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g. fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Scia'new's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Scia'new, Scia'new's engagement with the proponent, proponent commitments, recommended

NEB conditions, as well as relevant conditions proposed by the Province of any Environmental Assessment Certificate (EAC) issued.

Scia'new completed a TMRU study and conducted an independent, third-party traditional marine and land use baseline study (TMLUS). The TMLUS, titled, *Beecher Bay First Nation: Traditional Marine and Land Use Baseline Documentation* ([A4Q1L1](#)), was completed in May 2015. The TMLUS summarizes information related to Scia'new's traditional knowledge, values, as well as potential effects and mitigations related to the Project.

Impacts on Hunting, Trapping and Plant Gathering

In their TMLUS, Scia'new identified that community members hunt black duck, sawbill, goldeneye, goose, harbour seal and bufflehead and harvest the following plants in their traditional territory: seaweed, lichen, berries, bark and nettles. A total of eight hunting and plant gathering sites were identified by Scia'new in their TMLUS. Although all sites are located within the Marine Regional Study Area (RSA),² none of the sites require community members to cross the marine shipping lanes.

The general direct and indirect effects of the Project on hunting, trapping, and gathering, along with key mitigation measures, are described in Sections 4.3.1 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Sections 4.3.1 of this Report). The proponent would implement a range of mitigation measures that would directly or indirectly reduce potential Project-related marine shipping impacts on Scia'new's hunting, trapping, and plant gathering activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

In consideration of the information available to the Crown from the NEB process, consultation with Scia'new, Scia'new's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in a negligible impact on Scia'new's hunting, trapping and plant gathering activities.

Impacts on Marine Fishing and Harvesting

As described in Scia'new's TMLUS, community members fish for numerous species including halibut, black bass, ling cod, rock cod, red snapper, herring, skate, salmon (i.e. sockeye, Coho, pink, and spring), crab, barnacle, abalone, urchins, clam, chitons, sea cucumber, and ground fish. Scia'new identified 23 marine fishing sites in their TMLUS, all of which are within the Marine RSA. Five of the fishing sites

² The area extending beyond the LSA boundary (i.e. the zone of influence or area where the element and associated indicators are most likely to be affected by Project-related marine vessel traffic.) where the direct and indirect influence of other activities could overlap with Project-specific effects and cause cumulative effects on the environmental or socio-economic indicator.

identified would require Scia'new community members to cross the marine shipping lanes: Constance Bank; Middle Bank; Border Bank; 18 Fathom Reef; and Swiftsure Bank. Swiftsure Bank, where community members fish for salmon and ground fish, lies within the shipping lane.

In addition to providing traditional use information, Scia'new raised specific concerns during the NEB process and Crown consultation process with potential Project-related impacts on their marine fishing and harvesting activities, including impacts of increased marine traffic on traditional fishing activities.

The general direct and indirect effects of the Project on marine fishing and harvesting activities, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report. The conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with marine fishing and harvesting activities (Section 4.3.3 of this Report). The proponent would implement a range of mitigation measures that would directly or indirectly reduce potential Project-related marine shipping impacts on Scia'new's marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, and scheduling and notification of Project activities (via the proponent's marine public outreach program).

In consideration of the information available to the Crown from the NEB process, consultation with Scia'new, Scia'new's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities expected are to result in negligible-to-minor impacts on Scia'new's marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

The Juan de Fuca Strait is an important travelway identified by Scia'new in their TMLUS. Scia'new community members use various routes throughout the Juan de Fuca Strait to access traditional marine use sites including fishing and gathering sites. Within the Marine RSA, Scia'new identified multiple travelways that intersect marine shipping lanes and thus community members would have to cross shipping lanes when using these travelways. Scia'new did not identify gathering or sacred areas in their TMLUS.

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

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

In consideration of the information available to the Crown from the NEB process, consultation with Scia'new, Scia'new's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in negligible-to-minor impacts on Scia'new's other traditional and cultural practices.

Impacts Associated with Accidental Tanker Spills

Scia'new expressed concerns regarding the impact of a potential oil spill on their Aboriginal Interests, including the risks associated with a marine spill, the adequacy of spill response planning, and the capacity of insurance companies to pay for damages in the event of a spill.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with an accidental tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. A discussion of the potential impacts of an accidental spill on Aboriginal Interests is provided in Section 4.3.6 of this Report.

In consideration of this information and analysis, as well as information available to the Crown on Scia'new's Aboriginal Interests and concerns raised by Scia'new during the NEB review and Crown consultation processes, a pipeline spill associated with the Project could result in minor to serious impacts on Scia'new's Aboriginal Interests. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.³

VI – Conclusion

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing marine safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for marine vessel use of the area between the Westridge Marine Terminal and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the marine-shipping component of the Project on the exercise of Scia'new's Aboriginal Interests would be up to negligible-to- minor.

³ Trans Mountain Final Argument, p. 85 and 207

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

In addition, the Crown is aware that the proponent has entered into a Mutual Benefits Agreement with Scia'new in an attempt to offset potential impacts, should the Project proceed.