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T'Sou-ke Nation Submission to the Federal Cabinet on the Kinder Morgan Project

T'Sou-ke Nation's Territory and community are situated on the southern shore of Vancouver Island. T'Sou-ke has two reserves that front onto the Strait of Juan de Fuca, along the proposed Kinder Morgan Project shipping route. T'Sou-ke actively participated in the NEB Environmental Assessment and the Crown consultation process. The Nation has a number of outstanding concerns about the impacts that the Project's marine shipping component will have on the environment, and by extension, on T'Sou-ke's Aboriginal harvesting and cultural rights, Aboriginal title, and Douglas Treaty fishing rights. Moreover, a major oil spill in T'Sou-ke's Territory would have devastating effects on T'Sou-ke, and Canada has yet to propose adequate accommodation to address this risk.

This submission focusses on T'Sou-ke's most pressing concerns and most significant accommodation proposals.

1. Compensation for harm to section 35 Rights in the event of a spill

In its consultations with the Crown, T'Sou-ke has confirmed that Canada's current compensation scheme for oil spills does not cover all of the harms that Aboriginal peoples would experience from a major oil spill in their territories. A significant gap is in respect of non-pecuniary harms. The degradation of T'Sou-ke's Territory and resources (and potentially reserve lands) from an oil spill, and the resulting interference with T'Sou-ke's section 35 rights, would have severe cultural, spiritual and psychological impacts on T'Sou-ke members. Canadian law recognizes the right to compensation for non-pecuniary harms in many contexts. As part of its accommodation of section 35 rights on the Kinder Morgan Project, Canada must modernize its compensation scheme to provide compensation for the serious and unique harms of oil spills on Aboriginal peoples, including non-pecuniary harms. T'Sou-ke would welcome the opportunity to participate in Canada's development of this expanded compensation scheme.

2. Southern Resident Killer Whales

The NEB concluded that the marine shipping component of the Kinder Morgan Project will harm the already endangered Southern Resident Killer Whale population. The NEB Conditions provide no meaningful mitigation measures to address those adverse impacts. The further scientific research that is underway to better understand adverse impacts and that is promised in the draft *Species at Risk Act* Action Plan will in and of itself do nothing to protect Killer Whales. The draft Action Plan is grossly deficient on action. Canada's duty to accommodate Aboriginal concerns on this front is supplemented by a statutory obligation under section 79(2) of the *Species at Risk Act* to develop effective mitigation measures to address the Kinder Morgan Project's adverse impacts on Killer Whales. Canada must therefore ensure the prompt adoption and implementation of an effective, action-oriented Action Plan.

Canada should also suspend the approval of any further projects after the Kinder Morgan Project that would materially increase marine shipping in the Salish Sea until Canada develops an adequate understanding, through its ongoing research, of the following issues:

1. *Impacts of marine shipping on Killer Whales*
2. *Threshold of impacts beyond which recovery of Killer Whales becomes unlikely*
3. *Existence and effectiveness of mitigation measures to keep adverse impacts below the threshold impact levels and support the recovery of the Southern Resident Killer Whales.*

3. Proposed Federal-T'Sou-ke Partnership: Education and Research Centre at T'Sou-ke's Traditional Village site of Chee-a-nun

T'Sou-ke proposes to develop a marine environment education and research centre on the Southern Vancouver Coast, where its village of Chee-a-nun once stood, with funding support from the federal government. T'Sou-ke has prepared a short proposal that it has shared with the federal consultation team, Minister McKenna and Minister LeBlanc. T'Sou-ke believes its proposal could provide meaningful accommodation to T'Sou-ke on the Kinder Morgan Project while also helping Canada achieve some of its objectives under the newly released Oceans Protection Plan. T'Sou-ke urges Cabinet to direct appropriate staff to explore this partnership proposal in further detail with T'Sou-ke.

4. Training for T'Sou-ke Members to Join the Southern Coast Spill Emergency Response Teams

T'Sou-ke seeks confirmation that Canada will provide training for some T'Sou-ke members to become skilled members of marine emergency response teams, including Incident Command System training and marine certification. T'Sou-ke urges Cabinet to direct appropriate staff to confirm the availability of these training opportunities.

5. Research into behaviour of Petroleum Products in the Strait of Juan de Fuca

Canada is promising to do further research to better understand the behaviour of petroleum products in marine environments. T'Sou-ke seeks confirmation that research will extend to the Strait of Juan de Fuca, where T'Sou-ke's marine territory is situated.