

Appendix D.22 – T'Sou-ke First Nation

I - Background Information

T'Sou-ke First Nation (T'Sou-ke) is located on Southern Vancouver Island, British Columbia (BC), in the coastal areas surrounding the Sooke Basin on the Juan de Fuca Strait. T'Sou-ke has two reserves: T'Sou-ke Indian Reserve no. 1 (near Sooke Harbour) and T'Sou-ke Indian Reserve no. 2 (further east on Sooke Bay). T'Sou-ke's total registered population is 259 (131 are living on their Reserves, 2 living on other Reserves and 126 living off the Reserves).

The T'Sou-ke community historically spoke a dialect of the SENĆOŦEN language, associated with the Saanich peoples of southern Vancouver Island. There are five such dialects, referred to as the Northern Straits Salish, with each one identified by the name of the community that speaks it. As such, T'Sou-ke members speak the 'T'Sou-ke' dialect, though there are few remaining speakers today. The name "T'Sou-ke" is derived from the SENĆOŦEN word for the Stickleback fish found in the nearby estuary.

T'Sou-ke is part of the Te'mexw Treaty Association (TTA) along with four other Aboriginal groups: Beecher Bay, Nanoose, Malahat and Songhees. The TTA is part of the BC Treaty Process and is currently in Stage 5 of the BC Treaty process (i.e. Final Agreement), having signed an agreement-in-principle in April 2015.

II - Preliminary Strength of Claim Assessment

- Approximately 40 kilometres (km) of the marine shipping route would pass within the southern part of T'Sou-ke's asserted traditional territory.
- The Province of BC understands that T'Sou-ke has Douglas Treaty rights to carry on fisheries as formerly and hunt over unoccupied lands within its historic traditional territory.
- Canada recognizes the Douglas Treaties and understands that T'Sou-ke 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 T'Sou-ke, to implement the treaty through agreements with the Crown, and to explore opportunities to honour and recognize the Douglas Treaties.
- The Crown understands that ethnohistoric evidence suggests that former T'Sou-ke fishing was conducted at Sooke River, Sooke Harbour, in the vicinity of Sooke Inlet, De Mamiel Creek and likely Sooke Lake.¹

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 T'Sou-ke's Aboriginal Interests, the Crown is of the view that the legal duty to consult T'Sou-ke lies at the middle

¹ Te'mexw Treaty Association and Esquimalt Nation. Songhees, Beecher Bay, T'Sou-ke 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.

portion of the *Haida* consultation spectrum. T'Sou-ke was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which afforded T'Sou-ke opportunities to be consulted at a deeper level.

As an intervenor in the National Energy Board (NEB) hearing process, T'Sou-ke submitted written evidence, final written argument, and oral summary argument. T'Sou-ke also provided 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 on their concerns [[A71224](#)].

T'Sou-ke was awarded \$40,000 in participant funding (plus travel for two to participate in the hearing) from the NEB. The Major Projects Management Office (MPMO) also offered T'Sou-ke \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered T'Sou-ke an additional \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. T'Sou-ke signed contribution agreements with the MPMO in response to both of these offers, for a total of \$18,000 in allocated funding. On August 19, 2016, EAO provided T'Sou-ke with \$5,000 in capacity funding to support their participation in consultation with the Crown.

On June 16, 2016, the proponent and T'Sou-ke signed a confidential mutual benefit agreement (MBA), which included a Letter of Support for the Project.

T'Sou-ke met with the Crown consultation team on April 18, 2016, July 25, 2016, and September 14, 2016 to discuss the Project. The Crown provided a first draft of the Consultation and Accommodation Report (Report) to T'Sou-ke for review and comment on August 17, 2016. T'Sou-ke provided comments on the draft Report to the Crown on September 18, 2016. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016 and T'Sou-ke provided comments on November 15, 2016. T'Sou-ke also provided a separate Aboriginal group submission to the Crown on November 15, 2016.

IV - Summary of Key T'Sou-ke Issues and Concerns Raised

This section offers a summary of the key issues raised by T'Sou-ke, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown has gained its understanding of T'Sou-ke's issues and concerns through the community's involvement in the NEB process (including T'Sou-ke's submissions to the NEB and responses to the Crown's Information Request) as well as through correspondence and consultation meetings with the Crown. In addition, the Crown has considered information regarding the proponent's engagement with T'Sou-ke, as described in the proponent's [Aboriginal Engagement Report](#) (July 2016).

The Crown's assessment of the impacts of the Project presented in the subsequent section considers these issues and includes the Crown's views and conclusions. The Crown's understanding of T'Sou-ke's key Project-related issues and concerns is summarized below.

Methodology, Process and Consultation

T'Sou-ke raised procedural concerns with respect to the NEB review, stating that:

- Information requests are less effective at obtaining information than cross-examination of Project witnesses, the latter of which the NEB did not allow;
- The hearing schedule conflicted with marine harvesting activities, thereby creating a cultural and economic barrier to participation in the process; and
- Insufficient capacity funding prevented full and meaningful participation in the NEB review process.

Moreover, T'Sou-ke felt that the NEB process had gaps in its assessment of the marine shipping component of the Project. For example, T'Sou-ke does not think that the proponent conducted a comprehensive risk assessment for Project-related marine shipping. As a result, T'Sou-ke asserts that a complete understanding of the risks and effects of a potential marine oil spill is lacking.

T'Sou-ke also raised concerns about the Crown consultation process. From T'Sou-ke's perspective:

- Participant funding from the MPMO was insufficient, particularly in light of the complexity of the Project and the potential seriousness of Project impacts on Aboriginal Interests and Aboriginal rights;
- The Crown cannot rely on the NEB process to fulfill its duty to consult and accommodate; and
- The Crown needs to consult with T'Sou-ke about federal initiatives, such as a proposed Indigenous Advisory and Monitoring Committee and the Oceans Protection Plan, before a decision is made on the Project.

In a letter dated November 15, 2016, T'Sou-ke states that the Crown's consultation on the Project is incomplete. For these reason, T'Sou-ke requested an extension to the consultation period, beyond December 2016.

T'Sou-ke disagrees with the Crown's depth of consultation assessment afforded to T'Sou-ke, noting that T'Sou-ke has established fishing and hunting rights under the Douglas Treaties; as such, they assert, the duty to consult T'Sou-ke is at the strong end of the *Haida* spectrum. T'Sou-ke also made an assertion of title to the marine waters through which the tankers associated with the Project would travel and also because two of its reserves border on the marine waters, and thus stand to be adversely affected by a major oil spill. T'Sou-ke expressed concerns regarding the lack of transparency in how the federal Cabinet reaches its decisions. T'Sou-ke has also found information sharing to be inadequate in the Crown consultation process and raised concerns about the Crown consultation team's mandate to discuss accommodation with Aboriginal groups.

Lastly, T'Sou-ke has noted that applications for permits and authorizations from the various levels of government make it difficult for T'Sou-ke to effectively assert its Aboriginal Interests.

Environmental Impacts

T'Sou-ke identified the following concerns regarding the adverse effects of the Project on the environment and T'Sou-ke's environmental objectives:

- Large vessel wake action could result in erosion and damage to intertidal and shoreline areas, potentially affecting members' ability to exercise their rights in foreshore areas;
- Vessel traffic could adversely affect water quality, increasing the risk of pollution associated with vessel garbage, fuel leaks, and ballast water;
- Marine vessel traffic could adversely affect local air quality; and
- The Project could negatively impact T'Sou-ke's ecosystem restoration and stewardship efforts.²

T'Sou-ke also noted how Project-related tanker traffic could adversely affect marine animals and T'Sou-ke's key marine resources. T'Sou-ke indicated that increased vessel traffic could pose risks for the migration paths and habitat of salmon and other marine species. Reduced quality of culturally and economically significant species as well as reduced opportunities to harvest these species would negatively impact T'Sou-ke.

Similarly, T'Sou-ke asserts that the environmental assessment has not fully considered the Project's adverse effects on killer whales and their critical habitat, nor has it identified measures to address all adverse effects. The killer whale is culturally and spiritually significant for the T'Sou-ke People; T'Sou-ke fears that tanker traffic from the Project could harm the species, which is already under serious threat. According to the proponent's Aboriginal Engagement Report, T'Sou-ke indicated that adverse effects from the Project on the marine environment may also include injury or mortality of marine mammals resulting from a vessel strike, increased underwater sound levels that result in sensory impacts on marine life, and the introduction of invasive species from the transport of ballast water.

T'Sou-ke indicated that mitigation measures for marine resources and uses are not adequate and that they were not developed in consultation with T'Sou-ke.

Cultural and Social Impacts

T'Sou-ke identified the following concerns as they relate to potential impacts of the Project on T'Sou-ke culture and spirituality:

- Routine Project operations could damage cultural heritage sites or result in the loss of invaluable sites;
- The Project could adversely affect T'Sou-ke's subsistence harvesting practices, interfere with ceremonial practices, and disrupt the daily practice of T'Sou-ke's knowledge and culture;
- The Project could have negative implications for cultural continuity in the T'Sou-ke community, disrupting members' ability to transmit knowledge and practices to younger generations; and

² For example, one of T'Sou-ke's aims is to revitalize shellfish in T'Sou-ke's territory. To do so, T'Sou-ke is working to improve water quality in the region.

- The Project could impact T'Sou-ke's spiritual connection with the land and water as well as their identity as T'Sou-ke People.

Health and Human Safety

Concerns were raised with respect to the health and safety of T'Sou-ke members, should the Project proceed, including:

- A collision between a tanker and cruise ship could occur in a high wind areas (including the Juan de Fuca Strait);
- Small vessels could be at risk, discouraging some members from travelling in the Strait given the increase in tanker traffic;
- Tanker-related pollution and/or a spill could contaminate T'Sou-ke's marine resources, with potential human health implications with respect to seafood consumption; and
- Increased tanker traffic and the risk of a spill may adversely affect the psychological well-being of T'Sou-ke members in light of sensory disturbance for marine users, acoustic disturbance, impaired view, loss of privacy, on-water hazards, perceived pollution, physical obstruction, and perceived danger.

Accidents and Malfunctions

In T'Sou-ke's view, releases of crude oil would adversely impact marine ecosystems, which would hinder T'Sou-ke's conservation and habitat restoration efforts. Moreover, a major spill could have adverse effects on coastal ecosystems, including the shorelines of T'Sou-ke's reserve lands. A spill could destroy T'Sou-ke's way of life, with major implications for T'Sou-ke culture, domestic harvesting, and commercial harvesting.

Specifically, T'Sou-ke is concerned that the Sooke basin and harbor – which remain critical harvesting areas for fish, crab, commercial shellfish, and shoreline birds – are not nearly as productive as they used to be. T'Sou-ke identified Race Rocks as a culturally and spiritually significant site. T'Sou-ke noted that Race Rocks is also an environmentally sensitive area given the heightened potential for the dispersion of spilled oil from this location. A potential spill in this area would be devastating for T'Sou-ke, impacting members' cultural, spiritual, and economic connection to these areas.

For these reasons, an oil spill in T'Sou-ke's territory would be extremely traumatic for the community. T'Sou-ke members are experiencing deep uncertainty and anxiety about the Project. From T'Sou-ke's perspective, spill response, spill modelling, and spill mitigation is inadequate to address the risks of a spill. Moreover, T'Sou-ke has concerns that the existing marine liability and compensation regime would not provide T'Sou-ke with compensation for non-pecuniary harms, such as cultural or spiritual losses in the event of a spill.

T'Sou-ke's Response to NEB Recommendation Report

T'Sou-ke is concerned that there is a lack of compliance mechanisms built into the NEB conditions. They observed that some of the NEB's conditions, including those related to the marine shipping component

of the Project, require the proponent to file reports or plans with the NEB (e.g. NEB conditions 91, 131, 133, and 134) rather than have those submissions approved by the relevant authorities. Consequently, T'Sou-ke feels that there will be limited opportunities to ensure that the proponent's submissions are robust and that they adequately take Aboriginal concerns into account. For these reasons, T'Sou-ke recommended that the applicable government authority sign off on the proponent's reporting submissions as a safeguard (see discussion of accommodation measures below).

T'Sou-ke also indicated that the NEB conditions do not reflect T'Sou-ke's heightened perception of environmental risks. In particular, T'Sou-ke disagreed with the "clinical" approach the NEB took when assessing the risk and impacts of an oil spill. From T'Sou-ke's perspective, the NEB did not effectively consider how a spill would impact the community culturally and spiritually.

Although NEB condition 52 requires the development of an air emissions management plan for the Westridge Terminal, T'Sou-ke identified the lack of an NEB condition for air quality monitoring along the shipping route as a problem.

Accommodation Proposals

At the April 18, 2016 meeting, T'Sou-ke presented a preliminary list of its outstanding issues and proposed accommodation measures. On July 25, 2016, T'Sou-ke provided an updated version of its proposals and outstanding issues to the Crown consultation team.

The Crown responded to T'Sou-ke's accommodation proposals in writing on September 12, 2016. A follow-up consultation meeting also took place on September 14, 2016, during which T'Sou-ke requested more in-depth responses to T'Sou-ke's proposals. The Crown sent T'Sou-ke a revised written response on November 4, 2016.

A summary of T'Sou-ke's proposed accommodation measures are outlined below. T'Sou-ke is requesting:

- A comprehensive risk assessment of oil and fuel spills in the Juan de Fuca Strait;
- New marine emergency response standards embedded in regulation;
- Regular emergency response training exercises (for a range of spill sizes) in the Juan de Fuca Strait (including simulations on the water and as part of the Incident Command Structure);
- The completion of a local emergency response program and emergency response training for T'Sou-ke members before the Project begins;
- Compensation for Aboriginal rights and Aboriginal Interests in the event of a spill;
- Consideration of additional measures to make marine navigation safer and less intimidating for T'Sou-ke members;
- Prompt finalization and implementation of an effective *Species at Risk Act* Killer Whale Action Plan;
- A moratorium on upcoming or ongoing environmental assessments for projects that would increase vessel traffic in killer whale critical habitat by more than a trivial amount;

- An air quality monitoring and management plan along the shipping route;
- A commitment from Canada to secure better emission standards for marine vessels at an international level;
- Modifications to the NEB conditions that build oversight mechanisms into conditions; and
- Federal support for a marine research and education centre at Muir Creek (a proposal for which is appended to T'Sou-ke's two-page submission to Cabinet).

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 T'Sou-ke 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 T'Sou-ke'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 T'Sou-ke's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to T'Sou-ke'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 T'Sou-ke's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with T'Sou-ke, T'Sou-ke'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.

T'Sou-ke completed a third-party traditional marine and resource use (TMRU) study titled, *Traditional Marine Resource Knowledge and Use Study Report* [[A4L5U3](#)] in 2015. The focus of the study was on

Crown lands and waters within the asserted territory of T'Sou-ke crossed by the Marine Regional Study Area (RSA).³ Traditional marine resource uses identified by T'Sou-ke include hunting waterfowl and wildlife, gathering plants, information on fishing sites and marine harvesting, sacred sites, trapping sites, gathering areas for community members, and trails and travelways. In its Supplemental Technical Report [A4S718], the proponent estimated approximate distances and directions from the marine shipping lanes based on information in T'Sou-ke's report.

Impacts on Hunting, Trapping and Plant Gathering

T'Sou-ke community members identified in their TMRU study that waterfowl (e.g. ducks and geese) and wildlife (e.g. black-tailed deer, elk, bears, seals, mink, raccoons and sea otters) are important for the subsistence and culture of T'Sou-ke. Trapped species include mink, raccoon, and sea otter. Community members gather medicinal and other plants, harvest berries, and collect firewood, cedar bark and cedar poles. Common plants and berries include salmon berry shoots, rhubarb, sweet grass, blackberries, blueberries, Oregon grapes, salmon berries, salal berries, thimbleberries, strawberries, huckleberries, black caps, and red caps.

T'Sou-ke identified the following concerns related to environmental effects of the Project on hunting, trapping, and plant gathering activities:

- The potential for reduced harvesting and quality of species traditionally harvested by community members, including marine and land-based resources;
- Impacts to hunting, trapping and gathering for subsistence, cultural and economic purposes;
- Introduction of invasive species could affect their ability to harvest preferred species and harvest in preferred locations; and
- Project effects that could exacerbate existing cumulative impacts on ecologically and culturally sensitive areas.

T'Sou-ke identified a total of 10 hunting, trapping and plant gathering sites in their TMRU study that are located within the Marine RSA. Five hunting sites identified are the Strait of Juan de Fuca, Sooke Harbour, Sooke Basin, Sooke River and the coastal area near Sia-o-sun. Point No Point and the coastal area of the Strait of Juan de Fuca were identified as two trapping sites. Three plant gathering sites identified are the Strait of Juan de Fuca, Sooke Harbour and Sooke Basin. T'Sou-ke is not required to cross shipping lanes to access the trapping or plant gathering sites; however, shipping lanes are crossed to access the hunting site in the Strait of Juan de Fuca. The nearest plant gathering site is 8 km north of the shipping lanes.

³ 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.

Some of T'Sou-ke's concerns relate to specific locations and access for hunting, trapping, and plant gathering activities, including Sooke Basin and Sooke Harbor, which remain critical areas for harvesting birds along the shoreline. T'Sou-ke identified concerns with the direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its hunting, trapping, and plant gathering activities. These concerns include the potential for reduced harvests and the resulting impact on T'Sou-ke's economic, cultural and social structures within the community through lack of connection with historical and current traditions.

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 T'Sou-ke'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 T'Sou-ke, T'Sou-ke'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 negligible impacts on T'Sou-ke's plant gathering and trapping activities and a minor impact on T'Sou-ke's hunting activities.

Impacts on Marine Fishing and Harvesting

As described in their traditional marine use information, T'Sou-ke has stated that sockeye salmon is the most important species to community members. Gathering clams is a traditional activity regularly practiced by T'Sou-ke community members. Harvested marine and freshwater shellfish include limpets, mussels, oysters, abalone, chiton, sea cucumber, scallops, gooseneck barnacles, sea urchins; clams (manila clams, littleneck clams, butter clams, geoduck clams and cockles), kelp, crab, octopus, squid, smelt, trout, salmon, lingcod, halibut, dogfish, and herring. T'Sou-ke currently holds commercial clam and oyster farm tenures in the Marine RSA.

T'Sou-ke identified many concerns related to the environmental effects of the Project on marine fishing and harvesting activities, including the potential introduction of invasive species through the transport of ballast water, the impacts of increased vessel traffic on salmon and other marine species, injury or mortality of marine mammals resulting from a vessel strike, increased sensory impacts to marine life, erosion and damage to intertidal and shoreline habitat from large wake action, and cumulative impacts on ecologically sensitive areas.⁴ As described in Section 4.3.3 of this Report, Project-related marine

⁴ Supplemental Filing: Part 2, Aboriginal Engagement Report. (2016). Trans Mountain Expansion Project.

shipping activities are not likely to cause significant adverse environmental effects on marine fish and fish habitat, including *SARA*-listed species, and the proponent would implement several mitigation measures to reduce potential effects on marine fish and fish habitat. Key mitigations include the proponent's commitment (411) to require all tankers to process and empty their bilges prior to arrival and lock the discharge valve of the bilge water while in Canadian waters. Based on this information and the species identified by T'Sou-ke as important for marine fishing and harvesting activities, Project-related marine shipping activities are likely to have negligible environmental effects on species harvested by T'Sou-ke.

In their traditional marine use information, T'Sou-ke identified the following four locations within the Marine RSA where community members engage in fishing and harvesting activities: the Strait of Juan de Fuca, Race Rocks, the foreshore region near Sia-o-sun, Sooke Basin, Harbour and the flats, and Port Renfrew. T'Sou-ke identified fishing sites located in the Strait of Juan de Fuca that require community members to cross marine shipping lanes.

T'Sou-ke's concerns relate to specific locations and access for marine fishing and harvesting activities, including the potential implications of increased tanker traffic on the safety of T'Sou-ke members on the water and the ability of T'Sou-ke members to fish (particularly for salmon). 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 T'Sou-ke 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 T'Sou-ke's cultural activities and sharing of marine food with the community.

T'Sou-ke is concerned about the direct and indirect effects of Project-related marine shipping activities on social, cultural, spiritual, and experiential aspects of its marine fishing and harvesting activities. From T'Sou-ke's perspective, an increase in tanker traffic may discourage community members from travelling in the Strait of Juan de Fuca, interfere with travel in T'Sou-ke's traditional territory, and adversely impact the ability of community members to exercise their fishing and harvesting rights and cultural practices. T'Sou-ke expressed concern that community members may not be able to continue traditional practices, such as clam harvesting. Moreover, T'Sou-ke is concerned that the potential for reduced harvests would impact economic, cultural and social structures within the community through a lack of connection with historical and current traditions.

Project-related marine vessels are expected to cause temporary disruptions to T'Sou-ke'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 T'Sou-ke community members to take measures to reduce potential disruptions from tankers and allow planning for cultural events to take place that minimizes disturbance

from Project-related tankers. Reduced harvests, while not expected to occur from temporary access restrictions, could impact T'Sou-ke's cultural activities and sharing of marine food with the community.

The conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with marine fishing and harvesting sites (Section 4.3.3 of this Report). The proponent would implement a range of mitigation measures that would reduce potential effects associated with T'Sou-ke'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 T'Sou-ke, T'Sou-ke'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 T'Sou-ke's marine fishing and harvesting activities.

Impacts on Other Traditional and Cultural Practices

In their TMRU study, T'Sou-ke identified that trails located adjacent to beaches are used by community members to collect seafood and harvest berries. T'Sou-ke community members actively travel on the Sooke River, San Juan River, Sooke Basin, Sooke Harbour and the Strait of Juan de Fuca. Travelways are used for Tribal Journeys, and to access crab trapping locations, camping sites, shellfish gathering locations, and fishing and gaffing locations. Gathering places and sacred areas are important for the continuity of T'Sou-ke culture and community. Gathering places are used by community members as teaching places, housing, campsites, ceremonies, feasts, traditional drumming, picnics, and Elder and youth gathering. Sacred areas are used for a range of purposes such as birth places and burial sites, ceremonial places for dances and feasts, funerals and weddings, and Tribal Journeys.

T'Sou-ke identified six travelways during the TMRU study, of which four are located in the Marine RSA: Strait of Juan de Fuca, Sooke Harbour, Sooke Basin, and San Juan River. Three gathering places were identified by T'Sou-ke, all of which are within the Marine RSA: Strait of Juan de Fuca, Sooke Harbour and Sooke Basin. Nine sacred areas were identified, of which three are located in the Marine RSA: coast of Juan de Fuca Strait, Sooke Harbour, and Sooke Basin. The Strait of Juan de Fuca travelway and gathering place is located within the shipping lane. The shipping lanes are not crossed to access the sacred areas identified by T'Sou-ke. The nearest sacred area is located 8 km north of the shipping lane.

In addition to providing traditional use information, T'Sou-ke raised specific concerns with potential Project-related impacts relating to other traditional and cultural practices, including:

- Disruptions to the ability of T'Sou-ke members to travel within their territory and reduced enjoyment and experience of community members' use of areas in its asserted traditional territory;

- Project impacts on the Southern Resident Killer Whale population resulting from physical and acoustic disturbances associated with increased vessel traffic;
- Reductions in the harvesting of marine resources, particularly seals and salmon, impacting cultural and social structures in the community;
- Disruptions to the transmission of knowledge and culture, resulting from a decrease in community members' subsistence harvesting practices, lost teaching areas, and lost wildlife species; and
- Increased vessel traffic that could negatively impact economic structures within the community.

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. T'Sou-ke identified concerns regarding Southern Resident Killer Whales 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.

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 T'Sou-ke'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.

In consideration of the information available to the Crown from the NEB process, consultation with T'Sou-ke, T'Sou-ke'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 T'Sou-ke's other traditional and cultural practices.

Impacts Associated with Accidental Tanker Spills

T'Sou-ke expressed concern with direct and indirect effects of a Project-related tanker spill on their Aboriginal Interests. These concerns include:

- Lack of a full understanding of the risks and effects of a potential marine oil spill;
- Adverse impacts on marine ecosystems, which would hinder T'Sou-ke's conservation and habitat restoration efforts;
- Adverse effects on T'Sou-ke's cultural and traditional activities;
- Adverse impacts on critical harvesting areas at Sooke Basin, Sooke Harbour, and Race Rocks; and

- Impacts to T'Sou-ke's way of life, as a result of impacts to the shoreline of reserve land, T'Sou-ke culture, domestic harvesting, as well as commercial harvesting.

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 T'Sou-ke'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 low likelihood, on T'Sou-ke'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.⁵

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 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 T'Sou-ke's Aboriginal Interests would be up to moderate.

However, given existing use of the marine shipping corridor within areas proximate to the exercise of T'Sou-ke's Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of T'Sou-ke'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 T'Sou-ke First Nation. 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 MBA with T'Sou-ke in an attempt to offset potential impacts, should the Project proceed.

⁵ Trans Mountain Final Argument, p. 85 and 207