

Appendix D.20 – Tsawout First Nation

I - Background Information

Tsawout First Nation (Tsawout) is located in British Columbia (BC) on the southeastern shore of Vancouver Island in the Saanich Peninsula (near the Cordova Channel). Tsawout (pronounced “Tsa-woot”) has filed a *Writ of Summons* as part of the Saanich Nation asserting Aboriginal title to a territory identified in the writ. Tsawout has six reserve lands: Bare Island no. 9 (10.5 hectares [ha], shared with Tseycum), East Saanich no. 2 (237.7 ha), Fulford Harbour no. 5 (17.4 ha), Goldstream no. 13 (8.9 ha, shared with four Groups – Malahat FN, Pauquachin, Tsartlip and Tseycum), Pender Island no. 8 (3.2 ha, shared with Tseycum) and Saturna Island no. 7 (145.7 ha, shared with Tseycum). The Tsawout population totals 895 registered members (530 are living on their Reserve, 98 are living on other Reserves, 278 are living off reserves).

Tsawout had a Comprehensive Land Claim submitted in 1987 as part of the Saanich Tribal Council. This submission was not accepted for review since the BC Treaty Commission was subsequently established. Tsawout is not involved in the BC Treaty process within the BC Treaty Commission Six-Stage process.

II - Preliminary Strength of Claim Assessment

- Approximately 30 kilometres (km) of the marine shipping route would pass through the eastern portion of an area understood to be Saanich Nation’s traditional territory. Through consultation, Tsawout identified a broader geographic area where subsistence harvesting activities and other traditional uses and travel occurred, identifying an area of approximately 70 km that would overlap with the marine shipping route.
- The Province of BC understands Tsawout to be a Douglas Treaty beneficiary. The Province of BC understands that Tsawout has Douglas Treaty rights to fish as formerly and hunt on occupied lands within its historic traditional territory. Tsawout is composed of communities which formerly lived on Mayne, Salt Spring, Pender and Stuart Islands who moved to Saanichton Bay early in the 19th century. Ethnographic sources associate the Tsawout, Tsartlip, Tseycum and Pauquachin First Nations with the Saanich Peninsula, Goldstream River, and the southern Gulf Islands (including the southern portion of Salt Spring, Sidney, Stuart, Pender, Mayne and Saturna Islands).
- Canada recognizes the Douglas Treaties and understands that Tsawout 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 Tsawout and to explore opportunities to honour and recognize the Douglas Treaties.

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 Tsawout’s Aboriginal Interests, the Crown is of the view that the legal duty to consult Tsawout lies at the middle portion of the *Haida* consultation spectrum. Tsawout was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office, which affords Tsawout opportunities to be consulted at a deeper level.

Tsawout participated in the National Energy Board (NEB) review process as an intervenor and submitted written evidence and a written final argument, sent additional correspondence to the NEB, participated in the Oral Traditional Evidence Hearing in Victoria, and responded to the Crown's Issues Tracking Table Information Request by further elaborating their concerns [[A71233](#)].

Tsawout received \$10,000 in NEB funding, for which a contribution agreement was signed, and was also offered travel for two to the NEB hearings, for which no contribution agreement was signed. The Major Projects Management Office (MPMO) offered Tsawout \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Tsawout an additional \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Tsawout signed contribution agreements with the MPMO in response to both of these offers, for a total of \$18,000 in allocated funding. On November 14, 2016 Tsawout accepted \$5,000 in capacity funding from EAO to assist with the consultation process.

Tsawout met with the Crown for an early engagement meeting on June 24, 2014. In addition, the Crown consultation team and Tsawout met on April 29, 2016.

The Crown received a letter dated October 4, 2016. In this letter, Tsawout expressed their concerns and discontent with the consultation process and the Project.

The Crown provided a first draft of the Consultation and Accommodation Report (Report) to Tsawout for review and comment on August 17, 2016. In a letter dated October 13, 2016, Tsawout asked the Crown to extend the deadline for the submission of their comments on the draft until October 28, 2016. The Crown responded to encourage Tsawout to provide comments as soon as possible to allow the Crown time to consider the comments in advance of providing the second draft. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016. Tsawout provided comments on November 18, 2016.

Tsawout provided a separate Aboriginal group submission to the Crown on November 18, 2016.

IV - Summary of Key Tsawout Issues and Concerns Raised

The Crown has gained its understanding of Tsawout's Aboriginal issues and concerns through the community's involvement in the NEB process, including submissions made through the NEB hearings process, the responses Tsawout provided to the Crown on its Information Request, and through other engagement with the Crown, including a meeting held in April 2016.

This section offers a summary of the key issues raised by Tsawout, 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 on the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Tsawout's key Project-related issues and concerns are summarized below.

Tsawout raised concerns related to the Project and review process, potential impacts to their Aboriginal rights and sites of cultural and social significance, and cumulative impacts of prior and on-going development activities in their traditional territory. Tsawout also noted their disappointment at being excluded from the TERMPOL (Technical Review Process of Marine Terminal Systems and Transshipments Sites) process.

Methodology, Process, and Consultation

- Tsawout believes that the NEB process is not an appropriate means of fulfilling Canada's duty to consult, and that the NEB's list of issues was not comprehensive enough;
- Tsawout is concerned that the NEB did not consider environmental and socio-economic impacts of increased greenhouse gases (GHGs) and climate change;
- Tsawout does not believe that the NEB fully understands the issues affecting the marine and coastal environment and their impacts, and is concerned that the NEB has no jurisdiction over marine shipping;
- Tsawout noted their view that the timeframe for consultation and decision making on the Project is too short, and raised concerns that participant funding amounts were insufficient; and
- Tsawout believes that their consent is required for the Project under international law.

Cultural and Social Impacts

- Tsawout is concerned by potential disturbances to burial sites and other cultural and spiritual sites due to increased marine traffic (including ancestral remains on several nearby islands);
- Tsawout noted that cultural impacts would not only occur in the event of a Project accident or malfunction, but from the Project's regular operation, which could prevent fishing and hunting activities, as well as the gathering of medicinal plants;
- Tsawout is concerned about the impacts that the Project could have on culturally significant marine invertebrates;
- Tsawout is concerned about disruption to the use of historic, modern and future marine travel ways and marine access throughout their territory, including areas now considered to be part of the United States, as well as the cumulative disruption to all types of travelways; and
- Tsawout is concerned about disruption to their way of life, including the loss of traditional knowledge, diminishment of community culture and cohesion, diminishment of relations with other Salish communities, inter-generational alienation, loss of the medicinal value of traditional foods and loss of confidence in the healthiness of traditional foods.

Increased Vessel Traffic

- Tsawout raised issues regarding traditional use activities, commercial interests, and tourism interests that could be impacted by increased marine traffic and vessel wake;
- Tsawout is concerned about increased tanker traffic in the shipping lanes, resulting in disturbance to food gathering locations (fishing, harvesting, plant gathering and hunting) from increased vessel wake;

- Tsawout is concerned about disruption to marine ecosystems from vessel wake, noise, emissions and lighting due to increased marine vessel traffic;
- Tsawout is concerned about increased risk of collisions, groundings and other incidents due to increased marine vessel traffic;
- Tsawout is concerned about disturbance to distribution, health, abundance and long-term sustainability of fisheries and all other resources; and
- Tsawout is concerned about decreased marine water quality and increased pollution, including introductions of non-native species, due to increased marine vessels traffic.

Environmental Impacts

- Tsawout views the ecological environment of the Salish Sea as intricately connected. This is tied into their concerns over Project anchoring sites and possible damage to the ocean bed from Project activities; and
- Tsawout is concerned about marine mammals, including the southern resident orca population.

Economic Impacts

- Tsawout is concerned that ecotourism opportunities could be limited in the Tsawout community due to Project impacts; and
- Tsawout is interested in what the economic, employment and/or training opportunities could be related to the Project.

Impacts on Fishing Rights

- Tsawout expressed concerns that the Project could impact their rights to fish, including travel to fishing sites, as well as concerns about water quality;
- Tsawout is concerned that the Project will disrupt the ability of community members to access reef net fishery locations and may disrupt their ability to use those locations due to wave action and other effects;
- Tsawout is concerned about adequate compensation from lost fishing opportunity; and
- Tsawout is concerned that the Project will adversely affect Tsawout individuals and the future planned fishing and aquaculture activities of Salish Sea Foods, and that these effects are not assessed within the application as aspects of the Project's likely effects on the exercise of Douglas Treaty rights.

Cumulative Impacts

- Tsawout noted concerns regarding the lack of consideration of GHGs and climate change impacts on fisheries and marine resources, and how this Project could contribute to those impacts;
- Tsawout has ongoing concerns with respect to continued and cumulative effects throughout their territory as a result of development activities;
- Tsawout expressed that cumulative impacts need to be better understood and assessed;

- Tsawout is concerned that the proponent's assessment of cumulative impacts in the marine environment is not adequate;
- Tsawout is concerned that the Project would add to currently experienced impacts, and impacts to future prospective use;
- Cumulative effects assessment should include the development of community-based research on cumulative impacts to Tsawout's traditional marine territory;
- Tsawout raised concerns with continued cumulative effects to Tsawout's marine territory, including cumulative effects on marine resources, and cumulative impact to marine ecology affecting marine foods; and
- Tsawout expressed concern with continued and increasing cumulative effects throughout their territory, including contributing to climate change impacts, ecosystem effects and carbon emissions.

Health and Human Safety

- Tsawout expressed concerns related to impacts on diet and community members' health due to water, air, and/or cultural food contamination;
- Tsawout expressed concerns regarding the potential impacts of the Project on access to spiritual locations;
- Tsawout states that the Project could increase negative health effects related to reduced access to and availability of subsistence food;
- Tsawout believes that the Project could increase negative mental health effects related to disruption of community members' ability to carry out traditional roles and responsibilities of harvesting, to pass on knowledge and to continue to practice traditional knowledge of these activities;
- Tsawout states that the Project could increase the risk to safety in both accessing and practicing subsistence hunting, fishing, and marine gathering in preferred locations; and
- Tsawout states that there are long-term community fears that in the event of a spill, cultural foods would not be safe to eat again, leading to disease and/or mental health issues in the Tsawout community.

Accidents and Malfunctions

- Tsawout is concerned about potential accidents and malfunctions and would like to learn about navigation and navigation safety for the Project, as well as contingency planning for potential accidents or malfunctions;
- Tsawout is concerned about potential disturbance or destruction of archeological and heritage sites from oil contamination from accidents and malfunctions, whether small or large; and impacts associated with cleanup measures following a spill¹;

¹ https://docs.neb-one.gc.ca/II-eng/IIisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2451057/2786251/C355-15-18_-

- Tsawout is concerned about an increased perception of contamination of subsistence foods;
- Tsawout believes that a malfunction would be catastrophic due to the prevailing currents throughout the southern Gulf and San Juan Islands; and
- Tsawout is concerned about increased risk of impacts from oil spills because of insufficient knowledge and capacity to contain and clean-up diluted bitumen in the marine environment.

Accommodation Proposals

Tsawout identified a number of mitigation and accommodation measures. These measures are:

- Undertake a cumulative effects study of marine traffic;
- Decrease the number of vessels permitted for the Project;
- Create a forum to discuss and develop mitigations to address the possible effects of the Project on Tsawout's marine use and exercise of Aboriginal Interests;
- Reduce vessel speed in the shipping lanes in the Salish Sea, including from Active Pass to Race Rocks and from, San Juan de Fuca Strait to the 12 mile nautical limit;
- Ensure robust monitoring and enforcement of tanker standards and safety if the Project is approved;
- Undertake research for all types of hydrocarbon products to be shipped to facilitate appropriate spill response preparedness;
- Engage in Area Response planning and emergency response, including appropriate training and long term capacity funding to participate;
- Involve Tsawout in identifying and protecting important marine areas by designating marine conservation within Tsawout's territory;
- Provide capacity funding to Tsawout to address impacts to spiritual and cultural sites from increases vessel wake, including funds for long term monitoring and mitigation of burial sites;
- Provide capacity to Tsawout to monitor, research and address impacts to important eelgrass beds within the marine waters in our territory;
- Provide training and capacity funding to Tsawout to be first responders in the event of marine spills;
- Establish proposed marine protection zones specific sites including key cultural heritage and archeological sites;
- Revenue share with Tsawout for the life of the Project;
- Provide a significant monetary bond to be paid up front by Trans Mountain to cover the cost of spill response, spill recovery and clean-up and compensation to affected marine Nations in the event of an oil spill in the marine environment;

- Compensate Tsawout for past infringements from marine shipping to its Aboriginal title and rights and Douglas Treaty right, given the last fifty years of the operation of the Trans Mountain pipeline line 1; and
- Regarding reconciliation, establish an honourable table between the Crown and Tsawout to address Tsawout Aboriginal title and rights, and Douglas treaty rights, and to address the many projects and developments that are impacting Tsawout's territory, including but not limited to the marine shipping from this and other projects.

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 Tsawout 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.

Tsawout's Response to NEB Recommendation Report

No specific comments were received by the Crown from Tsawout First Nation on the *NEB Recommendation Report*.

V - Potential Impacts of the Project on Tsawout'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, 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 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 Tsawout's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Tsawout'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 Tsawout's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Tsawout, Tsawout's 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.

Tsawout completed a traditional marine resource use (TMRU) study in 2015 titled, *Tsawout First Nation Marine Use Study* (MUS) ([A4Q1F5](#), [A4Q1F7](#), [A4Q1F8](#), [A4Q1F9](#)). Tsawout stated that the focus of the MUS was on the intersection of the Project LSA and the shipping lanes with Tsawout's marine use and exercise of Tsawout's Douglas Treaty and other Aboriginal rights.² The MUS relies on traditional marine use interviews, community harvest surveys, and secondary research methods and presents a snapshot, however incomplete, of Tsawout's use of the Salish Sea for the purposes of fishing, gathering, hunting, harvesting, travelling, and the exercise of their Douglas Treaty rights. The MUS focuses on traditional land and marine use in the Local Study Area (LSA) and Regional Study Area (RSA) of the marine shipping component of the Project. In its Supplemental Technical Report ([A4S7I8](#)), the proponent estimated approximate distances and directions from the marine shipping lanes based on information in Tsawout's report. Additional TMRU information for Tsawout was presented in *Volume 8B* ([A3S4K3](#)) of the Project application.

In their comments on the draft Consultation and Accommodation Report submitted to the Crown on November 18, 2016, Tsawout raised concerns with the traditional marine resource use information in the draft appendix, particularly the information obtained from the proponent's Supplemental Technical Report. The Crown has responded to this concern by revising the information in this section to focus on the traditional marine resource use information Tsawout provided in its MUS. As a result, the Crown has relied on Tsawout's information in its MUS to assess Project impacts on their Aboriginal Interests and has revised the conclusions on the potential impacts on Tsawout's Aboriginal Interests where necessary.

Impacts on Hunting and Gathering

As summarized in the MUS, Tsawout community members historically hunted seals and sea lions, collected seagull eggs, and gathered cedar bark and logs, hog fennel, seaweed, cranberries and blueberries. Presently, community members gather seaweed year-round for both food and medicinal purposes, and hunt deer and various species of ducks and geese including: surf scoter, goldeneye, pintail, mallard, American black duck, sea pigeon, sawbill, merganser, murre, bufflehead, widgeon, brant, and Canada geese.

In their MUS, Tsawout described and mapped locations in the RSA and LSA where its community members hunt and gather. The Crown did not identify any sites used by Tsawout for trapping terrestrial animals during its review of the MUS. A summary of traditional uses and locations related to hunting and gathering are provided below.

Marine Birds

Tsawout identified traditional hunting locations at Boat Pass and Mitchell Bay in the San Juan Islands, Saanichton Bay, Saanich Inlet, the waters surrounding Sidney Island, James Island and D'Arcy Island, and

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.

generally in the open water. The 2002 SENĆOŦEN Alliance Study identified hunting areas on the south side of Saturna Island, at sites south and west of South Pender Island, surrounding Sidney and James Islands, and clustered heavily in Saanichton Bay, and extending south down the east coast of Vancouver Island towards Cordova Bay. Currently, Tsawout members concentrate duck hunting activities on the eastern waters of Sidney Island, Sidney Spit, Sidney Channel, the water surrounding James Island, the spit at Tsawout, and Saanichton Bay.

Deer

The 2002 SENĆOŦEN Alliance study reports 397 kill sites for Tsawout harvesters hunting deer, elk and bear. Sites identified include East Point and an area nearly the entire length of the east side of Saturna Island, the southern tip of South Pender Island, and the south ends of Salt Spring, Sidney and James Islands. Contemporary deer hunting takes place on East Saturna Island, Tumbo Island, and South Pender Island on tracts of land that appear to be within or adjacent to the LSA. A hunting area on Haro Island is approximately three km from the LSA, while a hunting area on Sidney Island sits roughly two km from the LSA. Other hunting areas exist beyond the shipping lanes, on Stuart Island, Spieden Island, Johns Island, and San Juan Islands.

Seal and Sea Lion

Tsawout members reported 14 seal or sea lion kill sites during the SENĆOŦEN Alliance Study in 2002, located southeast of both Tumbo and South Pender Islands. No respondents in the MUS reported recent sea lion or seal harvesting during interviews.

Seagull Eggs

According to the 2002 SENĆOŦEN Alliance study, Tsawout members gathered seagull eggs within or adjacent to the LSA at the south side of the Java Islets south of Saturna Island, numerous sites on Imrie, Reay, Pender, Mandarte, Halibut, and Seagull Islands, and a site in the Little Group Islands.

Seaweed

In its MUS, Tsawout identified a current seaweed gathering site surrounding Gooch Island and extending into the LSA, as well as numerous sites within the RSA. These sites include all shores and the smaller islands surrounding both Portland and D'Arcy Islands, the southwest shore of Moresby Island, the western shores of both Sidney and James Island, along the shore in Saanichton Bay and at the northern tip of the Saanich Peninsula. In the 2002 SENĆOŦEN Alliance study, Tsawout interviewees indicated 132 seaweed harvest sites/events. Sites include those along the southern shores of Saturna, South Pender, Moresby, Rubly, Gooch, Sidney, and James Islands, surrounding Reay, Brethour, Sheep, Domville, Forrest, and the Little Group Islands, and along the east side of Coal Island.

In addition to providing traditional use information, Tsawout raised specific concerns with potential Project-related impacts relating to their hunting and gathering activities:

- Concerns that the Project could impact community members' health due to water, air, and/or cultural food contamination, and that this could lead to long term community fears that cultural

foods would never be safe to eat again, leading to disease and/or mental health issues in the Tsawout community; and

- Potential cultural impacts would not only occur in the event of a Project accident or malfunction, but from the Project's regular operation, which could prevent subsistence fishing and hunting activities, as well as the gathering of medicinal plants and food.

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. 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 would implement a range of mitigation measures that would reduce potential effects associated with Tsawout's hunting and 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 Tsawout, Tsawout'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 minor impact on Tsawout's hunting and gathering activities.

Impacts on Marine Fishing and Harvesting

As described in Tsawout's MUS, crab and salmon are primarily harvested by Tsawout community members. Crab is an important source of protein for Tsawout families whereas salmon (i.e. sockeye, Chinook, coho, chum, and pink) are critical cultural keystone species to Tsawout not only for its nutritional value but also for its subsistence, economic, spiritual, and social value. Community members also harvest species such as halibut, cod, clams, herring and herring roe, sturgeon, flounder, sole, octopus, mussels, oysters, cockles, sea cucumber, chitons, sea urchins, rockfish, and shrimp. Currently, there is a group in the community that share or barter their harvests with households or at community gatherings.

In their MUS, Tsawout identified locations in the RSA and LSA where its community members fish and harvest certain marine species. These areas are mapped by Tsawout and presented in their MUS. A summary of these traditional uses and locations are provided below.

Crab

All of Tsawout's crab harvesting activities are located within the RSA including Saanichton Bay and water surrounding Sidney Island, James Island, Saturna Island, Stuart Island and Mandarte Island. Within the LSA, preferred crab harvesting areas are located at Saturna Island between East Point and Taylor's Beach. According to Tsawout, the LSA and shipping lane bisects the travel route to the crabbing destination at Stuart Island, and could make harvesting at this location less accessible and desirable.

Salmon

Currently, a considerable portion of Tsawout community members fish for salmon in areas within or contiguous with the LSA including Henry Island, Stuart Island, the northern end of San Juan Island, Happy Island, Bedwell Harbour, Saltspring Island, Satellite Channel, Dawson Channel, Saturna Island, as well as areas around Moresby and Pender islands. Community members favour the open channel off the eastern shores of the gulf islands of Saturna, Pender, and Sidney Islands and south to Cordova Bay. Tsawout still uses traditional harvesting areas on the east side of Georgia Strait from Bowen Island to Point Roberts and this use extends south of Burrard Inlet at Point Grey to the international boundary. Tsawout indicated that 17 of the 19 WSÁNEĆ reefnet sites are located within or near the LSA. These sites represent a fishery community members have focused on reviving for cultural and economic reasons and which they regard as foundational to their society.

Sea Urchin

Tsawout community members gathered urchin in areas exposed to the LSA near the southern tips of both Saturna, Saltspring and South Pender Islands, and dotting the waters from the south-eastern shore of Moresby Island to Gooch Island, along the east sides of both Mandarte and Halibut Islands, as well as north and east of both D'Arcy and Little D'Arcy Islands. According to Tsawout, the most reliable urchin harvesting site is located across the shipping lane within the LSA, along the north-western shores of Stuart Island, where the giant red urchin is harvested. Community members also identified numerous sites for urchin gathering throughout the Little Group Islands, and the islets west of Coal Island, east of Piers Island, and along the southern edge of Portland Island. Two additional urchin harvesting sites were identified within the LSA and the shipping lane, between Sidney and Henry Islands, and the reef along the eastern shore of Gooch Island.

Bivalves

Tsawout members currently harvest bivalves from a number of locations, including the shores surrounding Sidney and James Island, the spit at Tsawout, Bare Island, and Island View Beach, Willis Point, Saturna Island, Pender Island, D'Arcy and Little D'Arcy Island. East Point, Saturna Island is a harvesting area within the LSA. Locations in the vicinity of the LSA include, Tumbo Island, East Sidney Island, Little D'Arcy Island, North Henry Island, and Bruce Bight Saturna Island. Tsawout identified the following areas that requiring crossing the LSA: San Juan Island including Friday Harbour, and; East side of Stuart Island.

Chitons

According to Tsawout Elders, chitons were collected at sites throughout the Gulf Islands, including Pender, Saturna, Sidney, Gootch, the smaller islands off Sidney such as Coal and Piers Island, and at 10 Mile Point. The 2002 SENĆOŦEN Alliance study identifies sites at southern Saturna Island, the north side of D'Arcy Island, and multiple sites at the southern tip of James Island. Tsawout also identified sites on the east and west sides of James Island, in Saanichton Bay, as well as Bedwell Harbour.

Sea Cucumber

Sea cucumber is harvested at several sites including southern Saturna Island, the north side of D'Arcy Island, and multiple sites at the southern tip of James Island, as well as sites on the east and west sides of James Island, and in Saanichton Bay.

Cod

Tsawout harvesters identified many productive harvesting areas within or adjacent to the shipping lane and LSA, including areas between San Juan and Sidney islands, on a reef between Moresby and Pender, around Gootch Island and Sidney Islands, East Bay, at Saturna in Narves Bay and East Point over to Taylor's Bay, as well as in the Straits, near Stuart Island. One of the most important cod harvesting areas for Tsawout is in the area of the shipping lanes around D'Arcy, Big, and Little Zero islands.

Halibut

In the MUS, Tsawout harvesters identified using several locations partly within or adjacent to the LSA including East Point, Saturna Island, south of Pender Island, south of Moresby Island, and southwest of D'Arcy Island, as well as in the waters near Halibut Island (a W SÁNEĆ reserve). Tsawout identified a fishing area at Reid Harbour on Stuart Island that is located across the shipping lane.

Octopus

Tsawout mapped two octopus collection locations during the MUS study for this project. One location lies a few kms west of Sidney Island, west of Mandarte and Halibut islands, and the other sits south off Taylor Beach on Saturna Island. Both are partly or wholly within the LSA. Areas identified in previous studies include East Point and Monarch Point on Saturna Island, facing the shipping lanes and lying within the LSA, as well as Gooch Island, partly within and adjacent to the LSA, and Stuart Island and the San Juan's, on the eastern side of the shipping channel and LSA.

Flounder and Sole

Flounder/sole are typically caught incidentally by Tsawout fishermen when pursuing other species, especially bottom-fishing for cod or using traps. The SENĆOŦEN Alliance Study identified sites in an area extending from the southeastern tip of James Islands towards the northwestern side of D'Arcy Island, and another area extending south from Saanichton Bay along the east side of Vancouver Island. Multiple flounder fishing sites were also identified in Saanichton Bay, surrounding James Island, northwest of Sidney Island, and along the south side of Salt Spring Island.

Herring and Herring Eggs

Tsawout fishermen currently use herring for bait, food, and roe but the herring harvesting by individuals in their usual, preferred locations has declined in recent decades. Tsawout identified the following places where respondents caught herring, including Active Pass, Fulford Harbour, Ganges, Saanich Inlet, Long Harbour and Pat Bay, between James and Sidney Islands, Dawson Channel, Boundary Pass. The SENĆOŦEN Alliance Study identified herring harvesting sites at the eastern end of Active Pass, the south side of Salt Spring Island just outside of Fulford Harbour, and in Saanichton Bay, as well as on the east side

of Vancouver Island extending south from Saanichton Bay to a point almost directly west of D'Arcy Island.

Sturgeon

According to the MUS, Tsawout harvesters have recently fished for sturgeon near the mouth or in the estuary of the Fraser. All sturgeon fishing was conducted by Tsawout on the far side of the shipping lanes.

In addition to providing traditional use information, Tsawout raised the following concerns with potential Project-related impacts relating to their marine fishing and harvesting activities:

- Tsawout is concerned about the impacts that the Project could have on nursery habitat, restricting the access to harvesting areas, increasing interference to harvesting areas and disrupting gathering sites;
- Tsawout is concerned about the impacts that the Project could have on salmon and halibut fishery;
- Tsawout noted that cultural impacts would not only occur in the event of a Project accident or malfunction, but from the Project's regular operation, which could prevent fishing activities;
- Tsawout is concerned that the Project could impact their rights to fish, including travel to fishing sites;
- Tsawout is concerned about increased tanker traffic in the shipping lanes, resulting in disturbance to food gathering locations (fishing, harvesting, plant gathering and hunting) from increased vessel wake;
- Tsawout is concerned about disruption to marine ecosystems from vessel wake, noise, emissions and lighting due to increased marine vessel traffic;
- Tsawout is concerned about disturbance to distribution, health, abundance and long-term sustainability of fisheries and all other resources;
- Tsawout is concerned about decreased marine water quality and increased pollution, including introductions of non-native species, due to increased marine vessels traffic;
- Tsawout is concerned about Project anchoring sites and possible damage to the ocean bed from Project activities; and
- Tsawout noted concerns regarding the lack of consideration of GHG's and climate change's impacts on fisheries and marine resources, and how the Project could contribute to those impacts.

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 Tsawout's marine fishing and harvesting activities. The Crown understands 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 Tsawout 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 Tsawout's cultural activities and sharing of marine food with the community. The proponent would also implement a range of mitigation measures that would reduce potential effects associated with Tsawout'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 Tsawout, Tsawout'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 minor impacts on Tsawout's marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

In their MUS, Tsawout describes marine travel routes and maps year round travel routes that interact with the LSA and shipping lanes. According to the MUS, Tsawout community members access fishing, gathering, and hunting locations as part of the seasonal patterns and many of Tsawout's active harvesters have specific seasonal routes that they rely on. Tsawout also stated in their comments on the draft Consultation and Accommodation Report that dozens of village, harvesting, and sacred locations were identified that can only be reached by crossing the shipping lanes. Travel routes, as well as anchorage sites, are mapped by Tsawout and presented in their MUS. As Tsawout describes in their comments on the draft Consultation and Accommodation Report, the map in the MUS map identifies dozens of travelways used routinely by Tsawout harvesters. The exact number of travelways that either cross or are adjacent to marine shipping lanes is difficult to determine from the map.

Tsawout's MUS identifies archaeological sites, place names, and reef net sites within and adjacent to the LSA. Archeological sites include Burial Cairns, canoe runs, clam gardens, cultural depressions, culturally modified trees, defensive sites, fish traps, lithic scatters, middens, pictographs, petroglyphs, and wet sites (i.e. fish weirs, basketry and cordage). Maps in Tsawout's MUS show archaeological, place name and reef net sites located within the LSA. Tsawout identified 17 of 19 reef net sites – a sacred fishery which Tsawout members have been working to revive for cultural and economic reasons, and which they regard as foundational to their society – are contiguous with, within, or on the far side of the LSA. The MUS describes ethnographically and ethnohistorically recorded Saanich village sites and resource procurements places scattered throughout the San Juan and Southern Gulf Islands and 11 of these sites and places on Sidney, D'Arcy, and James Islands. In *Volume 8B*, a summer camp in the Gulf Islands, settlement site in the San Juan Islands and a sacred area in the Saanich Inlet were identified in the Marine RSA, of which the shipping lanes are crossed to access the summer camp and settlement site.

Tsawout members also identify the importance of whales in their MUS, particularly the special relationship that Tsawout has with orca. The MUS tells the story of an event held by Tsawout to reestablish the traditional reefnet fishery on Pender Island, where a pod of orca whales passed over the old and future reef net site, just as Tsawout members arrived to begin setting the anchors and net. According to the MUS this was the first time orca had done this in several generations and their presence was considered a great blessing, as attendees felt the whales were there to join them in the common purpose of hunting salmon.

In addition to providing traditional use information, Tsawout raised specific concerns with potential Project-related impacts on other traditional and cultural practices:

- Tsawout is concerned by potential disturbances to archeological, heritage, and burial sites and other cultural and spiritual sites due to increased marine traffic;
- Tsawout is concerned about disturbance to special places, the reef net fishery, and reserves;
- Tsawout is concerned with the impacts that the Project could potentially have on heritage sites;
- Tsawout brought up issues regarding traditional use activities, commercial interests, and tourism interests that could be impacted by increased marine traffic;
- Tsawout expressed concern that the 10 anchorage sites identified beyond the shipping lanes will become relatively inaccessible;
- Tsawout is concerned about disruption to the use of historic, modern and future marine travel ways and marine access throughout their territory, including areas now considered to be part of the United States, as well as the cumulative disruption to all types of travelways;
- Tsawout is concerned about disruption to their way of life, including the loss of traditional knowledge, diminishment of community culture and cohesion, diminishment of relations with other Salish communities, inter-generational alienation, loss of the medicinal value of traditional foods and loss of confidence in the healthiness of traditional foods;
- Tsawout identified that there will be cultural and social impacts on reserves and reef net locations and believes that they will become relatively inaccessible as a result of the Project; and
- Tsawout expressed the concern that all disruption and disturbance to their subsistence activities and spiritual areas will have negative social and cultural effects. These issues include effects to multiple use sites, disruption of travelways, disruption of plant gathering activities, and disturbance of gathering places, disruption of subsistence, commercial fishing activities, and hunting activities.

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 Tsawout'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

that are interested in providing traditional knowledge related to the location and construction of the Project.

Tsawout identified cultural use and significance of Southern Resident Killer Whales and concerns about potential impacts of the Project during the NEB and Crown consultation processes. The *NEB Recommendation Report* concluded that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Aboriginal use associated with the Southern Resident Killer Whale. The Crown understands that the Southern Resident Killer Whale population is in decline, and that additional adverse environmental effects from project-related marine shipping would be considered significant.

In consideration of the information available to the Crown from the NEB process, consultation with Tsawout, Tsawout'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 moderate impacts on Tsawout's other traditional and cultural practices.

Impacts Associated with Accidental Tanker Spills

Tsawout expressed the following concerns regarding the impact of a potential oil spill on their Aboriginal Interests:

- Tsawout is concerned about oil spills within their traditional territory and potential impacts on shorelines of the Gulf Islands and on areas that Tsawout rely on for traditional harvesting of marine species, including marine birds;
- Tsawout is concerned about the effects associated to with water contamination, shoreline contamination, and physical contact between a tanker's hull and marine sub-tidal habitat from vessel grounding;³ and
- Tsawout is concerned about the increased risk of impacts from oil spills because of insufficient knowledge and capacity to contain and clean-up diluted bitumen in the marine environment.

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 Tsawout's 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, with

³ https://docs.neb-one.gc.ca/II-eng/IIisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2451057/2786251/C355-15-27_-Tsawout_First_Nation_Expert_Report.__An_Assessment_of_Spill_Risk_for_the_TMEP_-_A4Q1G5.pdf?nodeid=2786049&vernum=-2

low likelihood, on Tsawout'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.⁴

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 Tsawout's Aboriginal Interests would be up to moderate.

However, given existing use of the marine shipping corridor within areas proximate to the exercise of Tsawout's Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of Tsawout'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 Tsawout. Please see Sections 4 and 5 of the main body of this Report for a discussion of proposed accommodation and responsive measures.

⁴ Trans Mountain Final Argument, p. 85 and 207