

Joint Federal/Provincial Consultation  
and Accommodation Report for the

# **Trans Mountain Expansion Project**

**November 2016**



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- A.7 Montana First Nation
- A.8 Samson Cree First Nation
- A.9 Sunchild First Nation

##### **Nakawē Peoples [Western Saulteaux]:**

- A.10 O'Chiese First Nation

#### TREATY SEVEN

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- A.12 Horse Lake First Nation

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- A.13 Sturgeon Lake Cree Nation
- A.14 Sucker Creek First Nation
- A.15 Whitefish (Goodfish) Lake First Nation / Saddle Lake Cree Nation

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- C.4 Squamish Nation – (Skwxwú7mesh)
- C.5 Tsawwassen First Nation
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- C.8 Cheam First Nation
- C.9 Katzie First Nation
- C.10 Kwantlen First Nation
- C.11 Matsqui First Nation
- C.12 Peters First Nation
- C.13 Popkum First Nation
- C.14 Seabird Island Indian Band (Sq'éwqel)
- C.15 Shxw'ōwhámel First Nation
- C.16 Sts'ailes Nation
- C.17 Union Bar First Nation
- C.18 Yale First Nation
- C.19 Stó:lō Collective:
  - Aitchelitz Band (Athelets)
  - Kwaw-Kwaw-Apilt First Nation (QweQwe'opelhp)
  - Leq'a:mel First Nation
  - Scowlitz (Sq'éwlets)
  - Shxwhá:y Village
  - Skowkale First Nation (Sq'ewqéyl)
  - Skwah First Nation
  - Skawahlook First Nation (Sq'ewá:lxw)

Soowahlie First Nation (Th'ewá:li )  
Squiala First Nation (Sxwoyehálá)  
Sumas First Nation (Sema:th)  
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- D.4 Lake Cowichan First Nation
- D.5 Lyackson First Nation
- D.6 Penelakut Tribe
- D.7 Snaw-naw-as (Nanoose) First Nation
- D.8 Snuneymuxw (Nanaimo) First Nation
- D.9 Stz'uminus (Chemainus) First Nation

### Straits Salish Peoples:

- D.10 Esquimalt Nation
- D.11 Malahat Nation
- D.12 Pauquachin First Nation
- D.13 Scia'new (Beecher Bay) Indian Band
- D.14 Semiahmoo First Nation
- D.15 Songhees (Lekwungen) Nation
- D.16 Tsartlip First Nation
- D.17 Tsawout First Nation
- D.18 Tseycum First Nation
- D.19 T'Sou-ke First Nation

### Southern Wakashan Peoples / Nuu-chan-luth:

- D.20 Ditidaht First Nation
- D.21 Pacheedaht First Nation
- D.22 Maa-nulth Treaty Society:
  - Huu-ay-aht First Nations
  - Ka:'yu:'k't'h'/Che:k'tles7et'h First Nations
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  - Uchucklesaht Tribe
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- E.2 Métis Nation of Alberta – Métis Regional Council Zone 4
- E.3 Métis Nation of Alberta – Gunn Métis – Local Council #55 (Lac Ste. Anne)
- E.4 Mountain Métis Nation Association

### **Métis Peoples (B.C.):**

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- E.7 Métis Nation of British Columbia

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# Acronyms, Abbreviations and Definitions Used in This Report

<b>ACO</b>	Aboriginal Consultation Office
<b>Alta.</b>	Alberta
<b>ANFO</b>	ammonium nitrate fuel oil
<b>B.C.</b>	British Columbia
<b>BC OGC</b>	British Columbia Oil and Gas Commission
<b>BCSC</b>	British Columbia Supreme Court
<b>bpd</b>	barrels per day
<b>CEAA</b>	Canadian Environmental Assessment Agency
<b>CEAA 2012</b>	<i>Canadian Environmental Assessment Act, 2012</i>
<b>CFIA</b>	Canadian Food Inspection Agency
<b>CO<sub>2</sub></b>	carbon dioxide
<b>CO<sub>2</sub>e</b>	carbon dioxide equivalent
<b>CPCN</b>	Certificate of Public Convenience and Necessity
<b>DFO</b>	Fisheries and Oceans Canada
<b>EA</b>	environmental assessment
<b>EAC</b>	environmental assessment certificate
<b>EAO</b>	British Columbia Environmental Assessment Office
<b>ECCC</b>	Environment and Climate Change Canada
<b>EMP</b>	Emergency Management Program
<b>FLNRO</b>	B.C. Ministry of Forests, Lands and Natural Resource Operations
<b>FSA</b>	Footprint Study Area
<b>GHG</b>	greenhouse gas
<b>GiC</b>	Governor in Council
<b>INAC</b>	Indigenous and Northern Affairs Canada
<b>IR</b>	Indian Reserve

<b>km</b>	kilometre
<b>LSA</b>	Local Study Area
<b>m</b>	metre
<b>MBA</b>	mutual benefits agreement
<b>MOTI</b>	B.C. Ministry of Transportation and Infrastructure
<b>MPMO</b>	Major Projects Management Office
<b>NEB</b>	National Energy Board
<b>NO<sub>2</sub></b>	nitrogen dioxide
<b>NRCan</b>	Natural Resources Canada
<b>OTE</b>	oral traditional evidence
<b>PM<sub>2.5</sub></b>	particulate matter 2.5 micrometres or smaller in diameter
<b>PFP</b>	Participant Funding Program
<b>RoW</b>	right-of-way
<b>RSA</b>	Regional Study Area
<b>SARA</b>	<i>Species at Risk Act</i>
<b>SCC</b>	Supreme Court of Canada
<b>TERMPOL</b>	Technical Review Process of Marine Terminal Systems and Transshipment Sites
<b>TLRU</b>	traditional land and resource use
<b>TMRU</b>	traditional marine resource use
<b>TMEP, TMX or Project</b>	Trans Mountain Expansion Project
<b>TMPL</b>	Trans Mountain oil products pipeline
<b>TRC</b>	TERMPOL Review Committee
<b>US</b>	United States
<b>VC</b>	Valued Component
<b>VFPA</b>	Vancouver Fraser Port Authority
<b>WMT</b>	Westridge Marine Terminal

# 1. INTRODUCTION

The Crown has a constitutional duty to consult Aboriginal groups, and where appropriate accommodate, when it contemplates conduct that might adversely affect asserted or established Aboriginal or Treaty rights. The Crown also consults with Aboriginal groups for many reasons, including statutory, contractual, policy and good governance, and overall to build effective relationships and understanding of Aboriginal groups. The Crown's consultation objectives are to meet the legal duty, uphold the honour of the Crown and build long-term relationships based on shared reconciliation objectives. Through the consultation process, governments seek to reconcile asserted or established Aboriginal rights, including title and treaty rights (referred to collectively in this report as "Aboriginal Interests") with the interests of the Crown and broader societal interests.

## 1.1 Purpose of the Report

The Major Projects Management Office (MPMO) of Natural Resources Canada (NRCan) and British Columbia's Environmental Assessment Office (EAO), collectively representing "the Crown," have prepared this Consultation and Accommodation Report to document the Aboriginal consultation conducted to date for the Government of Canada's and responsible British Columbia ministers' respective decisions on the proposed Trans Mountain Expansion Project's (Project) environmental assessment (EA) and regulatory review.

This Consultation and Accommodation Report summarizes the procedural and substantive aspects of Crown-Aboriginal consultation in respect of the Project. This report describes:

1. Aboriginal consultation undertaken in respect of the Project;
2. Views of Aboriginal groups on how the Project may impact Aboriginal Interests and other interests;
3. Measures proposed to address potential impacts on Aboriginal Interests and other interests raised by Aboriginal groups;
4. The Crown's conclusions regarding the potential impacts of the Project on Aboriginal Interests and other interests; and
5. Conclusions regarding the adequacy of consultation.

This report was developed based on consideration of all information brought forward to the Crown by Aboriginal groups through direct consultation; submissions made by Aboriginal groups and the proponent as part of the National Energy Board (NEB) Review; as well as on other information cited below.

In the development of this report, the Crown considered and integrated comments received by Aboriginal groups through consultation meetings, and during the written comment periods on the initial and revised draft versions of this report. The intention was to use this report to improve the Crown's understanding of the perspectives of Aboriginal groups, potential impacts on Aboriginal Interests, and options to accommodate these potential impacts.

## 1.2 Project Description

On December 16, 2013, Trans Mountain Pipeline ULC (the proponent or Trans Mountain), a wholly owned subsidiary of Kinder Morgan Canada, filed a Project Application with the NEB to build and operate the Project consisting of approximately 987 kilometres (km) of new 36-inch and 42-inch pipeline and reactivation of 193 km of existing pipeline between Edmonton, Alberta (Alta.) and Burnaby, British Columbia (B.C.).

The Project is designated under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) and would require a Certificate of Public Convenience and Necessity (CPCN) and other necessary relief under the *National Energy Board Act* (NEB Act) to proceed. For the province of British Columbia (B.C.), the Project is reviewable under the Reviewable Projects Regulation of B.C.'s *Environmental Assessment Act*, and would require an EA certificate from the province.

The Project would result in twinning the existing Trans Mountain Pipeline (TMPL) that runs 1,147 km from Edmonton, Alta. to the Westridge Marine Terminal (WMT) in Burnaby, B.C. The existing pipeline was constructed between February 4, 1952 and October 17, 1953, and consists of 1,155 km of a 61-centimetre (cm) main line between Edmonton and Burnaby, a distribution line from the Burnaby terminus tank farm to Burrard Inlet, and another to Washington State. Along its mainline, the pipeline has two major crossings – the Fraser and Thompson rivers – and 49 smaller river crossings. The system consists of two tank farms, a receiving tank farm in Edmonton, a delivery tank farm on Burnaby Mountain, a marine loading dock at Westridge on Burrard Inlet, and four pump stations (Edmonton, Edson, Black Pool, and Kamloops).

The federal Board of Transport Commissioners approved the existing Trans Mountain pipeline on December 13, 1951, after receiving submissions from the proponent, federal government departments and the two provincial governments. The approval was based on economic and strategic considerations. The existing pipeline did not undergo an environmental assessment, and the approval process did not include public or Indigenous consultations.

The proposed Project would increase the overall Trans Mountain pipeline system capacity from 300,000 barrels per day (bpd) to 890,000 bpd.

The Project as proposed also includes the following components and activities:

- Two 30-inch delivery lines from the Burnaby Terminal to the Westridge Marine Terminal (Westridge delivery pipelines);<sup>1</sup>
- Twelve new pump stations (10 at existing pump station sites and two at a new common pump station site at Black Pines), with seven in B.C. and five in Alberta;
- Thirty-four new pump units at the new pump stations;
- One new pump unit at the Sumas Pump Station to support additional deliveries to the Puget Sound Pipeline;
- Reactivating an existing pump station at Niton, Alberta;
- Re-connecting Jasper Pump Station to Line 1 and adding drag-reducing agent injection capability;
- Twenty new storage tanks: five at the Edmonton Terminal, one at the Sumas Terminal and 14 at the Burnaby Terminal, preceded by the demolition of two existing tanks, one each at Edmonton and Burnaby, for a total of 18 additional tanks;
- Twenty-five new sending or receiving traps;
- Deactivation and decommissioning of several components of existing facilities;
- Construction of one new dock complex at the WMT involving expansion of the foreshore area to enable three Aframax-capable berth faces and a utility dock; and
- Ancillary components and appurtenances, including mainline block valves, scraper traps, pressure reduction or relief stations, containment, power lines, access roads, and temporary infrastructure to support construction activities.

As a result of the Project, the number of marine tanker transits in Burrard Inlet (laden and empty) would increase from 10 Aframax class vessel transits per month (five vessels) to up to 68 vessel transits per month (34 vessels), or approximately 696 new transits per year (348 vessels).

The proponent indicated in supplemental information submitted to EAO in July 2016<sup>2</sup> that the loading of tankers at the Westridge Marine Terminal would fluctuate based on market conditions. Currently five tankers and three barges are handled each month (i.e., two barges outbound with crude oil shipments and one inbound with jet fuel). Crude oil and jet fuel barge traffic is not expected to increase as a result of the Project. Jet fuel receipts would not change as a result of the Project. Vessels bound for the Westridge Marine Terminal currently account for approximately 3%<sup>3</sup> of the total traffic under the jurisdiction of Vancouver Fraser Port Authority (VFPA). Project-related tanker traffic would represent an increase of 9.5% over 2012 vessel traffic in Burrard Inlet and a 3.7% increase over 2012 vessel traffic in the Juan de Fuca Strait.

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<sup>1</sup> Lengths are approximately 2.6 km for the tunnel option and 3.6 km for the street option.

<sup>2</sup> Available at: [http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic\\_project\\_home\\_459.html](http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_project_home_459.html)

<sup>3</sup> Excluding barges

The proponent has developed an interactive map that shows both the existing and proposed pipeline corridors along with other Project components at <https://www.transmountain.com/map>.

The figures below show the location of the Project, including the proposed pipeline route, Westridge Marine Terminal and existing marine shipping lanes designated for use by vessels transiting through the Strait of Juan de Fuca, Salish Sea and the Port of Vancouver. A historic representation of the existing Trans Mountain Pipeline system is also included.

**Figure 1 – Location of the Proposed Project**

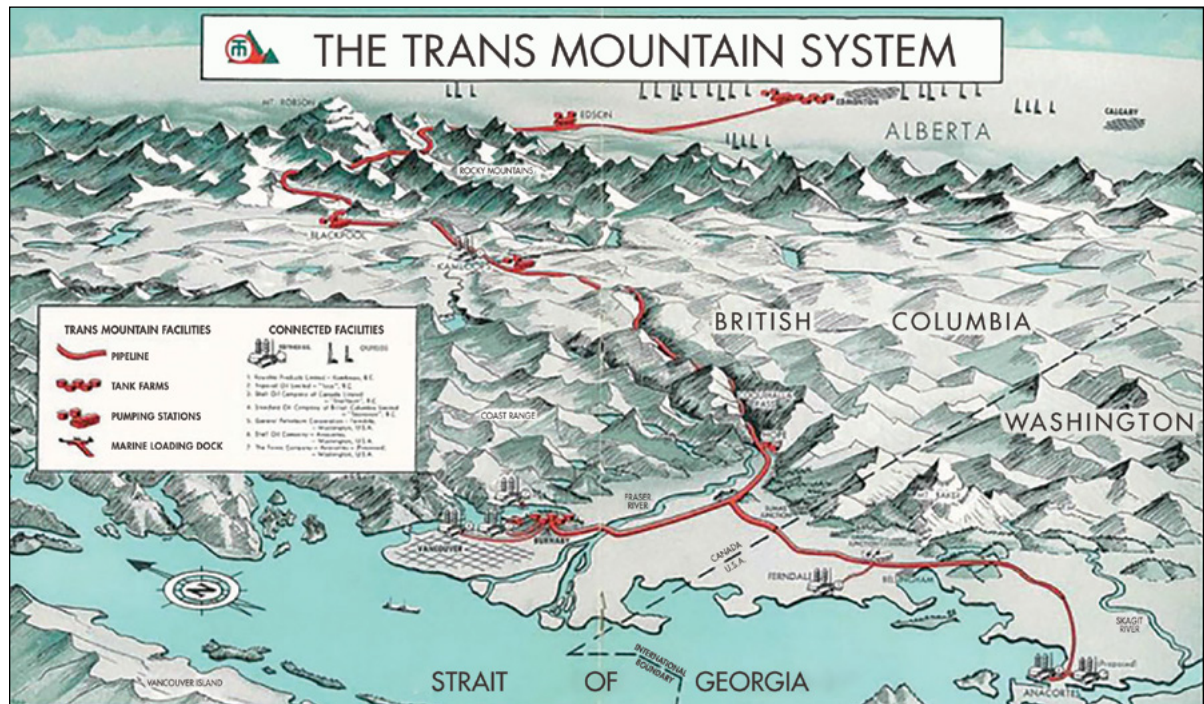




**Figure 2 – Location of the Proposed Westridge Marine Terminal Expansion and Project-related Marine Shipping**



**Figure 3 – Schematic of Existing Trans Mountain Pipeline System**



The proponent has applied for a 150 m-wide corridor, for what would become in most cases a temporary 45 m-wide pipeline corridor during construction and a permanent 18 m-wide easement during operations (although this would be reduced to 10 m-wide in some places because of existing constraints). Over 89% of the proposed pipeline route would parallel existing linear disturbances, including the right of way (RoW) for the existing Trans Mountain pipeline, thereby reducing the impacts from construction and right of way clearing. In two areas, the Project involves reactivating existing pipeline segments.

Since 1953, there have been various changes and modifications to the existing Trans Mountain pipeline. Between 2006 and 2008, 13 new pump stations were added, existing stations were modified, and the Anchor Loop project added 160 km of new pipe through Jasper National Park and Mount Robson Provincial Park between Hinton, Alberta, and Hargreaves, B.C.

Other infrastructure required for the Project includes temporary facility spaces, access roads and transmission lines. A comprehensive description of the Project is provided in Volume 2 of the Project Application filed with the NEB pursuant to regulatory hearing order OH-001-2014.

All documents associated with the regulatory hearing including the Project Application are available at <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2392873&objAction=browse&viewType=1>. Supplementary information on the Project provided by the proponent as part of the EAO process is available at: [http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic\\_project\\_doc\\_index\\_459.html](http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_project_doc_index_459.html).

## 1.3 Regulatory Review Including the Environmental Assessment Process

### 1.3.1 NEB REGULATORY REVIEW AND ENVIRONMENTAL ASSESSMENT PROCESS

The NEB completed a comprehensive environmental assessment of the Project, in accordance with its authority under the NEB Act and the CEAA 2012, which included a Public Hearing as part of the NEB regulatory process (together, termed the “NEB Review”).

#### **Preliminary Project Planning and Engagement**

Preliminary scoping of Crown consultation for the Project began in early 2012, in advance of the proponent submitting its detailed project description to the NEB. As part of the proponent’s pre-application engagement, it consulted with federal and provincial governments to identify which Aboriginal groups may be potentially affected by the Project.

On May 23, 2013, the NEB received the formal project description and undertook to determine whether, and by what form, the NEB Review would be conducted. As the regulatory authority for interprovincial pipelines, the NEB is responsible for assessing an application for a CPCN for the Project and providing a report under Section 52 of the NEB Act, which would also include recommendations from an environmental assessment conducted under sub-section 29(1) of CEAA 2012.

Consistent with implementation of a 2007 Cabinet Directive and relevant policies and guidance,<sup>4</sup> federal departments developed a plan for Aboriginal consultation for the Project. A Project Agreement,<sup>5</sup> was entered into by eight federal deputy ministers and Chief Executive Officers for the NEB in September 2014 that described the roles and responsibilities of federal authorities and the NEB during the NEB Review, as well as the Crown consultation process. As part of this agreement, the MPMO was identified as the Crown Consultation Coordinator for the Project.

In August 2013, the federal government shared an updated list of Aboriginal groups whose Aboriginal Interests and other interests may potentially be impacted by the Project with the proponent. This list was reviewed and updated over the course of the Project review. The process for identifying consultation requirements for Aboriginal groups is described in detail in Section 2 of this report.

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<sup>4</sup> See the *Cabinet Directive on Improving the Performance of the Regulatory System for Major Resource Project* (<http://mpmo.gc.ca/reports-publications/77>), its associated memorandum of understanding and the document *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (Aboriginal Affairs and Northern Development Canada, March 2011).

<sup>5</sup> <http://mpmo.gc.ca/projects/226>

## Start of the NEB Hearing

The NEB's *Filing Manual* and the *Filing Requirements Related to the Potential Environmental and Socio-Economic Effects of Increased Marine Shipping Activities: Trans Mountain Expansion Project* set out requirements for the proponent to engage Aboriginal groups potentially affected by the Project. As part of the Project Application, the proponent was required to identify measures to avoid, mitigate or otherwise accommodate potential adverse impacts on Aboriginal Interests. On December 16, 2013, the proponent submitted a Project Application to the NEB for a CPCN.

In January 2014, the NEB invited interested Aboriginal groups and organizations to apply for participant status in the NEB Review as well as participant funding. Applications submitted by Aboriginal groups often included preliminary information on potential Project impacts on Aboriginal Interests and other interests.

On April 2, 2014, the NEB Panel assigned to oversee the review of the Project announced it had sufficient information to proceed with the public hearings. The NEB set out the factors and scope of the factors for the environmental assessment to be conducted pursuant to CEAA 2012.

In accordance with the *National Energy Board Act*, the hearing was subjected to a legislated time limit of 15 months. On July 15, 2014, a seven-month exclusion period was announced and a second four months exclusion period was announced on September 24, 2015 pursuant to sub-section 52(5) of the NEB Act, which resulted in the hearing continuing until February 17, 2016.

The NEB issued draft conditions for the Project on April 16, 2014, August 12, 2015, and December 11, 2015, and sought comments from intervenors on the 2015 version of the draft conditions by January 12, 2016.

The NEB Report is required to recommend whether issuing a CPCN would be in the public interest, any terms and conditions that should be attached to the CPCN if issued by the NEB, and any recommendations based on the environmental assessment conducted under CEAA 2012. The NEB submitted its report to the Minister of Natural Resources on May 19, 2016.

### 1.3.2 BRITISH COLUMBIA'S ENVIRONMENTAL ASSESSMENT PROCESS

On June 21, 2010, the EAO and the NEB entered into an equivalency agreement (NEB-EAO Agreement) for environment assessments of projects that triggered both a provincial and NEB review. The NEB-EAO agreement states that B.C. would accept the NEB's environmental assessment of a project that would otherwise have to be reviewed under B.C.'s *Environmental Assessment Act* as an equivalent assessment and that the proposed project may proceed without a provincial EA certificate.

In January 2016, the B.C. Supreme Court, in *Coastal First Nations v. British Columbia* (BCSC Decision<sup>6</sup>), held that a portion of the NEB-EAO Agreement<sup>7</sup> was invalid. Specifically, the Court ruled that B.C.'s *Environmental Assessment Act* applies to projects subject to a NEB review, to the extent that they require a provincial EA certificate. Although effectively amended by virtue of the B.C. Supreme Court Decision, the remainder of the NEB-EAO Agreement remained valid. Therefore, for this Project, the NEB Review is being substituted for the EA process under B.C.'s *Environmental Assessment Act*. EAO is accepting the NEB Recommendation Report for the Trans Mountain Expansion Project as the assessment report for the Project.

As a result of the B.C. Supreme Court Decision, an order was issued under Section 10(1)(c) of the B.C. *Environmental Assessment Act* on April 8, 2016, requiring the Ministers of Environment and Natural Gas Development to make a decision on the issuance of a provincial EA certificate. Following consultation on a draft procedural order with Aboriginal groups and the proponent, an order was issued under Section 11 of B.C.'s *Environmental Assessment Act* on June 17, 2016, to establish the procedures for the remaining provincial EA process for the Project, including procedures for Aboriginal consultation. Among other procedural aspects, this order identified the Aboriginal groups to be consulted by EAO, Aboriginal consultation opportunities to be provided by EAO and the proponent's consultation requirements.

EAO has been coordinating Aboriginal consultation activities with the federal Crown. As part of this approach to Crown consultation, EAO has made use of the federal consultation record that preceded the Province's regulatory involvement in the EA process. While EAO has undertaken a joint approach to Aboriginal consultation with the federal government for Aboriginal groups in B.C., the provincial Crown's obligations to consult and accommodate pertain to areas of provincial jurisdiction as circumscribed by the Constitution.

## 1.4 NEB Recommendation Report

The NEB completed its review in accordance with its authority under the NEB Act and the CEEA 2012. The NEB found that with the implementation of the proponent's environmental protection procedures and mitigation and the NEB's recommended conditions, the Project is not likely to cause significant environmental effects. However, pursuant to its authority under the NEB Act, the NEB found that the operation of Project-related marine vessels is likely to result in significant adverse effects to the Southern Resident Killer Whale and to Aboriginal cultural uses associated with Southern Resident Killer Whales. The NEB also found that greenhouse gas emissions (GHG) from Project-related marine vessels would be significant.

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<sup>6</sup> <http://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc34/2016bcsc34.pdf>

<sup>7</sup> [http://www.eao.gov.bc.ca/EAO\\_NEB.html](http://www.eao.gov.bc.ca/EAO_NEB.html)

The NEB concluded that the consultation by the proponent with Aboriginal groups was acceptable. The NEB found that the proponent offered Aboriginal groups adequate opportunities to provide information about their concerns and interests in the Project area and within their traditional territories; considered the information that was provided; and made a number of changes to the design and planned operation of the Project as a result of this information.

The NEB found the proponent's approach to assessing the potential effects of the Project on Aboriginal Interests<sup>8</sup> was acceptable and noted that there would be impacts experienced by some Aboriginal groups if the Project was to proceed. The NEB acknowledged that Aboriginal groups would sustain modest burdens<sup>9</sup> to their ability to use the lands, waters and resources for traditional purposes; would be temporarily impacted by construction and routine maintenance activities; and that some opportunities for certain activities such as harvesting or accessing sites or areas of traditional use would be temporarily interrupted. For activities directly affected by the Westridge Marine Terminal, the NEB found that these effects would persist for the operational life of the Project, as traditional activities would not occur within the expanded water lease boundaries. The NEB found that while the effects would be long term, they would be reversible and would be confined to the water lease boundary for the Westridge Marine Terminal. The NEB did not name specific Aboriginal groups in these findings.

The NEB stated that in the event of a credible worst-case spill, environmental effects to the lands, waters or resources used for traditional purposes by Aboriginal groups would be adverse and significant. The NEB found, however, that the probability of a spill is very low, provided the Project is designed, constructed and operated in accordance with its certificate conditions and the proponent's commitments. The NEB considered the potential consequences of a spill as it weighed the overall benefits and burdens of the Project and found the level of risk acceptable.

The NEB concluded that the overall benefits of the Project outweigh the burdens and that the Project is in Canada's public interest and recommended approval by the Governor in Council (GiC). The NEB concluded that there would be considerable benefits as a result of the direct jobs created, local and regional spending on pipeline materials, and in providing Canadian shippers greater access to international markets. The NEB noted there would be modest benefits to local communities and the environment from the establishment of a Community Benefit Program and as a result of the enhanced marine spill response planning associated with the Project. On page 264 of its report, the NEB also found that the Project would likely result in positive economic effects, including revenues to various levels of government.

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<sup>8</sup> In this instance, "Aboriginal interests" pertains to the NEB's list of issues to be assessed pursuant to the requirements of the NEB Act and CEAA 2012

<sup>9</sup> The NEB Report (p.14) states "Definitions for the terms considerable and modest are not provided. Rather, the terms are meant to illustrate weight the Board attributed to the benefits and burdens relative to each other."

With respect to the potential impacts of the Project on Aboriginal Interests, the NEB stated the following (at page 52) in the NEB Report:

*Having considered all the evidence submitted in this proceeding, the consultation undertaken with Aboriginal groups, the impacts on Aboriginal Interests, the proposed mitigation measures, including conditions to minimize adverse impacts on Aboriginal interests and the commitments to and Board-imposed requirements for ongoing consultation, the Board is satisfied that the Board's recommendation and decisions with respect to the Project are consistent with section 35(1) of the Constitution Act, 1982. The Board is of the view that this assessment is consistent with what is required for the purposes of the Board's report.*

In accordance with the NEB's interpretation of its legislated mandate, the NEB did not make any determinations regarding the nature and scope of asserted or established Aboriginal rights, including title or treaty rights. As the consultation duty rests with the Crown, the NEB did not arrive at any conclusions regarding the scope of the Crown's duty to consult or whether the Crown has met this duty. These topics are the subject of this report.

The NEB Review supports the Crown in helping meet its constitutional obligations to consult, and as appropriate, accommodate for potential adverse impacts of Crown decision making on Aboriginal Interests. Many of the conditions recommended by the NEB are relevant to addressing impacts on Aboriginal Interests. See Section 4 of this report for a discussion of the relevant NEB recommendations and Appendix H for a full list of recommended NEB conditions for the Project.

## 2. APPROACH TO CONSULTING ABORIGINAL GROUPS

### 2.1 Identification of Aboriginal Groups

Direction was provided to the proponent, through the NEB's *Filing Manual*, to engage and consult Aboriginal groups potentially affected by the Project. In early 2012, prior to filing its Project Description with the NEB, the proponent sought the advice of federal and provincial officials with respect to the Aboriginal groups whose interests may be potentially affected by the Project.

As part of the proponent's pre-Application planning, the Alberta government advised the proponent to include Aboriginal group communities within 100 km of each side of the proposed expansion line. The B.C. government advised the proponent to include groups within 10 km on each side. At that time, Aboriginal Affairs and Northern Development Canada (now Indigenous and Northern Affairs Canada) provided advice to the proponent on the traditional territories of Aboriginal groups to inform its scope of engagement. In August 2012, the MPMO provided further advice to the proponent on behalf of the federal government on the Aboriginal groups for which Crown consultation may be required. The Crown's approach to consultation also took into account a preliminary assessment of the strength of any asserted Aboriginal rights, and established Aboriginal rights or treaty rights, and of the seriousness of potential adverse impacts of the Project on Aboriginal Interests.

On May 23, 2013, following receipt of a project description from the proponent, the Crown developed a preliminary list of potentially affected Aboriginal groups. Approximately 130 Aboriginal groups were initially identified. The Crown considered whether lands or marine areas currently or traditionally used by Aboriginal groups potentially overlap or interact with the Project footprint. In addition, a 50 km buffer from the Project footprint and marine shipping corridor was used to identify additional Aboriginal groups for which the indirect effects of the Project have the potential to impact Aboriginal Interests.

In August 2013, the federal Crown's initial list of potentially affected Aboriginal groups was shared with the proponent and the NEB, following review by implicated federal authorities, including Fisheries and Oceans Canada (DFO), Environment and Climate Change Canada (ECCC), Parks Canada and Transport Canada. In August 2013, the federal Crown sent letters to Aboriginal groups introducing the Project and the NEB review process.



## Refining the Scope of Aboriginal Consultation

The Project footprint and spatial assessment areas defined by the proponent informed its scope of Aboriginal engagement. Appendix 9 of the NEB Report provides a complete list of Aboriginal groups and organizations engaged by the proponent. Appendix 11 provides the study area boundaries defined by the proponent and adopted by the NEB for the environmental and socio-economic assessment of the Project.

Following the proponent's submission of the Project Application to the NEB in December 2013, the Crown reviewed available traditional use information for the identified Aboriginal groups, and the potential interactions between the effects of the Project and traditional land and marine uses. The Project Application defined the spatial boundaries selected to assess the effects of the Project to the environment or socio-economic conditions including to traditional land and marine uses. The Crown subsequently refined the scope to include any Aboriginal group with Aboriginal Interests that could be adversely affected by the Project. The Crown further refined the scope of consultations based on its understanding of the basis for which an Aboriginal group may represent the interests of a collective rights bearing entity under Section 35 of the *Constitution Act, 1982*, including whether a group was considered a Band under the *Indian Act*.

In April 2016, following the *Coastal First Nations (2016)* decision the EAO initiated the B.C. provincial EA process and identified 96 Aboriginal groups in B.C. to be consulted. Based on the strength of claims and potential to impact Aboriginal Interests, EAO identified 81 Aboriginal groups to be consulted at a deeper end of the consultation spectrum and 15 Aboriginal groups to be consulted at a lower end of the consultation spectrum. Some of the 81 Aboriginal groups at the deeper end organized into collectives, resulting in approximately 60 Aboriginal groups being directly consulted at the deeper end. The Aboriginal groups are identified in the order issued by the EAO under Section 11 of B.C.'s *Environmental Assessment Act*.<sup>10</sup> The Aboriginal groups identified by EAO are consistent with those identified by the federal Crown.

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<sup>10</sup> [http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic\\_document\\_459\\_40634.html](http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_document_459_40634.html)

## Aboriginal Groups Consulted

The following tables identify the individual Aboriginal groups in B.C. and Alberta for which a duty to consult was identified as of June 2016. Eighty-three of the individual Aboriginal groups within the Crown’s scope of consultation participated in the NEB Review, either on their own or as part of a collective.

**Table 1 – Alberta Aboriginal Groups**

Treaty Six	Treaty Seven
<p><b>Nakhóda Peoples:</b></p> <ul style="list-style-type: none"> <li>• Alexis Nakota Sioux Nation (with Alexis Trappers Association)*</li> <li>• Paul First Nation<sup>2</sup></li> </ul> <p><b>Nehiyawak Peoples:</b></p> <ul style="list-style-type: none"> <li>• Alexander First Nation*</li> <li>• Enoch Cree Nation*</li> <li>• Ermineskin Cree Nation*</li> <li>• Louis Bull Tribe</li> <li>• Montana First Nation*</li> <li>• Samson Cree First Nation*</li> <li>• Sunchild First Nation*</li> </ul> <p><b>Nakawē Peoples:</b></p> <ul style="list-style-type: none"> <li>• O’Chiese First Nation*</li> </ul>	<p><b>Nakhóda Peoples:</b></p> <ul style="list-style-type: none"> <li>• Stoney Nakoda First Nation</li> </ul>
	Treaty Eight
	<p><b>Dane-zaa Peoples:</b></p> <ul style="list-style-type: none"> <li>• Horse Lake First Nation*<sup>C</sup></li> </ul> <p><b>Nehiyawak Peoples:</b></p> <ul style="list-style-type: none"> <li>• Sturgeon Lake Cree Nation</li> <li>• Sucker Creek First Nation*</li> <li>• Whitefish (Goodfish) Lake First Nation/ Saddle Lake Cree Nation*</li> </ul>
<p>* Indicates that the Aboriginal group participated in the NEB hearings as an intervenor  <sup>2</sup> Indicates that the Aboriginal group participated in the NEB hearings as a commentor  <sup>C</sup> Indicates that the Aboriginal group is on Schedule C of the EAO Section 11 order</p>	

**Table 2 – B.C. Interior Aboriginal Groups**

<p><b>Dalkelh [Carrier] Peoples:</b></p> <ul style="list-style-type: none"> <li>• Lheidli T'enneh First Nation<sup>*B</sup></li> <li>• Lhtako Dene Nation<sup>B</sup></li> </ul> <p><b>Nlaka'pamuxw Peoples:</b></p> <ul style="list-style-type: none"> <li>• Ashcroft Indian Band<sup>*B</sup></li> <li>• Cook's Ferry Indian Band<sup>B</sup></li> <li>• Kanaka Bar Indian Band<sup>C</sup></li> <li>• Nicomen Indian Band<sup>C</sup></li> <li>• Siska Indian Band<sup>B</sup></li> </ul> <p><b>Nlaka'pamuxw Nation Tribal Council:</b></p> <ul style="list-style-type: none"> <li>• Boothroyd Band<sup>B</sup></li> <li>• Boston Bar Band<sup>B</sup></li> <li>• Lytton First Nation<sup>B</sup></li> <li>• Oregon Jack Creek Band<sup>B</sup></li> <li>• Skuppah First Nation<sup>B</sup></li> <li>• Spuzzum First Nation<sup>B</sup></li> </ul> <p><b>Nlaka'pamuxw Peoples  [Scw'exmx People Sub-Group]:</b></p> <ul style="list-style-type: none"> <li>• Coldwater Indian Band<sup>*B</sup></li> <li>• Lower Nicola Indian Band<sup>*B</sup></li> <li>• Nooaitch Indian Band<sup>*B</sup></li> <li>• Shackan Indian Band<sup>*C</sup></li> </ul>	<p><b>Okanagan Peoples:</b></p> <ul style="list-style-type: none"> <li>• Lower Similkameen Indian Band<sup>*B</sup></li> <li>• Okanagan Indian Band<sup>*B</sup></li> <li>• Osoyoos Indian Band<sup>*</sup></li> <li>• Penticton Indian Band<sup>*B</sup></li> <li>• Upper Nicola Band<sup>*B</sup></li> <li>• Upper Similkameen Indian Band<sup>*B</sup></li> <li>• Westbank First Nation<sup>*B</sup></li> </ul> <p><b>Secwepemc Peoples:</b></p> <ul style="list-style-type: none"> <li>• Adams Lake Indian Band<sup>*B</sup></li> <li>• Bonaparte Indian Band<sup>C</sup></li> <li>• Canim Lake Band<sup>B2</sup></li> <li>• Little Shuswap Lake Indian Band<sup>B</sup></li> <li>• High Bar First Nation (Llenlley'nen)<sup>C</sup></li> <li>• Neskonlith Indian Band<sup>*B</sup></li> <li>• Shuswap Indian Band<sup>C</sup></li> <li>• Simpcw First Nation<sup>*B</sup></li> <li>• Skeetchestn Indian Band<sup>*B</sup></li> <li>• Splantsin First Nation<sup>C</sup></li> <li>• Stswecem'c / Xgat'tem' [Canoe Creek Band]<sup>C</sup></li> <li>• Tk'emlúps te Secwépemc<sup>*B</sup></li> <li>• Ts'kw'aylaxw First Nation [Pavillion Indian Band]<sup>C</sup></li> <li>• Whispering Pines / Clinton Indian Band<sup>*B</sup></li> <li>• Williams Lake Indian Band<sup>*C</sup></li> <li>• Xatšúll First Nation [Soda Creek Indian Band]<sup>C</sup></li> </ul> <p><b>Tsilhqot'in Peoples</b></p> <ul style="list-style-type: none"> <li>• Toosey Indian Band<sup>C</sup></li> </ul>
<p>* Indicates that the Aboriginal group participated in the NEB hearings as an intervenor  <sup>B</sup> Indicates that the Aboriginal group is on Schedule B of the EAO Section 11 order  <sup>C</sup> Indicates that the Aboriginal group is on Schedule C of the EAO Section 11 order  <sup>2</sup> Indicates that the Aboriginal group participated in the NEB hearings as a commentator</p>	

**Table 3 – Lower Fraser River Aboriginal Groups**

<p><b>Downriver Halkomelem &amp; Squamish Peoples:</b></p> <ul style="list-style-type: none"> <li>• Kwikwetlem First Nation <sup>*B</sup></li> <li>• Musqueam Indian Band <sup>*B</sup></li> <li>• Squamish Nation <sup>*B</sup></li> <li>• Tsawwassen First Nation <sup>*B</sup></li> <li>• Tsleil-Waututh Nation <sup>*B</sup></li> </ul> <p><b>Upriver Halkomelem Peoples:</b></p> <ul style="list-style-type: none"> <li>• Chawathil First Nation <sup>*B</sup></li> <li>• Cheam First Nation <sup>*B</sup></li> <li>• Katzie First Nation <sup>*B</sup></li> <li>• Kwantlen First Nation <sup>*B</sup></li> <li>• Matsqui First Nation <sup>*B</sup></li> <li>• Peters First Nation <sup>*B</sup></li> <li>• Popkum First Nation <sup>*B</sup></li> <li>• Seabird Island Indian Band <sup>B</sup></li> <li>• Shxw'ōwhámel First Nation <sup>B</sup></li> <li>• Sts'ailes Nation <sup>C</sup></li> <li>• Union Bar First Nation <sup>B</sup></li> <li>• Yale First Nation <sup>B</sup></li> </ul>	<p><b>Upriver Halkomelem Peoples (cont'd):</b></p> <p>Stó:lō Collective: <sup>*B</sup></p> <ul style="list-style-type: none"> <li>• Aitchelitz Band <sup>B</sup></li> <li>• Kwaw-Kwaw-Apilt First Nation <sup>B</sup></li> <li>• Leq'a:mel First Nation <sup>B</sup></li> <li>• Scowlitz <sup>B</sup></li> <li>• Shxwhá:y Village <sup>B</sup></li> <li>• Skowkale First Nation <sup>B</sup></li> <li>• Skwah First Nation <sup>B</sup></li> <li>• Skawahlook First Nation <sup>B</sup></li> <li>• Soowahlie First Nation <sup>B</sup></li> <li>• Squiala First Nation <sup>B</sup></li> <li>• Sumas First Nation <sup>B</sup></li> <li>• Tzeachten First Nation <sup>B</sup></li> <li>• Yakweakwoose First Nation <sup>B</sup></li> </ul>
<p>* Indicates that the Aboriginal group participated in the NEB hearings as an intervenor  <sup>B</sup> Indicates that the Aboriginal group is on Schedule B of the EAO Section 11 order  <sup>C</sup> Indicates that the Aboriginal group is on Schedule C of the EAO Section 11 order</p>	

**Table 4 – Vancouver Island and Adjacent Area/Affiliated Aboriginal Groups**

<p><b>Island Halkomelem Peoples:</b></p> <ul style="list-style-type: none"> <li>• Cowichan Tribes<sup>*B</sup></li> <li>• Halalt First Nation<sup>B</sup></li> <li>• Hwlitsum<sup>B3</sup></li> <li>• Lake Cowichan First Nation<sup>*B</sup></li> <li>• Lyackson First Nation<sup>*B</sup></li> <li>• Penelakut Tribe<sup>*B</sup></li> <li>• Snaw-naw-as (Nanoose) First Nation<sup>B</sup></li> <li>• Snuneymuxw (Nanaimo) First Nation<sup>*C</sup></li> <li>• Stz'uminus (Chemainus) First Nation<sup>*B</sup></li> </ul> <p><b>Straits Salish Peoples:</b></p> <ul style="list-style-type: none"> <li>• Esquimalt Nation<sup>*B</sup></li> <li>• Malahat Nation<sup>B2</sup></li> <li>• Pauquachin First Nation<sup>*B</sup></li> <li>• Scia'new (Beecher Bay) Indian Band<sup>*B</sup></li> <li>• Semiahmoo First Nation<sup>B</sup></li> <li>• Songhees (Lekwungen) Nation<sup>B</sup></li> <li>• Tsartlip First Nation<sup>*B</sup></li> <li>• Tsawout First Nation<sup>*B</sup></li> <li>• Tseycum First Nation<sup>*B</sup></li> <li>• T'Sou-ke First Nation<sup>*B</sup></li> </ul>	<p><b>Southern Wakashan Peoples / Nuu-chah-nulth:</b></p> <ul style="list-style-type: none"> <li>• Ditidaht First Nation<sup>*B</sup></li> <li>• Pacheedaht First Nation<sup>*B</sup></li> <li>• Maa-nulth First Nation:<sup>*B</sup> <ul style="list-style-type: none"> <li>– Huu-ay-aht First Nations<sup>B</sup></li> <li>– Ka:'yu:'k't'h'/Che:k'tles7et'h First Nations<sup>B</sup></li> <li>– Toquaht Nation<sup>B</sup></li> <li>– Uchucklesaht Tribe<sup>B</sup></li> <li>– Ucluelet First Nation<sup>B</sup></li> </ul> </li> </ul>
<p>* Indicates that the Aboriginal group participated in the NEB hearings as an intervenor  <sup>B</sup> Indicates that the Aboriginal group is on Schedule B of the EAO Section 11 order  <sup>C</sup> Indicates that the Aboriginal group is on Schedule C of the EAO Section 11 order  <sup>2</sup> Indicates that the Aboriginal group participated in the NEB hearings as a commentator  <sup>3</sup> Hwlitsum are not recognized as a "Band" under the <i>Indian Act</i></p>	

**Table 5 – Métis Groups**

<p><b>Métis Peoples (Alberta):</b></p> <ul style="list-style-type: none"> <li>• Métis Nation of Alberta</li> <li>• Métis Nation of Alberta – Métis Regional Council Zone<sup>4*</sup></li> <li>• Métis Nation of Alberta – Gunn Métis – Local Council #55 (Lac Ste. Anne)<sup>*</sup></li> <li>• Mountain Métis Nation Association</li> </ul>	<p><b>Métis Peoples (B.C.):</b></p> <ul style="list-style-type: none"> <li>• BC Métis Federation<sup>*</sup></li> <li>• Kelly Lake Métis Settlement Society<sup>4</sup></li> <li>• Métis Nation of British Columbia<sup>*</sup></li> </ul>
<p>* Indicates that the Aboriginal group participated in the NEB hearings as an intervenor  <sup>4</sup> Applied for late intervenor status in the NEB hearings but was denied by the NEB</p>	

## **Spatial Study Areas**

Spatial study areas in environmental and socio-economic impact assessment specify the geographic area where the effects of the Project area are assessed and, in turn, informs how the Crown understands the scope and seriousness of potential effects of the Project on Aboriginal Interests.

In Volume 5A of its Application, the proponent defined spatial areas for the assessment of each valued environmental or socio-economic component (VC) identified in the NEB Hearing Order. The Local Study Area (LSA) was defined as the area within which the potential adverse effects of the Project would be assessed for each valued component. The local study area varied depending on the valued component and reflects the area where Project construction and operations are most likely to affect the valued component. The local study area is also referred to by the proponent as the “zone of influence.”

The proponent defined the Regional Study Area (RSA) for each valued component as the area where potential effects might overlap with the direct and indirect effects of other activities on that valued component, potentially causing cumulative effects.

The proponent also defined the Project’s Footprint Study Area as the area that would be directly disturbed by Project facilities and associated physical works and activities. It includes a 45-m-wide construction RoW, permanent and temporary access roads, camp and stockpile sites, valves and power lines, pump stations, tanks, and the Westridge Marine Terminal.

Key valued components for understanding potential interactions between the Project and Aboriginal Interests include traditional land and resource use (TLRU) and traditional marine resource use (TMRU). The local study area for TLRU encompassed and extended beyond the Project footprint to include the zones of influence of water quality and quantity, air emissions, acoustic environment, fish and fish habitat, wetlands, vegetation, wildlife and wildlife habitat and heritage resources as TLRU and TMRU are dependent on these resources. The TLRU LSA area included the area where there is a reasonable potential for localized Project-related effects to affect existing uses of the land for traditional purposes (e.g., trapping, hunting, fishing and gathering areas). The potential effects of the Project were assessed by the proponent in its Application, and subsequently by the NEB, within the Footprint and the TLRU LSA.

The RSA for TLRU VC includes the area where potential direct and indirect effects of other land uses and activities could overlap with Project-related effects and cause cumulative effects to TLRU indicators including subsistence activities and sites (e.g. hunting, trapping, fishing, plant gathering, trails and travel ways, and habitation sites); and cultural sites (e.g. gathering places and sacred areas).

The TLRU RSA includes the RSA boundaries defined for the water quality and quantity, air emissions, acoustic environment, fish and fish habitat, wetland loss or alteration, vegetation, wildlife and wildlife habitat and heritage resources VCs. As explained in Appendix 11 of the

NEB Report, in some cases, the focus of TLRU was on lands within a few hundred metres of the footprint, while in other cases broader territorial uses were identified extending several kilometres from the footprint. The proponent and subsequently the NEB assessed potential effects of the Project on TLRU within the RSA.

The proponent used a similar approach to define the area of assessment of Project effects to land and marine uses in the vicinity of the Westridge Marine Terminal. The spatial boundary encompassed and extended beyond the footprint of the Westridge Marine Terminal to include the zones of influence of air emissions, acoustic environment, marine fish and fish habitat, marine mammals and marine birds VCs. The land-based LSA includes the area where there is a reasonable potential for localized Project-related effects to impact lands and resources used for traditional purposes. The assessment of effects to TMRU within the LSA involved studying changes in marine access and use, sensory disturbances and alteration of subsistence resources within 500 m from the proposed water lease expansion. The RSA is defined as an area east of the First Narrows, including Indian Arm and Port Moody Arm of Burrard Inlet.

The effects to TMRU from Project-related marine shipping were assessed within the LSAs defined for assessing effects to marine fish and fish habitat, marine mammals and birds as TMRU is dependent on these resources. The RSA for TMRU encompassed a large portion of the Salish Sea.

## **2.2 Information Sources**

This report draws on the NEB Report, the Project Application, and information provided by Aboriginal groups filed on the NEB Hearing record and during Crown consultations. Ethnohistoric information included tribal council/association affiliations; language, governance, population, and socio-economic information; proximity of communities and traditional territories to Project-related activities; status of treaty negotiations in B.C.; history of land occupation; and traditional and contemporary resource use information of Aboriginal groups. Within B.C., the Crown accessed B.C. government ethnohistoric research reports and consulted with regional consultation experts and other relevant provincial (B.C.) land and resource management staff. Sources are referenced in the appendices for each Aboriginal group, and any research reports have been shared with Aboriginal groups upon request.

The nature, extent and importance of traditional and cultural activities practiced in the Project vicinity are identified in the Project Application and by information provided by Aboriginal groups and filed on the NEB hearing record. These traditional and cultural activities rely on the availability, quality and access to ecosystems and natural resources, such as the land, rivers, fish and wildlife, and vegetation. This information, along with consultation with Aboriginal groups, have helped the Crown understand traditional and contemporary land, marine and resource uses and associated Aboriginal Interests related to the Project.

## 2.3 Consultation with Aboriginal Groups

The federal government's approach to consultation with Indigenous groups is to involve officials from all relevant federal departments and agencies. This approach arose from a 2007 Cabinet Directive and supporting Memorandums of Understanding established by the Major Project Deputy Ministers' Committee.<sup>11</sup>

Pursuant to sub-section 4(1)(d) of CEAA 2012, one purpose of this Act is to promote communication and cooperation between the federal government and Aboriginal peoples. The CEAA 2012 also ensures that projects are considered in a careful and precautionary manner before federal authorities take a decision. The definition of environmental effects under Paragraph 5 of CEAA 2012 includes the effect to Aboriginal peoples of any change that the Project may cause on the environment to:

- Health and socio-economic conditions;
- Physical and cultural heritage;
- The current use of lands and resources for traditional purposes; or
- Any structure, site or thing that is of historical, archaeological, paleontological, or architectural significance.

In addition, CEAA 2012 enables the consideration of community knowledge and Aboriginal traditional knowledge into the EA process.

If approved, the Project would require federal (Table 6) and provincial permits and authorizations (Table 7).

With respect to potential authorizations under the *Indian Act*, as of July 2016, the proponent has commercial agreements or was negotiating with Bands to construct the Project across the following reserve lands: Lower Nicola Indian Band (Zoht #4; Zoht #5; Joeyaska Indian Reserve [IR] #2), Shxw'ōwhámél (Ohamil #1), Peters (IR #1; IR #1a), Popkum (IR #1; IR #2), Tzeachten (IR #13), and Matsqui (Main #2). The proponent would be seeking section 35 *Indian Act* tenures for the new pipeline from Lower Nicola, Peters and Popkum (amendments to the existing 1955 indenture to permit a second pipeline) whereas the following three Bands are operational under the *First Nations Land Management Act* (FNLMA) and have their own Land Codes in place: Shxw'ōwhámél, Tzeachten, and Matsqui. It is expected that Lower Nicola Indian Band will be operational under the FNLMA by December 2016. In addition, there are four temporary stockpile sites proposed on reserves, most likely requiring section 28 *Indian Act* tenures for the following Bands: Tk'emlúps te Secwépemc, Popkum, Lower Nicola and Enoch Cree.

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<sup>11</sup> See the Federal Action Plan, and Interim Guidelines, 2007 including the [Cabinet Directive on Improving the Performance of the Regulatory System for Major Resource Projects](#) (the directive that established the MPMO Initiative, launched on October 1, 2007) and supporting Memorandum of Understanding



If approved, the following B.C. provincial agencies may be required to make permitting decisions (Table 7): BC Oil and Gas Commission (BC OGC), Ministry of Environment (BC Parks), Ministry of Transportation and Infrastructure (MOTI) and Ministry of Forests, Lands and Natural Resource Operations (FLNRO). Provincial agencies will seek to coordinate consultation on permit applications for the Project to the extent practicable, if the Project is approved.

**Table 6 – Potential Federal Authorizations**

<b>Responsible Agency or Department</b>	<b>Permit</b>	<b>Legislation</b>
Indigenous and Northern Affairs Canada <sup>12</sup>	Permit under section 28	<i>Indian Act</i>
	Section 35 OIC Authorization	<i>Indian Act</i>
	Easement Agreement	<i>Federal Real Property and Federal Immovables Act</i>
Environment and Climate Change Canada	Section 127: Disposal at Sea Permit	Part 7 Division 3 of <i>Canadian Environmental Protection Act 1999</i> (CEPA 1999)
	Section 73 Permit	<i>Species at Risk Act</i>
	Authorization to work within Migratory Bird Sanctuary	<i>Migratory Birds Sanctuary Regulations</i>
Fisheries and Oceans Canada	Section 35(2): Serious Harm to Fish Authorization	<i>Fisheries Act</i>
	Section 73 (SARA): Listed Fish Species Permit	<i>Fisheries Act</i>
Industry Canada	Radio Licence	<i>Radio Communication Act</i>
National Energy Board	Request for Work Approval	NEB Act and <i>Canada Oil and Gas Operations Act</i> <i>Navigable Waters Protection Act</i>
Natural Resources Canada	Ammonium Nitrate Fuel Oil Permit	<i>Explosives Act</i> (explosive regulation, 2013)
	Temporary Blaster’s Licence or Blaster’s Permit	<i>Explosives Act</i> (explosive regulation, 2013)
	Temporary Magazine Licence	<i>Explosives Act</i> (explosive regulation, 2013)
Parks Canada	Special Activity Permits	<i>Canada National Parks Act</i>
Transport Canada	Aeronautics Obstruction Clearance (if required during construction)	<i>Aeronautics Act</i> , Canadian Aviation Regulations (dependent upon construction methods chosen and not for the work, only the “activity,” i.e. construction, not structure)
Vancouver Fraser Port Authority	Project Permit (WMT)	Vancouver Fraser Port Authority Letters Patent Port Authority Operations Regulations <i>Canada Marine Act</i>
	Building Permit (WMT)	Vancouver Fraser Port Authority Letters Patent Port Authority Operations Regulations <i>Canada Marine Act</i>

<sup>12</sup> For First Nations operating under the *First Nations Land Management Act* (FNLMA), no *Indian Act* authorization or permits are required. These First Nations make decisions under their own land codes and, if required, community approval processes. The Minister of Indigenous and Northern Affairs does not have a review or decision-making role regarding the reserve lands of First Nations under the FNLMA, as these authorities are now held by operational First Nations.

**Table 7 – Potential Provincial Authorizations**

<b>Responsible Agency or Department</b>	<b>Permit</b>	<b>Legislation</b>
BC Oil and Gas Commission	Cutting permits under section 47.4 and section 117 to harvest Crown timber	<i>Forest Act</i>
	Temporary occupation of Crown land along the pipeline RoW for camps, access, workspaces, etc. Road Use permits Quarry Permit/Soil Removal Permit, Quarry Licence of Occupation, and Borrow Pit Permit	<i>Land Act</i>
	Section 10: Use approvals (short-term use of water) Section 11: Changes in and about a stream	<i>Water Sustainability Act</i>
BC Ministry of Environment – BC Parks	Park use permit applications	<i>Park Act</i>
BC Ministry of Transportation and Infrastructure	Section 62 : <ul style="list-style-type: none"> <li>• Lane Closures / Traffic Control</li> <li>• Clearing and Grubbing</li> <li>• Revegetation</li> <li>• Blasting</li> <li>• Survey / Exploratory Work</li> <li>• Burning</li> <li>• Pipeline Crossing Ministry Road RoW</li> <li>• Substation, Camp, etc.</li> <li>• Power Lines within the Ministry RoW</li> <li>• Any work on Ministry RoW</li> </ul> Section 12 (Provincial Public Undertaking Reg. 4/2010): <ul style="list-style-type: none"> <li>• Structures within a setback of 4.5 m outside of the Ministry RoW</li> </ul>	<i>Transportation Act</i>
	Section 5 of <i>Industrial Road Act</i> and sections 49 and 62 <i>Transportation Act</i> . <ul style="list-style-type: none"> <li>• Access to Highway</li> <li>• Access / Road Construction within Ministry RoW</li> </ul>	<i>Industrial Road Act &amp; Transportation Act</i>
	Section 8: <ul style="list-style-type: none"> <li>• Commercial vehicle</li> <li>• Oversize vehicles</li> </ul>	<i>Commercial Transportation Act</i>
BC Ministry of Forests, Lands and Natural Resource Operations	Dike Maintenance Application Approval	<i>Dike Maintenance Act</i>
	Works Permit Forest Service Road Junction Permit	<i>Forest Act</i>
	Section 16: Forest Recreation Usage	<i>Forest Recreation Regulation</i>

Responsible Agency or Department	Permit	Legislation
BC Ministry of Forests, Lands and Natural Resource Operations (continued)	Section 12: Heritage Alteration Permit Heritage Inspection Permit – Clearance	<i>Heritage Conservation Act</i>
	Old Growth Management Area Boundary Adjustment Approval	<i>Land Act</i>
	Burning Registration Number	<i>Wildfire Act</i>
	Section 19: General permit, Animal care permit <i>Wildlife Act</i> Exemption Permits Section 40: Temporary Closure to Hunting, Trapping or Guide Outfitting	<i>Wildlife Act</i>
Alberta Culture and Tourism	<i>Historical Resources Act</i> clearance	<i>Historical Resource Act</i>
Alberta Environment and Parks (AEP)	Public Land Agreement (Pipeline Land Agreement) on Crown land	<i>Public Lands Act</i>
	Fish Research Licence for fish rescue at isolated crossings	<i>Alberta Fisheries Act</i>
	Temporary Field Authorization for access roads on Crown land	<i>Public Lands Act</i>
	Wildlife damage permits for beaver, lodge and beaver dam removal	<i>Wildlife Act</i>
	Research and Collection Permit	<i>Wildlife Act</i>
	<i>Water Act</i> approval for construction within a water body	<i>Water Act</i>
	Notification under the Code of Practice for Watercourse Crossings	<i>Water Act</i>
	Notification under the Code of Practice for Pipelines and Telecommunication Lines Crossing a Water Body	<i>Water Act</i>
	Notification under the Code of Practice for the Temporary Diversion of water for Hydrostatic Testing of Pipelines	<i>Water Act</i>
	Registration under the Code of Practice for the Release of Hydrostatic Test Water from Hydrostatic Testing of Petroleum Liquid and Gas Pipelines	<i>Environmental Protection and Enhancement Act</i>
Alberta Energy Regulator (AER)	Environmental Field Report for Pipeline Licence or Approval	<i>Alberta Public Lands Act</i>
Alberta Transportation	Roadside Development Permit	<i>Highways Development and Protection Act</i>
	Several other items (e.g. dangerous goods, overweight permit)	

### 2.3.1 PRINCIPLES INVOLVED IN ESTABLISHING THE DEPTH OF DUTY TO CONSULT AND IDENTIFYING THE EXTENT OF ACCOMMODATION

A constitutional duty to consult arises when the following three requirements are present:

- The Crown has actual or constructive knowledge of an Aboriginal Interest;
- The Crown contemplates conduct, including a statutory decision; and
- That conduct or decision may have an adverse impact on the Aboriginal Interest.<sup>13</sup>

In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, the Supreme Court of Canada established that the Crown is required to consult with Aboriginal groups on Crown-authorized activities that might adversely affect the exercise of Aboriginal Interests and that the extent or level of the consultation is proportionate to preliminary assessments of the following factors:

- Strength of the case for any claimed Aboriginal rights, including title, that may be adversely affected; and
- Seriousness of potential impact of contemplated Crown action or activity to adversely impact Aboriginal Interests.

In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, the Supreme Court of Canada also applied this consultation framework to treaty rights, where a Crown-authorized activity may adversely affect a treaty right. The continued application of this framework to treaty rights was confirmed in *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48. The Crown also has a consultation obligation in relation to potential impacts on other proven or established Aboriginal rights or title.

The extent or level of the Crown's obligation to consult is described in the *Haida* case as lying on a spectrum from notification to deep consultation. The stronger the case for supporting any claimed Aboriginal right, and the greater the potential of impact on an Aboriginal Interest, the deeper the level of consultation that may be required.

Factors that may indicate a low or notification level of consultation include:

- Little or no indication of any historical or current use of area by the Aboriginal group; or
- Proposed Crown action or activity is anticipated to result in minimal to no impact on the land or resources, i.e. potential for adverse impacts on Aboriginal Interests is minor or unlikely.

Conversely, factors that may indicate a deeper level of consultation include:

- Many indications of historical and current use of area by the Aboriginal group; and

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<sup>13</sup> Ref: *Hamlet of Clyde River et. al. v. TGS-NOPEC Geophysical Co. ASA (TGS)*, [2015] F.C.J. No. 991 (FCA) at para. 37 ("Clyde River"); *Haida* at para. 35; *Behn v. Moulton Contracting Ltd.*, [2013] 2 S.C.R. 22 (S.C.C.) at para. 29. *Rio Tinto* at para. 51

- Proposed Crown action or activity is anticipated to result in a moderate to severe impact on the land or resources and corresponding Aboriginal Interests.

Crown consultation must be carried out in good faith and, where appropriate, may lead to a duty to accommodate. While there is no duty on the government or on the Aboriginal group to reach agreement, the Crown is required to afford the Aboriginal group consultation that is meaningful (i.e. provides opportunities for Aboriginal groups to learn about the Project, have their interests heard, understood and responded to or accommodated as appropriate).

Aboriginal groups should not frustrate the Crown's reasonable, good faith attempts to consult; consider information provided by government, regulatory agencies or the proponent; express their interests and concerns; and consult in good faith.

### **Initial Depth of Consultation**

Based on the application of the above principles, and the initial scope of consultation described above, the federal Crown conducted initial depth of consultation assessments for each Aboriginal group potentially impacted by the Project. Initial depth of consultation assessments were conducted by the MPMO in collaboration with other federal departments based on preliminary strength of claim information and consideration of an Aboriginal group's proximity to and use of lands and resources in the spatial study areas used for the assessment of the effects of the Project. On May 27, 2015, the Crown filed its preliminary depth of consultation on the NEB hearing record.<sup>14</sup>

The NEB and Crown reviewed and refined the depth of consultation assessments throughout the NEB Review and Crown consultation processes, based on the following:

- Information contained in the proponent's Project Application;
- Information provided by Aboriginal groups regarding their views of how their Aboriginal Interests might be adversely impacted by the Project;
- Input received from Aboriginal groups on the Crown's methodology for assessing the seriousness of potential adverse impacts of the Project, including specific criteria and thresholds the Crown should consider;
- Aboriginal group comments received on draft conditions issued by the NEB in respect of the Project;
- Conclusions and recommendations of the NEB in respect of any residual effects of the Project and required regulatory conditions; and
- Consultation with Aboriginal groups regarding potentially outstanding issues, including recommendations for additional accommodation, as appropriate

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<sup>14</sup> NRCan's Written Evidence May 27, 2015 – Filing [A70313](#)

## **Preliminary Understanding of Impacts**

The Crown's preliminary understanding of potential adverse Project impacts on Aboriginal Interests and other interests is presented in Section 4.3 of this report, along with consideration of how these potential impacts and interests have been considered in the proponent's Application, the NEB hearing, the NEB Report and the Crown consultation process.

### **2.3.2 PRELIMINARY STRENGTH OF CLAIM**

The regulatory review is not a rights determining process in relation to asserted Aboriginal rights or title. Instead, an objective of the consultation process is to identify potential adverse effects of the Project on Aboriginal Interests and explore measures to avoid, mitigate or otherwise appropriately address such effects. The initial assessment of strength of claims of Aboriginal Interests is specific to the areas that are in proximity to the Project and does not apply to other parts of the asserted traditional territories.

Strength of claims are determined based on information currently available to government and are subject to change should case law change or additional information become available, including any information that may be provided during consultation. In considering Aboriginal rights claims, information relating to activities, practices, traditions, or customs integral to the distinctive culture at the time of contact by Europeans was considered. In considering Aboriginal title claims, information regarding sufficient and exclusive occupation at 1846 was considered.

The Crown recognizes different perspectives on the scope and nature of Aboriginal rights and that any discussions of such matters must be sensitive to perspectives of Aboriginal groups on the meaning of their rights, either asserted or negotiated.

To ensure that all potentially affected Aboriginal groups were engaged in consultation, the federal Crown initially focused its consultation efforts at the *Indian Act* Band level or with organizations representing Métis communities either independently or as part of an umbrella organization or society.

During consultation on the Project, many individual First Nation Bands identified to the Crown their view of collectively held Aboriginal rights and title interests and indicated a preference to be consulted in that manner. As a result, the Crown consulted at a variety of different levels, including with individual First Nation communities, with nations asserting collectively held rights and title interests, with Treaty First Nations and with a variety of Métis communities and societies.

### **2.3.3 ASSESSING POTENTIAL IMPACTS ON ABORIGINAL INTERESTS**

The analytical framework for assessing the seriousness of impacts on Aboriginal Interests is not the same as the significance test for environmental, socio-economic or other effects. However, in many instances, information regarding potential biophysical and/or socio-economic effects from a project or activity, and in particular effects to traditional land and marine resource uses, will be relevant to an assessment of adverse impacts on Aboriginal Interests.

The Crown recognizes that adverse Project impacts on Aboriginal Interests may not arise solely from changes to the biophysical environment. Aboriginal Interests are also understood as traditional practices related to hunting, trapping, gathering, fishing and marine harvesting, but rights may not be limited to these practices.

With respect to the assessment of the seriousness of adverse Project impacts on Aboriginal Interests for the Project, the Crown considers the following types of information where available:

- The location of the area understood to be the Aboriginal group's area of traditional use;
- Past, present, and anticipated future Aboriginal uses of the Project area and its surroundings, including the frequency and timing of such uses by each Aboriginal group;
- The baseline conditions of valued component's associated with the exercise of Aboriginal Interests, incorporating consideration of other activities or development in the local or regional area that may contribute to the current condition of the valued components;
- The context within which the rights are exercised, such as the relative importance of the Project area and its surroundings to the exercise of each group's Aboriginal Interests, including any special characteristics or unique features of that area;
- The relative availability of other areas in reasonable proximity, within the traditional territory of each Aboriginal group where the meaningful exercise of Aboriginal Interests could reasonably occur;
- Any residual impacts of the Project and cumulative effects to VCs associated with the exercise of Aboriginal Interests (informed by the NEB Report) including consideration of the magnitude<sup>15</sup> and direction of change, geographic extent,<sup>16</sup> duration<sup>17</sup> and frequency of change, reversibility<sup>18</sup> of the change and probability of occurrence;<sup>19</sup>
- The extent to which the Project could affect each Aboriginal groups' access to, and use of, the Project area to exercise Aboriginal Interests; and
- Measures proposed to mitigate adverse effects to corresponding Aboriginal Interests.

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<sup>15</sup> NEB definition of high magnitude: "effect would affect numerous individuals or affect the resource or parties involved in a substantial manner; is beyond environmental, regulatory or social standards or tolerance; and would impact quality of life, result in lasting stress and is generally not accepted by society."

<sup>16</sup> NEB definitions for geographic extent criteria provided for project footprint (e.g. width of RoW), LSA, RSA for receptor being considered.

<sup>17</sup> NEB definitions for temporal extent criteria provided for short-term (weeks-months), medium-term (months-years), long-term (years-decades).

<sup>18</sup> NEB definitions for reversibility criteria are either: 1) reversible to baseline within the life of the Project; or 2) decades, generations or permanent

<sup>19</sup> Ultimately, the Crown's assessment of the level of seriousness of a potential impact on Aboriginal Interests considers likely adverse residual effects (whether deemed significant or not by the NEB) that could cause a change to the practice of a right.

In considering potential impacts of Project-related activities on Aboriginal harvesting rights claims, the Crown has considered the following three components of Aboriginal rights:

- **Biophysical factors:** Consideration of potential effects to biophysical factors important for, or associated with, the exercise of an Aboriginal harvesting right. This can include consideration of VCs relevant to the exercise of the right, the residual and cumulative effects analysis of those VCs, the species harvested by the Aboriginal group, relevant mitigation measures, and the efficacy of such mitigation measures;
- **Specific sites or areas:** Consideration of potential effects to specific sites or areas of importance for traditional use, or sites or areas where the rights are exercised. This can include consideration of whether there are any traditional land or marine use sites identified overlapping or in proximity to the project area, the number of sites to the project, effects to the access to such sites, and effects to frequency or timing to access such sites, increased public access, relevant mitigation measures, and the efficacy of such mitigation measures; and
- **Social, cultural, spiritual, experiential factors:** Consideration of potential effects to social, cultural, spiritual and experiential aspects of the exercise of the right. This can include potential effects of the project on the experience of exercising rights in the area, effects to community health, on socio-cultural institutions, teaching and knowledge transfer, ceremonial/spiritual practices associated with the right, and the relative importance of the project area to the exercise of right.

In considering potential impacts of Project-related activities on Aboriginal title claims, the Crown has considered the following three components of Aboriginal title:

- **Use and occupation:** Consideration of potential alienation of an area, the degree of potential disturbance or functional effect of the potential disturbance associated with the Project, how the proposed decision might restrict community members' access to the area, and how the proposed decision might affect community members' enjoyment, experience, and use of the area, now and in the future;
- **Decision-making:** Consideration of whether the proposed decision would result in a new tenure or transfer of ownership to the area, the extent to which an Aboriginal community might be involved in the decision-making process, and whether the activity might be consistent/inconsistent with any cultural/other objectives of the Aboriginal group for management in this area, now and in the future; and
- **Economic benefits:** consideration of whether the Project-related decision might affect a community's ability to derive direct and/or indirect economic benefits from the area, and how the proposed decision might affect a community's economic development aspirations for the area, now and in the future.

A final consideration in assessing the seriousness of potential impacts on Aboriginal Interests is the overall level of confidence in the assessment, as limitations may arise from a lack of information relating to baseline conditions, lack of knowledge of cause and effect relationships,



lack of scientific certainty in the review of Project specific data, or the degree of subjectivity or professional opinion applied.

Impacts on Aboriginal Interests are assessed for each individual Aboriginal group and for each category of rights. These impacts are described based on the level of seriousness of potential impacts from negligible to serious, defined as follows:

- Negligible impact – no detectable impact or any change from current conditions;
- Minor impact – ability to exercise the right is minimally disrupted;
- Moderate impact – ability to exercise the right has been diminished or disrupted; and
- Serious impact – ability to exercise the right has been significantly diminished.

In some instances the Crown has used hyphenated levels of impacts (e.g. minor-to-moderate), which indicate that the impacts fall between the two categories. When reporting on impacts for any one Aboriginal group, we acknowledge that the impacts on the group always vary in time and space. That is, impacts on Aboriginal Interests in one area of a group's territory are not the same as elsewhere and impacts during construction are not the same as during operations. The impact assessment reported for each group is the greatest expected impact on the Aboriginal Interest as a result of routine Project construction and operations.

Impact statements for each Aboriginal group are included in appendices A to E.

## 2.4 Asserted or Established Aboriginal Rights and Treaty Rights

The following sections of this report explain how information on the nature and scope of Aboriginal Interests have been considered and used to inform the consultation process to date.

### 2.4.1 TREATIES

In understanding the scope and nature of the rights and obligations under historic or modern treaties, the Crown is guided by the text of the treaty, as well as the understandings and intentions of the Aboriginal groups and Crown participants to the making of the treaty or subsequent adhesions, following rules of treaty interpretation articulated by the Supreme Court of Canada.

#### **Modern Treaty Nations**

##### *Tsawwassen First Nation*

The Tsawwassen Final Agreement is a treaty within the meaning of section 35 of the *Constitution Act, 1982*, entered into with B.C. and Canada and came into effect on April 3, 2009. This treaty sets out requirements for Canada and B.C. to consult with Tsawwassen, including providing the opportunity to participate in an environmental assessment process.

### ***Maa-nulth First Nations***

Subject to the Maa-nulth First Nations Final Agreement, this is a treaty within the meaning of section 35 of the *Constitution Act, 1982*, entered into with B.C. and Canada and came into effect on April 1, 2011. This treaty sets out that each of the Maa-nulth First Nations has the right to harvest fish and aquatic plants, for food, social and ceremonial purposes, in the Maa-nulth Domestic Fishing Areas, the southern portion of which is in close proximity to the established marine shipping lanes to be used by Project-related tankers and other shipping vessels. The Maa-nulth First Nations and B.C. entered into a Reasonable Opportunity Agreement on May 22, 2014, setting out a process through which the parties would fulfill the treaty provisions that relate to ensuring that Maa-nulth First Nations are not denied a reasonable opportunity to harvest fish and aquatic plants by any authorizations made by B.C. Maa-nulth First Nations also have the right to harvest Wildlife for Domestic Purposes in the Wildlife Harvest Area and the right to harvest Migratory Birds for Domestic Purposes in the Migratory Bird Harvest Area. The southern portion of the Wildlife Harvest Area and the Migratory Bird Harvest Area are also in proximity to portions of the marine shipping lanes. Although not a component of the treaty, the Maa-nulth First Nations hold commercial fishing licences in accordance with a Harvest Agreement.

### **Historic Treaty First Nations**

For the historic treaties, the Crown understands that the parties created mutually binding obligations and that section 35 of the *Constitution Act, 1982* recognizes and affirms these existing treaty rights. For the parties to it, the Crown understands that the treaties had the effect of exchanging all undefined Aboriginal rights in or to the lands described, both surface and subsurface, for the defined rights in the treaty.

Specifically, with respect to Treaty 6, Treaty 7 and Treaty 8, in exchange for a surrender of “all rights, titles and privileges whatsoever, to the lands” and other promises, the Crown agreed, among other things, to set aside land as reserves, to provide both one-time and annuity payments, and to allow the First Nations to pursue their “usual vocations of hunting, trapping and fishing” subject both to the geographical limitations with respect to lands “required or taken up from time to time for settlement, mining, lumbering, trading or other purposes” and to reasonable government regulation.

Similarly with Douglas Treaties, First Nation signatories agreed to “surrender entirely and for ever” a geographic area described, and the Crown agreed, among other things, to set aside their villages and enclosed fields and agreed that the First Nations would be “at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.”

The Crown also understands that in Alberta, the treaty rights were modified following the conclusion of the *Natural Resource Transfer Agreements*, restricting the hunting, trapping and fishing rights for the purpose of food. Some Aboriginal groups have noted that the Natural Resource Transfer Agreements were not part of their treaty negotiations.

In addition, treaty harvesting rights include those activities reasonably incidental to the right itself, including harvesting activities undertaken for spiritual and cultural purposes.

A number of Aboriginal groups hold different understandings of what was agreed to in these treaties and have informed the Crown of this during consultation.

The historical and cultural context in which the treaties were made is relevant to their interpretation and the rights and obligations of the parties to it. That context includes reports submitted to the Superintendent General of Indian Affairs that cite assurances given that the treaties would not lead to any “forced interference with mode of life” and that “the same means of earning a livelihood would continue after the treaty as existed before it.” The Crown views these aspects as being consonant with the terms of historic treaties insofar as the mode of life and livelihood referred to in the report were the hunting, trapping and fishing activities protected by the treaty.

As stated by the Supreme Court of Canada in *Mikisew* (SCC, 2005), and reaffirmed in *Grassy Narrows* (SCC, 2014),<sup>20</sup> the Crown’s right to take up lands under historic treaties, such as Treaty 6, Treaty 7 and Treaty 8, is not absolute, and is subject to the duty to consult and, if appropriate, accommodate the treaty First Nations’ interests before reducing the area over which their members may continue to pursue their treaty harvesting rights. Although all Treaty 6, Treaty 7 and Treaty 8 First Nations are entitled to engage in hunting, fishing and trapping activities within the whole of their treaty area, where a treaty First Nation no longer has a meaningful right to hunt, trap, or fish in relation to the territory over which it has traditionally hunted, trapped, or fished, this would result in a treaty infringement.

When intending to take up lands, the Crown must exercise its powers in accordance with the Crown obligations owed to the Treaty First Nations, which includes:

- Being informed of the potential impact of the Project on the exercise of the rights to hunt, trap and fish;
- Communicating such findings to the First Nations; and
- Engaging with these First Nations in good faith and with the intention of substantially addressing their concerns.

The extent or scope of the duty to consult and accommodate required with a treaty First Nation depends on the seriousness of potential impacts on that First Nation, as discussed in the following sections of this report.

Adherents to Treaty 6, Treaty 7 and Treaty 8 have rights to hunt, trap and fish throughout their entire treaty area, and adherents to the Douglas Treaty have rights to hunt and fish within their traditional territories. Land use information and other evidence filed with the NEB was reviewed to understand interactions between the Project and First Nations’ traditional use areas including

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<sup>20</sup> *Mikisew* para. 56 and *Grassy Narrows* paras. 50-3.

areas used for spiritual and cultural purposes. Where a First Nation appeared to principally exercise treaty harvesting rights distant from the area to be directly impacted by the Project, the Crown determined that it was appropriate to engage with these First Nations at the lower end of the consultation spectrum.

The Crown approached consultation at the higher end of the consultation spectrum where there was clear evidence of potential Project interactions with the exercise of treaty harvesting and other traditional and cultural use rights. See Section 4 and Appendix A and Appendix D for further analysis of the potential impacts of the Project on the Alberta Treaty First Nations' rights and other interests, and the Douglas Treaty First Nations' rights and other interests, respectively.

## 2.4.2 ABORIGINAL RIGHTS, INCLUDING TITLE

### Approach to Consultation With Non-treaty First Nations

Non-treaty First Nations have asserted or established Aboriginal rights, including title, within their asserted traditional territories. The Crown's approach to understanding the nature of Aboriginal Interests with non-treaty First Nations is described in Section 2.4.2. Information on the unique nature and scope of each First Nations' asserted or established Aboriginal rights and title interests are provided in the group-specific appendix for each of these First Nations (Appendices B, C and D of this report).

### Approach to Consultation With Métis Nations

Métis are Aboriginal peoples of Canada, such that section 35 of the *Constitution Act, 1982* protects the customs, practices and traditions that were historically important features of Métis communities, who emerged subsequent to European "contact" and prior to the exercise of "effective control" by the European settlers. For Métis to be able to exercise Aboriginal rights, they must be able to demonstrate they are members of a modern Métis community that has ancestral linkages to an historic rights-bearing Métis community. The test for establishing Métis Aboriginal rights was set out by the Supreme Court of Canada decision in *R. v. Powley [2003] 2 S.C.R.*

In 2004, the Métis Nation of Alberta signed an Interim Métis Harvesting Agreement with the government of Alberta. In 2007, this agreement was replaced with the "Métis Harvesting in Alberta Policy" (updated in 2010), further outlining the criteria supported by the 2003 Supreme Court of Canada *Powley* decision. The policy recognizes eight Métis Settlements and 17 historic and contemporary communities for the purposes of Métis harvesting. Alberta Métis have the right to harvest for food through hunting, trapping, and fishing throughout the year within the community harvesting area (160 km surrounding the settlement or community) unless there is activity or development on the lands that would make harvesting unsafe or there is a closure for conservation reasons. Alberta Métis can also harvest on private lands with permission from owners or occupants.

At this time, the province of Alberta is prepared to consider, for the purposes of Métis harvesting, eight Métis Settlements and the following 17 communities as both historic and contemporary Métis communities: Fort Chipewyan, Fort McKay, Fort Vermilion, Peace River, Cadotte Lake, Grouard, Wabasca, Trout Lake, Conklin, Lac La Biche, Smoky Lake, St. Paul, Bonnyville, Wolf Lake, Cold Lake, Lac Ste. Anne and Slave Lake.

No Métis rights-bearing community in B.C. has been recognized by a court. In *R v. Willison*, 2006 BCSC 985, the B.C. Supreme Court was unable to conclude there was an historic Métis community in existence along the fur brigade trail in the southern part of the province. There has not been a judicial determination regarding the existence of a Métis community in northern B.C.

There were three Métis groups in B.C. included in consultation on the Project: Métis Nation BC, BC Métis Federation and the Kelly Lake Métis Settlement Society. The province of B.C. does not recognize a legal obligation to consult with Métis people as it is of the view that no Métis community is capable of successfully asserting site-specific section 35 rights in B.C.

On April 14, 2016, the Supreme Court of Canada, in the Daniels decision, declared that Métis and non-Status Indians are “Indians” for the purpose of federal Parliament’s law-making jurisdiction under sub-section 91(24) of the *Constitution Act, 1867*. The Government of Canada’s position is that not all Canadians who self-identify as Métis are section 35 rights-holders and thus there is a distinction between Métis self-identification and Métis Aboriginal rights. The 2003 Supreme Court of Canada decision in *R. v. Powley* provides the test needed to prove Métis Aboriginal rights, and Métis self-identification is only one component of a broader objectively verifiable process that is required in order to meet the Powley test.

### **Other Aboriginal peoples (Aboriginal groups) for which a legal duty to consult was not recognized for the purposes of the Project**

Please see Appendix 9 of the NEB Report for a list of Aboriginal groups and organizations engaged by the proponent in respect of the Project for which the Crown did not identify a legal duty to consult.

## 3. SUMMARY OF CONSULTATION ACTIVITIES

The following sections discuss the procedural elements and chronology of Aboriginal consultations and engagement activities undertaken by the proponent, the NEB, and the Crown.

### 3.1 Proponent's Engagement Process

In 2011, the proponent began to identify Aboriginal groups potentially impacted by the Project. Before it submitted its Project Application to the NEB, the proponent worked with the federal and provincial governments to develop its initial scope of Aboriginal engagement. The proponent's list included 105 Aboriginal groups, including Aboriginal communities, associations, councils, and tribes and two non-land based Métis groups in B.C. As of July 2016, the proponent's engagement list has grown to 133 Aboriginal groups.

In May 2012, the proponent sent letters to Aboriginal groups identified as potentially impacted by the Project. These letters introduced the Project, announced the start of the 18 to 24 month pre-Application phase of the Project, and outlined the anticipated project review schedule and routing. These letters invited Aboriginal groups to share any information related to land or resource use that could potentially be impacted by the Project as well as any other issues and concerns. Of the groups, the proponent identified a sub-set that was not directly in the area of the proposed expansion. For these groups, the proponent's May 2012 correspondence served as a notification letter. Meanwhile, the proponent determined that 62 Aboriginal groups required a deeper level of engagement: the proponent invited these groups to be involved in early project planning and scoping and indicated it would provide funding to these groups so support their involvement.

The proponent engaged with potentially affected Aboriginal groups through its Aboriginal Engagement Program. The proponent provided approximately \$12 million of capacity funding to the potentially affected groups who accepted this offer, as well as funding to conduct TLRU and TMRU studies. Some Aboriginal groups did not accept the proponent's offer for funding.

The proponent has indicated that engagement consisted of one-on-one meetings, community-wide discussions, project newsletters, telephone conversations, information sessions, and other forms of correspondence. The proponent also negotiated group and community-specific protocols to guide engagement efforts.

According to the proponent, it collaborated with potentially impacted Aboriginal groups to identify and support economic development opportunities resulting from the Project. As of November 2016, the Crown was aware that 33 potentially affected Aboriginal groups have signed a confidential mutual benefit agreement (MBA), including a letter of support, with the proponent (see Table 12 in Section 4).

Should the GiC approve the Project, the NEB conditions would require the proponent to conduct further engagement with potentially affected Aboriginal groups. The proponent has committed to engaging Aboriginal groups throughout the construction and operation of the Project. If approved by the two responsible B.C. Ministers, EAO's proposed environmental assessment certificate conditions would also require additional engagement by the proponent with Aboriginal groups. In addition to complying with NEB and EAO conditions, the proponent has indicated that it would continue to engage with groups through the regulatory processes, Project newsletters and updates, ongoing meetings and correspondence.

More detailed information regarding the engagement undertaken by the proponent is provided in its Application (Volume 3B), its consultation updates filed on the NEB evidentiary record, its December 2015 Final Written Argument submitted to the NEB, its Reply Argument filed in February 2016, the NEB Recommendation Report, and in the supplemental Aboriginal Engagement Report submitted to the EAO.<sup>21</sup> The interests and concerns raised by Aboriginal groups during the proponent's engagement process are discussed in Volume 3B, Section 1.5.1 of the Application; updates to the list of interests and concerns raised are provided in subsequent consultation updates. Details relating to the TLRU, TMRU, and cultural use studies conducted by Aboriginal groups are discussed in Volumes 5 and 8 of the proponent's [Application](#), found on the NEB's hearing website for the Project.

### 3.1.1 TERMPOL ENGAGEMENT

The Technical Review Process of Marine Terminal Systems and Transshipment Sites (TERMPOL) is a voluntary review process, in which proponents involved in building and operating a marine terminal system for bulk handling of oil, chemicals and liquefied gases can participate. No approvals or permits are issued as a result of the TERMPOL review. Through this process, a proponent works with a TERMPOL Review Committee (TRC) chaired by Transport Canada, which provides a report on the proponent's TERMPOL submission with findings and recommendations.

TERMPOL reviews focus on the marine transportation components of a project (i.e. when a tanker enters Canadian waters, navigates through channels, approaches the berth at a marine terminal, and loads or unloads oil or gas) with the intent to improve where possible those elements of a proposal that could in certain circumstances threaten the integrity of a vessel's hull while navigating and/or during cargo transfer operations alongside the terminal.

The TRC for the Project consisted of representatives from federal departments and authorities with expertise and/or responsibilities relevant to the Project and included Transport Canada, Fisheries and Oceans Canada (including the Canadian Coast Guard and Canadian Hydrographic Service), ECCC, Pacific Pilotage Authority, and Port of Vancouver. The BC Coast Pilots Ltd. and United States (US) Coast Guard also provided comments and input.

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<sup>21</sup> [http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic\\_document\\_459\\_40921.html](http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_document_459_40921.html)

The TERMPOL review of the marine shipping component of the Project was carried out from December 2013 to December 2014. As part of the Project review process for marine shipping, the TRC recommended that the proponent engage marine users, including Aboriginal groups, to:

- Provide sufficient information about the Project to enable participants' understanding of the Project;
- Listen to concerns raised by Aboriginal groups and, where possible, address these concerns;
- Provide Aboriginal groups an opportunity to review and comment on the draft surveys and studies of interest and consider Aboriginal groups' comments;
- Document its efforts to engage Aboriginal groups, including a written communication log, a summary of issues raised, a record of how the proponent has addressed concerns (as applicable), and a description of outstanding issues;
- Provide Aboriginal groups an opportunity to review and validate the summary of issues raised; and
- Provide Transport Canada with a copy of the documentation above.

In December 2013, Transport Canada sent a letter to 30 Aboriginal groups with traditional territories along the Project's shipping route, providing information on the TERMPOL review process and advising that the TRC had recommended that the proponent engage Aboriginal groups on TERMPOL surveys and studies to incorporate relevant local and traditional knowledge that could enhance the proponent's technical assessment of marine safety. Transport Canada also participated in proponent-led workshops for Aboriginal groups to explain the TERMPOL process and in December 2014 provided technical briefings on the TERMPOL report findings and recommendations to interested Aboriginal groups. Part 3 of the proponent's Technical Update #3 provides information on the proponent's Aboriginal Engagement Program specific to TERMPOL-related engagement between August 1, 2013, and July 31, 2014. Starting in August 2013, the proponent engaged Aboriginal groups on the type of information and research being undertaken to develop TERMPOL studies. Aboriginal groups expressed interest in the timing, content of studies and process for shaping the TERMPOL studies, and participating in the review process.

On November 13, 2013, the proponent sent a letter to Aboriginal groups to notify them of the availability of the TERMPOL studies for review. Through this letter, the proponent:

- Affirmed that the TERMPOL application and studies would be submitted to Transport Canada in December 2014;
- Committed to distribute the studies to Aboriginal groups that requested copies; and
- Stated a need for advice and feedback to Trans Mountain on the TERMPOL reports within two to three months.



On December 16, 2013, and January 27, 2014, the proponent sent letters to the Aboriginal groups who requested copies of TERMPOL studies. Following the distribution of the letters and studies, the proponent followed up with Aboriginal groups who requested the studies to discuss:

- Participating in a TERMPOL workshop;
- Providing of a written response to Trans Mountain;
- Initiating of a third party review; and/or
- Allocating of capacity funding for the third party review.

Trans Mountain received three formal responses to the TERMPOL studies and conducted three TERMPOL workshops with seven Aboriginal groups. Formal responses were provided to questions raised by Aboriginal groups and information and the proponent used feedback received from Aboriginal groups in its December 2014 filing with Transport Canada.

The results of the TERMPOL review were provided to the NEB in support of its review of the Project.

## 3.2 National Energy Board Engagement

Prior to its public hearing, the NEB carried out a program of early Aboriginal engagement, consisting of correspondence in August 2013 to 129 potentially interested Aboriginal groups and organizations introducing the Project and the associated regulatory review. This correspondence also included a letter from the MPMO introducing the federal government's proposed approach to Crown consultation for the Project. Between November 2013 and February 2014, NEB staff presented information in person at nine community meetings attended by 22 different Aboriginal groups and organizations.

As discussed in Section 1.3.1, the NEB determined that the Project would be subject to an integrated regulatory review and environmental assessment. Three NEB Board members were appointed to the NEB Panel to conduct the regulatory hearing pursuant to the NEB Act and procedural orders, as well as to serve as the responsible authority for the EA conducted pursuant to the CEAA 2012. The NEB Chair assigned the NEB Panel members on November 28, 2013.

On July 29, 2013, the NEB determined the List of Issues it would consider during the hearing process, which included the potential impacts of the Project on Aboriginal Interests.

The NEB Review started in April 2014 and was subject to a legislated time limit of 15 months; however, on August 12, 2014, the clock on this time limited stopped for a seven month excluded period. On September 18, 2015, it stopped again for four months.

Commentors and intervenors in the hearing had an opportunity to express their concerns regarding potential adverse impacts of the Project. For Aboriginal groups, this included impacts on their Aboriginal Interests. The NEB Panel's responsibility included consideration of evidence provided on these potential adverse impacts, including evidence provided by the proponent.

Based on the public reporting of all non-confidential evidence, the Crown was able to track concerns raised by Aboriginal groups along with avoidance, mitigation and accommodation measures proposed by the proponent and recommended by the NEB.

The NEB hearing provided opportunities for Aboriginal group intervenors to give oral traditional evidence (OTE), written evidence, submit information requests, file motions, and submit a final written summary argument and oral summary argument, including comments on draft NEB conditions. Crown officials were present during the majority of OTE hearings and all final oral summary arguments.

In total, 83 Aboriginal groups on the Crown consultation list participated in the NEB hearing, either individually or as part of a collective.

### **3.3 Federal Government Consultation**

As noted above, the MPMO coordinated federal departments' participation in the NEB Review, as well as the Crown consultation process. The federal departments and agencies who provided expertise and advice during the NEB Review and Crown consultations were Fisheries and Oceans Canada, Canadian Coast Guard, Transport Canada, Natural Resources Canada, ECCC, Health Canada, Parks Canada Agency, Indigenous and Northern Affairs Canada and Vancouver Fraser Port Authority.

#### **3.3.1 EARLY ENGAGEMENT PHASE**

In advance of the NEB review, the MPMO and NEB developed a list of potentially impacted Aboriginal groups and offered to meet with groups on the list to outline the NEB review process and anticipated timelines, availability of participant funding, and Canada's approach to Crown consultations.

##### **Early Crown/NEB Engagement Meetings (Summer–Fall 2014)**

In May 2014, the MPMO sent letters to 53 groups identified as potentially being owed a moderate to high level of consultation in respect of the Project. This letter outlined how the Crown would carry out its duty to consult, noting that the Crown would rely on the NEB Review, to the extent possible. The letter also indicated that Aboriginal groups who had concerns should discuss these concerns with the proponent and bring forward unresolved concerns to the NEB during the hearing process, as the NEB had authority to develop conditions that could help address these concerns.

This early engagement letter encouraged Aboriginal groups to participate in the oral Aboriginal traditional evidence hearings and to apply for the NEB participant funding program. It indicated that the Crown would track issues raised by Aboriginal groups throughout the NEB Review to determine whether additional consultation was required and if so, that such consultations would

take place after the NEB closed its hearing record. The letter also extended an offer to meet with interested Aboriginal groups in order to discuss the NEB Review and consultation process, respond to any questions or concerns, and provide further information on participation in the project review.

In May 2014, the MPMO invited Aboriginal groups to meet, and as a result, 14 meetings took place with representatives of 31 groups during June and July 2014 to discuss how the NEB hearing would be used in Crown consultations. The NEB participated in some of these meetings.

In February 2015, the MPMO sent letters to 97 Aboriginal groups and organizations representing all 112 individual Aboriginal groups included in the Crown's scope of consultation at that time. This letter set out the Crown's consultation framework, which organized consultation into four phases: Phase I – Early engagement; Phase II – NEB hearing; Phase III – government decision making (representing the time between the close of the NEB hearing record and a GiC decision on the Project), and; Phase IV – Regulatory authorizations, should the Project be approved.

The consultation framework communicated in February 2015 continued to be refined, primarily as a result of changes to the timelines described below.

In May 2015, the MPMO sent 95 letters to Aboriginal groups or collective organizations representing 115 individual Aboriginal groups identified as being potentially affected by the Project at that time. One purpose of this correspondence was to offer an opportunity for groups to apply for participant funding from the Crown to support their engagement in the consultation process following the close of the NEB hearing record. The letter also:

- Explained the Crown's intent to use the NEB's June 2015 information request to intervenors round of the NEB hearing to seek feedback on the completeness and adequacy of the Crown's tracking of Aboriginal group issues and proponent commitments to that point in the process;
- Provided information on mandates and expertise of federal departments and agencies involved in the review of the Project; and
- Described the process and substance of consultations to take place following the close of the NEB hearing record, including the purpose of this Consultation and Accommodation Report and options for addressing potentially outstanding concerns as part of the government decision making phase.

Federal officials had nine telephone calls with 10 Aboriginal groups and several email exchanges during the spring of 2015. Following the May 2015 letter, 98 follow-up emails were sent and eight calls were made to introduce the newly appointed Crown Consultation Lead. In addition, following the June 22, 2015, information request to other intervenors filing, 57 email follow-ups were sent to help facilitate review and response to the Crown's information request.

### 3.3.2 NATIONAL ENERGY BOARD HEARING PHASE

The Crown used the NEB review, correspondence and other direct forms of consultations with Aboriginal groups to:

- Inform itself and Aboriginal groups about the Project and the nature of any adverse impacts on Aboriginal Interests;
- Understand issues and concerns of Aboriginal groups participating in the process; and
- Consider mitigation measures proposed by the proponent and/or recommended by the NEB in the form of terms and conditions (including proponent commitments that may address adverse impacts on rights).

Throughout the NEB hearing, each federal authority tracked issues related to the Project, as well as those of Aboriginal groups that were related to the departments' mandates. The MPMO worked with federal departments and agencies to explore in its May 27, 2015, evidence filing and subsequent information requests or responses to the NEB the connections between the issues raised by Aboriginal groups, departmental mandates and potential impacts on Aboriginal Interests.

On May 27, 2015, the MPMO introduced its evidence about the government's approach to Crown consultation with the NEB.<sup>22</sup> The evidence described the role of the MPMO and the past, ongoing and future consultations through the four consultation phases and identified all the Aboriginal groups for which the Crown recognized a duty to consult along with the Crown's preliminary assessment of the depth of consultation owed to each of these groups.

On June 22, 2015, the MPMO filed information requests to all Aboriginal group intervenors, seeking feedback on the draft issues tracking tables. Through this request, the MPMO sought to make sure that the issues listed accurately reflected each group's concerns and whether proponent commitments made to date adequately addressed those concerns.<sup>23</sup> Responses from Aboriginal groups were carefully reviewed and served to further inform the Crown's understanding of Aboriginal groups' issues, concerns and the potential adverse impacts of the Project on their interests.

On January 12, 2016, the MPMO and several other federal departments filed written arguments-in-chief including comments on draft NEB conditions. Several of these comments pertained directly to the Crown's interest in avoiding or minimizing potential adverse impacts from the Project on Aboriginal Interests.

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<sup>22</sup> <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2786712&objAction=browse&viewType=1>

<sup>23</sup> <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2791135&objAction=browse&viewType=1>

During the NEB hearing, Aboriginal group intervenors were afforded the opportunity to:

- Give evidence during oral traditional evidence hearings sessions;
- Ask questions to the proponent and other intervenors, including federal departments, during the information request rounds;
- Submit written intervenor evidence (both public and confidential);
- Submit written final arguments and comments on the NEB's draft terms and conditions; and,
- Provide oral summary arguments.

The NEB hearing also assisted the Crown in understanding at a broad level the issues and concerns of potentially affected Aboriginal groups who did not participate in the NEB Review, but who engaged in correspondence with the Crown and expressed support or similar issues noted by intervenors in the NEB hearing.

### **Direct Crown Consultation during the NEB Hearing**

During the summer of 2015, the federal government announced action to respond to various procedural concerns raised by Aboriginal groups by placing a renewed focus on building relationships between Crown officials and Aboriginal communities as a complement to the NEB Review. The Crown increased efforts to directly consult potentially affected Aboriginal groups, in addition to its reliance on the NEB process. Consultations took place through a variety of forms, including meetings, letters, emails and telephone calls designed to enable Aboriginal groups to:

- Bring issues and information to the NEB and participate in the hearing;
- Participate in direct discussions with the Crown about procedural questions or concerns and potential impacts from the Project on Aboriginal Interests;
- Review and comment on the draft NEB conditions (note: the MPMO offered non-intervenor Aboriginal groups an opportunity to share comments on the draft NEB conditions directly with the MPMO); and
- Inform the development of this Consultation and Accommodation Report.

MPMO maintained a consultation log to track all interactions between the Crown and individual Aboriginal groups or collectives throughout the process.

### **Excluded Period**

On August 21, 2015, the Panel responsible for the NEB's review of the Project announced that it was striking evidence from the hearing record that was prepared by or the under the direction of Mr. Steven J. Kelly and that oral summary arguments involving Aboriginal group intervenors would be postponed (these had previously been scheduled for September 2015). Subsequently, on September 24, 2015, the NEB announced a 16-week excluded period for its review of the Project. The excluded period (September 17, 2015 to January 8, 2016) allowed the NEB to acquire additional information from the proponent and intervenors in relation to the stricken and replaced

evidence. In [Procedural Direction No.18](#), the NEB set out its revised timeline for the completion of the hearing and extended the opportunity for participants to comment on the draft conditions to January 12, 2016.

On October 22, 2015, the NEB released [Procedural Direction No. 19](#), which noted that oral summary argument would take place between January 18 and February 12, 2016, and indicated that the NEB hearing record would close in February 2016, immediately following the filing of the proponent's written reply argument.

During the excluded period, the MPMO continued to correspond with Aboriginal groups to provide procedural updates on the NEB Review and consultation process. This correspondence encouraged Aboriginal groups to make use of the extended period for commenting on the draft NEB conditions. The Crown also offered opportunities to meet with Aboriginal groups to discuss the consultation process and their preliminary views on the NEB's draft conditions.

The MPMO offered to meet with Aboriginal groups assessed at the high and moderate levels of the *Haida* consultation spectrum throughout this period. As a result, the MPMO had meetings with the Tsleil-Waututh Nation, Squamish Nation, Leq'a:mel First Nation and the 13 member Bands of the Stó:lō Collective. Several other meetings took place by teleconference. The purpose of these meetings was to develop relationships with the groups, and to discuss the consultation process, related procedural matters and the draft NEB conditions for the Project.

In October 2015, MPMO officials participated in the Kamloops Pipeline Summit attended by several Aboriginal groups being consulted on the Project and presented information on how the Crown approaches consultation for major pipeline projects subject to regulatory review by the NEB, including the ongoing review of this Project. This opportunity to meet informally with representatives of Aboriginal communities with an interest in the Project coincided with email updates sent on October 26, 2015, and October 29, 2015, reminding groups of the extended comment period on the NEB's draft conditions and that Crown-Aboriginal group dialogue on potentially outstanding issues would begin with a series of meetings and discussions scheduled to take place immediately following the close of the NEB hearing record in February 2016.

On December 18, 2015, correspondence was sent to Aboriginal groups as another reminder of the NEB's revised deadline of January 12, 2016, for comments on the NEB draft conditions as part of written argument-in-chief. This correspondence also invited Aboriginal groups who were not participating in the NEB Review to submit any views on the NEB's draft conditions directly to the MPMO, to further assist the Crown in understanding any potentially outstanding Project-related issues or concerns.

The December 18, 2015, correspondence recognized various procedural issues raised to that point by Aboriginal groups with respect to the NEB review process and the extent to which the Crown could rely on this process to support its consultation and accommodation obligations, as well as many Aboriginal groups' expressed desire to work in partnership with the Crown to implement a consultation process that would meet commonly-held objectives.

Attached to the December 2015 correspondence to groups was a list of the Crown's objectives for the consultation process during the post-NEB hearing phase:

- To work cooperatively and collaboratively with Aboriginal groups during consultation on the Project;
- To communicate with Aboriginal groups about the Project and to understand the way in which it may adversely impact constitutionally protected Aboriginal rights or treaty rights;
- To respond to specific requests, address topic-specific issues related to the Project, and to gather input from potentially impacted Aboriginal groups regarding their concerns about the Project; and
- To listen to the issues and concerns raised, and create an environment that helps identify options to further avoid, mitigate or accommodate any outstanding concerns related to the Project.

As part of the December 2015 correspondence, Aboriginal groups were invited to share their own objectives for consultation, particularly in light of the December 4, 2015 Speech from the Throne that stated Indigenous peoples will be more fully engaged in reviewing and monitoring major resource development projects moving forward.

### **Oral Summary Argument**

From January to February 2016, several federal officials observed oral summary argument hearing sessions in Burnaby and Calgary. Officials used this experience, as well as a detailed review of written comments provided by Aboriginal groups in their argument-in-chief, to further understand potentially outstanding issues, including adverse impacts of the Project on Aboriginal Interests.

At the oral summary argument hearing in Calgary, the Crown Consultation Lead raised a preliminary matter with the NEB to offer an opportunity to the Panel members to question the Crown on any aspect of its intended approach to consultation.

### **3.3.3 INTERIM STRATEGY**

In the late summer and early fall of 2015, the Crown consultation process had been refined, initially influenced by the 16-week excluded period noted above, but further necessitated by the October 2015 federal election. These changes enabled a detailed review of key procedural concerns with respect to the consultation process up to that point, and a consideration of options for adjustments to the process that supported the new government's commitments, in particular to renew relationships with Indigenous peoples based on the recognition of rights, respect, co-operation and partnership.

As part of this review, the MPMO identified various opportunities and enhancements stemming in part from the input of potentially affected Aboriginal groups through the NEB process or direct consultations with the Crown.

On January 18, 2016, the MPMO sent letters to all potentially affected Aboriginal groups to note the Crown's awareness of procedural concerns, including:

- The impact of legislated time limits on the NEB Review and consultation process;
- The limited scope of the NEB Review;
- Inadequate participant funding for the NEB review process and Crown consultations; and
- An over-reliance on the NEB Review for meeting Crown consultation obligations.

The January letter also noted the government's intention to respond to these concerns through the Prime Minister's mandate letters, and invited groups to meet with the Crown consultation team during the upcoming post-NEB hearing phase.

On January 27, 2016, the federal government announced an interim strategy to support decisions on major resource projects.

The following principles would guide these decisions during the interim period:

1. No project proponent will be asked to return to the starting line — project reviews will continue within the current legislative framework and in accordance with treaty provisions, under the auspices of relevant responsible authorities and Northern regulatory boards;
2. Decisions will be based on science, traditional knowledge of Indigenous peoples and other relevant evidence;
3. The views of the public and affected communities will be sought and considered;
4. Indigenous peoples will be meaningfully consulted, and where appropriate, impacts on their rights and interests will be accommodated; and
5. Direct and upstream greenhouse gas emissions linked to the projects under review will be assessed.

In order to meet this commitment, the Governor in Council extended the time limit for a decision from three to seven months and Budget 2016 increased the amount of participant funding for Indigenous groups from \$700 thousand to \$2.2 million.

The MPMO shared the January 27 announcement with all Aboriginal groups, adjusted its work plans and approach for the post-NEB hearing phase of consultations by dividing the extended time period into two rounds, and in a series of emails, telephone calls and subsequent correspondence, extended invitations to approximately 100 individual Aboriginal groups to meet with Crown officials in a first round of meetings prior to the release of the NEB Report, which had previously not been contemplated.



### 3.3.4 POST-HEARING PHASE LEADING TO GOVERNMENT DECISION

Following the close of the NEB hearing record in mid-February, the MPMO letters to all potentially affected Aboriginal groups the government's interim measures, how the Crown intended to use the additional four months of government decision-making time, and plans to offer additional participant funding.

These letters also provided information on how the Crown assesses the depth of consultation owed to each group and noted the forthcoming opportunity to comment on the draft Crown Consultation and Accommodation Report.

#### **Post-NEB Hearing Phase Consultation**

A first set of face-to-face meetings with Indigenous groups took place between the close of the NEB hearing record up to the release of the NEB Recommendation Report on May 19, 2016. Individual or collective consultation meetings with approximately 60 Aboriginal groups were conducted during this period, focused on relationship-building and seeking to ensure the Crown understood procedural and substantive concerns in respect of the Project.

Topics discussed included Aboriginal groups' overall objectives for the consultation process and how best to use the period after the release of the NEB Recommendation Report. The MPMO also sought a dialogue with Aboriginal groups on the NEB draft conditions and on outstanding concerns, including any proposals from Aboriginal groups for accommodation measures.

Federal officials shared meeting records and lists of follow-up action items with groups for review and comment. The mandate of the Crown consultation team was to listen, understand, engage and report to senior officials, Aboriginal group perspectives. The Minister of Natural Resources and other Ministers were provided a summary of these meetings.

Federal officials sought a second round of meetings with Indigenous groups following the NEB's submission of its final report and recommendations to the government. The purpose of these meetings was to gather feedback from Aboriginal groups on the NEB Report and to identify, consider and attempt to address outstanding concerns and adverse impacts from the Project on Aboriginal Interests that were not addressed by the NEB conditions and proponent commitments.

By mid-July 2016, all Aboriginal groups involved in consultation with the Crown were invited to apply for additional participant funding to support ongoing consultation activities including participation in meetings and provision of written comments on the draft Consultation and Accommodation Report.

Government representatives participating in consultation meetings have endeavoured to meaningfully respond to all questions from Aboriginal groups. As with the first set of meetings in the spring, meeting summaries were prepared and shared back with the groups for comment.

## **Draft Consultation and Accommodation Report**

In August 2016, the draft Consultation and Accommodation Report was shared with Aboriginal groups for written comment and discussion. Aboriginal groups were asked to respond within 30 days although comments were accepted into late October. Groups were invited to submit written comments on the draft report to make sure that the Crown adequately described Aboriginal groups' participation in the consultation process, strength of claims, depth of consultation, potential impacts on Aboriginal Interests, any outstanding concerns raised and views on the status of those concerns (e.g. whether they are addressed by NEB conditions, proponent commitments or whether other accommodation measures were recommended).

## **Separate Submission**

In addition to providing opportunities to Aboriginal groups to review and comment on drafts of the Consultation and Accommodation Report, Aboriginal groups had the opportunity to provide a short submission outlining any outstanding concerns, issues or fundamental views in respect of the Project. This input, along with the Consultation and Accommodation Report, is being provided directly to GiC and B.C. Ministers to inform their decisions on the Project.

## **Regulatory and Permitting Stage Consultation**

Letters sent to all Aboriginal groups early on in the process explained the Crown's intent to rely on the NEB process to the extent possible to understand potential Project impacts on Aboriginal Interests and meet the duty to consult. However, the Crown also recognized that additional consultation would be required in the regulatory and permitting stage that could potentially follow the GiC and provincial EA certificate decisions on the Project.

### **3.3.5 BRITISH COLUMBIA**

Pursuant to Section 11 of B.C.'s *Environmental Assessment Act*, an order is issued by EAO that sets out, in addition to other matters, how potentially affected Aboriginal groups will be consulted by EAO and the proponent. EAO's initial approach to identifying Aboriginal groups to consult with was based on a geographic analysis of the proximity of the Project to an Aboriginal groups' asserted traditional territory. Aboriginal groups with asserted traditional territory that overlaps with or falls within 2 km of the project corridor were put on Schedule B of the Section 11 Order. Aboriginal groups with an asserted traditional territory more than 2 km away from the project corridor and that may experience indirect impacts from the project, were put on Schedule C of the Section 11 Order.

Consultation with Aboriginal groups on Schedule B was approached at the deeper end of the consultation spectrum, and included the following opportunities:

- Notification of the issuance of any orders under B.C.'s *Environmental Assessment Act* in relation to the Project;

- Discussing and commenting on the issues the Aboriginal group raised through the NEB review and through any subsequent consultation in relation to potential impacts of the Project on areas of provincial jurisdiction on its Aboriginal Interests and measures to avoid, minimize or otherwise accommodate, as appropriate;
- Reviewing supplemental information provided by the proponent to inform consultation in relation to potential impacts of the Project on areas of provincial jurisdiction on its Aboriginal Interests and measures to avoid, minimize or otherwise accommodate, as appropriate;
- Providing comments to the proponent on the proponent's draft Aboriginal engagement report;
- Meeting to discuss potential impacts of the Project on areas of provincial jurisdiction on its Aboriginal Interests and measures to avoid, minimize, or otherwise accommodate such impacts, as appropriate;
- Commenting on the EAO's draft referral materials;
- Providing a submission to the EAO regarding their views on the Project and on the draft referral materials to be included in the package of materials sent to Ministers when the Project is referred to Ministers for decision; and
- At the request of any of these Aboriginal groups, providing additional opportunities to engage with the EAO, within timelines as agreed with that Aboriginal group.

Consultation with Aboriginal groups on Schedule C was approached at a lower level on the consultation spectrum and included the following opportunities:

- Notification of the issuance of any orders under B.C.'s *Environmental Assessment Act* in relation to the Project;
- Providing comments to the proponent on the proponent's draft Aboriginal engagement report;
- Commenting on the EAO's draft referral materials; and
- Discussing and commenting on the issues the Aboriginal group raised through the NEB review and through subsequent consultation in relation to potential impacts of the Project on areas of provincial jurisdiction on its Aboriginal Interests and measures to avoid, minimize or otherwise accommodate, as appropriate.

EAO shared a draft of the Section 11 Order with Aboriginal groups on May 9, 2016, and asked for their feedback. After considering feedback received from Aboriginal groups, changes were made to the Section 11 Order. On June 17, 2016, EAO issued the Section 11 Order, which established the consultation activities that both EAO and the proponent would undertake with all Aboriginal groups potentially affected by the Project, as listed on Schedules B and C of the Order.

The proponent submitted its Aboriginal engagement report<sup>24</sup> to EAO on August 4, 2016. This report summarized the efforts undertaken by the proponent to consult with Aboriginal groups,

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<sup>24</sup> [http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic\\_document\\_459\\_40921.html](http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_document_459_40921.html)

identified the feedback and information received from Aboriginal groups during this consultation, identified potential adverse impacts of the Project on Aboriginal Interests for each Aboriginal group, identified how these impacts would be mitigated or otherwise accommodated, and outlined future consultation activities.

EAO built on the consultation that has occurred to date with federal and provincial agencies, the NEB review, and engagement with the proponent, and has been coordinating Aboriginal consultation activities with the MPMO, as described in Section 3.3 and other sections of this report. This section will not repeat the coordinated activities that have occurred.

Permits will not be issued by provincial agencies until the Ministers make a decision on the EA certificate, in accordance with Section 9 of B.C.'s *Environmental Assessment Act*, with the exception of investigative use permits (e.g. permits to collect information to support the assessment of the Project). However, permitting agencies may consult with Aboriginal groups on permit applications prior to the Ministers' decision on the certificate.

As described in Section 2.5, the Province of B.C. has taken a coordinated approach to Aboriginal consultation for this Project that will be informed by consultation by provincial agencies responsible for permit authorizations, coordinated consultation with the federal government, the NEB process, and information provided by the proponent. While EAO has undertaken a joint approach to Aboriginal consultation with the federal government for Aboriginal groups in B.C., the provincial Crown's obligations to consult and accommodate pertain to areas of provincial jurisdiction as circumscribed by the Constitution.

### 3.3.6 ALBERTA

Within Alberta, the Government of Alberta's Policies on Consultation with First Nations and Métis Settlements on Land and Natural Resource Management direct First Nation and Métis Settlement consultation with respect to the management and development of natural resources on provincial Crown lands. The associated guidelines demonstrate how the Government of Alberta is seeking to fulfill its consultation responsibilities under the consultation policies and are intended to clarify the expectations of all parties engaged in the consultation process by providing an overview of the procedures to follow in the consultation process.

Consultation with First Nations and Métis Settlements is triggered when the Government of Alberta is contemplating conduct that may have an adverse impact on the exercise of Treaty rights or traditional use activities or Métis settlement members' harvesting activities. The Government of Alberta is responsible for overseeing and managing all substantive aspects of consultation. Although the Government of Alberta may delegate some procedural aspects of consultation to proponents, the Crown retains the sole responsibility for overseeing the overall consultation process and ensuring that the proponent's consultation activities comply with the consultation policies and guidelines. The First Nations and/or Métis Settlements that project proponents are directed to consult are based on the location of the project footprint in relation to First Nations' or Métis Settlements' consultation areas as well as other relevant information.

To strengthen the Government of Alberta's role in the First Nation's and Métis Settlement consultation process, the Government of Alberta created the Aboriginal Consultation Office (ACO). The ACO's mandate is to provide consultation management services to meet the needs of Government of Alberta ministries, First Nations, Métis settlements, the Alberta Energy Regulator and project proponents.

The Government of Alberta's First Nations and Métis Settlements consultation guidelines outline the stages of consultation, which include:

1. Pre-consultation assessment
  - a. Assess whether or not consultation is required;
  - b. If consultation is required, identify which First Nations and/or Métis Settlements are to be consulted;
  - c. Assess the potential adverse impacts of the proposed decision or activity;
  - d. Assess the scope of the duty to consult based on available information regarding the potential adverse impacts on Treaty rights, traditional uses or harvesting activities; and
  - e. Assign a level of consultation that corresponds with the scope of the potential adverse impacts. The level of consultation (Level 1 – streamlined, Level 2 – standard and Level 3 – extensive) identifies how deep the consultation should be and what process steps are required.
    - i. Level 3 Consultation requires the proponent to develop a Consultation Plan that the ACO must approve before consultation activities can begin.
2. Information sharing
  - a. Proponents are required to provide comprehensive information to the First Nations and/or Métis Settlements regarding the project, regulatory authorizations being sought, the consultation process, level of consultation, and requests for feedback and any concerns.
3. Exploring and documenting concerns
4. Verifying the consultation record with the First Nation and/or Métis Settlement
5. Determining the adequacy of consultation. Although the optimal outcome of consultation is that all consulting parties reconcile interests, agreement of all parties is not required for consultation to be adequate. If consultation is deemed adequate, the proponent proceeds with the application to the appropriate regulatory decision maker.

The Trans Mountain Expansion Project was assessed as requiring Level 3 (Extensive) consultation. On June 5, 2015, the Government of Alberta directed the proponent to consult on the Project and its ancillary dispositions with the potentially impacted First Nations. The ACO is continuing to work with the proponent, First Nations and other Ministries to facilitate the fulfillment of consultation requirements under Alberta's consultation policies and guidelines.

## 3.4 Participant Funding

In addition to proponent-led capacity agreements and participant funding provided by the NEB, it is standard practice for the Crown to provide some financial assistance for Aboriginal groups to participate in a regulatory review and consultation process with highly technical components.

The proponent, NEB, the MPMO and EAO offered funding to support the engagement of Aboriginal groups during various stages of the process, from the early Project planning phase, during the NEB Review, and for Crown consultation.

### 3.4.1 PROPONENT CAPACITY FUNDING

The proponent provided approximately \$12 million in capacity funding, delivered through consultation agreements negotiated with specific Aboriginal groups.

### 3.4.2 NEB ALLOCATION OF FUNDS FOR PARTICIPATION IN HEARING

On 22 July 2013, the NEB announced it would make \$1.5 million available under its Participant Funding Program (PFP) for the Trans Mountain Expansion Project hearing and that a higher amount could be considered once applications for funding had been received. On 16 July 2014, the NEB announced it doubled the amount of available funding to \$3 million given the high level of interest. By the November 28, 2014 application deadline, the NEB had received 95 applications requesting over \$24 million from individuals, non-profit organizations and Aboriginal groups.

The NEB offered 54 eligible Aboriginal intervenors \$2.36 million for travel and other eligible expenses to prepare for, and participate in, the review process. In addition, the NEB offered \$10,000 in special funding to each of the two Aboriginal groups directly impacted by the decision to strike the evidence prepared by Mr. Kelly from the hearing record. Overall, awards to Aboriginal intervenors averaged \$43,626 (\$5,000 higher than the average for non-Aboriginal recipients), ranging from a minimum of \$1,250 for travel alone to \$550,000 for a collective of 16 Aboriginal groups.

Further information on the NEB's allocation of funds to support participation in the review is available at <http://www.neb-one.gc.ca/prtcptn/hrng/pfp/lctnfd/trnsmntnxpnsn-eng.html>.

### 3.4.3 FEDERAL FUNDING

The federal Participant Funding Program supported Aboriginal participation in consultation during the period leading up to the close of the NEB hearing as well as throughout the post-NEB hearing phase.

**Table 8 – Summary of Federal Participant Funding for Aboriginal Groups (as of October 25, 2016)**

<b>Round 1</b>	Total amount offered in Round 1	\$753,129
	Total amount provided <sup>25</sup>	\$471,129
	Total amount dispensed <sup>26</sup>	\$187,847
<b>Round 2</b>	Total amount of outstanding funding from Round 1 <sup>27</sup>	\$282,000
	Total amount offered in Round 2	\$1,259,000
	Total combined offers	\$1,541,000
	Total amount provided <sup>28</sup>	\$933,446
	Total amount dispensed <sup>29</sup>	\$4,250
<b>Total</b>	Total funding offered to Aboriginal groups (in Rounds 1 & 2)	\$2,012,129
	Total funding dispensed to Aboriginal groups (in Rounds 1 & 2)	\$192,097

**Timing:** Initially, the MPMO planned for the post-NEB hearing phase of consultation to take place between December 2015 and February 2016, following the expected release of the NEB Recommendation Report in November 2015. In keeping with this timeline, the MPMO sent letters to eligible Aboriginal groups in May 2015, offering participant funding to support these consultations and inviting groups to submit an application for funding.

Contribution agreements between the MPMO and Aboriginal groups were signed between August and November 2015. However, in early 2016, additional groups expressed interest in accessing funding following MPMO’s correspondence in February 2016, and consultation meetings that took place between February and May 2016. MPMO tried to be as flexible as possible in making funding available and Round 1 funding offers were extended into May 2016 for the Peters Band, Kwikwetlem First Nation and Nicomen Indian Band.

**Funding Allocations:** Several factors were taken into consideration when determining eligibility for participant funding and the levels of funding offered. Individual funding offers were based on four factors: the initial depth of consultation assessment; the group’s level of participation in the NEB hearing (i.e. intervenor, commentor, or non-participant); proximity of traditional use areas to the project footprint; and whether a group was participating in Crown consultations as part of a larger collective or as an individual group. The MPMO offered a maximum of \$12,000 and a minimum of \$1,500 to individual groups. Collectives were offered between \$18,000 and \$60,000, depending on the number of groups represented by the collective.

<sup>25</sup> As per signed contribution agreements between NRCan and Aboriginal groups or collectives

<sup>26</sup> As per claims submitted to CEAA for reimbursement

<sup>27</sup> Amount of funding offered in Round 1 but for which groups did not sign a contribution agreement

<sup>28</sup> As per signed contribution agreements between NRCan and Aboriginal groups or collectives

<sup>29</sup> As per claims submitted to CEAA for reimbursement

In total, the MPMO offered \$753,129 in participant funding to 99 Aboriginal groups in the first round of participant funding (76 individual groups and four collectives). Of the 99 groups offered funding, 60 Aboriginal groups (37 individual groups and four collectives) signed contribution agreements with the MPMO in order to access this funding. In other words, the MPMO observed a 60% uptake rate on participant funding offers by Aboriginal groups. The total amount allocated under these contribution agreements was \$471,129. As of October 2016, \$150,640 in participant funding has been dispensed, based on claims submitted by Aboriginal groups for reimbursement.

## **Second round of Funding**

*Timing:* As a result of the January 2016 interim measures for the Project, the MPMO announced that additional participant funding would be offered for the extended period of consultation on the Project. Individual funding allocations were communicated in early July 2016.

*Funding Allocations:* For the second round, the MPMO offered \$1,259,000 in participant funding. Funding allocation for the second round was similar to the methodology used in the first, with two notable exceptions, including the fact that participant funding was offered to 118 potentially affected Aboriginal groups, whereas some groups were not eligible for funding in the first round, because of the distance of Aboriginal communities from the Project footprint or lack of participation in the NEB process. Table 9 summarizes the allocation methodologies for both rounds of consultation funding. Appendices A to E indicate specific participant funding offers or disbursements made to each Aboriginal group or collective.

The second round of consultation funding was based on several factors: the preliminary depth of consultation assessment; the Aboriginal group's level of participation in the NEB Review; and whether a group was participating in Crown consultations as part of a larger collective or as an individual group. In general, a maximum of \$14,000 and a minimum of \$3,000 was offered to individual groups. Collectives were offered between \$15,000 and \$70,000, depending on the number of groups represented by the collective. In specific instances, these offers varied to address particular circumstances where additional technical studies were undertaken or protocol development formed a key component of the consultation process with the Crown.

The MPMO re-offered funding to eligible groups that were previously offered participant funding but had not signed contribution agreements. Specifically, 39 of the 99 Aboriginal groups offered participant funding in the first round did not sign a contribution agreement with the MPMO (totaling \$282,000). For these groups, outstanding funding was added to the second funding offer.

In total, Round 2 funding allocations combined with the outstanding Round 1 funding offers amounted to \$1,541,000. Of the 118 groups offered funding following the release of the NEB Report, 53 Aboriginal groups (35 individual groups and two collectives) signed contribution agreements with the MPMO in order to receive this funding. From July to October 2016, approximately 45% of Aboriginal groups offered participant funding took advantage of the funding offered. The total amount allocated under Round 2 contribution agreements was \$933,446. As of October 2016, \$4,250 in participant funding has been dispensed, as per invoices submitted by Aboriginal groups for reimbursement.



**Table 9 – Summary of the Funding Allocation Methodology for Round 1 and Round 2 of Crown Consultation**

Criteria	Round 1	Round 2
General base funding for each group based on the depth of consultation assessment	Deep: \$12,000 Middle: \$12,000 Low: \$3,000	Deep: \$14,000 Middle: \$14,000 Low: \$6,000
Participation in the NEB process	Groups initially identified at the middle to deep end of the <i>Haida</i> consultation spectrum that did not participate in the NEB process received half the base funding.  Groups initially identified at the lower end of the <i>Haida</i> consultation spectrum that did not participate in the NEB process were not offered funding.	Any group (deep, middle or low) that did not participate in the NEB process received half the base funding.
Distance from the Project footprint	Groups whose territories were located more than 50 km from the Project footprint were not offered funding as it was determined that potential adverse impacts from the Project would be very low to negligible for these groups.	Aboriginal groups scoped into the Crown consultation process were offered funding to support their participation in meetings and/or to provide written comments on the draft Consultation and Accommodation Report, regardless of the degree of seriousness of impact from the Project.

### 3.4.4 EAO FUNDING

EAO offered capacity funding to Aboriginal groups on Schedule B of the Section 11 Order issued under the B.C. *Environmental Assessment Act*, to groups who stated they are actively participating, in the EAO assessment process. EAO offered individual Aboriginal groups \$5,000 and Aboriginal group collectives \$10,000. These funds were provided to assist with Aboriginal groups' participation in consultation activities, such as document review and meetings, as outlined in Section 3.4.1. As of October 29, 2016, 45 Aboriginal groups and three Aboriginal group collectives had been offered funding.

## 4. CONSIDERATION OF ABORIGINAL INTERESTS AND CONCERNS

This section considers the Aboriginal Interests, issues and concerns of potentially affected Aboriginal groups.

### 4.1 Crown Consultation Record and Issues Tracking

The governments have kept track of Aboriginal group comments, issues, interests and concerns raised in respect of the Project during the NEB Review process including TLRU and TMRU studies.

Federal officials developed a variety of tracking tools to help ensure that it has an accurate understanding of Aboriginal Interests and concerns. The proponent developed and filed as part of its Application to the NEB consultation logs that presented the issues, concerns and interests identified by Aboriginal groups as understood by the proponent. The proponent also tracked its commitments and actions to address the interests and concerns expressed by various Aboriginal groups. The Crown made use of these documents at an early stage to understand many of the interests and concerns of Aboriginal groups potentially affected by the Project.

The NEB's program of early engagement with Aboriginal groups also generated an awareness of interests and concerns communicated by Aboriginal groups. As part of a Project Agreement with the MPMO, the NEB referred to the MPMO and relevant federal authorities a table of all issues raised by Aboriginal persons or groups in the context of the NEB's early engagement activities. This input, beginning in June 2014, captured issues falling outside of the NEB's mandate as well as issues related to the factors and valued components, which were included in the scope of the NEB Review.

The federal Crown's issues tracking tables maintained during the NEB hearing for each Aboriginal group intervenor organized issues in relation to potential impacts on Aboriginal Interests, as well as other issues and concerns raised by Aboriginal groups during all stages of the process, whether they fell into the scope of the NEB review process or not. Therefore, the categories of issues tracked by the federal Crown did not solely focus on the valued environmental and socio-economic components studied during the NEB regulatory hearing, but also captured broader issues raised by Aboriginal groups that were relevant to the Crown's duty to consult and, as appropriate, accommodate. In addition, federal departments and agencies tracked issues specific to their areas of regulatory jurisdiction or subject-matter expertise.

The federal Crown's issues tracking tables were used to analyze and help respond to issues and potential impacts on Aboriginal Interests, indicating whether, in the view of the Crown, the proponent's commitments or NEB conditions addressed these potential impacts, partially addressed them, or inadequately addressed them. In this way, the Crown was able to identify potentially outstanding issues, at an early stage, for which incremental or other forms of Crown action or accommodation may be required.

The issue categories tracked by the federal Crown throughout the review of the Project were:

- Pipeline Construction and Operations;
- Pipeline Accidents and Malfunctions;
- Marine Terminal Construction and Operations;
- Marine Terminal Accidents and Malfunctions;
- Marine Shipping Operations;
- Marine Shipping Accidents and Malfunctions;
- Cumulative Effects;
- Social and Cultural Impacts;
- Other Aboriginal and Treaty Rights;
- Review Process and Methodology;
- Economic Effects; and
- Health and Human Safety.

The issues are presented below in terms of the ways in which specific Aboriginal Interests could be adversely impacted (i.e. hunting, trapping, gathering, fishing, marine harvesting, other traditional and cultural practices, Aboriginal title), as well as other interests they may have (e.g. accidents and malfunctions, health and human safety, socio-economic issues, cumulative effects).

Responses to these potential impacts are indicated in terms of proponent commitments, NEB conditions, and Crown responses where available. In addition, Project modifications and other accommodation measures are presented in relation to how they would address Aboriginal Interests and concerns.

The proponent prepared an Aboriginal engagement report to address EAO submission requirements identified in the Section 11 order issued on June 17, 2016. On May 18, 2016, the proponent provided a draft of the report to Aboriginal groups identified in the Section 11 order, and submitted a final report<sup>30</sup> August 12, 2016.

Appendices A to E of this report provide an overview of the specific interests and concerns of each potentially affected Aboriginal group. These appendices include a description of the consultation with each Aboriginal group; the concerns raised by the group; a summary of the Crown's strength of claims and depth of consultation assessment for each group; and the Crown's assessment of the potential impacts of the Project on each Aboriginal group's asserted or determined Aboriginal rights, including title, and treaty rights.

<sup>30</sup> [http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic\\_document\\_459\\_40921.html](http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_document_459_40921.html)

## 4.2 Addressing Key Aboriginal Interests and Concerns

### 4.2.1 PROJECT MODIFICATIONS

During Project planning and throughout the NEB Review, the proponent implemented or committed to implement several design changes to avoid or reduce potential adverse effects from the Project that could directly or indirectly impact Aboriginal Interests.

#### Routing Principles

The first principle of the Project design was to route the proposed pipeline, wherever possible, so that it would parallel the existing pipeline RoW and/or other linear disturbances. This principle assists the proponent in minimizing disturbance to new traditional use sites, and reducing new or additional impacts on Aboriginal Interests. The proposed pipeline corridor is generally 150 m wide, centred on the existing Trans Mountain pipeline easement, except where deviations are required, for example to avoid areas that have significant environmental value or to minimize routing through extensively developed urban areas.

Environmental factors that were taken into consideration when looking at deviating from the existing pipeline easement included:

- The total number of watercourse crossings;
- Length in the Riparian Reserve Zone;
- Difficult reclamation areas and unstable terrain;
- Length within provincial parks and other designated protected areas;
- The total number of wetland crossings; and
- Creating new access in areas considered to be ecologically important.

Where deviations from the existing pipeline corridor were deemed necessary, Trans Mountain attempted to minimize environmental impacts by having the new pipeline constructed beside rights-of-way of other linear facilities. Access to the RoW and power lines to the pump stations are already established, thereby reducing the need to create additional disturbance for ancillary facilities.

The second principle relied on traditional use information deemed relevant by the proponent to inform routing decisions. The proponent has engaged Aboriginal groups whose traditional territories overlap the study corridor for the proposed route to undertake traditional use studies. These studies identify traditional sites or uses that, according to the proponent, would be adversely affected by the location or timing (e.g. construction times that overlap with the timing for collecting medicinal plants) of the Project and measures to either avoid or reduce the conflict.

The third principle related to pipeline routing was the consideration of Indian Reserves. The proponent has committed (and is legally obliged) not to route the proposed pipeline on an Indian Reserve unless the affected Aboriginal group has agreed to the routing. To date, the proponent has reached agreement to route the pipeline on certain reserves but not others. The proponent has indicated that it continues to engage Aboriginal groups on the pipeline routing on Indian Reserves (see the proponent submission to the NEB on July 31, 2015 and August 20, 2015 Reply Evidence).

The proponent also considered the confidential evidence provided by certain Aboriginal groups during the NEB Review (the proponent and the NEB entered into confidentiality agreements with these Aboriginal groups). In some cases, new traditional use sites were identified by Aboriginal groups and the proponent considered these for mitigation or other action, such as route re-alignment or construction space configuration.

Examples of how the above routing and other Project design principles were applied in practice include:

- RoW alignment considered and sought to avoid some known sites of significance, e.g. burial or other culturally important sites;
- The proponent tried as much as possible to follow the existing RoW to reduce the amount of development that had to occur on “greenfield” areas: 73% of the Project follows the RoW for the existing pipeline and 16% of the Project follows other linear disturbances, which means only 11% of the route would create a new corridor;
- Refined routing to the existing pipeline to avoid 22 crossings at significant fish-bearing rivers such as the Fraser River near Rearguard, Thompson River, upper North Thompson, Albreda, Coldwater and Coquihalla rivers;
- Exceed in-stream depth of underground burial requirements required by Code of Practice design and construction standards including using 1:200 year flood design instead of current industry standard of 1:100 year design floods and accounting for climate change effects of increased flood magnitude and frequency;
- Increase in pipeline wall thickness at crossings of watercourses of significance;
- The previously proposed sloped earthen wall at the WMT has been replaced by a vertical retaining wall, which minimizes dredging and significantly reduces the foreshore extension footprint; and
- The proponent identified that the need for a disposal at sea permit for dredging material would most likely be eliminated through refined construction methods at the WMT.

In late summer 2015, federal officials sought additional examples from the proponent where the Project had changed in response to Aboriginal Interests, in particular those that might not already be on the NEB’s record in the form of a traditional use study and mitigation measures (e.g. in the Environmental Protection Plan, Aboriginal engagement logs, information request responses, commitment tracking table, or the proponent’s August 20, 2015 Reply Evidence).

In response, the proponent indicated that there were very few examples that were not already provided on the NEB’s record; however the proponent did provide an updated list of where known Aboriginal Interests and concerns influenced the design of the Project. The proponent noted it incorporated all Aboriginal Interests and concerns into the Application and evidentiary filings with the NEB, whether resulting in a change to the Project or not. Specific concerns that have been incorporated that resulted in a Project change are included in the table in Appendix F. Appendix G provides the commitment tracking tables that the proponent filed with the NEB. In October 2016 the proponent confirmed that no changes had been made to these tables since their filing.

The proponent noted that Aboriginal Interests in Appendix F associated with a specific geographical site were incorporated into Project planning, including consideration for incorporation into the Environmental Alignment Sheets, which inform Project routing and future planning. The proponent also noted that most of these sites are not within the proposed RoW, and so would not be directly impacted by construction or operations. Additionally, there are several commitments in Appendix G regarding Environmental Protection Plan workshops, which could result in additional route refinements within the corridor.

In the proponent’s Reply Evidence, the outcomes of recently conducted traditional use studies and an updated set of consultation logs were included. Using knowledge gained through the engagement process, the proponent made modifications to the Project, including route refinements. Additionally, the proponent will use Environmental Protection Plans and Mitigation Plans throughout construction to reduce or avoid construction impacts wherever possible.

### **Project Routing and Indian Reserves**

The following tables outline the routing related to Indian Reserve crossings with the existing TMPL corridor and the proposed expansion as of July 2016.

**Table 10 – Indian Reserves Crossed by the Existing TMPL Corridor**

<b>Indian Reserve Name</b>	<b>Aboriginal Groups With an Interest in the Indian Reserve</b>
Coldwater #1	Coldwater Indian Band
Grass #15	Aitchelitz First Nation, Kwaw-kwaw-apilt First Nation, Shxwha:y Village, Skowkale First Nation, Skwah First Nation, Soowahlie Indian Band, Squiala First Nation, Tzeachten First Nation, Yakweakwioose First Nation
Joeyaska #2	Lower Nicola Indian Band
Kamloops #4	Tk'emlups te Secwpmec (Kamloops Indian Band)
Kawakawa Lake Reserve #16	Union Bar First Nation
Matsqui Main #2	Matsqui First Nation
Ohamil #1	Shxw'ow'hamel First Nation
Peters #1	Peters Band

Indian Reserve Name	Aboriginal Groups With an Interest in the Indian Reserve
Peters #1a	Peters Band
Popkum #1	Popkum First Nation
Popkum #2	Popkum First Nation
Tzeachten #13	Tzeachten First Nation
Whispering Pines #4	Whispering Pines/Clinton Band
Zoht #4	Lower Nicola Indian Band
Zoht #5	Lower Nicola Indian Band

**Table 11 – Indian Reserves Crossed by the Proposed Trans Mountain Expansion Project Corridor**

Indian Reserve Name	Aboriginal Groups With an Interest in the Indian Reserve
Matsqui Main #2	Matsqui First Nation
Ohamil #1	Shxw'ow'hamel First Nation
Peters #1	Peters Band
Peters #1a	Peters Band
Popkum #1	Popkum First Nation
Popkum #2	Popkum First Nation
Tzeachten #13	Tzeachten First Nation

As a result of engagement activities the Project corridor would not intersect the following Indian Reserves:

- Coldwater #1;
- Grass #15;
- Kamloops #4;
- Kawakawa Lake Reserve #16; and
- Whispering Pines #4.

Trans Mountain continues its engagement with Lower Nicola Indian Band to seek the necessary approval to construct the Project across the following Indian Reserves:

- Joeyaska #2;
- Zoht #4; and
- Zoht #5.

## 4.2.2 PROPONENT COMMITMENTS

The proponent's Application and supporting evidence filed during the NEB hearing set out mitigation and other commitments applicable to the potential adverse effects of the Project on Aboriginal Interests. These commitments would be legally binding and would need to be tracked and reported on, as per the NEB Conditions #2 and #6.

Many of the measures proposed by the proponent for a valued component may also help mitigate potential impacts on Aboriginal Interests and other concerns raised throughout the Project review by Aboriginal groups, where the effects are mitigable. These are additional to mitigation measures that the proponent has committed to implement as part of standard practice during Project construction and operation in compliance with federal and provincial regulatory requirements, in compliance with existing proponent policies and procedures and in accordance with the technically feasible, cost-effective and environmentally sound management of large-scale pipeline projects.

Trans Mountain submitted its commitment tracking table and updates to the table to the NEB in January, March, and July 2015. The most recent version of Trans Mountain's commitment tracking table on the NEB's record can be found at [Filing ID A4R6I5](#), which includes commitments up to May 12, 2015.

### **Proponent-Aboriginal Group Agreements**

The proponent has provided, or has committed to providing, economic benefits and capacity-building opportunities specific to Aboriginal groups during activities prior to and during the construction phase of the Project. Highlights of these opportunities include:

- Lump sum cash, up-front costs, training funds prior to CPCN;
- Lump sums following in-service;
- Annual payments over 20 years after CPCN, some indexed to inflation;
- Some agreements allow for renegotiation after 20 years;
- Fees or taxes levied in exchange for land use where reserves are crossed by the RoW;
- Funding for community improvement projects;
- Economic development contributions;
- Funding of committee work;
- Scholarships;
- Funding identified for environmental enhancement; and
- Funding identified for emergency response centres (buildings, equipment).

During consultations, various Aboriginal groups based on Vancouver Island noted to the Crown that Mutual Benefit Agreements (MBA) that they have entered include proponent commitments to support environmental stewardship.



As of November 2016, the Crown was aware that 33 of the Aboriginal groups being consulted by the Crown had signed an MBA and associated Letter of Agreement with the proponent indicating support for the Project. These groups are highlighted in the table below.

**Table 12 – Aboriginal Groups With a Mutual Benefit Agreement or Letter of Support With the Proponent**

<b>Alberta Aboriginal Groups</b>	<b>B.C. Aboriginal Groups</b>	<b>B.C. Métis Groups</b>
Alexander First Nation	Ashcroft Indian Band	BC Métis Federation
Alexis Nakota Sioux Nation (with Alexis Trappers Association)	Canim Lake Band	Métis Nation of British Columbia
Enoch Cree Nation	Ditidaht First Nation	
Ermineskin Cree Nation	Esquimalt Nation	
O'Chiese First Nation	Halalt First Nation	
Paul First Nation	Lake Cowichan First Nation	
Samson Cree First Nation	Malahat Nation	
	Matsqui First Nation	
	Nicomien Indian Band	
	Pacheedaht First Nation	
	Pauquachin First Nation	
	Penelakut Tribe	
	Peters First Nation	
	Popkum First Nation	
	Scia'new (Beecher Bay) First Nation	
	Seabird Island Indian Band	
	Semiahmoo First Nation	
	Shxw'ōwhámél First Nation	
	Simpcw First Nation	
	Tk'emlúps te Secwépemc	
	T'Sou-ke First Nation	
	Union Bar First Nation	
	Whispering Pines / Clinton Indian Band	
	Yale First Nation	

### 4.2.3 NATIONAL ENERGY BOARD CONDITIONS

Under the NEB Act, the NEB Panel reviewing the Project Application has a responsibility to submit a recommendation to the Minister of Natural Resources about whether a CPCN should be issued for the Project. In addition, regardless of the NEB's recommendation, it must include all conditions that the NEB considers necessary and desirable in the public interest, should the Project be approved by the GiC.

As the NEB developed conditions, it issued two draft versions of the conditions and invited all hearing participants to provide feedback. The NEB identified a preliminary set of draft conditions on April 16, 2014. In releasing draft conditions early in the hearing process, the NEB provided all participants with information about how potential concerns with the Project could be addressed, while recognizing that draft conditions could be expected to change significantly during the hearing process as new evidence would be filed and assessed by the NEB.

After considering the information submitted throughout its hearing process, the NEB revised the draft conditions and issued the updated set of draft conditions for comment on August 12, 2015. The NEB added additional conditions on December 11, 2015. The comment period on these draft conditions closed on January 12, 2016.

Thirty-five Aboriginal groups provided comments on the draft conditions. Issues raised with respect to the draft conditions included environmental protection, risk of accidents or malfunctions and Aboriginal participation requirements in monitoring and oversight of the Project, if it proceeds. The Stoney Nakoda Nations provided comments on the draft NEB conditions directly to the MPMO, as the Stoney Nakoda Nations did not participate in the NEB hearing.

Federal departments and agencies and the province of B.C. also commented on the draft NEB conditions.

The NEB reviewed all of these submissions, and set out its final recommended conditions in its May 19, 2016 report. In total, the NEB recommended attaching 157 conditions to the CPCN, should the GiC decide to approve the Project. These NEB's conditions, adopted by the NEB would become legally binding on the proponent. As an overarching condition, the NEB recommended that, if the Project is to proceed, all mitigation measures proposed by or committed to by the proponent during the hearing process become conditions of Project approval. NEB conditions were recommended in the following areas:

- Regulatory oversight;
- Economics and financial responsibility;
- Emergency preparedness and response;
- Environment;
- People, communities and lands;
- Engineering and safety; and
- Multidisciplinary (e.g. WMT and marine shipping).

The NEB conditions for the Project can be found in Appendix 3 of the NEB Recommendation Report (Filing [A5A9H1](#)) and are also provided in Appendix H of this report.

The Crown took a significant interest in the development of Project conditions as these measures could potentially address many of the issues and concerns raised by Aboriginal groups during the review of the Project. In addition, a review of Aboriginal groups' comments on the draft NEB conditions enabled the Crown to understand many of the potentially outstanding issues and concerns of these groups in respect of the Project and its potential impacts on Aboriginal Interests and other interests. The NEB conditions recommended by the NEB that would avoid, mitigate or otherwise address key Aboriginal Interests and concerns are discussed in this report, along with key NEB conclusions relating to Aboriginal Interests.

Some Aboriginal groups sought clarification from the Crown as to whether the NEB Act gives exclusive authority to the NEB for identifying Project-specific conditions as part of the CPCN. Some Aboriginal groups noted that in their view, the Minister of Natural Resources or the GiC should be empowered to attach additional conditions to a CPCN if they so wished, in particular to assist in meeting the Crown's duty to consult, and as appropriate, accommodate. The Crown responded that in its view, the GiC has the authority to ask the NEB to reconsider its recommendation for the Project or any of the terms and conditions established by the NEB. While the process for NEB reconsideration has not been defined in policy or procedures, it is reasonable to assume that the NEB's reconsideration could lead to it either revising or recommending additional conditions for the Project.

Federal and provincial authorities with regulatory responsibilities for permits and authorizations following potential issuance of a CPCN, could also impose their own Project-specific conditions that would also become legally binding on the proponent if the Project is allowed to proceed.

Additional consultation could also be required in relation to permitting activities of federal and provincial authorities should the Project be approved by the GiC and B.C. Ministers. This determination will be made by the permitting authority, based on their regulatory mandate, on a case-by-case basis. Tables 6 and 7 provide a list of potential federal and provincial regulatory approvals and authorizations.

#### **4.2.4 POTENTIAL PROVINCIAL EA CERTIFICATE CONDITIONS**

Pursuant to Section 17 of the B.C. *Environmental Assessment Act*, if provincial Ministers decide to issue an EA certificate, Ministers may attach any conditions to the EAC the ministers consider necessary. Such conditions would be legally binding on the certificate holder. Based on the NEB's report, the consideration of any additional information and Aboriginal consultation, the EAO will identify any conditions to recommend to provincial Ministers to address Project impacts on areas of provincial jurisdiction. Aboriginal groups will have the opportunity to provide comments on the draft referral materials, which will also include the draft conditions. These conditions would be in addition to any conditions proposed by the NEB.

In consideration of existing legal requirements, and the 157 NEB conditions that would become legally binding on the Project should it receive GIC approval, EAO is proposing to provincial Ministers an additional 35 conditions that Ministers may attach to a provincial EA certificate, if approved. These conditions are proposed in relation to areas of provincial jurisdiction. EAO recognizes that the NEB has the primary responsibility for ensuring the Project is developed, constructed and operated in a manner that is safe and secure and protects people, property and the environment.

The EAO's proposed conditions are in response to the concerns that have been raised by Aboriginal groups during the joint Crown consultation undertaken for the Project. The proposed conditions are also in response to the key areas of provincial interest within the EA. The conditions endeavour to ensure that the Project would be developed and operated in a manner that is consistent with provincial policies and programs, in consideration of the existing regulatory regime. The conditions address a variety of issues, including the consultation and engagement of Aboriginal groups, the public and provincial agencies, the mitigation and offsetting of wildlife impacts, greenhouse gas emissions, drinking water, archaeology and heritage resources, emergency response planning, geographic response planning, research related to the fate and behaviour of bitumen, and emergency management preparedness and response exercises. The conditions also support the ongoing participation of Aboriginal groups in the activities of Trans Mountain, including in implementing the requirements of NEB conditions and proposed provincial conditions.

## **4.2.5 BROAD CROWN INITIATIVES RELEVANT TO THE PROJECT**

The initiatives summarized in this section are not specific to the Project, but may further mitigate adverse effects of the Project and in many cases, will include additional engagement with Aboriginal groups.

### **B.C. Spill Response Regime**

The Province of B.C. has passed legislation that will allow for the implementation of a world-leading preparedness, response and recovery regime for hazardous substance spills. Key elements of the new spill regime, including an initial set of detailed regulations, will come into effect in 2017. The Province released its policy intentions for the proposed regime in April and, through spring 2016, conducted seven regional First Nations workshops as well as a symposium attended by stakeholders and First Nations.

This legislation will:

- Establish new requirements for spill preparedness, response and recovery;
- Create new offences and penalties;
- Enable the certification of a Preparedness and Response Organization; and
- Increase transparency, participation and accountability.

In June 2015, the Ministry of Environment announced seven agreed upon principles for the design of this world-leading regime:

1. Polluter pays – this principle is already in effect in B.C. and will not change. Companies that spill or pose the risk of having a spill should be responsible for the costs associated with preparing for and responding to a spill.
2. Risk-based requirements – all spillers will be required to meet new response requirements. The requirements for planning and preparedness will be based on a defined risk threshold, which will consider persistence and volume.
3. Avoids unnecessary duplication – recognizing there are some effective and collaborative spill response procedures in place in certain sectors, supplementation is still required to ensure environmental protection and also ensure B.C.'s system can be considered world-leading.
4. Fair and transparent process – government has committed to continued dialogue through consultation on the development of new legislation and regulations.
5. Opportunities for First Nations and communities in preparedness, response and recovery – active engagement by First Nations and communities on all aspects of a world-leading system are considered key to the successful design, implementation and operations.
6. Strong government oversight – new requirements will provide both clarity and certainty for industry, meet public and First Nations expectations, and maximize the protection of the environment.
7. Continuous improvement – the B.C. government is committed to continuous improvement, ensuring a sustainable world-leading system by applying lessons learned from exercises, incidents and other jurisdictions. Additionally, any technological innovations will continue to be adopted.

While response to marine spills falls under federal jurisdiction, spills in the marine environment can negatively impact B.C.'s coast. The province continues to work with federal partners to align regulatory processes for a consistent spill response framework across B.C.

### **Requirements for British Columbia to Consider Support for Heavy Oil Pipelines**

On July 23, 2012, the Province of B.C. set out, in the policy paper *Requirements for British Columbia to Consider Support for Heavy Oil Pipelines*,<sup>31</sup> the requirements that it stated must be established in order for the Province of B.C. to consider supporting the construction and operation of heavy oil pipelines within its borders. The policy paper outlined five main requirements, which are:

- Successful completion of the environmental review process;
- World-leading marine oil spill response, prevention and recovery systems for B.C.'s coastline and ocean to manage and mitigate the risks and costs of heavy oil pipelines and shipments;

<sup>31</sup> [http://www.env.gov.bc.ca/main/docs/2012/TechnicalAnalysis-HeavyOilPipeline\\_120723.pdf](http://www.env.gov.bc.ca/main/docs/2012/TechnicalAnalysis-HeavyOilPipeline_120723.pdf)

- World-leading practices for land oil spill prevention, response and recovery systems to manage and mitigate the risks and costs of heavy oil pipelines;
- Legal requirements regarding Aboriginal and treaty rights are addressed, and First Nations are provided with the opportunities, information and resources necessary to participate in and benefit from a heavy-oil project; and
- B.C. receives a fair share of the fiscal and economic benefits of a proposed heavy oil project that reflects the level, degree and nature of the risk borne by the province, the environment and taxpayers.

### **Strategic Partnership Initiative and West Coast Energy Infrastructure Program**

The Strategic Partnership Initiative and West Coast Energy Infrastructure program were established by the Government of Canada to enhance Aboriginal participation in the development of Canada's energy resources and protection of the environment. Aboriginal groups have raised a number of broad issues for the Project that fall outside the scope of the Project review and consultation process. MPMO-West serves as one key point of entry for Aboriginal groups to discuss broader issues surrounding west coast energy infrastructure development including topics related to employment and training, business development and pipeline and marine safety.

For a summary of these broader Government of Canada initiatives related to west coast energy infrastructure development that could have direct or indirect relevance to the Project, please see Appendix I.

### ***Pipeline Safety Act***

The *Pipeline Safety Act* received Royal Assent on June 18, 2015, and came into effect in June 2016. Key aspects of the new legislation include:

- Introducing absolute liability for all NEB-regulated pipelines, meaning that companies will be liable for costs and damages irrespective of fault — \$1 billion for companies operating major oil pipelines — the only absolute liability that exists among our peer jurisdictions (US, UK and Australia). Companies continue to have unlimited liability when at fault or negligent;
- Providing the NEB authority to order reimbursement of any clean-up costs incurred by governments, communities or individuals;
- Providing the NEB authority and resources to take control of incident response if a company is unable or unwilling to do so (i.e. in exceptional circumstances); and
- Requiring companies operating pipelines to hold a minimum level of financial resources, set at \$1 billion for companies operating major oil pipelines.

Further information on the *Pipeline Safety Act* and its liability provisions is available on the NEB website: <https://www.neb-one.gc.ca/bts/ctrq/gnnb/dmgprvntnrgltn/pplnsftctfq-eng.html>.

## **Area Response Planning**

During May and June of 2016, the Government of Canada engaged Aboriginal groups and coastal communities on its Area Response Planning Initiative. This initiative is a pilot project jointly led by Transport Canada and the Canadian Coast Guard (CCG) and is aimed at improving Canada's ship-source oil spill preparedness and response regime, as it is defined in Part 8 of the *Canada Shipping Act, 2001*. In accordance with the Act, the pilot project is focused on preparedness and response for oil spills from all vessels over 400 gross tonnages (GT), all tankers over 150 GT and spills from oil handling facilities when a vessel is present.

The Area Response Plan pilot project seeks to identify where improvements can be made to further strengthen the current preparedness and response regime for ship-source oil spills and to ensure that the regime remains responsive to changing demands and practices. Using a risk management framework, Area Response Plans will be developed that allow flexibility for regional differences and levels of risks. The risk management framework will identify the critical elements of ship-source oil spill prevention, preparedness and response. Transport Canada is developing an Area Risk Assessment Methodology to perform a quantitative analysis of these elements to determine the levels of risks and, ultimately, to inform tailored Area Response Plans.

As part of the Area Response Plan pilot projects, information on cultural/archaeological sites collected will aid the lead agency for response (CCG) in assigning priorities during a response. Information gathered during the Area Response Plans would help Command (in the Incident Command Services) make informed decisions about protecting resources potentially at risk.

## **Independent Review of the M/V Marathassa Fuel Oil Spill Environmental Response Operation**

In addition, following release of the *Independent Review of the M/V Marathassa Fuel Oil Spill Environmental Response Operation*, the Minister of Fisheries and Oceans accepted and committed to implementing all recommendations, including:

- Review of internal and external notification procedures and practices following a report of marine pollution;
- Improving communications;
- Further implementation of the Incident Command System within CCG and exercising with all partners, including First Nations, provincial and municipal partners, and non-governmental organizations as part of the plan; and
- Clarifying roles and responsibilities, internally, and with our federal and local pollution response partners, to ensure an effective and appropriate pollution response.

## **Marine Safety Initiatives**

The Government of Canada recently announced measures to strengthen Canada's world-leading marine safety system, restore and protect marine ecosystems and habitats, build partnerships with Indigenous communities, and invest in oil spill cleanup research and methods. These marine safety initiatives will benefit all Canadians and were developed to address gaps in Canada's existing marine safety system that were identified by Indigenous and coastal communities, as well as environmental groups, industry, and experts. The specific initiatives respond to where marine safety improvements are needed the most, as identified through Canada-wide consultation efforts.

Indigenous coastal communities will be involved in co-developing aspects of this plan to protect, preserve, and restore Canada's oceans and sea routes, and to play a stewardship role in protecting Canada's coasts by contributing traditional knowledge and expertise. Some example initiatives include the establishment of Indigenous Community Response Teams and creation of an Indigenous chapter of the Coast Guard Auxiliary; creation of local vessel control areas to minimize safety risks and environmental impacts in collaboration with Indigenous groups; and the design and launch of a five-year program on the South Coast of B.C. to collect and update baseline biological, ecological, social, cultural and economic data to support effective environmental stewardship, also in partnership with Indigenous groups.

The Crown is of the view that these marine initiatives will lead to safer, more responsible marine shipping and cleaner, healthier marine ecosystems for traditional and other community uses. While not specific to any one project, they will nevertheless respond to a variety of concerns that Indigenous groups have raised in the context of the proposed Trans Mountain Expansion Project.

### **South Coast Marine Safety Workshops**

Transport Canada is planning on co-hosting additional workshops in early 2017 with Indigenous groups and responsible authorities of the marine safety system, with respect to ways to improve the system, including increasing involvement of Indigenous groups along the marine shipping route.

Further information on these initiatives that have particular relevance for Indigenous groups who may be potentially affected by the marine shipping element of the Project are forthcoming.

## **4.2.6 CONTEMPLATED PROJECT-RELATED CROWN ACCOMMODATION MEASURES**

Crown analysis of the NEB Report and the outcomes of the consultation process on the NEB Report have identified outstanding issues and general residual effects of the Project that could adversely impact Aboriginal Interests and other interests. Specific Aboriginal group impacts are discussed in appendices A to E.

In addition to potential impacts on Aboriginal Interests, the Crown has also gained an appreciation for the interest within Aboriginal communities of being involved in ongoing environmental monitoring and oversight of Project construction and operational activities and in emergency



planning and response. In part, these interests stem from the role Aboriginal groups take with respect to decision making for major resource projects proposed within their traditional territories and asserted title lands. In addition, the Crown understands that Aboriginal groups with title claims and current use of lands and resources for traditional purposes within the Project footprint wish to derive some direct benefits should the Project proceed, over and above any benefits provided through agreements reached with the proponent.

The Crown understands that one form of accommodation to address these issues can come through acknowledgement and respect for traditional governance systems and Aboriginal groups' strong cultural ties to the land<sup>32</sup> including past, present and future use of the land for the existing TMPL corridor and the proposed expansion. The Crown also understands that there is currently a lack of trust that pipeline operators and regulatory agencies will protect ecosystems and Aboriginal Interests, despite increasing levels of transparency for compliance and enforcement reporting and emergency planning.

The Crown has also heard through the consultation process that Aboriginal groups wish to collaborate with the proponent, regulatory authorities and the appropriate government authorities to better understand industry standards and technical matters associated with pipeline safety, emergency planning and response, in order to help communicate and manage any incremental risk to communities.

To address these outstanding concerns as well as the incremental risk of the Project to the exercise of Aboriginal Interests where cumulative effects may already place limits on where, when and how traditional activities can be practiced, consultation has been initiated on some specific proposed federal measures, described below.

### **Proposal for an Indigenous Advisory and Monitoring Committee**

The Indigenous Advisory and Monitoring Committee proposal involves establishing a forum for Indigenous communities to engage with federal regulators and the federal government (and potentially provincial governments and proponents) to participate in monitoring of construction, operation, and decommissioning of the Project. Subject to further consultation with interested Indigenous communities, such a committee's role could include:

- Sharing information and local traditional knowledge regarding environmental conditions, community concerns and company performance throughout the life cycle of the pipeline;
- Collaborative review of plans, reports, and activities related to the Project and monitoring of compliance with regulatory requirements and Project conditions; and
- Providing advice to the regulator and the proponent on issues with respect to monitoring and mitigation.

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<sup>32</sup> For example, through consultation on this Project, the Crown has come to understand that the word "land" can mean far more than is commonly understood from the English word. For example, the word "land" in the Nsyilxcen language is "ła\_kłtmx"úla?x" (loosely pronounced "tumulx"), which to the Syilx people means everything we are a part and responsible for protecting – including the bugs, birds, bears and the entire ecosystem including what is below the ground.

## **Recognition of Historical Impacts of the Existing Trans Mountain Pipeline**

Governments do not have a duty to consult or accommodate in respect of past or existing projects. Nevertheless, many Aboriginal groups raised concerns that they were not consulted in the early 1950s when the existing TMPL was approved and that this was important because the Project would become part of the TMPL system if it receives approval.

## **4.3 General Impacts on Aboriginal Interests and Concerns**

### **4.3.1 IMPACTS ON HUNTING, TRAPPING, AND GATHERING**

Early on in the review of the Project, the Crown identified that routine construction and operation of new pipeline segments including terminals, pumping stations and expanded storage facilities could result in changes to hunting, trapping and gathering activities for those groups who exercise rights within the Project footprint.

The Project could result in changes to hunting and trapping through the following potential effects:

- Loss or alteration of wildlife habitat and wildlife movement;
- Changes to terrestrial food sources for wildlife;
- Increased predation risk of harvested species;
- Sensory disturbances to wildlife from short-term noise and vibration;
- Changes to the quality of country (traditional) foods;
- Increased access by non-Aboriginal hunters and trappers; and
- Temporary loss of access to traditional lands.

The Project could result in changes to traditional gathering activities through the following potential effects:

- Loss or contamination of native vegetation, soil degradation, localized changes to topography, erosion, air quality and noise;
- Increased access to previously inaccessible areas; and
- Temporary loss of access to traditional lands.

In the event of an accident or malfunction that allowed for fuel, oil or other deleterious substances to be released into the terrestrial or marine environment, the Project could result in the following changes to the environment and socio-economic conditions and on hunting, trapping and gathering through the following potential effects:

- Direct loss or alteration of wildlife and wildlife habitat abundance, or quality;
- Direct loss of harvestable plant species of interest to Aboriginal groups; and
- Changes to water and soil quality.

## **NEB Conclusions in Relation to Potential Impacts on Hunting, Trapping, and Gathering**

In respect of the above potential effects, the NEB concluded on page 279 of its report that the ability of Aboriginal groups to use the lands, waters and resources for traditional purposes would be temporarily impacted by construction and routine maintenance activities during operations, and that some opportunities for certain activities such as harvesting or accessing sites or areas of TLRU will be temporarily interrupted.

Other specific conclusions of the NEB in respect of the above noted potential effects of the Project include:

- Not likely to cause significant adverse effects to soil and soil productivity (page 189);
- Not likely to cause significant adverse effects to rare plants and lichens and vegetation communities of concern (page 195);
- No-net-loss of old growth forests within Old Growth Management Areas (page 196);
- Not likely to cause significant adverse effects to wetlands (page 200), wildlife and wildlife habitat (page 204), caribou (page 208) or grizzly bear (page 212), wildlife species at risk (215); and
- Not likely to cause significant adverse effects to surface water quality and quantity (page 177) or groundwater (page 179).

The NEB is of the view that impacts would be short-term, limited to brief periods during construction and routine maintenance, and largely confined to the Project footprint for the pipeline, associated facilities and the on-shore portion of the WMT. The NEB found that these effects would be reversible in the short to long term, and low in magnitude.

The NEB found that Project construction and operation would result in adverse effects to riparian habitat because of clearing of vegetation required for watercourses crossed using trenched methods. Generally, the NEB considers adverse effects to riparian habitat as temporary, since disturbed riparian habitat is likely to return to a similar pre-construction functionality during the life of the Project. However, in certain situations, such as when mature riparian habitat is removed, adverse effects to riparian habitat would be considered permanent such that riparian habitat may not return to pre-construction conditions within the life of the Project.

The following NEB conditions would help avoid or mitigate potential impacts on Aboriginal groups' hunting, trapping, and gathering:

- Overarching conditions (#1,2,3,4) for compliance with commitments, environmental protection, engineering and safety;
- Conditions for soil, vegetation and wetlands protection prior to construction (#40,41,42,45,46,47,71,76,92) and during operation (#151,154,155,156,157);

- Conditions for wildlife and wildlife habitat protection prior to construction (#36,37,38,44,47,56,71,92), prior to operation (#128) and during operation (#37,128,149,150,151,154); and
- Conditions for Aboriginal engagement (#96,146), TLRU and TLMU investigation reporting (#97) and participation in monitoring during construction (#98).

Trans Mountain has also committed to communicating its construction schedule to Aboriginal trappers so that they can set their traplines in areas unaffected by construction activities. Should they lose trapline revenue and or suffer a reduced harvest, the proponent has committed to offering compensation. NEB condition #2 (Compliance with commitments) requires that Trans Mountain fully implement all of the commitments it made in its Application or during the NEB review process.

Many Aboriginal groups stated they have a significant reliance on food gathered from the land as part of their normal diet, and access to this food is directly related to the health and well-being of their people. Interference with the ability to continue harvesting plants for medicinal use was raised as a concern. Some groups said that they had concerns with the clearing of vegetation and with contamination of plants and loss or alteration of traditional use subsistence sites for plant gathering. Aboriginal groups also identified many concerns related to environmental effects of the Project on hunting, trapping, and plant gathering activities.

Aboriginal groups are concerned about the impacts on a wide variety of wildlife species, including species at risk, through habitat loss and fragmentation, increase in predation by creating animal corridors, wildlife displacement and sensory disturbance. Aboriginal groups are concerned that there will be a destruction of plants and medicinal resources relied on by Indigenous people, such as cedar bark, roots, buds, wood, berries, and medicines.

Aboriginal groups raised concerns with the Project's potential impacts on access to hunting, trapping, and plant gathering, including increased barriers to accessing traditional resources and practices, especially during construction. They were concerned that the access to these locations, especially preferred sites, will result in fewer hunting, trapping, and plant gathering opportunities for their community members. Aboriginal groups stated that hunting activities are currently impacted by existing development and that existing fragmented lands in their traditional territories will be further fragmented, enabling increased access to non-Aboriginal recreational hunters. The result is that Aboriginal groups are of the view that fewer hunting opportunities will be available for Aboriginal hunters should the Project proceed.

Aboriginal groups in the Coastal Region of B.C. raised concerns about restricted marine access to specific hunting, trapping, and plant gathering activities because of increased marine vessel traffic associated with the Project. These Aboriginal groups were concerned that their smaller vessels could be at risk when traversing the established marine shipping lanes, and that some Aboriginal group members will be discouraged from travelling on the water because of Project-related marine vessel traffic.

Aboriginal groups also expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of hunting, trapping, and plant gathering activities. Aboriginal groups were concerned that the Project could impede access to hunt, trap and gather plants, and that this could cause a sense of spiritual and cultural alienation from the land. Groups were also concerned about the use of pesticides to control invasive species and what the impact could be on the health of community members that consume country foods.

The Crown acknowledges that proponent commitments, NEB conditions and the existing pipeline and marine safety regimes would not eliminate the potential adverse impacts of the Project on Aboriginal Interests specific to hunting, trapping, and plant gathering activities. The following is a discussion of the general factors that have been considered by the Crown in assessing the potential impacts on Aboriginal group's Aboriginal Interests associated with hunting, trapping and plant gathering activities.

For all of the valued components assessed by the NEB related to hunting, trapping and plant gathering, adverse effects were found to be limited to directly disturbed areas in the Project footprint, sometimes extending off-footprint into the Local Study Area (LSA). The Project's adverse effects vary in duration and frequency from short-term to long-term including for woodland caribou mortality risk, some weeds/invasive species, and medium-term for soil and soil productivity, rare plants, lichens, vegetation, and wetlands (with reclamation). Other medium- to long-term effects are predicted to occur for mature trees and grasslands and terrestrial wildlife including woodland caribou and grizzly bear. The Project's adverse effects to species relied upon for hunting, trapping and plant gathering activities were found by the NEB to range from reversible to permanent.

The Crown notes that there is a divergence of opinion on the magnitude and significance of cumulative effects over a wide array of valued components related to hunting, trapping and plant gathering. The proponent and NEB conclude that the Project's contributions to the total cumulative effects for most VCs are relatively minor, inconsequential or insignificant. The NEB cites the voluntary commitment of the proponent to develop an Environment Stewardship Program, where the proponent would seek opportunities, alone or in partnership, to restore, secure, or enhance elements of aquatic and terrestrial ecosystems above and beyond regulatory requirements.

The baseline information related to the construction and operation of the pipeline RoW and associated facilities is well understood. In the Crown's view, the construction and operation of the pipeline, WMT and associated facilities represent a low to moderate magnitude change in the established baseline environment. The majority of effects – primarily in the biophysical context – are reversible within the Project life cycle with a small number of effects being more permanent over decades/generations related to removal of riparian habitat and mature vegetation for the RoW and facilities maintenance. Adverse effects are short term in duration and frequency during the Project construction; long term in duration for operations and maintenance over the Project life cycle.

However, the Crown notes that many Aboriginal groups maintain that the cumulative effects of development activities have severely impacted their ability to exercise their Aboriginal and treaty rights to hunt, trap and gather plants. Aboriginal harvesting activities continue to be adversely affected by development, with fragmentation of lands, loss of access to hunting and trapping areas, encroachment of developments, and loss of natural habitat. Project-related impacts on access to, or use of, culturally sensitive sites and practices are viewed as additive to the current baseline that reflects cumulative effects of past development activities.

In consideration of concerns raised by Aboriginal groups during the NEB hearing and through Crown consultation, and in consideration of the conditions proposed by the NEB, the existing regulatory regime, and the jurisdiction of the province, EAO is also proposing a number of conditions, which B.C. Ministers may attach to the provincial EA certificate, if approved. Conditions particularly relevant to avoiding or mitigating impacts on Aboriginal groups' hunting, trapping and gathering include:

- EAO Conditions 10 and 12 require Aboriginal consultation and Aboriginal construction monitors;
- EAO Conditions 16 to 20 require a range of wildlife management and offsetting plans, a weed and vegetation management plan, and an access management plan. These plans establish incremental requirements to the NEB conditions and include the requirement to consult Aboriginal groups in the development of the plans; and
- EAO Condition 22 requires the proponent to prohibit hunting, fishing, trapping and plant gathering by employees and contractors.

The potential impacts of the project on Aboriginal Interests associated with hunting, trapping and gathering activities for each Aboriginal group are discussed in appendices A to E.

### **4.3.2 IMPACTS ON FRESHWATER FISHING**

Early on in the review of the Project, the Crown identified that routine construction and operation of new pipeline segments, terminals, pumping stations and expanded storage facilities could result in changes to freshwater fishing for those groups exercising rights within the proposed pipeline RoW and related facilities.

The Project could result in changes to freshwater fishing through the following potential effects:

- Temporary loss of or impeded access to traditional fishing sites;
- Disturbance to riparian habitat at pipeline watercourse crossings leading to indirect effects to fish harvesting; and
- Reduction in water levels or quality.

## **NEB Conclusions in Relation to Potential Impacts on Freshwater Fishing**

During the NEB hearing and Crown consultation with Aboriginal groups, concerns were raised regarding the potential impacts of the Project on fish, and in particular, Pacific salmon, as a culturally, economically and ecologically important species within B.C. Concerns were raised about the existing cumulative effects from industrial and urban development, impacts on riparian areas, and potential impacts on species at risk. Chapter 10.2.5 of the NEB Report provides the assessment of the potential impacts on freshwater fish and fish habitat, including the key mitigation measures identified by Trans Mountain. The NEB found that proposed watercourse crossings designs, mitigation measures, reclamation activities, and post construction monitoring would be appropriate and would effectively reduce the extent of effects to fish and fish habitat. Watercourse crossings would need to comply with federal (NEB and Fisheries and Oceans Canada [DFO]) and provincial laws and regulations and would require permits under the B.C. *Water Sustainability Act*, which protects the quality and quantity of water for fish and fish habitat. The NEB agreed with Trans Mountain's self-assessment of the potential for serious harm, in that the majority of proposed watercourse crossings would not constitute serious harm to fish under the *Fisheries Act*.

NEB condition 43 requires site-specific information to make an accurate serious harm determination for higher risk crossings and would include consideration of fish habitat features and functions, species use, and composition of riparian habitat. The NEB noted that it would use this information to conduct a site-specific review of each of the proposed watercourse crossings where Trans Mountain cannot meet all of DFO's Measures to Avoid Causing Harm to Fish and Fish Habitat and to verify the results of Trans Mountain's self-assessment of the potential for serious harm to fish. The NEB would refer to DFO any watercourse crossing activities that may likely result in serious harm to fish and require authorization under the *Fisheries Act*. DFO would then be responsible for reviewing the proponent's Application for Authorization, making a determination on whether serious harm to fish is likely, and issuing potential *Fisheries Act* authorization(s). The NEB did not anticipate impacts on critical habitat of the Nooksack dace and Salish sucker (fish species at risk) provided that trenchless watercourse crossing methods are employed, as required in NEB Condition 75. The NEB concluded that there would not be significant adverse effects to freshwater fish and fish habitat (page 185-6).

The NEB concluded that the Project was not likely to cause significant adverse environmental effects to surface water quality and quantity (page 177) or groundwater (page 179). The NEB is of the view that the proposed Environmental Protection Plans would effectively reduce the extent of any effects of Project construction and operation on surface water quality and quantity.

The following NEB conditions would help avoid or mitigate potential impacts on Aboriginal groups' freshwater fishing:

- Overarching conditions (#1,2,3,4) for compliance with commitments, environmental protection, engineering and safety;
- Conditions for water quality protection (#35,39,47,71,87,113,130,151,154);

- Conditions for fish and fish habitat (#43,47,71,75,92,108,110,151,154);
- Conditions for watercourses (#43,47,48,65,67,71,72,74,75,87,92,94,108,110,113, 151,154); and
- Conditions for Aboriginal engagement (#96,146), TLRU and TLMU investigation reporting (#97) and participation in monitoring during construction (#98).

Many Aboriginal groups stated they have a significant reliance on food gathered from the land as part of their normal diet, and access to this food is directly related to the health and wellbeing of their people. Aboriginal groups identified many concerns related to environmental effects of the Project on fishing activities, in particular, risks to marine and freshwater habitats that are important to salmon in the Fraser River on already stressed salmon populations that have been experiencing low returns in recent years.

Aboriginal groups raised concerns with the Project's potential impacts relating to specific locations and access to fishing activities, specifically the destruction of traditional resources, including spiritually and culturally important sites, increased barriers to accessing traditional resources and practices, and increased access to the land by members of the public because of Project-related activities.

Aboriginal groups expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of its fishing activities, and sense of spiritual and cultural alienation. Aboriginal groups in the Fraser Basin stated that salmon are key species in their culture, connected to community members' social well-being, spirituality, way of life, and connection to their land.

The Crown acknowledges that proponent commitments, NEB conditions and the existing pipeline safety regime would not eliminate the potential adverse impacts of the Project on Aboriginal Interests specific to freshwater fishing. The following is a discussion of the general factors that have been considered by the Crown in assessing the potential impacts on Aboriginal group's Aboriginal Interests associated freshwater fishing activities.

For all of the VCs assessed by the NEB related to freshwater fishing, adverse effects were found to be limited to directly disturbed areas in the Project footprint, sometimes extending into the LSA. The Crown notes the NEB's finding that proposed watercourse crossings designs, mitigation measures, reclamation activities, and post-construction environmental monitoring, as proposed by Trans Mountain, are appropriate and would effectively reduce the extent of effects to fish and fish habitat. The Crown also notes that all watercourse crossings will need to comply with federal (NEB and DFO) and provincial laws and regulations and will require section 11 permits under B.C.'s *Water Sustainability Act* that protects the quality and quantity of water for fish and fish habitat.



This Project is subject to the December 2013 Memorandum of Understanding between DFO and the NEB for the Cooperation and Administration of the *Fisheries Act* and the *Species at Risk Act* Related to Regulating Energy Infrastructure. As such, the NEB reviewed and assessed effects to fish and fish habitat associated with the pipeline component. DFO's response to effects to marine fish and fish habitat and marine mammals (including species at risk) associated with the marine terminal and marine shipping Project components is discussed in section 4.3.3.

If, following the identification of mitigation measures, a watercourse crossing is likely to result in serious harm to fish, then the NEB will inform DFO that a *Fisheries Act* authorization under paragraph 35(2)(b) is likely to be required. Similarly, if it is anticipated that there will be unavoidable impacts on aquatic species at risk associated with watercourse crossings, the NEB will inform DFO.

Once DFO receives the proponent's application for authorization, it will review the application, conduct consultation with potentially affected Aboriginal groups, and issue an authorization if deemed appropriate. Authorizations issued by DFO would relate specifically to those works, undertakings or activities that are likely to result in serious harm to fish as defined by the *Fisheries Act* and not the entire Project. DFO would undertake appropriate Aboriginal consultation in the regulatory phase should a *Fisheries Act* authorization or SARA permit be required.

The Project's adverse effects to surface water and freshwater fish and habitat due to watercourse crossings were determined by the NEB to be short term and reversible. The proponent and NEB concluded that the Project's contributions to the total cumulative effects for most VCs are relatively minor, inconsequential or insignificant. The Board cites the voluntary commitment of the proponent to develop an Environment Stewardship Program, where the proponent would seek opportunities, alone or in partnership, to restore, secure, or enhance elements of aquatic ecosystems above and beyond regulatory requirements.

The baseline information related to the construction and operation of the pipeline RoW and associated facilities is well understood. In the Crown's view, the construction and operation of the pipeline, WMT and associated facilities represent a low to negligible magnitude change in the established baseline environment related to fish and fish habitat. The majority of effects – primarily in the biophysical context – are reversible within the Project life cycle. Adverse effects to traditional freshwater fishing practices are viewed by the Crown as short term in duration and frequency during the Project construction.

However, the Crown notes that many Aboriginal groups maintain that the cumulative effects of development activities have severely impacted their ability to exercise their Aboriginal and treaty rights to fish. Aboriginal fishing activities continue to be adversely affected by development and the effects of climate change. Project-related impacts on access to fishing or use of culturally sensitive sites and practices associated with fishing activities are viewed as additive to the current baseline that reflects cumulative effects of past development activities.

In consideration of concerns raised by Aboriginal groups during the NEB hearing and Crown consultation and in consideration of the conditions proposed by the NEB, the existing regulatory regime, and the jurisdiction of the province, EAO is also proposing a number of conditions, which B.C. Ministers may attach to the provincial EA certificate, if approved. Conditions particularly relevant to avoiding or mitigating impacts on Aboriginal groups' freshwater fishing include:

- EAO Conditions 10 and 12 require Aboriginal consultation and Aboriginal construction monitors;
- EAO Condition 20 requires an access management plan, including measures to avoid or mitigate disruption of the access by members of Aboriginal groups carrying out traditional use activities. This plan establishes incremental requirements to the NEB condition and includes the requirement to consult Aboriginal groups in the development of the plan; and
- EAO Condition 22 requires the proponent to prohibit hunting, fishing, trapping and plant gathering by employees and contractors.

The potential impacts of the Project on Aboriginal Interests associated with freshwater fishing activities for each applicable Aboriginal group are discussed in appendices A to E.

### 4.3.3 IMPACTS ON MARINE FISHING AND HARVESTING

Early on in the review of the Project, the Crown identified that construction and operation of the WMT and routine marine shipping operations could result in changes to marine fishing and harvesting for those groups exercising rights within Burrard Inlet, Salish Sea and Strait of Juan de Fuca in the vicinity of the designated traffic separation schemes or marine shipping lanes<sup>33</sup>.

The Project could result in changes to marine fishing and harvesting through the following potential effects:

- Loss or alteration of marine foraging habitat, bird habitat and other species habitat associated with marine harvesting as a result of WMT expansion;
- Sensory disturbances to marine mammals and marine birds from short-term noise and vibration;
- Temporary loss or impeded access to traditional fishing or marine harvesting sites;
- Temporary loss of access to ocean harvesting areas for short durations from shipping;
- Vessel strikes and other interference with vulnerable or endangered species of significance to Aboriginal groups such as the Southern Resident Killer Whale; and
- Environmental effects such as routine marine-related discharges, invasive species, air and light pollution.

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<sup>33</sup> For impacts related to accidents and malfunctions, see section 4.3.6.

## **NEB Conclusions in Relation to Potential Impacts on Marine Fishing and Harvesting**

For the TMRU activities directly affected by the WMT, the NEB concluded on p. 279 of its report that effects of WMT construction and operation would persist for the operational life of the Project, as TMRU activities would not occur within the expanded water lease boundaries for the WMT. The NEB found that while the effects would be long term in duration, these would be reversible in the long term. The NEB notes that the anticipated loss of marine fish and fish habitat would be offset, and that specific offsetting measures will be determined in consultation with DFO and affected Aboriginal communities. The NEB acknowledges the concerns expressed by Aboriginal groups about the effects to harvesting and traditional user vessel movements in the vicinity of the WMT, but notes that the dock and associated vessel movement have been present for many years. Aboriginal groups would likely be able to adapt to the expanded water lease boundary. Therefore, the NEB concluded that for the WMT, the Project's effects to TMRU are low in magnitude.

The NEB concluded that marine shipping from the Project would disrupt Aboriginal marine vessels and harvesters and that this could disrupt activities or access to sites. The Board is of the view that these disruptions would be temporary, only occurring during the period of time when Project-related tanker vessels are in transit. The NEB is of the view that Aboriginal marine vessel users would maintain the ability to harvest marine resources and to access subsistence and cultural sites in the presence of the periodic and short-term disruptions caused by Project-related vessels. The NEB found that, with the exception of effects to the Southern Resident Killer Whale, the magnitude of effects of Project-related marine vessel traffic on traditional marine resource uses, activities, and sites is low.

The Board agreed with DFO and Trans Mountain that there is no direct mitigation Trans Mountain can apply to reduce or eliminate potential adverse effects from Project-related marine vessels. The Board recognizes that altering vessel operations, such as shifting shipping lanes away from marine mammal congregation areas or reducing marine vessel speed, can be an effective mitigation to reduce impacts on marine mammals from marine shipping.

Given the low frequency, duration and magnitude of effects associated with potential disruptions, and Trans Mountain's commitments to provide regular updated information on Project-related marine vessel traffic to Aboriginal communities, the Board finds that adverse effects to traditional marine resource uses, activities and sites are not likely and that contribution of Project-related marine traffic to overall effects related to changes in traditional marine use patterns is not likely to be significant.

The NEB noted that Trans Mountain has committed to initiating a public outreach program prior to beginning operations to educate the public on marine shipping and provide regular updated information on marine vessel traffic, including the area around Swiftsure Bank (page 362).

Other specific conclusions of the NEB in respect of potential effects of the Project to marine fishing and harvesting include:

- The Project is not likely to cause significant adverse environmental effects to marine sediment and water quality (page 219), marine fish and fish habitat (page 222), marine mammals (page 225), or marine birds (page 226);
- The impact of marine shipping on marine fish and fish habitat will be low magnitude and reversible (page 340);
- Underwater noise from marine shipping will create a long-term sensory disturbance for marine mammals, however this effect is reversible (page 349);
- Marine shipping lane utilization is expected to increase regardless of whether or not the Project is approved (page 349);
- The Marine Mammal Protection Program is meant to ensure Trans Mountain participates in the development of industry-wide best practices (page 349);
- Project-related marine vessels would have some impact on humpback whales, transitory killer whales, and other baleen whales. However these effects would be inconsequential (page 351).;
- Effects of marine shipping on marine birds are expected to be long term, but reversible, and of low magnitude (page 351); and
- Disruption of Aboriginal traditional marine use, such as through interference or collisions with marine tanker traffic, is unlikely because of existing regulatory standards (page 362).

If the Project is approved, the following NEB conditions would either directly or indirectly avoid or reduce some of the impacts and concerns raised by Aboriginal groups in respect of potential impacts on marine fishing and harvesting:

- Overarching conditions (#1,2,3,4) for compliance with commitments (including TERMPOL recommendations and findings), environmental protection, engineering and safety;
- Conditions for protection of fish and fish habitat (#92,109,151);
- Conditions for protection of marine mammals (#92,132,151); and
- Conditions for the WMT:
  - Prior to construction: #8,21,30,33,34,35,52,53,80,81,82,83,84,97,101;
  - Prior to operation: #30,109,118,119,123,126,127,129,130,136,138;
  - During operation: #109,141; and
  - Hydrostatic Testing Plan: #113.

The above-noted NEB conditions for the WMT include various requirements to develop more detailed mitigation plans during the permitting phase. These include:

- Condition 35 – Marine Sediment Management Plan (Possible mitigations for harvesting: test dredges for gauging sediment behaviour; use of silk screens to contain sediment; uplands disposal of dredge materials; disposal at sea behind a berm);
- Condition 80 – Noise Management Plan for construction at terminals and pump stations (Possible mitigations for impacts on harvesting include use of alternative underwater techniques: underwater bubble curtains, isolation casing for piles);
- Condition 81 – Westridge Marine Terminal Environmental Protection Plan (Possible mitigations for impacts on harvesting include reliance upon a Fisheries Impact Study looking at what impacts their proposed project may have on Aboriginal fisheries and fish and fish habitat, carried out by an Aboriginal group that resides in the Inlet; developing and implementing an oyster shell replacement plan; support funds for the Lynn Creek Estuary Legacy Project. Possible mitigations for impacts on cultural practices include for anchorages, VFPA officials, in response to complaints, asking vessels to power down lights and boilers);
- Condition 83 – Westridge Marine Terminal (offshore) – pile design (Possible mitigations for impacts on harvesting include construction activities carried out outside the fish window; use of steel instead of creosote-treated piles; and
- Condition 98 – Plan for Aboriginal group participation in construction monitoring (Possible mitigations for impacts on culture/cultural practices include instituting archaeological chance find procedures for construction activities and in some instances ensuring Aboriginal monitors are on site during works.)

In addition to the above, the following conditions are generally applicable to protecting marine fishing or harvesting activities in the vicinity of the Project:

- Reports on improvements to Trans Mountain's Emergency Preparedness Program (#117) and Implementing improvements to Trans Mountain's Emergency Preparedness Program (#124);
- Conditions for project-related marine shipping (#91,131,132,133,134,144);
- Conditions for Aboriginal engagement (#96,146), TLRU and TLMU investigation reporting (#97) and participation in monitoring during construction (#98); and
- Community Benefit Program progress reports (#145).

Condition 131 would require Trans Mountain to develop a public outreach program prior to Project operations in order to ensure that the program is designed in consultation with the Pacific Pilotage Authority and implemented in a manner that is appropriate to its intended audience. The NEB also noted that Project-related marine vessels are required to fully comply with all applicable navigational, communications and safety regulations including those of Transport Canada, the Canadian Coast Guard, the Pacific Pilotage Authority and Vancouver Fraser Port Authority (VFPA), including adherence to VFPA's guidelines regarding noise and light pollution for tankers docked at VFPA managed anchorages (page 356).

Aboriginal groups on the Salish Sea raised concerns with potential Project impacts related to their Aboriginal right to fish and harvest marine resources.

Aboriginal groups were concerned that routine shipping could adversely impact marine organisms of critical importance through chemicals released through the discharge of ballast water, impacts from invasive species transported via the hull of a ship or in ballast water, ongoing sensory disturbance to marine fish and mammals, erosion and damage to intertidal and shoreline habitat from wakes.

Aboriginal groups raised concerns that increased tanker traffic will disrupt the ability of community members to access marine fishing and harvest areas and have concerns for the safety of community members on the water when tankers are transiting because of increased vessel wake and potential collisions. Groups noted that access to some harvesting areas is already constrained and increasing use of shipping lanes is impairing access to and use of some areas. If shipping traffic becomes too high, some groups expressed that it may effectively prevent use in some areas.

Aboriginal groups raised concerns with direct and indirect effects of Project-related marine shipping activities on social, cultural, spiritual, and experiential aspects of its marine fishing and harvesting activities. Groups are concerned that increases in tanker traffic that may discourage community members from travelling on the ocean, interfere with travel to traditional territories, and adversely impact the ability of community members to exercise their fishing rights and cultural practices, including the transfer of traditional knowledge. Aboriginal groups raised concerns that reduced harvests would impact economic, cultural and social structures within the community through lack of connection with historical and current traditions.

The following is a discussion of the general factors that have been considered by the Crown in assessing the potential impacts on Aboriginal Interests associated with marine fishing and harvesting activities resulting from environmental effects, the WMT, routine Project-related marine vessel traffic and interference, marine vessel wake and shoreline erosion, and Southern Resident Killer Whale, Stellar Sea Lions, and other marine mammals.

### ***Westridge Marine Terminal***

The current Westridge Marine Terminal dock complex extends 75 m into Burrard Inlet. The proposed expanded dock is anticipated to extend approximately 250 m into Burrard Inlet with a maximum marine footprint of construction activities estimated to be 350 m. Construction would take approximately two years. Given the potential increase in marine shipping associated with the Project, the Crown understands that the four existing anchorages within eastern Burrard Inlet proximal to the WMT would be used at a greater frequency and more continuously over the life of the Project if it proceeds.

The First and Second Narrows contain deep-sea transit routes and are subject to movement restrictions. The Second Narrows Movement Restriction Area (MRA) is subject to additional procedures facilitating safe transit and order of priority for large vessels because of extremely strong currents and available clearance and depth of the channel. It is expected that vessels less than 20 m (including fishing vessels) shall not impede the passage of larger vessels within a narrow channel or hamper the movements of vessels maneuvering on or off a berth.

While limited recreational boating is allowed between the Lions Gate and Second Narrows bridges, pleasure craft must have outboard motors for transiting through the Inner Harbour. Anchoring, crabbing, fishing, sailing, rowing, paddling, jet-skiing and waterskiing are prohibited for reasons pertaining to human safety, with the exception of Coal Harbour. Further exacerbating the congestion of navigation, the Inner Harbour contains eight commercial anchorages and 16 deep sea terminals.

The proponent has noted that the proposed WMT expansion may result in serious harm to fish. As such, a *Fisheries Act* authorization under Paragraph 35(2)(b) will likely be required. However, details on site-specific effects to marine fish and fish habitat have not been provided at this time. Should the Project proceed to the regulatory phase, the proponent would be required to provide more detailed information to support any future *Fisheries Act* authorization application process. Consultation with potentially affected Aboriginal groups would take place prior to the issuance of an authorization.

Any dredging associated with the construction of new berths at the WMT would require mitigation for limiting the impacts of water-borne, contaminated sediment and could require uplands disposal or disposal at sea. In terms of managing dredged sediment disposal, NEB condition 65 includes consideration of options for and minimizing the amount of material that may be considered for disposal. If a disposal at sea permit is required, ECCC will review the proponent's permit application in consultation with potentially affected Aboriginal groups before a decision on issuing a permit.

Burrard Inlet and Indian Arm constitute Management Area 28, which is regulated by DFO. DFO issues licences for food, social and ceremonial (FSC) purposes and commercial fishing within this area, subject to concerns regarding conservation and public health. Squamish Nation has licences for salmon, crab, prawn and shrimp in Eastern Burrard Inlet and Indian Arm. However, baseline conditions in Burrard Inlet, relative to the practice of Aboriginal Interests, are not conducive to supporting a subsistence marine fishing or harvesting economy or unfettered and unregulated marine travel in relation to marine fishing and harvesting. Additionally, cultural activities associated with these traditional practices have been limited by the increasing urbanization of the Inlet.

The area is closed to the fishing of rockfish and lingcod (including catch and release) and the harvesting of bivalve molluscs all year. Surf smelt closures apply from July to August during the peak spawning period. Harvesting of crab, shrimp and prawns is closed between Lions Gate Bridge and the Second Narrows Bridge all year to avoid any conflicts with navigational activity in the harbour.

The Rockfish Conservation Area in Eastern Burrard Inlet – which surrounds the WMT – is closed to all recreational fishing except invertebrates by hand picking or diving, crab by trap, shrimp/prawn by trap, and smelt by gillnet. The safety of navigation through port waters has taken precedence over harvesting or fishing in Burrard Inlet.

The Crown acknowledges that navigation and harvesting require special attention, as there have been measurable decreases in Aboriginal groups' ability to practice these rights over the last 200 years.

In regard to marine vessel source pollution in the vicinity of the WMT, VFPA does not allow ballast exchange or black water discharge within its jurisdiction. Grey water can only be discharged within VFPA jurisdiction if authorized to do so. When, where and how grey water is authorized to be discharged is informed by sampling conducted by VFPA. Hull cleaning within VFPA jurisdiction is not permitted unless authorized. To be authorized, the vessel must propose appropriate mitigation measures that prevent adverse impacts on the aquatic environment and prevents the introduction of invasive species. Some vessel pollution prevention is regulated by TC. VFPA's Port Information Guide addresses issues within VFPA's jurisdiction.

Despite Burrard Inlet being a heavily urbanized environment, Aboriginal groups have managed to sustain minimal levels of harvesting while pursuing re-establishment of certain species, and remediation of polluted areas. The Crown understands that there are five Aboriginal group entities that either exercise established or asserted fishing rights and/or assert a range of other Aboriginal rights in the vicinity of the WMT: Tsleil-Waututh Nation, Squamish Nation, Musqueam Indian Band, First Nations of the Hul'qumi'num Treaty Group, and four Stó:lō groups (Shxw'ow'hamel, Soowahlie, Skawahlook, and Seabird Island). In particular, Tsleil-Waututh Nation members are active users of the eastern end of Burrard Inlet, and their early efforts at remediating contamination in Maplewood Mudflats are part of their work toward restoring bivalve harvesting within a generation.

In regard to the impacts of marine vessel traffic, the Crown notes that marine travel supporting potential marine harvesting in the vicinity of the WMT has been limited for quite some time, but has the potential to be further limited given increased traffic in the waters surrounding the WMT. The VFPA has been slowly making changes to its navigation channels and anchorages to align with modern demands. However, the Crown notes that the Project would result in more marine vessel traffic in eastern Burrard Inlet and potential conflicts with Aboriginal groups.

In general, the Crown views there being a low possibility of navigational impacts affecting access to marine harvesting activities. Vessel traffic from the WMT will utilize existing deep-sea navigational channels and constraints for vessel interactions with these channels will remain unchanged. The Crown notes that Project-related impacts on navigation and cultural practices – specifically in eastern Burrard Inlet in proximity to the WMT – would exist for the lifetime of the Project, and would occur daily. While navigation is already significantly affected by deep-sea vessel traffic in Burrard Inlet, the existing four anchorages south and east of Cates Park would be occupied consistently if terminal operations commence, which is not the case currently.



Mitigation for impacts on valued components that affect marine harvesting would involve off-setting habitats destroyed by the Project as noted in the NEB conditions. However, additional effort could involve the collection of baseline data and remediation initiatives. The Crown notes that destruction of parts of the rockfish conservation area surrounding WMT is a measurable, not speculative impact.

#### ***Routine Project-related Marine Vessel Traffic***

For interference from Project-related marine vessels, there would be an increase from approximately five Aframax class vessel visits to the WMT per month currently to approximately 34 visits per month. The NEB expressed its view that Aboriginal marine vessel users will maintain the ability to continue to access subsistence sites in the presence of periodic and short-term disruptions from marine shipping related to the Project. The TERMPOL Report concluded that the established marine shipping lanes can accommodate additional vessels from the Project and that existing marine resources and capacity to support additional vessel traffic is sufficient.

In regard to impeded access to sites used for traditional purposes in the marine environment or upland areas accessed via waters transected by the marine shipping corridor for the Project, the Crown notes that mariners are obliged to follow the rules of the Collision Regulations to minimize vessel interference.

However, the Crown recognizes that the cumulative impacts associated with existing shipping activity must be taken into account when considering the incremental impacts on Aboriginal Interests from Project-related marine shipping activities. The designated shipping lanes may currently limit access to some Aboriginal groups traveling across or within the shipping lanes to access hunting, trapping, plant gathering, fishing, marine harvesting or other sites of cultural or spiritual importance to Aboriginal groups. The Crown understands that temporary, short-term and low magnitude interference from marine vessels associated with the Project may also occur. However, Project-related marine vessels are not expected to follow any different navigation routes than the existing traffic, which is confined to the designated shipping lanes and monitored by MCTS via the Canadian Coast Guard. The use of designated shipping lanes helps to protect the safety and security of all users of the marine environment.

The Crown estimates that the direct effects of a Project-related tanker transit would last approximately 15 minutes through any given area. As there would be up to two transits a day by ships associated with the Project, this amounts to 0.5 hours per day of potential interference. In other words, incremental interference would be possible up to 2% of the time. The NEB noted that all other marine vessels, including Aboriginal marine vessel users, would be able to continue their movements very shortly after the transit of a tanker, representing a temporary and reversible effect. The TERMPOL Report did not identify any navigation or regulatory concerns for tankers, tanker operations, the proposed route, or navigability, in terms of conflicts with other waterway users. The TERMPOL Report did not consider the overall increase in marine traffic levels to be an issue, but it did support additional measures to promote shared safe use of the preferred shipping

route. The Crown also notes that the proponent has made several commitments including implementation of TERMPOL recommendations and findings. Many of the measures go beyond regulatory requirements, and include:

- Extended use of tethered and untethered tug escort;
- Safety calls by laden tankers when in transit; and
- An engagement and awareness strategy to promote safe navigation and interaction between Project-related tankers and recreational boaters, fishing vessel operators, and operators of small vessels.

Transport Canada acknowledges the concerns raised by some Aboriginal groups that tanker vessel wakes could undermine the stability of smaller boats. The size of wake depends on a number of unique factors such as vessel draft and configuration, vessel speed and water depth. Transport Canada does not regulate vessel wake, but notes that speed limits can be set by port authorities within their jurisdictional boundaries, and vessel pilots can use their discretion to manage wake by modifying vessel speed.

The NEB concluded that the proponent's support of TERMPOL Report Recommendation 11 is a key measure to minimize potential disruption to recreational boaters, fishing vessel operators, and operators of small vessels as a result of increased Project-related marine vessel traffic.

In addition to the physical effects of marine shipping activities associated with the Project, the Crown's assessment considered site-specific, social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests, including Aboriginal group perspectives. For groups who frequently traverse or use the marine shipping lanes to access site-specific hunting, trapping, plant gathering, fishing, marine harvesting sites or areas of cultural or spiritual importance, impacts may be greater at times based on the seasonality of these practices or the uniqueness of a specific area or use, such as Swiftsure Bank.

#### ***Southern Resident Killer Whale, Stellar Sea Lions and Other Marine Mammals***

The NEB concluded that Project-related vessel traffic would have a significant adverse effect on Southern Resident Killer Whales. Many international bodies have responsibilities for the protection of the marine environment, including the protection of cetaceans from the negative effects of anthropogenic noise. Most of the available data on bio-acoustic impacts is limited to short-term responses in individual mammals, therefore the management of underwater noise focuses on specific events limited in space and time (such as pile driving and sonar). Research into the impacts on whales of chronic noise from ships is less advanced and therefore not as well-represented within international regulations.

The NEB was of the view that Project-related vessels have the potential to strike a marine mammal vessel, and that this would likely contribute to the cumulative risk of marine mammal strikes. The NEB does not provide their view on the probability of such strikes. However, based on the expert knowledge of marine mammal researchers within the Department of Fisheries and Oceans

Canada (DFO), the Crown is of the view that the risk to Southern Resident Killer Whale and stellar sea lions from Project-related vessel collisions may be extremely low to negligible. The proponent has recognized that alterations in ship speed and routing can be effective mitigation measures to reduce ship strike risk, but has not proposed to adopt such measures because it does not own or operate the shipping vessels or possess the regulatory authority to require such alterations.

Section 7 of the *Marine Mammal Regulations* made under the *Fisheries Act* protects marine mammals by prohibiting their disturbance, subject to the exception set out therein. All vessels in Canadian waters must abide by these regulations to avoid impacts on marine mammals. At this time, the Crown notes there are a variety of initiatives and programs underway (e.g. Enhancing Cetacean Habitat and Observation (ECHO) and Green Marine programs) aimed at developing mitigation measures to reduce effects of underwater noise and ship strikes on marine mammals. The Vancouver Fraser Port Authority leads the ECHO Program, which aims to improve understanding and management of the impact of shipping activities on at-risk whales throughout the southern coast of B.C. The ECHO Program's long-term goal is to develop mitigation measures that will lead to a quantifiable reduction in potential threats to whales as a result of shipping activities.

The Crown notes that the ECHO program in itself is not a mitigation measure, and at this time, has not yet proposed potential mitigation measures. The ECHO Program is currently in a phase of advancing scientific studies to support decisions on potential mitigation.

In 2014, the International Marine Organization (IMO) produced guidelines for commercial ships on ways to reduce underwater noise because of concerns about the short- and long-term negative impacts on marine life, especially marine mammals. Guidelines relate to features of ship design (such as hull and propeller shapes), on-board machinery, and various operational and maintenance recommendations (such as hull cleaning). These guidelines are voluntary.

The Crown understands that Aboriginal groups still have serious concerns regarding impacts on marine mammals with increased vessel traffic. Transport Canada has indicated a willingness to participate in a coordinated approach with other agencies to study the issue prior to developing mitigation measures. For example, Transport Canada provides funding for and is an active participant in the ECHO initiative.

#### ***Marine Vessel Wake and Shoreline Erosion***

The NEB recognized the concerns in regards to potential impacts on shorelines and associated biota from Project-related marine vessel wake waves. The NEB concurred with Trans Mountain and DFO that Project-related marine vessels are unlikely to result in any measurable changes to the biophysical characteristics of intertidal habitats, but acknowledged that there could be some localized, small areas where there may be some impacts on intertidal habitat, such as increased sedimentation.

Transport Canada acknowledges the concerns raised by a number of Aboriginal groups who exercise Aboriginal Interests and have culturally important sites along the shorelines proximal to the designated shipping lanes. Transport Canada notes that the size of a wake depends on a number of unique factors such as vessel draft and configuration, vessel speed and water depth. Transport Canada does not regulate vessel wake, but notes that speed limits can be set by port authorities within their jurisdictional boundaries, and pilots can use their discretion to manage wake by modifying vessel speed. Outside port jurisdiction, speed is regulated by the Collision Regulations, which do not set speed limits. Rather, they require vessels to proceed at a safe speed at all times such that the vessel can take proper and effective action to avoid collision. Safe speed is determined by such factors as visibility, traffic density and presence of other vessels, maneuverability, weather and sea conditions and the depth of the water relative to the vessel's draught.

Under the *Canada Shipping Act, 2001*, the ship master has the responsibility for the safety of the ship. Under the *Pilotage Act*, the pilot is responsible for the safe conduct of the ship. This means that the master and pilot have the discretion to choose the route, speed, and any other maneuver that keeps the ship safe. For these reasons, Transport Canada is unlikely to impose site-specific restrictions on vessels by means of regulation.

Transport Canada notes there are mechanisms other than regulations that can minimize potential damage to culturally sensitive sites. Policy approaches such as notices to mariners, agreements with the Pacific Pilotage Authority (PPA) and additional training for Indigenous communities on communication protocols can be effective at raising awareness of the issues among maritime users.

While this was not identified as an issue by the NEB, Transport Canada recommends that where Aboriginal groups have site-specific concerns, they can contact the PPA to notify them of their concern. The Pacific Pilotage Authority can work with pilots to modify vessel speed, where possible within the parameters required to maintain safe vessel movement, to minimize potential wake-related damage at specific sites.

### ***Conclusions***

Overall, the Crown acknowledges that proponent commitments, recommended NEB conditions, the existing marine safety regime and marine mammal protection programs would only partially address the ongoing burdens and risks identified by the NEB for Aboriginal groups who exercise traditional marine fishing and harvesting activities in the vicinity of the WMT and marine shipping corridor for the Project. In particular the Crown notes the NEB conclusion that the effects of the proposed WMT expansion on Aboriginal users of the area would be low in magnitude, but would persist for the operational life of the Project. Further discussion on marine safety initiatives and proposed federal Crown action in the form of an Indigenous Advisory and Monitoring committee may help to further address these ongoing burdens and risks.

In consideration of concerns raised by Aboriginal groups during the NEB hearing and Crown consultation, the conditions proposed by the NEB, the existing regulatory regime, and the jurisdiction of the province, EAO is also proposing a number of conditions, which B.C. Ministers may attach to the provincial EA certificate, if approved. Conditions particularly relevant to avoiding or mitigating impacts on Aboriginal groups' marine fishing and harvesting include:

- Conditions 10 and 12 require Aboriginal consultation and Aboriginal construction monitors;
- Condition 11 requires the development and implementation of a marine outreach program for Aboriginal groups; and
- Condition 22 requires the proponent to prohibit hunting, fishing, trapping and plant gathering by employees and contractors.

The potential impacts of the Project on Aboriginal Interests associated with marine fishing and harvesting activities for each applicable Aboriginal group are discussed in Appendices A to E.

#### **4.3.4 IMPACTS ON OTHER TRADITIONAL AND CULTURAL PRACTICES**

Early on in the review of the Project, the Crown identified that routine construction and operation of new pipeline segments, terminals, pumping stations, expanded storage facilities and marine shipping could result in changes to other traditional and cultural practices for Aboriginal groups who exercise rights within the Project footprint. In addition, the Crown understands that the broader effects of the Project, should they occur, could adversely impact claimed or currently practiced traditional systems of governance used to manage the sustainable use of lands, waters and resources.

The Project could result in changes to other traditional and cultural practices through the following potential effects:

- Changes in access may affect use of trails, travelways and hunting, trapping and plant gathering areas by restricting access to sites or by increasing access by non-Aboriginal users;
- Disruption or alteration of trails and travelways through clearing of the Project footprint;
- Disrupted use of habitation sites or cause alteration of habitation sites through changes to visual quality, air quality, noise levels, and disrupting access. The Project could affect the enjoyment of the activity or use of the sites through the perception of a decrease in the quality of the experience;
- Potential sensory disturbance to marine species and birds including indirect effects from increased underwater noise;
- Potential effects to marine mammal species of importance to Aboriginal groups via vessel strikes;
- Reduced abundance and quality of country (traditional) foods;

- Potential change to the ability of Aboriginal groups to carry out cultural or spiritual practices as a result of impeded access or reduced quality of experience as a result of visual disturbance, noise, or physical alteration of cultural sites;
- Incremental increase in marine vessel traffic from the Project may displace members from one community practicing Aboriginal rights within their traditional territory into the territory of another community;
- Any reduction in fishing, hunting or harvesting resources within an Aboriginal community's asserted traditional territory may result in impacts on asserted governance rights and trade or bartering activities between Aboriginal communities;
- Potential effects to lands, waters and resources could impact the cultural expression of rights incidental to hunting, trapping, gathering, fishing and marine harvesting;
- Spiritual and cultural reliance on the Southern Resident Killer Whale could be adversely affected by knowledge that project approval would lead to increased risk of vessel strikes and disturbance from ships; and
- Cumulative effects of all aspects of the project could further diminish Aboriginal groups' ability to meaningfully exercise traditional and cultural practices within the project footprint and adjacent areas.

In its Application, the proponent identified the following Aboriginal use sites that exist within the proposed pipeline RoW and would require mitigation:

- Trails and travelways;
- Habitation sites;
- Plant gathering sites;
- Hunting sites;
- Fishing sites;
- Trapping sites;
- Gathering places; and
- Sacred areas.

The proponent in its application for CPCN did not assess the impacts of the Project on traditional governance systems. The NEB in its recommendation report, also did not specifically assess how the residual effects of the Project or the Project itself, could adversely impact traditional governance systems.

## **NEB Conclusions in Relation to Potential Impacts on Other Traditional and Cultural Practices**

The NEB accepted Trans Mountain's assessment that, in relation to the pipeline and associated facilities, despite some interruptions to Aboriginal cultural and spiritual practices as a result of construction and operations of the Project, this would not result in significant adverse effects to the ability of Aboriginal groups to use land, waters or resources for traditional purposes. The NEB also accepted Trans Mountain's statement that the Project's contribution to potential broader cultural impacts related to access and use of natural resources is not significant.

On page 279 of its report, the NEB concluded that the ability of Aboriginal groups to use the lands, waters and resources for traditional purposes would be temporarily impacted by construction and routine maintenance activities and that some opportunities for certain activities such as harvesting or accessing sites or areas of the TLRU will be temporarily interrupted. However, the NEB determined that these impacts would be short term, as they would be limited to brief periods during construction and routine maintenance, and these effects would be largely confined to the Project footprint for the pipeline, associated facilities and the on-shore portion of the WMT site. The NEB determined that these effects would be reversible in the short to long term, and low in magnitude.

With respect to the WMT, the NEB accepted Trans Mountain's assessment that while the expanded dock complex would become a permanent feature of the inlet, traditional resource use patterns will likely adapt over time. As a result, the NEB accepted Trans Mountain's assessment that no significant residual effects are likely to occur as a result of construction and operation activities of the WMT.

In relation to the potential effects of marine shipping on other traditional and cultural practices, the NEB concluded the following:

- There will not be an impact to archaeological sites located on the shoreline because of an increase in marine traffic (page 356);
- The effect of Project-related vessel wakes will not be detectable from existing wave conditions (page 356); and
- Wakes will not have an impact on shoreline archaeological sites (page 356).

In relation to large marine mammals and in particular killer whale, the NEB acknowledged that Project-related marine vessels will encounter a killer whale relatively often. However, given the limited number of recorded killer whale marine vessel strikes and the potential avoidance behaviours of killer whales, the Board agrees with Trans Mountain and DFO that the probability of a Project-related marine mammal vessel strikes on a Southern Resident Killer Whale is low. Nevertheless, the Board expressed its view that the Southern Resident Killer Whale population has crossed a threshold where any additional adverse environmental effects would be considered

significant and the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects to the traditional Aboriginal use associated with the Southern Resident Killer Whale (page 350).

The NEB is of the view that Aboriginal marine vessel users will maintain the ability to continue to harvest marine resources and to access subsistence and cultural sites in the presence of these periodic and short-term disruptions. The Board therefore finds that, with the exception of effects to the Southern Resident Killer Whale, the magnitude of effects of Project-related marine vessel traffic on traditional marine resource uses, activities and sites is low (page 362).

The NEB finds, as described in its views in this chapter on marine mammals that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects to the Southern Resident Killer Whale. The Board finds that Project-related marine vessel traffic would further contribute to total cumulative effects, which are determined to be significant, with or without the Project. Given these conclusions and recognizing the stated cultural importance of the killer whale to certain Aboriginal groups, the Board finds that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects to the traditional Aboriginal use associated with the Southern Resident Killer Whale (page 363). In regard to the effects of marine shipping on traditional marine use, the Board noted its view that Project-related marine traffic's contribution to cumulative effects is of low to medium magnitude and reversible in the long term.

The NEB concluded that that any disruptions to Aboriginal marine vessel users that would result from Project-related marine vessel traffic would be temporary, that the frequency of Project-related marine vessels would be one return transit per day, and that all other marine vessels, including Aboriginal marine vessel users, would be able to continue their movements very shortly after the transit of the tanker (page 362).

The NEB concluded that Project-related marine vessels are unlikely to result in any measurable changes to coastal habitats, harvesting and culturally sensitive areas and that the proponent's support of TERMPOL Report Recommendation 11 is a key measure to minimize potential disruption to recreational boaters, fishing vessel operators, and operators of small vessels as a result of increased Project-related marine vessel traffic.

Aboriginal groups expressed concern with damage or loss of areas of cultural and spiritual importance to Aboriginal groups in the Project RoW. These areas include archaeological sites, sacred and spiritual areas, traditional use areas, trails and travelways, and areas of historical significance.

Aboriginal groups were concerned that the Project would contribute to the disruption to their way of life, including the loss of traditional knowledge, diminishment of community culture and cohesion, diminishment of relations with other communities, inter-generational alienation, loss of the medicinal value of traditional foods and loss of confidence in the healthiness of traditional foods.



Many coastal Aboriginal groups stated that they have strong cultural ties to the Southern Resident Killer Whale, a listed species under the federal *Species at Risk Act* (SARA), and have concerns that underwater noise from shipping will increase the cumulative impact on this species. Aboriginal groups also were concerned that the increase in shipping will also increase the likelihood of vessel strike mortalities for marine mammals of cultural significance.

Aboriginal groups expressed concern with direct and indirect effects of the Project on social, cultural, spiritual, and experiential aspects of traditional and cultural practices. Aboriginal groups expressed concern with the potential change to the ability to carry out cultural or spiritual practices as a result of impeded access or reduced quality of experience as a result of visual disturbance, noise, or physical alteration of cultural sites.

It was noted by some groups that there is not a legal requirement, for the project or more broadly, to compensate Aboriginal groups for cultural losses.

The following is a discussion of the general factors that have been considered by the Crown in assessing the potential impacts on Aboriginal group's Aboriginal Interests associated with other traditional and cultural practices.

The NEB concluded that Aboriginal groups would sustain modest burdens to their ability to use the lands, waters and resources for traditional purposes and that the level of risk of a Project-related spill was acceptable.

Many of the NEB conditions already noted above in sections 4.3.1 to 4.3.3 would either directly or indirectly avoid or reduce some of the impacts and address concerns raised by Aboriginal groups regarding potential impacts on other traditional and cultural practices. In addition, the NEB has established conditions broadly addressing effects to communities (including Aboriginal) and specific impacts on Aboriginal Interests. However, the Crown acknowledges that proponent commitments, recommended NEB conditions and the existing pipeline and marine safety regime would only partially address the potential impacts of the Project on cultural integrity, heritage and the sense of belonging that most Aboriginal groups have to the land as understood from an Aboriginal perspective.

Proponent compliance with NEB conditions would avoid or minimize some Project-related impacts on access to or use of culturally sensitive areas or places and on the practice of cultural activities in general. During the NEB review process Aboriginal groups were encouraged to identify potentially impacted culturally sensitive sites and practices so that the NEB could take them into consideration while assessing the environmental and socio-economic effects of the Project and effects of the Project on Aboriginal interests.

Should the Project be approved, the Crown notes that the proponent will be required to manage access to culturally sensitive sites pursuant to conditions imposed by the NEB and the proponent's commitment to implement an access management plan. The proponent will be required to justify any area subject to access control, including during the construction

and operational phases of the Project. To limit the impact on Aboriginal groups, NEB draft condition 24 Access Management Plan includes requirements for the proponent to incorporate Aboriginal Traditional Land Use and Traditional Ecological Knowledge into the design of its access management plan.

With respect to cultural losses associated with project construction, operation, or potential accidents and malfunctions, the Crown is not aware of any NEB condition, proponent commitment or regulatory law or policy that currently addresses the issue of potential cultural losses resulting from impacts of pipelines, marine terminals or ship-source spills.

With respect to potential impacts of Project-related marine shipping on the Southern Resident Killer Whale, the Crown understands that the population of this species is in decline within the area to be used by Project-related tankers. The Crown also understands that marine mammals are of importance to many Coast Salish First Nations but that killer whales especially hold strong spiritual and cultural importance. The Crown accepts the NEB's conclusion that effects to the endangered Southern Resident Killer Whale and Aboriginal cultural use of Southern Resident Killer Whale from Project-related marine shipping will be significant.

Overall, the Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support potentially affected Aboriginal groups' ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Aboriginal groups in emergency response planning activities. The federal Crown is also considering incremental measures that would further accommodate the potential adverse impacts of the pipeline, WMT and marine shipping components of the Project on Aboriginal Interest, as discussed in Sections 4 and 5 of this report. Further discussion on marine safety initiatives may also help to further avoid or mitigate adverse impacts on Aboriginal Interests in the marine corridor, including greater involvement of Aboriginal groups in emergency response planning activities.

In consideration of concerns raised by Aboriginal groups during the NEB hearing and Crown consultation, the conditions proposed by the NEB, the existing regulatory regime, and the jurisdiction of the province, EAO is also proposing a number of conditions, which B.C. Ministers may attach to the provincial EA certificate, if approved. In addition to the proposed conditions discussed in the preceding sections, conditions particularly relevant to avoiding or mitigating impacts on Aboriginal groups' other traditional and cultural practices include:

- EAO Condition 13 requires the proponent to engage with the Aboriginal group to seek to identify opportunities for cultural awareness and recognition;
- EAO Condition 21 requires the proponent to engage Aboriginal groups in the development of their workforce accommodation strategy; and
- EAO Condition 25 requires the proponent to engage Aboriginal groups on the reporting, management and mitigation of impacts on archaeological and heritage resources.

Aboriginal group-specific potential impacts of the Project on Aboriginal Interests associated with other traditional and cultural practices are discussed in Appendices A to E.

### 4.3.5 IMPACTS ON ABORIGINAL TITLE

As discussed in Section 2.4.3 of this report, the Crown has considered how Project-related activities, inclusive of the pipeline, marine terminal, shipping activities, and associated facilities, may impact each of the following three components of Aboriginal title claims overlapping the Project area: use and occupation, decision making, and economic benefits. Mitigation measures relevant to address impacts on each component of Aboriginal title are also considered and described in the paragraphs that follow.

#### **Use and Occupation**

As described in TLU information submitted by Aboriginal groups during the NEB process and Crown consultation process, terrestrial, marine, and aquatic environments within or near the Project area have been historically and/or currently used for resource harvesting activities with intended future use for harvesting activities. Certain impacts associated with the use and occupation component of Aboriginal title have been identified below.

Temporary effects related to the proposed pipeline RoW may include:

- Potential disruption of subsistence activities, including hunting, trapping, fishing and plant gathering, during construction;
- Access for Aboriginal groups to the Project area to hunt, trap, fish, gather or conduct other activities may be affected in the short term, for a limited area and time during the construction phase, where access may be restricted for safety reasons; and
- Disruption of use and connectivity of trails and travel ways through clearing.

Longer term impacts from Project operation along the proposed pipeline RoW and from associated facilities and supporting infrastructure may include:

- RoW clearing may disrupt use of lands including use of areas as trails, travel ways, resource harvesting and habitation sites;
- Associated infrastructure including access roads, pump stations, transmission lines, storage facilities and the expanded WMT would limit or remove an ability to use these areas for resource harvesting, habitation sites, trails or travelways over the long-term lifespan of the Project; and
- Pipeline and related facilities operations (including the WMT) may reduce Aboriginal community member's enjoyment and experience of using the affected area and proximal areas, including from increased access by non-Aboriginal people, routine maintenance activities, noise, light and other visual and sensory disturbances.

Potential impacts on Aboriginal title claims from the construction and operation of the WMT and supporting infrastructure may include:

- Disruption of subsistence activities, including hunting, trapping, plant gathering, freshwater fishing and potential marine fishing and harvesting activities in proximity to the Project footprint;
- Loss of access for Aboriginal groups to the Project footprint in relation to potential use of these areas for hunting, trapping, gathering, fishing, or carrying out of other social, cultural or ceremonial activities (access would be restricted for the life of the Project at these locations for safety and security reasons);
- Disruption of use and connectivity of trails and travel ways, cultural, habitation and spiritual sites within and around the Project footprint; and
- May reduce Aboriginal community member's enjoyment and experience of using the WMT footprint and proximal areas, including from increased access by non-Aboriginal people, routine maintenance activities, noise, light and other visual and sensory disturbances.

Potential impacts on Aboriginal title claims from shipping within Burrard Inlet, Salish Sea and the designated marine shipping lanes may include:

- Increases in marine traffic resulting in temporary daily disruption in access to specific marine resource harvesting locations;
- Disturbance from temporary daily marine vessel transits in proximity to shoreline resource harvesting and other cultural activities, including potential low magnitude effects to intertidal and subtidal archaeological sites resulting from vessel wake; and
- Potential reduction in the enjoyment of the land and marine areas in proximity to the shipping route for the Project from visual, noise, light and other sensory disturbance.

Numerous Aboriginal groups raised concerns associated with the enjoyment, experience, and use of areas that would be impacted by Project-related activities, including shipping. These concerns, which differ widely by Aboriginal group, traditional activity, and Project-related activity, include impacts on species important for the practice of Aboriginal rights, cultural and spiritual practices and the health and well-being of Aboriginal peoples, as well as the extensive development in Aboriginal group's asserted traditional territory that has adversely impacted the enjoyment of using areas.

Groups also identified concerns related to access restrictions that could prevent or deter Aboriginal groups from using particular areas and the resulting impacts on cultural continuity from disrupting members' ability to transmit knowledge and practices to younger generations. Some groups raised concerns that the existence of the Project could negatively impact their spiritual connection with the land and water as well as their identity as Aboriginal peoples. Several Aboriginal groups that would be impacted by the increase in Project-related marine shipping activities expressed concern that the Project could adversely affect the psychological well-being of their community members as a result of acoustic disturbance, impaired views, loss of privacy, on-water hazards, perceived pollution, physical obstruction, and perceived danger.

In considering potential Project impacts on the use and occupancy component of Aboriginal title claims, the Crown has considered the following factors:

- The potential alienation of an area used by Aboriginal groups for exercising their asserted rights depends on the specific Project-related activity. With respect to the pipeline portion, the pipeline would be fully buried, with the exception of pipeline within compressor and meter station yards. The proposed Project includes 11 compressor stations, and each would typically require 9.5 ha to 20 ha of land. Approximately 89% of the proposed RoW for the Project will be contiguous with existing disturbances. With regard to the WMT, the Crown understands that permits for the marine terminal and corresponding expansion of the existing water lease are required under the *Canada Marine Act*. The Crown understands that WMT is located on fee simple land owned by the proponent and that the site is located in an industrialized area that is fenced, suggesting limited current use by Aboriginal groups. The water lease is leased from the Crown by the proponent. There is no contemplation of transfer of ownership of Crown land to the proponent; the proponent would be granted a lease providing for use and occupation. With respect to the marine shipping component of the Project, there is no proposal for any alienation or removal of land in areas upland of the marine shipping lanes that would be used by Project-related tankers;
- The NEB concluded that traditional land and resource users may be unable to use, or be deterred from using, certain areas at times during construction and periods of site-specific maintenance. Furthermore, the ability of Aboriginal groups to use the lands, waters and resources for traditional purposes would be temporarily impacted by construction and routine maintenance activities, and some opportunities for certain activities such as harvesting or accessing sites or areas of the TLRU will be temporarily interrupted. These impacts would be short term, as they would be limited to brief periods during construction and routine maintenance, and these effects will be largely confined to the Project footprint for the pipeline, associated facilities and the on-shore portion of the WMT site. The NEB finds that these effects would be reversible in the short to long term and low in magnitude;
- The NEB concluded that routine Project operations would cause low to moderate magnitude impacts on the lands, waters and resources impacted by the Project. With respect to the impact of the marine shipping on the use of upland areas, the NEB also concluded that the Project could result in significant adverse effects to greenhouse gas emissions from Project-related marine vessels, as well as Project spills and spills from Project-related tankers;
- For the TMRU activities directly affected by the WMT, the NEB finds that these effects would persist for the operational life of the Project, as TMRU activities would not occur within the expanded water lease boundaries for the WMT. The NEB finds that while the effects would be long term in duration, they would be reversible in the long term. Aboriginal groups would likely be able to adapt to the expanded water lease boundary. Therefore, the NEB finds that for the WMT, the Project's effects to the TMRU are low in magnitude;

- NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with the degree of disturbance of the Project. NEB Conditions related to the protection of environmental resources (including but not limited to fish and fish habitat, wetlands, water quality, wildlife and wildlife habitat, and marine mammals) referenced in section 4.3 would reduce disturbance associated with Project-related activities in the marine, terrestrial, and aquatic environments. The proponent has also undertaken many commitments in an attempt to reduce potential impacts of Project-related activities to environmental resources (Appendix G);
- In terms of access restrictions, the ability of Aboriginal groups to use lands, waters, and resources would be temporarily interrupted during construction and during routine maintenance. The Crown understands that these effects will be largely confined to the Project footprint for the pipeline, associated facilities and the on-shore portion of the WMT site. The Project would also result in some disruption of traditional marine use that would persist for the operational life of the project, and that these effects would be reversible. The Crown notes that access restrictions could become prolonged in the event of a credible worst-case spill that occurs along the pipeline RoW, at the marine terminal, or during marine shipping, although the NEB concluded that the likelihood of such an event occurring is very low;
- The Crown understands that the proponent has committed to several mitigations that would reduce access restrictions for Aboriginal groups using areas impacted by routine Project activities. The proponent has committed to minimize the development of access routes, control public access along the construction RoW, select appropriate access routes that cause the least disturbance to high quality, sensitive wildlife habitat, managing traffic on these routes and determining appropriate construction reclamation. The proponent has also committed to working with applicable resource managers and traditional land and resource users to define locations where access control is necessary and what type(s) of access control will be implemented. In the marine environment, the proponent must communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would help to reduce potential disruptions from tankers when travelling to and from sites located in areas upland of the shipping lanes; and
- The Crown appreciates that the Project could adversely impact the enjoyment and experience of Aboriginal groups using areas impacted by the Project and that reduced levels of enjoyment and/or a negative experience have the potential to deter community members from participating in future activities. Although the suite of mitigation measures that would be implemented if the Project is approved would help to reduce impacts on Aboriginal group's enjoyment, experience, and use of areas, the Crown acknowledges that there will be residual Project impacts on the enjoyment, experience, and use of areas.

## Decision making

Aboriginal groups raised concerns with how the proposed project could affect their ability to manage and make decisions over the Project area in accordance with their traditions, cultures and/or customs, now and in the future. Aboriginal groups also identified how the proposed project might be consistent or inconsistent with any cultural/other objectives for management in this area.

Several groups expressed concerns related to the traditional use information that helped to inform the decision-making process. These concerns included the perspective that traditional knowledge collected by the proponent should not be considered as scientifically credible and should not be used in the decision-making process. Groups also expressed the view that traditional knowledge information was inadequate to understand Aboriginal rights, traditional land use practices and traditional knowledge in order to assess the potential effects of the Project on lands and resources used by Aboriginal groups.

Other concerns identified by Aboriginal groups were thematic of the role of Aboriginal peoples as stewards of the land. Indeed, several groups described the responsibility that Aboriginal communities have in maintaining the care, protection, health and well-being of the land and raised concerns that these rights of stewardship would be impacted by the Project. Aboriginal groups who have ongoing environmental and/or species restoration programs and stewardship initiatives in their traditional territories suggested that the Project is inconsistent with these management objectives.

The Crown acknowledges the view of many Aboriginal groups that the lack of a fixed operating life of the Project or any plans to decommission the Project (or the existing TMPL) will place limits on the ability of Aboriginal groups to make decisions over lands and resources or to develop lands within or proximal to the Project for many generations.

Aboriginal groups also expressed concern with the NEB process and Crown consultation process. Groups criticized the NEB process for a narrow scope that does not adequately incorporate the laws, spirituality, and traditional knowledge of Aboriginal groups in a way that acknowledges interconnections among Aboriginal people, families and family groupings, culture, and the elements of the landscape. Many Aboriginal groups raised procedural concerns related to funding, timelines, consultation, capacity, and resources. A group located along the marine shipping corridor expressed concern regarding the lack of transparency in how the federal Cabinet reaches its decisions.

In considering potential Project impacts on the decision-making component of Aboriginal title claims, the Crown has considered the following factors:

- While the Project does not have a fixed operating life, with regard to changes in tenure along the pipeline, there is no contemplation of transfer of ownership of land to the Proponent along the RoW. In B.C., the proponent would be granted a temporary Licence of Occupation under section 39 of the *Land Act* and upon completion of legal survey requirements, a statutory RoW for the life of the Project would be issued under section 40 of the *Land Act*. The WMT is located on fee simple land owned by the proponent, most of which has been zoned for industrial use. The water lease is leased from the Crown by the proponent. There is no contemplation of transfer of ownership of Crown land to the proponent; the proponent would be granted a lease providing for use and occupation. The Crown notes there would be no change in tenure for upland areas along shipping lanes;
- The Crown notes that the construction and operation of the Project in reserve lands under the *First Nation Land Management Act* would require instruments and approvals pursuant to an Aboriginal group's approved land code. The Crown also notes that the construction and operation of the Project in reserve lands under the *Indian Act* would require instruments authorized under Sections 35 and 28 of the *Indian Act* for staging areas and the pipeline RoW;
- As described in section 5.1, the Crown has attempted to undertake a principled, meaningful and responsive consultation process characterized by genuine efforts to acknowledge and document Aboriginal concerns as well as to identify ways to demonstrably address these concerns prior to or as part of the decision-making process. Throughout the Project review, Aboriginal groups were provided with opportunities to describe their views of the nature and scope of potential impacts of the Project on their Aboriginal Interests and on mitigation or accommodations measures that could be applied to address those potential impacts. The Crown consultation process provided Aboriginal groups with an opportunity to provide their perspective on the extent to which the Project affects their ability to manage and make decisions over areas impacted by the Project; and
- Should the Project proceed, the proponent would be required to continue consultation with potentially affected Aboriginal groups and to finalize the development of its plans and measures to reduce and mitigate the potential effects and to protect the environment and the resources that are of importance to and utilized by Aboriginal groups. Ongoing consultation with Aboriginal groups as identified in NEB Conditions for Aboriginal engagement (#96, 146), TLRU and TLMU investigation reporting (#97) and participation in monitoring during construction (#98). The Crown understands the proponent has committed to ongoing engagement with Aboriginal groups including but not limited to commitments #1, 3, 8, 597, 600, 2, 551, 697, 691, 896, 854, 936–8, 7, and 488. These mitigations would reduce potential impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project. However, the Crown understands that the Project may not be consistent with the management objectives of every Aboriginal group potentially impacted by the Project.



## Economic Benefits

Aboriginal groups have indicated that the pipeline and related facilities operations, including the WMT, may reduce Aboriginal groups' economic development aspirations for the affected area and proximal areas as physical use of the Project footprint and adjacent areas would be limited for any other physical works. Specific concerns identified by Aboriginal groups in relation to the economic benefit component of title include potential effects from construction and operation of the pipeline on the ability of Aboriginal groups to derive future economic benefits from the area, the lack of Project-related economic, training, and business opportunities for Aboriginal groups, and potential negative impacts on local economies. Some groups raised dissatisfaction with the lack of compensation offered by the proponent for disrupting the traditional way of life of an Aboriginal community. Aboriginal groups with existing economic activities in their traditional territories raised concerns about the potential loss to their economic interests from the Project, as well as limitations to other development opportunities including oceanfront property assets along the marine shipping lanes and in the vicinity of the marine terminal. Other Aboriginal groups expressed interest in exploring opportunities for training and employment contracts in order to develop transferable skills and employment capacity within their communities.

In considering potential Project impacts on the economic component of Aboriginal title claims, the Crown has considered the following factors:

- The NEB noted that the Project presents an economic opportunity for Aboriginal communities, but also concluded that the ability of Aboriginal groups to use lands, waters, and resources would be temporarily interrupted during construction and during routine maintenance;
- Construction and operation of the Project have the potential to limit economic aspirations for the area. These impacts would largely be concentrated along the pipeline corridor, as the 18-m easement that remains over the operating life of the Project would limit the economic uses of the area to certain type of activities that do not conflict with the underground pipeline. Project-related marine vessels have the potential to impact economic aspirations along and within the shipping corridor;
- Mitigation measures associated with the ability of Aboriginal groups to derive direct and/or indirect economic benefits if the Project is approved include NEB Conditions for Aboriginal, local, and regional skills and business capacity inventory (NEB Condition 11), training and education monitoring plan (NEB Condition 12), training and education monitoring reports (NEB Condition 58), plans for Aboriginal group participation in construction monitoring (NEB Condition 98), Aboriginal, local, and regional employment and business opportunity monitoring reports (NEB Condition 107), procurement opportunities for Aboriginal groups (commitments 14, 440, 442, 447, 451), employment and business opportunities for Aboriginal groups (commitment 952, 445), and hiring of Aboriginal monitors (commitment 113), among others (see Appendix G); and

- As of November 2016, the Crown is aware that 33 potentially affected Aboriginal groups have signed an MBA or letter of support with the proponent. Although MBAs are confidential, the Crown understands they may contain provisions for financial, environmental and training benefits that could further reduce impacts on Aboriginal title claims if the Project proceeds. For those Aboriginal groups that signed MBAs, the Project could partly satisfy current and future economic development aspirations for the area impacted by the Project.

In consideration of concerns raised by Aboriginal groups during the NEB hearing and Crown consultation, the conditions proposed by the NEB, the existing regulatory regime, and the jurisdiction of the province, EAO is also proposing a number of conditions, which B.C. Ministers may attach to the provincial EA certificate, if approved. Specific conditions have been summarized in many of the preceding and subsequent sections. However, the conditions proposed by EAO would help support the mitigation of impacts on Aboriginal groups' Aboriginal title in a number of ways:

- Many of the proposed EAO conditions ensure greater opportunity for the ongoing participation of Aboriginal groups in informing the development and implementation of the Project;
- Several of the conditions require consideration and integration of Aboriginal use and practices into the development of mitigation; and
- Conditions recognize the important tie of Aboriginal peoples to their territories, by requiring opportunities for construction monitors, archaeological monitors, and cultural awareness and recognition.

The potential impacts of Project-related activities on Aboriginal title for each applicable Aboriginal group are discussed in Appendices A to E.

#### 4.3.6 OTHER COMMON ABORIGINAL GROUP CONCERNS

##### **Impacts Associated with Accidental Pipeline, Westridge Marine Terminal or Marine Spills**

In the event of an accident or malfunction that released fuel, oil or other deleterious substances into the terrestrial or marine environment, the Project may result in the following changes to the environment and socio-economic conditions, and on fishing and marine harvesting through the following potential effects:

- Direct loss or alteration of wildlife and wildlife habitat, abundance, or quality;
- Direct loss of harvestable plant species of interest to Aboriginal groups;
- Changes to water, soil and sediment quality;
- Direct loss of fish and aquatic species or alteration of fish and aquatic bird habitat and other resources used for fishing and marine harvesting;
- Direct loss or reduced quality of harvestable marine plant species of interest to Aboriginal groups;

- Impacts to human health; and
- Loss or alteration of traditional resources used for cultural or spiritual practices.

The NEB found that over the life of the Project, the probability of a small spill is high, where a small spill includes those caused by relatively minor equipment failure or human error and would likely occur on proponent-owned property such as pump stations and tank farms. The NEB noted that in the event of a small spill, response personnel and equipment would be readily available and clean up would be expected to be effective.

For the existing Trans Mountain pipeline, between 1961 and 2013, Trans Mountain reported 81 liquid hydrocarbon spill incidents of all magnitudes to the NEB and the “uncontained spillage” of approximately 5,799,700 litres of liquid hydrocarbons.<sup>34</sup> Of these incidents, the proponent acknowledges five have been significant spills. The NEB noted the proponent’s statement that there have been five spills from the existing Trans Mountain pipeline since 1953, and that these were remediated to the standards of the time.

In the event of a spill from the pipeline or at the WMT, the NEB concluded on page 279 of its report that, depending on the extent and location of the spill, response time and the effectiveness of response measures, there could be significant adverse environmental effects to the use of lands, waters and resources for traditional purposes.

The NEB found that, depending on the size, location and conditions of a spill and the effectiveness of response measures, there could be significant adverse effects to Aboriginal traditional uses, practices and activities. However, the NEB concluded that there is a very low probability of a Project spill (i.e. from pipeline, tank terminals, pump stations, or WMT) that may result in a significant effect (high consequence) and that the level of risk is acceptable. The NEB also concluded that there is a very low probability of a marine spill from a Project-related tanker that may result in a significant effect (high consequence) and that this level of risk is acceptable.

The NEB considered impacts associated with small tanker spills and credible worst-case tanker spills. A small spill that is contained quickly, the NEB concluded, could have low-magnitude adverse effects. Conversely, impacts from a credible worst-case spill would probably be adverse and significant, although the probability of a worst-case spill is very low. Adverse effects from a credible worst-case spill could occur over a larger geographic extent and longer duration [than smaller spills]. The NEB acknowledged that environmental effects of a tanker spill would depend on numerous factors including the volume and type of product spilled, the location of the spill, the time required to respond to the spill, the effectiveness of spill containment and clean up, valued components that are impacted, weather conditions, and the time of year that the spill occurs.

<sup>34</sup> Sean Kheraj, *Historical Background Report: Trans Mountain Pipeline, 1947-2013*; City of Vancouver, C77-27-19 - Appendix 18 (A4L7X6), p. 21

The NEB also concluded that there is a very low probability of a marine spill from a Project-related tanker that may result in a significant effect (high consequence) and that this level of risk is acceptable. The NEB also concluded that the effects of a credible worst-case spill on the current use of lands, waters and resources for traditional purposes by Aboriginal people would likely be adverse and significant.

Spill impacts on important marine habitats (e.g. salt marshes, eelgrass beds, and kelp forests) could affect marine species reliant upon these habitats as well as terrestrial species, including SARA-listed plant species, along the coastal area. According to the NEB, most impacted areas and species would likely return to biological conditions that existed prior to the spill through the process of natural recovery. This recovery could occur within one to two years or may occur over a decade or more depending on the valued component, while some SARA-listed species may not recover to pre-spill conditions. Population level impacts could occur from the mortality of individuals of SARA-listed species. The NEB refers to the potentially catastrophic impacts associated with the exposure of Northern or Southern Resident Killer Whales to spilled oil, despite the low probability of this exposure.

In Section 14.6.2 of its report, the NEB noted the proponent's commitment to use available spill response technologies to mitigate spill impacts on ecosystems and assist in species recovery. The NEB is of the view that implementation of an appropriate spill response and measures such as compensation and harvest restrictions or closures would lessen the effects experienced until resource-dependent species recover.

The NEB also noted its view that, should the Project be designed, constructed and operated according to the fulfillment of its certificate conditions and Trans Mountain's commitments, an accident or malfunction that could result in significant adverse environmental or socio-economic effects is not a likely event.

In regard to emergency response, the NEB concluded that an effective response does not guarantee recovery of all spilled oil and that no such guarantee could be provided, particularly in the event of a large terrestrial, freshwater, or marine spill. The oil spill preparedness and response commitments made by the proponent cannot ensure recovery of the majority of oil from a large spill. Recovery of the majority of spilled oil may be possible under some conditions, but experience indicates that oil recovery may be very low due to factors such as weather conditions, difficult access, and sub-optimal response time, particularly for large marine spills.

The following are some additional specific conclusions of the NEB with respect to accidents, malfunctions, emergency preparedness and response:

- The Board is of the view that the evidence filed by those bodies that regulate marine shipping and by Trans Mountain indicate that there is an acceptable level of safety in place regarding marine shipping associated with the Project. To monitor future developments of Trans Mountain's Tanker Acceptance Standard, the Board would impose Condition 134 requiring Trans Mountain to file the Standard and future updates with the Board;

- Some participants raised the need for additional tugs to escort Project-related vessels and Trans Mountain made a voluntary commitment to implement enhanced tug escort measures that exceed regulatory requirements. Evidence filed by Trans Mountain, Transport Canada and the Pacific Pilotage Authority indicates that tug escort is an important mitigation measure. In its report, the TERMPOL Review Committee supported the implementation of Trans Mountain's key risk reduction measures, including but not limited to, enhanced tug escort. The Board expects Trans Mountain to follow through on this voluntary commitment and would make it a requirement of any certificate issued by imposing Condition 133 requiring Trans Mountain to implement enhanced tug escort measures. The NEB also noted that should such a voluntary commitment become mandatory under federal marine shipping-related legislation, Trans Mountain could apply to the Board to have its certificate varied accordingly (page 377);
- The NEB noted that the south coast of B.C. has been identified as a high risk area based on both the environmental sensitivity of the area and the probability of a tanker spill occurring (page 378), but the NEB also noted there are no proposed or widely accepted risk acceptance criteria for marine oil spills (page 377); and
- The NEB noted that a large spill in Burrard Inlet would result in significant adverse environmental and socio-economic effects and cited (page 378) Tsleil-Waututh's assessment as indicating the extent of possible impacts. However, the NEB concluded a very low probability of a credible worst-case event: "The Board finds that there is a very low probability of a marine spill from a Project-related tanker that may result in a significant effect (high consequence). The Board finds this level of risk to be acceptable." (page 17)

Other specific conclusions of the Panel in respect of potential spills include:

- The Board rejected evidence of a credible worst-case scenario of 8,000 to 16,000 m<sup>3</sup> in Burrard Inlet, English Bay, or at the WMT (page 378);
- The Board found that diluted bitumen would weather quickly, making it possible that some spilled oil would submerge and strand on shorelines if not recovered quickly (page 387);
- The Board would impose Condition 90 requiring Trans Mountain to engage with stakeholders, including Aboriginal groups, when designing its emergency spill response plan (page 387);
- A small spill would have adverse effects of low magnitude, whereas a worst case spill could have adverse effects that are larger and longer in duration (page 397);
- Even after a worst case spill the environment would eventually return to a biological state similar to pre-spill conditions (page 399); and
- Effects of a spill on human health would be context dependent (i.e. severity of the spill, proximity to spill). However, because spill risk is low, risk to human health from a spill is low (page 404).

These NEB conditions, if the Project is approved, would assist in reducing the likelihood of accidents and malfunctions including spills or enable improved response and recovery in the case of an accident or malfunction involving a spill:

- Overarching conditions (#2,3,4) for compliance with commitments, environmental protection, engineering and safety; and
- Conditions for emergency preparedness and response (#89,90,117–120,123–127,136, 138,145,153).

The NEB stated that liability for any spill along the pipeline route or from the WMT into marine water before the product is loaded in the tanker would be covered by the liability regime amended through the *Pipeline Safety Act*. The act establishes the absolute liability limit for companies that have the capacity to transport at least 250,000 bpd (such as Trans Mountain) at no less than \$1 billion, regardless of whether there is proof of fault or negligence. If the pipeline operator is found at fault, there is no limit to liability.

The NEB noted that spills associated with marine shipping are governed by the framework set out in the *Marine Liability Act*. The NEB noted that in the event of an oil spill in Canadian waters, the owner of the tanker would be liable for the cost of cleanup and compensation to affected parties subject to the limits of their liability, which is limited based on vessel tonnage to a maximum of about CAD \$136.8 million. Beyond that liability limit, compensation is available through a tiered funding system in the event of an oil spill in a marine environment. The funding includes approximately \$1 billion through the International Oil Pollution Compensation Fund and the Supplementary Fund Protocol and up to approximately \$168 million from Canada's Ship-source Oil Pollution Fund. In total, there is approximately \$1.3 billion in funding available to address the costs of emergency response, cleanup and compensation in the event of an oil spill from a tanker.

The proponent has agreed to the following mitigation measures related to potential spills:

- Facilitating a \$100 million investment in new equipment by the Western Canada Marine Response;
- Investing in new spill-response bases that will be located at ports in Delta, Nanaimo, Sidney, Sooke and Ucluelet; and
- Ensuring an untethered tug accompanies tankers through the Strait of Georgia and between Race Rocks and the 12 nautical mile limit in addition to tug requirements to assist with navigation. The tug can be tethered.

During the NEB process and Crown consultation, most Aboriginal groups expressed some level of concern about the potential for an oil spill and the possible impacts a spill would have on the environment that they rely on and consequently on their way of life. Many Aboriginal groups during the NEB hearing noted that even a low probability of a spill event is a concern and that any incremental risk may have implications for those exercising Aboriginal rights on the lands and waters and may erode the ability of Aboriginal groups to preserve these rights for future generations.

There are concerns that low-level leakage from the pipeline, as well as catastrophic pipeline failure or a shipping spill, could lead to contamination of terrestrial, aquatic and marine ecosystems. Groups are concerned that any spill could have catastrophic impacts on Aboriginal well-being by placing long-term limits on traditional and cultural activities (such as hunting, fishing and gathering), and access to sacred places and diminish food and water security. Other indirect impacts arise from a perceived increased risk, leading to diminished mental and spiritual health.

Groups on the coast and in the Fraser River Basin have concerns that a spill ending up in rivers or in the Salish Sea when salmon are migrating could have devastating long-term impacts on already stressed salmon populations that have been experiencing low returns in recent years. Salmon not only serves as the main food source for many Indigenous people, but they also rely on it as a source of material wealth, physical activity, and cultural and spiritual enrichment. Groups on the Fraser River have also relied on eulachon and sturgeon, two fish species that are currently designated as endangered by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). Groups on the coast also rely on marine resource harvesting areas such as fish spawn collecting areas, shellfish and intertidal gathering areas, waterfowl hunting areas, and plant harvesting sites that could be impacted by a spill. Shoreline oiling in estuaries, sensitive habitats, sandbanks, marshlands, and mudflats would impact habitats for migratory birds, wildfowl, juvenile salmon, and harvestable marine plant species, among other species. Alberta groups were concerned about the potential for significant adverse environmental effects to the environment should a major rupture occur at the Athabasca River.

Many groups expressed concern that a spill would have impacts on human health and safety through contamination of food and water and through perceived risks. Groups were concerned that a spill could have devastating and long-term impacts on their communities' drinking water through impacts on surface water and ground water. Groups were concerned about the perceived risks of a spill. Risk perception is connected not only to contaminants, but also a sense of place, connection to the land, social relationships, and traditional cultural spiritual practices.

Some groups raised concerns on both spill effects and lack of data on marine life, such as humpback whales, killer whales (resident and transient populations), right whales, grey whales, steller sea lions, sea otters, abalone, and marine birds. There was also concern by some groups about spill impacts on sensitive ecosystems, such as the biofilm on which migratory birds feed at Roberts Bank.

Aboriginal groups also raised concerns about uncertainties of whether dilbit will sink or float and that spill science research is incomplete. They argued that risk has been understated by the proponent and the NEB and that their communities have much less tolerance for risk than the NEB and proponent.

Aboriginal groups expressed concern about the adequacy, readiness and capacity of local oil spill response, especially in all weather conditions where access during severe snow or rain events, rough sea conditions, high river conditions, coupled with the remoteness of locations would

make the site inaccessible and delay response times. Groups have expressed an interest in being involved as local first responders in their own territory. This includes being involved in emergency spill response planning, having local resources and equipment available, and training.

Aboriginal groups also expressed concerns regarding inadequate knowledge and experience with the fate and behaviour of diluted bitumen; the adequacy, readiness and capacity of oil spill response; appropriate mechanisms for avoidance, mitigation, and compensation for impacts; and liability and responsibility for damages and ecosystem recovery.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline or marine tanker spill and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal groups has a high degree of uncertainty.

In respect of small spills, the NEB found that over the life of the Project, the probability is high. The seriousness of impact on Aboriginal Interests will depend on the size, location and conditions of a spill and the effectiveness of response measures. 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 regardless of its size.<sup>35</sup>

A credible worst-case spill has the potential to result in serious impacts on Aboriginal Interests. However, the Crown agrees with the NEB's assessment of the very low likelihood of such an occurrence. The Crown also acknowledges the comprehensive set of mitigation measures committed to by the proponent to minimize the likelihood of a spill and reduce the magnitude of impacts in the event a spill occurs.

The Crown notes that each NEB-regulated company must have an emergency management program that anticipates, prevents, manages and mitigates conditions during an emergency. The company's management system and processes must also be evident in its emergency management program.

An emergency management program must include:

- The identification and analysis of potential hazards;
- The evaluation and management of risks associated with all hazards;
- An up-to-date emergency procedures manual that is filed with the NEB;
- Liaising with agencies that may be involved in an emergency situation;
- Taking all reasonable steps to inform all persons who may be associated with an emergency response activity on the pipeline of the practices and procedures to be followed;

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<sup>35</sup> Trans Mountain Final Argument, p. 85 and 207



- Having a continuing education program for the police, fire departments, medical facilities, other appropriate organizations and agencies and the public residing adjacent to the pipeline to inform them of the location of the pipeline, potential emergency situations and the safety procedures to be followed in case of an emergency;
- Procedures for the safe control or shutdown of the pipeline system in the event of an emergency;
- Sufficient response equipment;
- Training to instruct employees on the emergency procedures and emergency equipment; and
- A verifiable capability to respond to an emergency demonstrated through emergency response exercises.

### ***Terrestrial Accidents and Malfunctions***

If a pipeline spill incident does occur, the NEB will verify that there is adequate and appropriate clean-up and full remediation of any environmental effects resulting from the incident. The company must conduct, to the NEB's satisfaction, a complete clean-up and remediation of any adverse environmental effects. *Pipeline Financial Requirements Regulations*, as announced and explained on the NEB's website in October 2016, provide further details of the liability and compensation regime in place for pipelines (see <http://www.gazette.gc.ca/rp-pr/p1/2016/2016-10-08/html/reg3-eng.php>).

The proponent would also need to notify the province of spills and for any instances of contamination that migrate off the RoW. Trans Mountain would be required to comply with the *Contaminated Sites Regulation*, *Hazardous Waste Regulation* and *Spill Reporting Regulation* under the *Environmental Management Act*. The Province of B.C. is also in the process of updating the Provincial Spill Response System, which will include new requirements for spill preparedness, response and recovery, as outlined in Section 4.2.5.

In respect of seismic hazards, Natural Resources Canada's recommendations to the NEB have led to a requirement for the proponent to provide the results of its fault-mapping studies prior to the commencement of construction. This condition also requires the proponent to provide specific conclusions on four potentially active faults along with potential hidden faults.

To confirm that the potential for liquefaction-triggered ground movement is adequately assessed in detailed engineering and design, the NEB imposed Condition 68 requiring the proponent to identify sites with very high, high, and moderate liquefaction potential and describe how the potential for liquefaction-triggered ground movement will be mitigated at each site.

While it is the responsibility of individual First Nations to ensure their emergency response plans are current and reflect the specific hazards, risks and vulnerabilities of their community (including oil spills), First Nations interested in developing their emergency plans and/or undertaking training

should contact INAC. INAC supports an all-hazards approach to emergency management on-reserve, which includes the four pillars of prevention and mitigation, preparedness, response and recovery.

When First Nations require outside assistance to manage an emergency, INAC relies on emergency management organizations (such as provincial/territorial emergency management agencies or non-government agencies) for the delivery of response and recovery services on reserve. INAC's arrangements with these organizations ensure that First Nations have access to comparable emergency assistance services available to other nearby non-Aboriginal communities.

INAC's Emergency Management Assistance Program is the Government of Canada's primary mechanism for supporting emergency management on-reserve. INAC assumes responsibility for 100% of eligible emergency response and recovery activities carried out exclusively for on reserve First Nations except when the emergency responsibilities fall within the mandate of another department, agency or the private sector.

In the event of a spill on-reserve, INAC will work in collaboration with the impacted First Nations, the emergency service provider, the party responsible for the spill, and other public safety partners to help coordinate emergency response activities. In the case of a ship-source spill impacting reserve lands, the agency with jurisdiction over the spill would be the Canadian Coast Guard/Transport Canada.

Further information regarding INAC's role in emergency management and a copy of INAC's national emergency management plan can be found on the departmental website.

The preparedness for and response to an oil spill is regulated under various regimes depending on the source of the spill. If the spill is from a ship during the transfer of oil while the ship is at the terminal, the spill response is regulated by Transport Canada. Other sources of spills from the WMT are regulated by the NEB.

#### ***Marine-based Accidents and Malfunctions***

Marine vessels and oil handling facilities (OHF) are required to have pollution emergency plans in place that outline how they comply with the *Vessel Pollution and Dangerous Chemical Regulations* and how they will prevent discharges while engaged in transfer operations with prescribed vessels. In addition, emergency response plans must specify arrangements in place with the TC-certified local response organization, Western Canada Marine Response Corporation (WCMRC).

Oil handling facilities are categorized by their maximum oil transfer rate and, based on that, are required to plan and prepare for a minimum spill size. The WMT, with a transfer rate of more than 2,000 m<sup>3</sup>/h, is categorized as a Level 4 facility and therefore must plan to respond to a spill of at least 50 m<sup>3</sup>.

TC inspects the WMT annually to ensure compliance with requirements for safe transfers of oil, such as:

- Trained Supervisor of Oil Transfer Operations (SOTO) as required by *Marine Personnel Regulations*;
- Sufficient lighting at work areas for transfer connections;
- Procedures for shut-down in the event of a spill;
- Coordination and communication between the terminal and the vessel; and
- Standards and testing for pipes and hoses.

The marine safety system is based on a process of continuous improvement through the ongoing evaluation of its components, including seeking input from stakeholders and making adjustments such as new regulations, as appropriate.

Canada's marine safety system is effective, as demonstrated by a strong safety record and the Government's plans to continue to strengthen the marine safety system, in accordance with the Minister's mandate letter (<http://pm.gc.ca/eng/minister-transport-mandate-letter>). The recently announced marine initiatives outline concrete measures that the Government of Canada will take to improve marine safety, as described in section 4.2.5.

Canada's marine safety system has continuously improved over the past 25 years by making the most of advances in science and technology and industry best practices. For more detail on the marine safety system, see TC's Written Evidence, Appendix A – Marine Safety Framework. Recent work by the Canadian Council of Academies has found British Columbia experiences the highest level of shipping activity. The accident rate and the nature of the cargo shipped, together with current and planned moratoriums, suggest it has a relatively low risk profile compared to other regions (from *Commercial Marine Shipping Accidents: Understanding the Risks in Canada Workshop Report*, <http://www.scienceadvice.ca/en.aspx#1>). Despite increased vessel traffic and the volume of oil transported, the number and severity of ship-source oil spills have decreased over the years. An independent pan-Canadian risk assessment indicated that there is a very low risk of a ship-source oil spill over 10,000 tonnes. However, as marine traffic increases, smaller oil spills, particularly of fuel oil, are more likely to occur.

Canada has a robust system in place to prevent a ship-source spill; however, the risk can never be reduced to zero. In the highly unlikely event of a spill, Canada remains prepared to respond to spills to contain them and to clean them up as quickly and effectively as possible. Should individuals suffer pollution damage, claims can be made to the domestic compensation fund, the Ship-Source Oil Pollution Fund ([www.ssopfund.ca/](http://www.ssopfund.ca/)) and international funds.

Trans Mountain has committed to adopting the TERMPOL 31 findings and 17 recommendations in addition to mitigation measures proposed as part of the Project. TRC supports the following measures that will provide for a high level of safety for tanker operations, which will reduce risk and enhance awareness:

- Extended use of tethered and untethered tug escort (Finding 17, 18, Recommendation 8, 9, 10);
- Extension of the pilot disembarkation zone (Finding 18);
- Safety calls by laden tankers when in transit (Finding 19);
- Guidance on communication between masters and watch keeping personnel to support strong communication between tankers and their escort tugs (Finding 21); and
- An engagement and awareness strategy to promote safe navigation and interaction between Project tankers and recreational boaters, fishing vessel operators, and operators of small vessels (Recommendation 11, Finding 20).

The TRC also supports risk-based response planning and Western Canada Marine Response Corporation's efforts to increase capacity and reduce response time (Finding 28).

While the Crown understands that the risk of accidents and malfunctions, including oil spills, cannot be eliminated, it views the probability of any long-term, irreversible, high magnitude effects from increased marine vessel traffic to be very low.

Transport Canada administers a liability and compensation regime that applies only to spills from ships. The responsible authority for pipeline oil spills (even if the oil spill enters the water) is the NEB. If the spill occurs during the transfer of oil while a ship is at the terminal, the spill is regulated by Transport Canada. Under Part 8 of the *Canada Shipping Act, 2001*, Transport Canada ensures that the appropriate level of preparedness is available to respond to marine oil pollution incidents in Canada of up to 10,000 tonnes within prescribed time standards and operating environments.

The regime is based on the polluter pay principle and as such, costs of maintaining a preparedness capacity are covered by its users. The regime is built on the principle of cascading resources, which means that in the event of a spill larger than 10,000 tonnes, the regime can be supplemented by the Canadian Coast Guard and resources from other regions, such as the United States Coast Guard (in the event of trans-boundary spill) and their partner oil spill response organizations. If necessary, additional resources may be requested from other countries under the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC).

In Canada, claimants have three tiers of compensation available to them: 1) ship owners' insurance; 2) international funds; and 3) Canada's domestic Ship-Source Oil Pollution Fund (<http://www.ssopfund.ca/>). In the case of a spill from a crude oil tanker, up to approximately \$1.5 billion is available in compensation. In the unlikely event that a spill should occur, the current compensation regime provides adequate compensation to cover economic losses, including such losses related to Aboriginal fisheries, loss of income for individuals, and subsistence fishing and harvesting.

Transport Canada understands that Aboriginal groups have concerns regarding potential spills and spill response planning. During the review of the Project and the related Crown consultation process, many Aboriginal groups have requested more information and involvement in the emergency response components of the marine safety system and have provided technical suggestions for improvement.

With respect to the former, TC is offering to provide information sessions to groups along the marine shipping route to inform them about the existing emergency response framework; including the new Area Response Planning pilot project, which emphasizes input from Aboriginal groups in developing plans and responding to incidents (as noted in section 4.2.5)

Also noted in Section 4.2.5, TC is also planning on co-hosting workshops with Aboriginal groups and responsible authorities of the marine safety system, with respect to ways to improve the system, including increasing involvement of Aboriginal groups along the marine shipping route. These discussions would not be project-specific, as the marine safety system is consistent across projects. These workshops will occur in early 2017 and provide an opportunity for facilitating discussions with Aboriginal groups in the marine safety system.

Section 4.2.5 also describes the newly announced whole of government marine safety initiatives that will lead to safer, more responsible marine shipping and cleaner, healthier marine ecosystems for traditional and other community uses. While not specific to any one project, they will nevertheless respond to a variety of concerns that Indigenous groups have raised in the context of the Project.

The interaction between oil and sediment is still an active area of research. Environment and Climate Change Canada is studying these interactions, and any new knowledge gained from this research will enhance confidence in the prediction of spill behaviour, including the potential for oil submergence.

Environment and Climate Change Canada (ECCC) investigates and measures oil properties and publishes this data in a publicly accessible database. Officials within ECCC also research the major chemical and physical processes that affect spills and contribute that insight to improve computer models. It is expected that ECCC's research results will help proponents to strengthen their emergency response plans and minimize risk by modeling and predicting the fate and behaviour of their oil products over the full range of realistic spill conditions, including rare or extreme events. Research carried out by ECCC is generally applicable to any spill in Canada.

Proponents are responsible for acquiring, and making accessible, specific spill information related to their development project and the particular marine environment in which it is proposed to be located. High-confidence predictions of spill behaviour are possible when accurate and complete chemical and physical property data are available and the computer model can demonstrably represent the known physical and chemical mechanisms important for determining spill behaviour over time. However, where all the necessary data on the specific petrochemical products that are to be transported are unavailable, the certainty of those particular spill behaviour predictions is reduced.

In consideration of concerns raised by Aboriginal groups during the NEB hearing and Crown consultation, the conditions proposed by the NEB, the existing regulatory regime, and the jurisdiction of the province, EAO is also proposing a number of conditions, which B.C. Ministers may attach to the provincial EA certificate, if approved. In addition to the proposed conditions discussed in the preceding sections, conditions particularly relevant to avoiding or mitigating impacts on associated with spills include:

- EAO Condition 24 requires the proponent to provide drinking water if a person's water supply becomes contaminated as a result of a spill;
- EAO Condition 30 requires additional information regarding emergency response plans and requires the plans to include a description of how the proponent would coordinate the participation of Aboriginal groups and other parties that may be involved in emergency response;
- EAO Condition 31 and 32 require the development of geographic response plans and the proponent's participation in coastal geographic response planning;
- EAO Condition 33 requires that Trans Mountain undertake additional research regarding the behaviour and clean-up of heavy oils spilled in freshwater and marine aquatic environments, with the objective of providing Trans Mountain and spill responders with improved information on how to effectively respond to spills; and
- EAO Conditions 34 and 35 increase the requirements associated with Trans Mountain's emergency preparedness and response exercise and training program, including testing additional plans in the exercises and additional full-scale exercises prior to the commencement of operations.

The potential impacts of a spill on Aboriginal Interests for each Aboriginal group are discussed in Appendices A to E.

### **Ship-source Pollution**

In addition to the risk of spills from marine vessels, Aboriginal groups raised concerns about operational ship-source pollution in respect of Project-related tanker traffic.

Discharges from ships as a result of routine operations are regulated under the *Vessel Pollution and Dangerous Chemicals Regulations*, which implement international standards set out under International Convention for the Prevention of Pollution from Ships (MARPOL). These include standards for ships to manage oil and oily wastes, chemicals (noxious liquid substances), packaged dangerous goods, sewage and garbage. For air emissions, TC implements in Canada the standards for the North American Emission Control Area (ECA) adopted under MARPOL. As of January 1, 2015, the maximum allowable sulphur content for marine fuels within the ECA is 0.1%, the lowest in the world and represents a 96% reduction in sulphur emissions. New vessels built after January 1, 2016, are required to meet Tier III standards for nitrogen oxides, which represent an 80% reduction from Tier I standards.

Ballast water is regulated under the *Ballast Water Control and Management Regulations*, which require vessels to exchange their ballast water 200 nautical miles offshore, among other conditions. Since mid-ocean ballast water exchange requirements were introduced in 2006, introductions of invasive species have been reduced, but we acknowledge remain a concern. For this reason, Canada is a party to the International Convention on the Control and Management of Ships' Ballast Water and Sediments, which is expected to enter into force in 2017 or 2018. The Convention will shift ships to manage ballast water to fit treatment systems in order to meet performance standards.

These international standards are continually under review by the International Maritime Organization, and technical updates to MARPOL are routinely adopted every year.

If the Project is approved, compliance inspections and monitoring of tanker traffic by federal authorities with jurisdiction in marine safety, such as Transport Canada and the Canadian Coast Guard, will increase (TERMPOL Finding 2). It includes all types of inspections currently under the jurisdiction of TC such as port state (inspections of foreign vessels), OHF, and security and CCG inspections of navigation aids.

### **Health and Human Safety Concerns**

Throughout the review of the Project, a number of Aboriginal groups raised issues and concerns with respect to the impacts of the Project on human health and safety. The following is a summary of the key issues raised:

- Country food contamination, including everything that could have an indirect effect on country food and physical health;
- General negative human health effects from a holistic (Aboriginal) perspective – cultural aspects, psychosocial well-being;
- Air quality as a result of an accident or malfunction (marine or terrestrial);
- Drinking water quality and water for spiritual and cultural use;
- Noise of operations and during construction; and
- Adverse health effects from spills.

### **NEB Conclusions and Recommendations Related to Health and Human Safety**

The NEB found that with Trans Mountain's commitments and the NEB's recommended conditions, during construction and routine operation there would be no significant adverse effects to human health, including the health of Aboriginal people. With respect to the WMT, the NEB acknowledged evidence submitted about the existing air quality at the WMT site and the predicted exceedances for respiratory irritants during routine operations of the WMT. The NEB found that the Project's contribution to these already predicted exceedances would be inconsequential.

Regarding air quality associated with marine shipping, considering that Trans Mountain will be required to adhere to all federal and international emission requirements to reduce emissions from the Project-related marine shipping, the Board determined that the residual effects from Project-related marine shipping is not likely to cause significant adverse effects to human health (page 367).

The Board acknowledges that there is an existing regulatory regime governing air emissions from tankers underway or in transit. Trans Mountain would require Project-related tankers and barges to follow international and federal regulations and apply best practices during operations. Under Transport Canada's *Vessel Pollution and Dangerous Chemicals Regulations* pursuant to the *Canada Shipping Act*, these tankers would be required to carry onboard a volatile organic compound management plan that meets the requirements of the International Convention for the Prevention of Pollution from Ships (page 367).

In the case of a spill or accident, the NEB found that the effects to human health that may result from a spill or accident would be largely limited to mild and transitory effects. The NEB concluded that based on the evidence presented, there would likely be potential adverse effects to human health for those people in the vicinity of a spill, but that these effects would be limited in duration and magnitude and therefore these are not likely to cause significant adverse effects to human health.

The Board is of the view that, in the event of a spill in the marine environment during shipping, including a large spill, there would be adverse effects to human health. These effects would vary over time and space depending on the location and extent of the spill, and there would likely be exceedances of certain short-term exposure limits for some chemicals of potential concern, including both carcinogenic and non-carcinogenic chemicals, but these would be expected to diminish in the hours following a spill. Some people would likely experience health effects, including a range of transient effects. These health effects could be experienced in all spills, but the intensity of the effects would be greatest for the larger-sized spills because of the higher concentrations of the chemical vapours that could be encountered and the longer durations of exposure (page 404).

Other specific conclusions of the NEB in respect of the above noted potential effects of the Project on health and human safety include:

- Not likely to cause significant adverse environmental effects to marine sediment and water;
- Not likely to cause significant adverse environmental effects relating to an increase in ambient air emissions from construction or operations (pages 171-172);
- $PM_{2.5}$  and  $NO_2$  concentrations in the area around WMT will remain well below acceptable levels;
- There will be minor exceedances of short-term exposure limits for respiratory irritants at the Squamish Nation Capilano # 5 reserve and for the District of North Vancouver; however, these are not likely to have a significant adverse effect on human health (page 367);



- Long-term exposure to chemicals, such as benzene, will remain below exposure limits (page 367);
- The Board accepts Trans Mountain's conclusion that for the construction of the Project and for routine operation of the pipeline, pump stations and Edmonton, Burnaby and Sumas tank terminals, adverse health effects would not be expected. The Board therefore finds that these elements of the Project are not likely to cause significant adverse effects to human health, including the health of Aboriginal people (page 287); and
- The Board is of the view that with Trans Mountain's proposed measures and commitments, and with the Board's conditions, the construction and routine operations of the pipeline and the WMT facilities are not likely to cause significant adverse effects to community health, including the health of Aboriginal communities (page 291).

Regarding human safety, the Board has examined the evidence and tested the assertions made by Trans Mountain and other hearing participants. The Board determined that the proposed design approach demonstrates that the conceptual and preliminary design of the Project complies with current and applicable regulations and standards (page 54).

Trans Mountain would be subject to *Pipeline Safety Act* financial liabilities, including \$1 billion in absolute liability and unlimited liability for at fault incidents (page 320).

If approved, the Board would impose a condition requiring Trans Mountain to develop a Financial Assurances Plan made up of two components that total \$1.1 billion. First, Trans Mountain must have ready cash of at least \$100 million to cover immediate costs of a spill. Second, Trans Mountain must have core coverage of \$1 billion to cover the costs of cleaning up a spill, remediating the environment and compensating affected third parties. This core coverage must be a portfolio of financial instruments (page 321).

Health Canada considers country foods (also known as traditional foods) as any food that is trapped, fished, hunted, harvested or grown for subsistence or medicinal purposes, outside of the commercial food chain, and that is not regulated under the *Food and Drugs Act* including the following:

- Aquatic and terrestrial fauna that are fished, trapped, hunted and/or harvested (e.g. game animals and birds, fish and seafood) for domestic consumption;
- Produce harvested from naturally occurring sources (e.g. berries, seeds, leaves, roots and lichen);
- Plant tissues (roots, bark, leaves and seeds) that are ingested for medicinal or other uses (e.g. teas);
- Produce (fruit, vegetables and fungi) grown in gardens and/or home orchards; and
- Aquatic and terrestrial fauna (and their by-products) produced for domestic consumption but not for market (e.g. ducks, chickens or other fowl, eggs and dairy products).

Chemical contamination of country foods may occur from pipeline leaks/ruptures affecting wild game, fish and vegetation, as well as spills from marine tanker accidents and malfunctions affecting marine seafood. Measures to minimize the likelihood of accidents and malfunctions resulting in oil spills in the marine and terrestrial environments also serve to mitigate the impacts of spills on human health resulting from contamination of country foods. The Crown notes that the NEB have recommended a number of conditions related to the protection of human health and safety that would limit Project impacts on country foods, air quality, drinking water and noise pollution.

Health Canada is responsible for establishing standards for the safety and nutritional quality of all foods sold in Canada. The department exercises this mandate under the authority of Canada's *Foods and Drugs Act* and pursues its regulatory mandate under the *Food and Drugs Regulations*. While the department does not have a regulatory role with respect to contamination of country foods or the determination for the need for a consumption advisory, Health Canada would work with other departments and be able to review information and provide related technical advice to support the Government of B.C. or the B.C. First Nations Health Authority (FNHA), upon request by either party.

Determining the need for, issuing, and the subsequent communication of any consumption advisory related to non-commercial foods is the responsibility of the Government of British Columbia.

The FNHA provides environmental public health services to B.C. First Nations communities, including services aimed to assess impacts on human health from food, water, air and sanitation. As part of its services to B.C. First Nations communities, the FNHA may be able to review any Provincial consumption advice as it pertains to community specific factors and work with health authorities to ensure relevant and community-specific advice.

The safety of commercial foods falls within the responsibilities and mandate of the Canadian Food Inspection Agency (CFIA) and the provinces' Health Authorities. Commercial foods distributed to the public that could be contaminated by the Project are subject to Canada's *Food and Drugs Act* and the *Canada Agricultural Products Act*. Levels of chemicals in commercial foods are monitored by the CFIA through its National Chemical Residue Monitoring Program. The monitoring program is used to determine the need for directed sampling, which focuses on identified chemical contamination issues and compliance sampling to support the removal of food in violation of standards from the marketplace.

The Canadian Shellfish Sanitation Program (CSSP) is a federal food safety program whose goal is to protect Canadians from the health risks associated with the consumption of contaminated bivalve molluscan shellfish (e.g. mussels, oysters and clams). It is jointly administered by CFIA, ECCC and DFO. Under the CSSP, the Government of Canada implements controls to verify that only shellfish that meet food safety and quality standards reach domestic and international markets.

Provincial Health Authorities and the FNHA in B.C. also have a role in monitoring foods that may be contaminated and in issuing consumption advisories.

NEB condition 81 requires the proponent develop a Project-specific WMT Environmental Protection Plan that addresses impacts related to all Project phases and activities, including construction. The proponent is required to consult with government authorities (including VFPA) and Aboriginal groups during the development of this plan.

Through its Project and Environmental Review of a Project Permit application, VFPA would review the proponent's WMT Environmental Protection Plan and would require the proponent to adhere to conditions for the mitigation of potential environmental effects that could impact traditionally harvested foods.

Regarding the responsibilities of federal departments in managing the effects of marine spills, Transport Canada is the lead agency responsible for Canada's Marine Oil Spill Preparedness and Response Regime. Under Part 8 of the *Canada Shipping Act, 2001*, Transport Canada ensures that the appropriate level of preparedness is available to respond appropriately to marine oil pollution incidents in Canada of up to 10,000 tonnes within prescribed time standards and operating environments.

Should a marine spill occur, the Canadian Coast Guard is the lead federal agency to ensure a rapid response to a ship-source spill. The Incident Command System (ICS), a widely accepted emergency management system, is utilized to enable a coordinated response to incidents by all emergency responders.

In terms of air quality, ECCC made specific recommendations to the NEB related to mitigation and monitoring, which are partially addressed. NEB acknowledged the specific ECCC recommendation for a monitoring site to be established at or adjacent to Tseil-Waututh Nation reserve and noted that conditions 52 and 53 along with proponent commitment 210 could accommodate this potential need. ECCC is prepared to assist in the implementation of these conditions and commitment to help ensure the environmental protection objectives are achieved. ECCC will also be available to provide input to the consultation process for the Air Emissions Management Plan (AEMP) for the WMT. ECCC suggests that uncertainty about the potential for air contaminant exceedances of thresholds at the Tseil-Waututh Nation reserve would be reduced if the air monitoring program outlined in condition 52 incorporated these principles:

- The monitoring site would be located with the intention of recording the highest concentrations in the vicinity (such as at a location on the proposed foreshore);
- Monitoring to be conducted on an hourly, continuous basis, throughout the year; and
- The criteria and thresholds that would trigger the implementation of additional mitigation measures would be based on the most conservative Canadian or Metro Vancouver air quality standards applicable.

ECCC would also be available to contribute to any discussions with respect to the possible “ambient survey” at the Tsleil Waututh Nation reserve if requested. ECCC would suggest that if the ambient survey proceeds, at a minimum it should monitor NO<sub>2</sub> and PM<sub>2.5</sub>, follow a recognized ambient monitoring protocol (see Condition 52c), monitor pollutant concentrations on an hourly, continuous basis and establish the timing and duration of the survey so as to make it highly likely that the annual maximum concentration would be recorded. Monitoring for at least one year would of course capture the annual maximum and establish a solid basis for comparison between the concentrations at Tsleil Waututh and the Westridge monitoring site.

In respect to the general negative human health effects from a holistic (Aboriginal) perspective including cultural aspects and psychosocial well-being, the Crown acknowledges that no mitigation is available to directly address these aspects.

In addition, EAO proposes a condition (21) to Ministers that requires the proponent to engage Aboriginal groups in the development of their workforce accommodation strategy, which would include mitigation measures related to the environmental and social-economic impacts of workforce accommodations on potentially impacted Aboriginal groups, as well as a plan for provision of medical and health services for employees and contractors using the temporary worker camps during Project construction.

### **Cumulative Effects**

A number of Aboriginal groups expressed concerns about cumulative effects to the TLRU, the TMRU and the underlying valued components that support Aboriginal traditional uses of these resources. During OTE presentations, Aboriginal groups shared their observations of changes to the land and waters in their traditional territories as a result of development.

In general, Aboriginal groups said that these changes have affected their ability to practice TLRU and TMRU activities, such as hunting, plant gathering, fishing, and trapping, as well as cultural ceremonies and gatherings.

Some groups expressed concerns about the effects of existing development on the health of the ecosystems and resources harvested, as well as the impacts on their cultural and spiritual well-being and the potential effects of the Project in addition to these existing effects. Various Aboriginal groups have said that they have concerns about the pressure the Fraser River is under and noted that Sockeye salmon, a species with the significant importance, has suffered a long decline.

A number of Aboriginal groups raised concerns about how Trans Mountain conducted its cumulative effects assessment. Many groups felt that Trans Mountain’s assessment was inadequate to assess the effects of the Project on their rights and interests. Many expressed the view that group-specific cumulative effects assessments specific to them or their areas of interest should have been conducted. Some groups said it did not accurately characterize or reflect the implications of incremental impacts on their use and occupancy of their territory, their interests, or their Aboriginal rights and title.

Within the NEB's report, the Board is explicit in its recognition of "the importance that Aboriginal groups place on being able to continue their traditional uses and activities within the entire area of their traditional territories." In respect to the evidence (oral and written) these Aboriginal groups provided the Board, the NEB described the information provided to them in the following way:

*... Aboriginal groups explained how they continue to use the lands, waters and resources within their traditional territories for a range of activities, including hunting, trapping, fishing, gathering of resources on the land, and to continue to access sites and locations of cultural and spiritual importance. Groups also described the significant role that these activities and locations on the landscape have within their cultures and societies. They described how the transmission of cultural knowledge relies on the continued ability to access resources, sites and locations for traditional purposes. The Board acknowledges the strongly held views expressed by Aboriginal groups about the relationships between their use of the lands, waters, and resources and the importance of these within each Aboriginal society.*

The NEB recognized that the Project's route (89% is on the existing RoW) "traverses land and water areas in Alberta and B.C. that Aboriginal groups use for traditional activities, uses and practices and for exercising various potential or established Aboriginal and treaty rights." The NEB in its review of the Project noted its concerns, at various points in their report, regarding historic and current impacts of the existing infrastructure.

In regard to the existing situation of watersheds crossed by the pipeline, the NEB made the following comment:

*Existing cumulative effects differ in the various watersheds crossed by the proposed pipeline corridor. Numerous current and historical activities have reduced the abundance and health of fish species and the quality of habitat within the pipeline corridor. For some species and watersheds, existing cumulative effects could be considered substantial or above environmental regulatory thresholds.*

The NEB also took note of the submissions of the cities of Burnaby and Vancouver that the proposed pipeline route may include lands used historically by industry and that there are potential sources of contamination from these previous activities. The proponent has indicated that historical and current reporting indicates that "the existing berth at the Westridge Marine Terminal has elevated levels of certain contaminants (such as polycyclic aromatic hydrocarbons, cadmium, and mercury) in the subtidal sediment" at this location. The NEB stated "that the marine sediment and water quality surrounding the Westridge Marine Terminal (WMT) have been affected by historical and existing terminal activities" and that "some contaminants are present at levels higher than the applicable criteria because of historical and existing terminal activities."

In respect to traditional use of land and marine areas, the NEB found that the total cumulative effects (from agriculture, forestry, transportation, roads and other infrastructure) from past and existing projects and physical activities could be significant in certain areas of high development.

Citing filings from the proponent, government departments and Aboriginal groups, the NEB noted the evidence that Burrard Inlet has been significantly cumulatively impacted by industrial and urban development and that a large percentage of the intertidal habitat has been modified.

In evaluating the significance of cumulative effects under Paragraph 19(1)(b) of the CEAA 2012, the NEB focused on the total cumulative effects of the Project from past, existing and reasonably foreseeable physical facilities and activities, including the Project's effects. In so doing, the NEB rejected the proponent's approach to evaluating the significance of the Project's contribution to cumulative effects, rather than total cumulative effects. The NEB took the approach that if the total cumulative effects were considered to exceed a relevant threshold for a particular valued component, or found to be substantial, then effects to that component would generally be found to be significant unless the Project contribution to total cumulative effects was determined to be inconsequential.

The NEB observed that for various valued components, cumulative effects were already significant without the Project. For example:

- Certain ambient concentrations of airborne contaminants around the Edmonton Terminal and WMT already exceeded or were approaching the applicable ambient air quality objectives;
- Numerous watersheds crossed by the proposed pipeline corridor could be considered significantly impacted by cumulative effects because of past industrial and urban development has reduced the quality and quantity of surface water;
- Cumulative effects to groundwater resources could be significant in areas where vulnerable aquifers are present or where more concentrated agricultural, municipal and industrial activities result in higher groundwater usage and demand;
- Current and historical activities have reduced the abundance and health of fish species and the quality of habitat within the pipeline corridor. For some species and watersheds, existing cumulative effects could be considered substantial or above environmental regulatory thresholds;
- A relatively high percentage (approximately 39%) of soils in the local study area for the Project are already disturbed and therefore cumulative effects to soil and soil productivity is already significant;
- Existing cumulative effects to native vegetation are already substantial in the regional study area for vegetation in Alberta and in the lower mainland of B.C., which place various rare plants, lichens and vegetation communities at risk because of sustainability thresholds being exceeded for the species or community;
- Existing cumulative effects to old growth and mature forests in B.C. are already substantial in some areas, including substantial forest health-related damage from the mountain pine beetle;
- The presence of weeds and resulting adverse effects are already substantial in some areas with high existing disturbance;

- For wildlife species, existing cumulative effects to Woodland caribou are already substantial because existing cumulative effects have already exceeded a sustainability threshold for the species, and for certain populations of grizzly bear, regional cumulative effects to mortality risk are considered substantial partly because of linear disturbances;
- Some marine sediment and water quality contaminants are present at levels higher than the applicable criteria because of historical and existing terminal activities in the vicinity of the WMT;
- Cumulative effects to marine fish and fish habitat could be considered substantial and above environmental regulatory thresholds within the RSA and LSA as Burrard Inlet has been altered by urban and industrial development that has resulted in a loss of habitat and a decrease in marine fish abundance; and
- Existing cumulative effects for marine mammals could be considered substantial or above environmental regulatory thresholds for Burrard Inlet as industrial and urban development have substantially altered areas formerly considered high quality habitat in this area.

For all of the above, the Board would impose conditions on the proponent to minimize or offset the Project's contribution to these already significant cumulative effects, including measures proposed by the proponent. The NEB determined that the Project's contribution to total cumulative effects is expected to range from inconsequential to relatively minor.

With respect to the total cumulative effects of the Project on TLRU and TMRU, factoring in the suite of mitigation measures to address biophysical effects that support these activities, the NEB determined that the Project's contribution to cumulative effects to the TLRU and TMRU were not significant.

The NEB did conclude that effects from the operation of Project-related marine vessels would contribute to the total cumulative effects to the Southern Resident Killer Whale population and would further impede the recovery of the endangered Southern Resident Killer Whale population for which the cumulative effects are already significant.

EAO proposes a number of conditions relevant to the mitigation of cumulative effects, many of which are discussed above. Conditions have been included for wildlife species that have been particularly vulnerable to cumulative effects, including species at risk (16), grizzly bear (18), and caribou (19).

### **Cumulative Effects Associated With Greenhouse Gas Emissions**

Given the link between greenhouse gas emissions and the effects of climate change on Aboriginal traditional uses of lands, waters and resources, various concerns were raised about the direct and indirect sources of greenhouse gases (GHG) associated with the Project.

The NEB accepted the proponent's analysis that the Project would generate 1,020,000 tonnes of CO<sub>2</sub>e during construction (primarily from land clearing) and 407,000 tonnes per year of CO<sub>2</sub>e during annual operations. The NEB noted that construction-related GHGs are not reportable under any existing federal regulations, however given the substantial amount of anticipated emissions, the

NEB proposed condition 140 requiring quantification of the total direct GHGs after all construction activities are complete and condition 142 requiring development of an offset plan for the Project's entire direct construction-related GHGs. The intent would be to confirm there are no net GHGs from Project construction.

With respect to GHGs emitted during annual operations, the NEB found these would be below national reporting thresholds and therefore were not considered significant.

With respect to the marine shipping aspect of the Project, the NEB found GHGs from Project-related marine vessels are likely to be significant. The NEB estimated these emissions to be 68,100 tonnes of CO<sub>2</sub>e per year, resulting in a 2.1% increase in estimated marine provincial emissions, or a 0.11% increase in B.C.'s total GHGs (based on 2012 levels).

To address certain Project-related contributions to GHG emissions, the NEB recommended the proponent files a Post-construction GHG assessment report (Condition # 140) and implements a GHG Emission Offset Plan for the project construction phase (Condition #142).

In respect of the NEB's findings on GHG emissions, the Crown notes that there are two parts to the GHG and climate change that were assessed by the federal government direct and upstream GHGs. GHG emissions directly attributed to the Project were considered within the scope of the NEB review process and the Crown notes these GHG emissions will be partly offset via proponent compliance with NEB condition #142.

Upstream GHG emissions were considered outside the NEB process. The transition strategy the Government of Canada announced in January 2016 for projects currently undergoing EA included a commitment to assess the upstream GHG emissions linked to projects under review. As such, ECCC conducted an assessment of the upstream GHG emissions associated with the Project. This assessment was released to the public and Aboriginal groups for comment. The purpose of the assessment is to provide information to the Project decision makers on the upstream GHG emissions associated with the project. Because the upstream emissions were not included in the NEB review and are not under the care and control of the proponent, there are no conditions that would apply to the upstream assessment.

Transport Canada acknowledges the Board's significant finding related to GHG emissions from Project vessels. Canada is working toward the control and reduction of GHG emissions from ships on a global scale as a member state of the International Maritime Organization (IMO) and by participation on the IMO's Marine Environment Protection Committee (MEPC).

In 2011, the IMO adopted mandatory technical and operational reduction measures under MARPOL. These measures include the Energy Efficiency Design Index (EEDI) and the *Ship Energy Efficiency Plan* (SEEMP). The EEDI applies to new ships and sets a standardized means to calculate energy efficiency (the EEDI formula) and requires new vessels to meet minimum efficiency targets that become more stringent in phases. The SEEMP is required to be onboard all ships and set out operational measures for how a ship will improve its energy efficiency. These measures constitute the first-ever mandatory global GHG reduction regime for an entire global



industry sector. The regulations entered into force on January 1, 2013, and apply to all ships over 400 gross tonnages. Based on compliance results of current newly built vessels with the EEDI, the efficiency targets for new ships are currently under review by IMO with the view to increasing stringency.

ECCC does not regulate marine shipping GHG emissions. However, ECCC does produce the National Marine Emissions Inventory (MEI), a database of marine emissions from all commercial vessels operating in Canadian waters, based on current activity data, and updated on an on-going basis.

The Crown notes that neither the direct nor the upstream GHG emissions of a particular project can be linked to local changes to the environment. However, a project's direct and upstream GHG emissions are an important consideration for the decision makers because they would contribute to global GHG emissions and subsequent climate change impacts.

The governments of Canada and British Columbia are committed to addressing climate change, and the Government of Canada is working in collaboration with provincial and territorial governments, municipalities and Indigenous peoples. First Ministers have established working groups to identify specific actions to grow Canada's economy while reducing greenhouse gas emissions and adapting to climate change. These working groups will develop reports identifying options for action in four areas: clean technology, innovation and jobs; carbon pricing mechanisms, specific mitigation opportunities; and adaptation and climate resilience. These reports will help inform the development of the pan-Canadian framework on clean growth and climate change, which First Ministers are to finalize this fall for implementation beginning in early 2017.

The federal government is also determined to make sure the voices and perspectives of Indigenous peoples are heard and included in the pan-Canadian framework on clean growth and climate change. Working groups are specifically including Indigenous peoples, in particular the Assembly of First Nations, the Métis National Council and Inuit Tapiriit Kanatami.

The Government is also addressing climate change through some specific measures. Canada, together with the US, has committed to take action to reduce methane emissions by 40 to 45 percent below 2012 levels by 2025 from the oil and gas sector, the world's largest industrial methane source, in support of achieving international climate change commitments.

In order to implement this target, ECCC will put in place national regulations in collaboration with provinces/territories, Indigenous Peoples and stakeholders. Environment and Climate Change Canada intends to publish an initial phase of proposed regulations by early 2017.

In 2007, the B.C. Government passed the *Greenhouse Gas Reduction Act*, legislating provincial GHG reduction targets of 33% below 2007 emission levels by 2020 and 80% below by 2050. Interim reduction targets of 6% by 2012 and 18% by 2016 have been set in policy to guide and measure progress. In the province's most recent Greenhouse Gas Inventory Report, B.C.'s 2012 CO<sub>2</sub>e emission levels were reported at 61,500 kt, 4.4% below 2007 levels.

In order to achieve the legislated GHG reduction goals, B.C. has designed and implemented a suite of policy, regulatory, and legislative measures to reduce emissions across the province. These measures include:

- A provincial carbon tax, introduced in 2008 through the *Carbon Tax Act*;
- A carbon-neutrality mandate for all public sector operations (Carbon Neutral Government Regulation), largely achieved through the sourcing of province-based offsets; and
- Mandatory GHG reporting program for industrial facilities (Reporting Regulation).

EAO proposes several conditions particularly related to greenhouse gas emissions within B.C.:

- Condition 26 requires the proponent quantify and report greenhouse gas emissions in a manner that is consistent with B.C.'s *Greenhouse Gas Industrial Reporting and Control Act* and accompanying regulations; and
- Condition 27 requires the proponent to purchase all greenhouse gas emissions offsets for emissions within B.C. through the BC Carbon Registry to ensure that the offsets meet the standards established in B.C.'s *Greenhouse Gas Industrial Reporting and Control Act* and accompanying regulations.

### **Socio-economic and Socio-cultural Effects**

A number of Aboriginal groups raised concerns about socio-economic, community and socio-cultural effects. As some of these issues may relate to potential impacts on Aboriginal Interests, they are also discussed in the preceding sections. Key issues identified in this topic area included the following:

- Loss of access or damage to culturally sensitive sites;
- Cultural impacts associated with the potential loss of culture and loss of ability to practice traditional resource use or ceremonial activities, e.g. as a result of operations, a spill, or increased traffic through traditional territory;
- Visual disturbances;
- Potential community effects during construction;
- Training and employment;
- Procurement and business opportunities;
- Partial ownership, revenue sharing, or other economic benefit;
- Access to salvageable timber;
- Impacts on trapping and the need for notification and compensation;
- Negative economic impacts associated with construction or operation, e.g. value of land; and
- Quality of economic data Trans Mountain submitted to the NEB.

In its report, the Board acknowledged that the Project would pass through areas of importance to many groups and stakeholders, including Aboriginal groups.

The NEB found that the potential effects of the Project on physical and cultural heritage resources would be confined to the Project footprint and the WMT site boundary, would be short to long term, reversible to permanent, and of low to moderate magnitude. The NEB concluded that, with proponent commitments to avoid all sites where possible, implement its Heritage Resources Discovery Contingency Plan and fulfill its obligations to meet provincial requirements, the Project is not likely to cause significant adverse environment effects to heritage resources, including with respect to Aboriginal groups.<sup>36</sup>

The NEB conditions require the proponent to manage access to culturally sensitive sites and implement an access management plan. Trans Mountain would be required to justify any area subject to access control, including during the construction and operational phases of the Project. To limit the impact on Aboriginal groups, NEB condition #24 for an Access Management Plan includes requirements for Trans Mountain to incorporate Aboriginal Traditional Land Use and Traditional Ecological Knowledge into the design of its access management plan.

Condition #64 requires the proponent to develop a Project-specific WMT Environmental Protection Plan that addresses impacts related to all Project phases and activities, including construction. The proponent is required to consult with government authorities (including VFPA) and Aboriginal groups during the development of this plan. VFPA would review the proponent's WMT Environmental Protection Plan and would require the proponent to adhere to any conditions for the mitigation of potential environmental effects that could impact traditionally harvested foods or other potential community effects.

Regarding trapping, Trans Mountain has committed to communicating its construction schedule to Aboriginal trappers so that they can set their traplines in areas unaffected by construction activities. The proponent has stated that should trappers lose trapline revenue and or suffer a reduced harvest, they are committed to offering compensation. Condition #2 (Compliance with Commitments) requires that Trans Mountain fully implement all of the commitments it made in its Project Application or during the NEB review process.

The NEB acknowledged that the Project has the potential to affect the quality of life within affected communities, as well as the well-being of individuals because of potential changes in population and community life. In order to address potential negative socio-economic effects, the NEB proposed Condition #13 requiring the proponent to file a plan for monitoring the potential adverse socio-economic effects from the Project as a means of ensuring that measures to reduce or eliminate adverse effects are implemented within timeframes for which effects might occur.

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<sup>36</sup> The Panel acknowledged the concerns raised by Aboriginal groups regarding the potential effects of the Project on physical and cultural heritage resources and stated that a limited number of sites had been identified through the impact assessment performed by the proponent.

With respect to potential positive socio-economic effects for communities, the NEB proposed Condition #145 requiring the proponent to file progress reports on a Community Benefit Program. Overall, based on proponent commitments and the NEB's recommended conditions, the NEB concluded that potential effects to the social and well-being of communities can be effectively addressed.

EAO proposes a number of conditions that would contribute to the mitigation of potential adverse socio-economic and socio-cultural effects, which have been discussed in the preceding sections.

A number of issues associated with socio-economic, community and socio-cultural effects are also relevant to assessing impacts on Aboriginal title, which is further considered in the applicable Appendices A to E.

### 4.3.7 PROCEDURAL CONCERNS

Throughout the Project review and Crown consultation process, many Aboriginal group participants expressed their opposition to the Project, criticized the NEB Review as fundamentally flawed, and raised various concerns regarding the Crown's approach to consultation including reliance on the NEB Review, to the extent possible, to satisfy aspects of the Crown's legal duty to consult. This section summarizes the key procedural issues raised and offers responses where provided either by the NEB or the Crown.

#### **NEB List of Issues, Scoping, and Proponent's Assessment Approach**

The NEB's *Filing Manual* establishes the requirements proponents must follow in submitting applications to the NEB for CPCN. The NEB selected the List of Issues that would be examined in the hearing process, as well as the scope of the environmental assessment and scope of the factors to be assessed under CEAA 2012.

One key theme of Aboriginal group concerns about the NEB Review involved the lack of opportunities they felt were available to influence the direction the NEB provided to the proponent to respond to issues and concerns raised about evidence filed by the proponent. The proponent set out its assessment of the Project in its Application to the NEB, guided by the requirements of the NEB filing manual, the regulatory order issued in respect of the scope of the EA, and scope of the factors to be assessed under CEAA 2012. However, various Aboriginal group participants wanted to be consulted on the scope of the review process and the list of issues that the NEB would examine during the hearing process.

Aboriginal groups wanted to have the NEB further direct the proponent to conduct specific assessments of valued components important to them. Two key examples of components that Aboriginal groups felt were lacking were 1) an assessment of greenhouse gas emissions indirectly associated with to the Project, and 2) an assessment of potential adverse impacts on Aboriginal Interests. In each instance, Aboriginal groups wanted the NEB to require this information as part of the hearing process, so that it could be factored into the Project assessment and public interest recommendation.

The view that a historical and current context was lacking from the traditional use studies undertaken by the proponent in its Project Application was also provided in many Aboriginal groups' evidentiary filings with the NEB. In the view of many Aboriginal groups, the indicators and measurements used by the proponent in regard to subsistence activities and sites (including hunting, trapping, fishing, plant gathering, trails and travel ways, and habitation sites), as well as cultural sites (including gathering places and sacred areas), did not accurately represent an understanding of the impacts of the Project on their Aboriginal Interests.

Some Aboriginal groups also criticized the baseline studies conducted by the proponent. In these groups' view, the proponent's studies revealed that they do not know where and when the baseline values should be established. Without an appropriate historic and current context, many Aboriginal groups believe any baseline cannot provide a useful reference point against which future conditions are compared for assessing Project-specific and cumulative effects. Also of concern to Aboriginal groups has been the need to understand the degree of future impacts based upon having effective data on the prior conditions. Tsleil-Waututh Nation, for example, noted the importance of this information within their discussion of their own consideration of baseline and current conditions in Burrard Inlet:

*[118.] The Assessment Report [of Tsleil-Waututh Nation] describes baseline conditions – the conditions of Burrard Inlet pre-contact and at the time of the Crown's assertion of sovereignty – as well as current conditions. Baseline and current conditions provide a means by which cumulative effects on TWN's title, rights, and interests may be measured over time. They are the "existing state of affairs" through which, as a matter of law, the seriousness of additional Project impacts must be viewed and assessed.<sup>37</sup>*

In response to these issues, the NEB concluded in its report that the proponent had considered and, to the extent possible, incorporated the information provided by Aboriginal groups in its studies, design, and mitigation measures. The NEB would require Trans Mountain to continue its consideration and incorporation of additional information it receives from Aboriginal groups as it proceeds to final design. A number of NEB conditions for the Project require ongoing engagement of Aboriginal groups; however, Aboriginal groups remain concerned about the completeness and quality of the information relied upon by the NEB during the hearing process, to inform its assessment of the Project, and its ultimate recommendation in respect of whether the Project is in the public interest.

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<sup>37</sup> C358-30 – Tsleil-Waututh Nation – Written Argument-in-Chief (A75090). p.47. The citation for quotation used here is to: Moberly First Nations v British Columbia (Chief Inspector of Mines), 2011 BCCA 247, 2011 Carswell BC 1238 at para 119 (WL) [TWN Authorities, Vol 3, Tab 42].

## **NEB Hearing Process**

Various Aboriginal group intervenors noted that the NEB did not offer an oral hearing that would have enabled direct cross-examination of the proponent and other intervenors' evidence. A low rate of direct response to information requests provided to the proponent raised frustration that the NEB did not hold the proponent accountable to addressing issues raised by Aboriginal groups through a written "testing of the evidence." In addition, several Aboriginal groups expressed that the quasi-judicial nature of the Board's hearing process made it adversarial, and some Aboriginal groups did not participate because the hearing format did not respect the preferred manner in which they would want to provide information.

The majority of Aboriginal groups engaged in consultation with the Crown stated that the NEB Review places an unreasonable burden on intervenors to assess the Project. The view strongly expressed by Aboriginal groups is that it is up to intervenors to submit research and reports to challenge the assumptions made by the proponent in its application, and that intervenors are often poorly resourced to perform this function.

In general, Aboriginal groups expressed concern with the perceived lack of flexibility shown by the NEB for the provision of oral evidence, filing of evidentiary updates by Aboriginal group intervenors, and the refusal to accept late submissions of traditional use information.

In addition, Aboriginal groups felt that the requirement placed on them to participate as formal intervenors was at odds with meaningful engagement, as Aboriginal groups would have preferred to work collaboratively with the Crown to understand the impacts of the Project on their specific Aboriginal Interests and other interests.

## **Level of Participant Funding**

Many Aboriginal groups raised concerns about the level and consistency in approach with respect to the NEB's participant funding program, as well as the participant funding offered by Natural Resources Canada to support the participation of Aboriginal groups in the consultation process.

Many Aboriginal groups raised the concern that for an administratively burdensome process that is legalistic in nature, costs for meaningful engagement and review of technical information far outweighed the level of funding offered by the NEB to support participation in the hearing. Some groups were not able to obtain any NEB participant funding as a result of the timing of their applications to participate, while others received what they felt was an arbitrary and minimal funding allocation compared to other groups. Several groups indicated they spent substantially more of their own resources participating in the Project review process than they were allocated by the NEB or the Crown.

## **Crown's Reliance on the NEB Hearing to Inform Crown Consultation**

Given the above procedural concerns, most Aboriginal group participants in the NEB hearing expressed concern over what they viewed as the Crown's over-reliance on the NEB Review process to satisfy key aspects of the duty to consult, and as appropriate, accommodate for potential adverse Project impacts on Aboriginal Interests.

Time limit constraints and timing of the Post-NEB hearing phase of consultation, as well as the capacity for Aboriginal groups to engage in consultation during the summer months, were also raised as key concerns by many participants. Many Aboriginal groups expressed a desire for more time to meet face-to-face and respond to issues raised during the post-NEB hearing phase.

Another procedural concern raised by many groups was that the NEB process did not adequately incorporate consultation and accommodation considerations in respect of the Crown's duty to consult. A key element of this concern was the view that the NEB's recommendation for GIC to approve the Project did not consider justification under the constitutional framework in place for protecting Aboriginal rights or whether the Crown's duty to consult, and as appropriate, accommodate was adequately met.

The Crown has consulted meaningfully during the post-NEB hearing phase of consultation on the Project and to identify measures available to avoid or minimize potential adverse impacts on Aboriginal Interests. If adverse effects cannot be fully mitigated, the Crown consults toward arriving at a common-ground view of the degree of seriousness of impacts potentially arising from Crown decision making in respect of the Project. In addition, the Crown has sought to work closely with potentially impacted Aboriginal groups to inform recommendations to decision makers for accommodation or other action to address potential impacts as appropriate in an effort to reconcile Aboriginal Interests with other public interests.

The Crown is committed to meeting its duty to consult, which includes a consideration of the seriousness of the potential impacts of Crown decisions in relation to the Project on Aboriginal Interests. This consideration will include whether potential impacts on a group can be addressed by the NEB conditions or whether additional Crown action may be needed. Provincially, these additional Crown actions may include proposed EA certificate conditions. Federally, these Crown actions could include referring aspects of the NEB Recommendation Report back for reconsideration, saying no to the Project, or if the Project is approved, accommodating Aboriginal groups in a manner that is commensurate to the degree of seriousness of the impact.

Through the Crown's efforts during the NEB review process and the post-NEB hearing phase, the Crown has provided opportunities for Aboriginal groups to provide feedback on the NEB's recommendation and conditions for the Project, raise potential outstanding issues, discuss possible mitigation and accommodation measures as well as discuss any other issues groups wished to raise. This dialogue, as well as consultation on this report, seeks to ensure that the Governments' decisions are informed by a record that reflects the views and concerns of Aboriginal groups and presents actions recommended to meaningfully respond to those concerns.

## 4.4 Common Outstanding Issues Raised by Aboriginal Groups Post-NEB Report

During consultation meetings and through the review of comments received on the initial draft of this report, several common themes emerged in terms of Aboriginal group responses to the NEB Report and the NEB's recommended terms and conditions for the Project. Common concerns include:

- Disagreement with NEB conclusions in respect of the temporary, reversible or insignificant nature of adverse effects pertaining to Aboriginal groups;
- View that the NEB Report includes inaccurate, incomplete and faulty information that has undermined confidence in the findings of the report or adequacy of recommended mitigation;
- Lack of specificity of NEB findings and the general nature of conditions relating to “potentially affected Aboriginal groups” that many Aboriginal groups view as providing too much discretion to the proponent and the NEB in determining which groups to engage and how to engage them and whether that engagement was satisfactory in avoiding impacts on Aboriginal Interests and other interests;
- Some Aboriginal groups suggested that a specific set of standards and methods be established for the proponent to adhere to for meeting compliance with each NEB condition that requires consultation with Indigenous groups, similar to regulatory conditions on other projects;
- Inadequate ability to evaluate to what extent the NEB Report or recommended conditions may address specific concerns raised by Aboriginal groups including impacts on Aboriginal Interests. In particular, given the high level and generic approach taken by the NEB for documenting its assessment of Project-related impacts on Aboriginal group interests, several Aboriginal groups questioned whether the NEB had fully satisfied its statutory obligations under CEAA 2012 or the policy objectives of integrating traditional knowledge into the process;
- Lack of specific protection through NEB conditions for cultural or sacred sites or continued ability to use and transfer traditional knowledge;
- Lack of compensation for cultural losses in the event of a spill or accident from pipeline, the WMT, or marine shipping components of the Project;
- Concern that NEB condition 98 uses the term “Aboriginal Monitors,” which, in the view of Aboriginal groups, does not provide certainty that local traditional knowledge holders would be engaged in construction monitoring within a specific Aboriginal group’s territory to help protect values such as traditional land and resource use and traditional marine resource use; and
- Absence of NEB mandate or findings with respect to assessing impacts on Aboriginal title claims and absence of any mitigation or compensation in respect of potential impacts or risks of impact on Aboriginal title.



Other key common issues expressed to the Crown during the post-NEB Report round of consultations include:

- Expression that more time is needed for the Crown to meaningfully consider Aboriginal group comments and concerns prior to a decision on the Project;
- Some groups indicated that they required more time and funding to participate in Crown consultation to consider the impacts of the Project on their communities;
- Suggestion that the Crown has responsibility to ensure traditional knowledge, cultural and sacred sites and Aboriginal rights and title are meaningfully considered by the proponent and the NEB throughout the planning, construction, operation and life cycle regulation of the Project;
- Suggestion that the proponent has not adequately considered or collected traditional knowledge or used information in Project plans developed to date and that there has been a lack of consistent proponent engagement or follow-up with many groups who are seeking to have an active and ongoing dialogue with the proponent;
- Some groups indicated a lack of proponent follow-up on commitments made but that were not formally documented in the proponent's engagement logs filed with the NEB or shared with Aboriginal groups;
- In the absence of a decision to delay the decision, many Aboriginal groups urged the Crown to order the NEB to reconsider its recommendation or terms and conditions in particular to ensure the direct involvement of potentially affected Aboriginal groups in the proponent's detailed Project planning;
- In a number of consultation meetings and via correspondence, Aboriginal groups recommended that GIC consider referral back to the NEB for reconsideration, the definition of terms element of Appendix 3 of the NEB Report to more specifically define the term "potentially affected Aboriginal groups" referred to throughout the conditions;
- If the Project is approved, that additional resources will be required by Aboriginal groups to reviewing and responding to referrals;
- If the Project is approved, desire for an ongoing Project oversight and monitoring role for Aboriginal groups, to ensure the proponent complies with conditions affecting Aboriginal group interests;
- Many groups noted their view that an oversight committee should not be "advisory" but have the ability to ensure requirements are met and should include an ability to have technical sub-committees established comprised of local Aboriginal group experts;
- Some groups noted an oversight committee function could be directly referenced in the NEB conditions such that it could receive draft proponent plans and reports directly from the proponent and is provided capacity to review these plans and reports over the life cycle of the Project;

- Desire of several Aboriginal groups to have certainty that they will have official standing in any future detailed route alignment hearing process established by the NEB and that this will allow Aboriginal group interests to be directly factored into future Project planning to avoid or minimize impacts;
- Ongoing concerns about the environmental impacts of the Project;
- Ongoing concerns about the cumulative effects of development in Aboriginal groups' traditional territories;
- Ongoing concerns about the potential for serious adverse impacts from any Project-related spill;
- Ongoing concerns about the adequacy of the spill response systems for pipeline and marine-based accidents;
- Ongoing concerns that the Project would adversely impact Aboriginal title claims;
- Desire to benefit economically from the Project;
- Lack of trust in the proponent, regulatory agencies and institutions of Government to meaningfully address Aboriginal group interests and to sustain investment in ongoing relationships with Aboriginal groups;
- Reconciliation requires parties moving toward consensus, common positions or partnerships that may involve some degree of compromise or middle-ground solutions that try to meet the interests of Canada as a nation and Indigenous peoples as well; and
- In some cases, a desire for consultation protocols to be developed with the Crown on the Project or to address broader issues including cumulative effects and broader natural resource development taking place within an Aboriginal group's traditional territory.

## 5. CONCLUSIONS

### 5.1 Summary of Conclusions of Impacts on Aboriginal Interests

This section presents a summary of the Crown's conclusions about the impacts of the Project on Aboriginal Interests. The assessment of impacts on Aboriginal Interests for each individual Aboriginal group, along with a summary of strength of claims, consultation activities, and key issues and concerns, are provided in the group-specific appendices to this Report.

The following tables summarize the Crown's conclusions regarding the depth of consultation owed to each Aboriginal group, the potential Project-related impacts on specific Aboriginal Interests for each Aboriginal group, and the overall range of potential Project-related impacts. The tables are organized by geographic region.

**Table 13 – Alberta Groups: Conclusions Regarding Impacts on Aboriginal Interests and the Depth of Consultation**

Aboriginal Group	Depth of Consultation	Assessed Impact on Aboriginal Interest				Greatest Assessed Impact on Aboriginal Interests
		Hunting, Trapping, and Plant Gathering	Fishing and Harvesting	Other Traditional and Cultural Activities	Aboriginal Title	
Alexander	deeper	minor-to-moderate	minor	minor-to-moderate	(treaty)	minor-to-moderate
Alexis Nakota Sioux	deeper	minor-to-moderate	minor	minor-to-moderate	(treaty)	minor-to-moderate
Enoch Cree	deeper	minor-to-moderate	minor	minor-to-moderate	(treaty)	minor-to-moderate
Ermineskin Cree	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor
Horse Lake	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor
Louis Bull	middle	minor-to-moderate	negligible-to-minor	negligible-to-minor	(treaty)	minor-to-moderate
Montana	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor
O'Chiese	middle	minor-to-moderate	minor	minor-to-moderate	(treaty)	minor-to-moderate
Paul	deeper	minor-to-moderate	minor	minor-to-moderate	(treaty)	minor-to-moderate
Samson Cree	middle	minor-to-moderate	minor	minor-to-moderate	(treaty)	minor-to-moderate
Stoney Nakoda Nations	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor
Sturgeon Lake Cree Nation	lower	minor	minor	minor	(treaty)	Minor
Sucker Creek First Nation	lower	minor	minor	minor	(treaty)	Minor
Sunchild First Nation	middle	minor	minor	negligible-to-minor	(treaty)	negligible-to-minor
Whitefish (Goodfish) Lake First Nation & Saddle Lake Cree Nation	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor

**Table 14 – B.C. Interior Groups: Conclusions Regarding Impacts on Aboriginal Interests and the Depth of Consultation**

Aboriginal Group	Depth of Consultation	Assessed Impact on Aboriginal Interest				Greatest Assessed Impact on Aboriginal Interests
		Hunting, Trapping, and Plant Gathering	Fishing and Harvesting	Other Traditional and Cultural Activities	Aboriginal Title	
Adams Lake	Middle	minor	minor	minor	negligible	Minor
Ashcroft	Middle	minor	minor	minor	negligible	Minor
Bonaparte	Middle	negligible	negligible	negligible	–	Negligible
Boston Bar	middle to deeper	Minor-to-moderate	minor	Minor-to-moderate	minor	Minor-to-moderate
Canim Lake (Tsqescen)	Lower	minor	minor	negligible-to-minor	negligible	Minor
Coldwater	Deeper	minor-to-moderate	minor-to-moderate	minor-to-moderate	minor-to-moderate	minor-to-moderate
Cook's Ferry	Deeper	minor-to-moderate	minor	minor-to-moderate	minor	Minor-to-moderate
High Bar	Lower	negligible	negligible	negligible	–	Negligible
Kanaka Bar	Middle	negligible	negligible	negligible	–	Negligible
Lheidli T'enneh	Lower	negligible-to-minor	negligible	negligible	negligible	negligible-to-minor
Lhtako Dene	Lower	negligible	negligible	negligible	negligible	Negligible
Little Shuswap Lake	Lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	negligible	negligible-to-minor
Lower Nicola	Deeper	moderate	minor-to-moderate	minor-to-moderate	minor-to-moderate	Moderate
Neskonlith	Lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	negligible	negligible-to-minor
Nicomen	Middle	negligible	negligible	negligible	–	Negligible
Nooaitch	Middle	minor	minor-to-moderate	minor	minor	minor-to-moderate
Nlaka'pamux Nation Tribal Council*	middle to deeper	minor	minor	minor	minor	Minor
Shackan	middle to deeper	minor	Negligible-to-minor	minor	–	Minor

Aboriginal Group	Depth of Consultation	Assessed Impact on Aboriginal Interest				Greatest Assessed Impact on Aboriginal Interests
		Hunting, Trapping, and Plant Gathering	Fishing and Harvesting	Other Traditional and Cultural Activities	Aboriginal Title	
Shuswap	Lower	negligible	negligible	negligible	–	Negligible
Simpcw	Deeper	minor	minor	minor	negligible	Minor
Siska	Middle	Minor-to-moderate	minor	Minor-to-moderate	Minor	Minor-to-moderate
Splats'in	Middle	negligible	negligible	negligible	–	Negligible
Stk'emlupsemc te Secwepemc Nation **	Deeper	minor	minor	minor	minor	Minor
Stswecem'c Xgat'tem	Lower	negligible	negligible	negligible	–	Negligible
Syilx (Okanagan Nation Alliance) ***	Deeper	moderate	minor-to-moderate	moderate	minor-to-moderate	Moderate
Toosey	Lower	negligible	negligible	negligible	–	Negligible
Ts'kw'aylaxw (Pavilion)	Lower	negligible	negligible	negligible	–	Negligible
Whispering Pines/Clinton	Lower	negligible-to-minor	negligible-to-minor	negligible	–	negligible-to-minor
Williams Lake	Lower	negligible	negligible	negligible	–	Negligible
Xatsull First Nation (Soda Creek)	Lower	negligible	negligible	negligible	–	Negligible

\* Nlaka'pamux Nation Tribal Council member groups are Boothroyd Indian Band, Oregon Jack Creek Indian Band, Lytton First Nation, Spuzzum First Nation, Skuppah Indian Band and Boston Bar First Nation.

\*\* Stk'emlupsemc te Secwepemc Nation member groups are Skeetchestn Indian Band and Tk'emlups Band.

\*\*\* Syilx (Okanagan Nation Alliance) member groups are Lower Similkameen Indian Band, Okanagan Indian Band, Penticton Indian Band, Upper Nicola Indian Band, Upper Similkameen Indian Band, and Westbank First Nation.

**Table 15 – B.C. Lower Fraser Groups: Conclusions Regarding Impacts on Aboriginal Interests and the Depth of Consultation**

Aboriginal Group	Depth of Consultation	Assessed Impact on Aboriginal Interest				Greatest Assessed Impact on Aboriginal Interests
		Hunting, Trapping, and Plant Gathering	Fishing and Harvesting	Other Traditional and Cultural Activities	Aboriginal Title	
Chawathil	Deeper	minor	minor	minor	minor	Minor
Cheam (Pilalt)	Deeper	minor	minor	minor	minor	Minor
Katzie	Deeper	minor	minor	minor	minor	Minor
Kwantlen	Deeper	minor	minor-to-moderate	minor	minor	minor-to-moderate
Kwikwetlem	Deeper	minor	minor	minor	minor-to-moderate	minor-to-moderate
Matsqui	Deeper	minor-to-moderate	minor-to-moderate	minor	negligible	minor-to-moderate
Musqueam	Deeper	minor	minor-to-moderate	minor-to-moderate	minor	minor-to-moderate
Peters	Deeper	minor-to-moderate	minor-to-moderate	moderate	negligible	Moderate
Popkum	Deeper	minor	minor-to-moderate	minor	negligible	minor-to-moderate
Seabird Island	Deeper	minor	minor	minor	negligible	Minor
Shx'wow'hamel	Deeper	minor-to-moderate	minor	minor-to-moderate	negligible	minor-to-moderate
Squamish	Deeper	negligible-to-minor	minor	minor	minor	Minor
Stó:lō Collective	Deeper	minor	minor-to-moderate	minor-to-moderate	minor-to-moderate	minor-to-moderate
Sts'ailes (Chehalis)	Lower	negligible	negligible	negligible	–	Negligible
Tsawwassen	Deeper	negligible-to-minor	minor	moderate	(treaty)	Moderate
Tsleil Waututh	Deeper	minor	moderate	moderate	minor-to-moderate	Moderate
Union Bar	Deeper	minor	minor	minor	negligible	Minor
Yale	Middle	minor	negligible-to-minor	minor	negligible	Minor

\* Stó:lō Collective member groups are Aitchelitz First Nation, Kwaw-Kwaw-Apilt First Nation, Leq'a:mel First Nation, Shxwha:y First Nation, Skawahlook First Nation, Skowkale First Nation, Skwah First Nation, Soowahlie First Nation, Squiala First Nation, Sumas First Nation, Tzeachten First Nation, Yakweakwoose First Nation, and Scowlitz First Nation.

**Table 16 – B.C. Vancouver Island and Other Coastal Groups: Conclusions Regarding Impacts on Aboriginal Interests and the Depth of Consultation**

Aboriginal Group	Depth of Consultation	Assessed Impact on Aboriginal Interest				Greatest Assessed Impact on Aboriginal Interests
		Hunting, Trapping, and Plant Gathering	Fishing and Harvesting	Other Traditional and Cultural Activities	Aboriginal Title	
Cowichan Tribes	Middle	minor	minor	negligible-to-minor	negligible-to-minor	Minor
Ditidaht	Middle	negligible-to-minor	minor	negligible-to-minor	–	Minor
Esquimalt	Middle	negligible	negligible	negligible	(treaty)	Negligible
Halalt	Middle	minor	minor	negligible-to-minor	negligible	Minor
Hwlitsum *	Middle	–	–	–	–	Minor
Lake Cowichan	Middle	negligible	negligible-to-minor	negligible-to-minor	negligible	negligible-to-minor
Lyackson	Middle	negligible-to-minor	minor	moderate	negligible-to-minor	Moderate
Maa-nulth	Lower	negligible	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor
Malahat	Middle	minor	negligible-to-minor	moderate	(treaty)	Moderate
Pacheedaht	Middle	negligible-to-minor	minor	moderate	none	Moderate
Pauquachin	Middle	negligible-to-minor	minor	moderate	(treaty)	Moderate
Penelakut Tribe*	Middle	negligible-to-minor	minor	negligible-to-minor	negligible	Minor
Scia'new (Beecher Bay)	Middle	negligible	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor
Semiahmoo	Lower	negligible-to-minor	minor	negligible-to-minor	negligible	Minor
Snaw-naw-as (Nanoose)	Lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor
Snunemuxw (Nanaimo)	Middle	negligible	negligible	negligible	(treaty)	Negligible
Songhees (Lekwungen)	Middle	negligible-to-minor	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor
St'zuminus (Chemainus)	Middle	negligible-to-minor	minor	moderate	negligible-to-minor	Moderate



Aboriginal Group	Depth of Consultation	Assessed Impact on Aboriginal Interest				Greatest Assessed Impact on Aboriginal Interests
		Hunting, Trapping, and Plant Gathering	Fishing and Harvesting	Other Traditional and Cultural Activities	Aboriginal Title	
Tsartlip	Middle	negligible-to-minor	negligible-to-minor	moderate	(treaty)	Moderate
Tsawout	Middle	minor	minor	moderate	(treaty)	Moderate
Tseycum	Middle	negligible-to-minor	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor
T'Sou-ke	Middle	minor	minor	moderate	(treaty)	Moderate

\* The Crown is of the view that Hwlitsum is a family group/component of Penelakut Tribe. However, the Crown is aware of Hwlitsum's views that it is an Aboriginal group independent of the Penelakut Tribe or any other Cowichan community. Therefore the overall conclusions reported for Hwlitsum are the same as for Penelakut Tribe.

**Table 17 – Métis Groups: Conclusions Regarding Impacts on Aboriginal Interests and the Depth of Consultation**

Aboriginal Group	Depth of Consultation	Assessed Impact on Aboriginal Interest				Greatest Assessed Impact on Aboriginal Interests
		Hunting, Trapping, and Plant Gathering	Fishing and Harvesting	Other Traditional and Cultural Activities	Aboriginal Title	
Gunn Métis Local 55, Lac Ste. Anne Métis (Alberta)	Middle	minor-to-moderate	minor-to-moderate	minor-to-moderate	–	minor-to-moderate
Métis Nation of Alberta and Métis Nation of Alberta – Regional Zone 4	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	–	negligible-to-minor
Mountain Métis Nation Association	middle	negligible-to-minor	negligible-to-minor	minor-to-moderate	–	minor-to-moderate
Kelly Lake Métis Settlement Society	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	–	negligible-to-minor
British Columbia Métis Federation	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	–	negligible-to-minor
Métis Nation of British Columbia	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	–	negligible-to-minor

Table 18 identifies the greatest potential impact on each Aboriginal group's Aboriginal Interests, as well as the depth of consultation.

There are total of 117 individual Aboriginal groups listed in the tables above, including the groups within collectives.<sup>38</sup> In total 43 Aboriginal groups were identified as being owed a deeper level of consultation (4 First Nations in Alberta and 39 First Nations in B.C.), 7 Aboriginal groups were assessed as being owed a middle-to-deep level of consultation (all in B.C.), 35 Aboriginal groups were assessed at the middle of the consultation spectrum (4 First Nations in Alberta, 29 in B.C., and 2 Métis groups), and 32 Aboriginal groups were assessed as being owed a low depth of consultation (7 First Nations in Alberta, 21 in B.C., and 4 Métis groups).

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<sup>38</sup> The accounting of the overall number of individual Aboriginal groups consulted with by the Crown on the Project varied over time as the scope of consultations evolved. Consultations were informed by an understanding of the basis for which an Aboriginal group may represent the interests of a collective rights bearing entity under Section 35 of the *Constitution Act, 1982* or whether a group preferred to be consulted as a Band under the *Indian Act*. In some cases more than one distinct Aboriginal community is recognized as part of the same First Nation under the *Indian Act*.

**Table 18 – Greatest Assessed Impact on Aboriginal Interests and the Depth of Consultation for Each Group**

<b>Seriousness of Impacts</b>	<b>Moderate</b>		Lyackson; Malahat; Pacheedaht; Pauquachin; St'zuminus (Chemainus); Tsartlip; Tsawout; T'Sou-ke	Lower Nicola; Peters; Sylix (Okanagan Nation Alliance) [5 groups]; Tsawwassen; Tsleil- Waututh
	<b>Minor-to-Moderate</b>		Gunn Métis Local 55, Lac Ste. Anne Métis; Louis Bull; Mountain Métis Nation Association; Nooaitch; O'Chiese; Samson Cree; Siska	Alexander; Alexis Nakota Sioux; Boston Bar; Coldwater; Cook's Ferry; Enoch Cree; Kwantlen; Kwikwetlem; Matsqui; Musqueam; Paul; Popkum; Shx'wow'hamel; Stó:lō Collective [13 groups]
	<b>Minor</b>	Canim Lake; Semiahmoo; Sturgeon Lake; Sucker Creek	Adams Lake; Ashcroft; Cowichan Tribes; Ditidaht; Halalt; Hwlitsum; Penelakut Tribe; Yale	Chawathil; Cheam; Katzie; Nlaka'pamux Nation Tribal Council [5 groups]; Seabird Island; Shackan; Simpcw; Squamish; Stk'emlupsemc te Secwepemc Nation [2 groups]; Union Bar;
	<b>Negligible-to-Minor</b>	British Columbia Métis Federation; Ermineskin; Horse Lake; Kelly Lake Métis Settlement Society; Lheidli T'enneh; Little Shuswap Lake; Maa-nulth [5 groups]; Métis Nation of Alberta and Métis Nation of Alberta – Regional Zone 4; Métis Nation of British Columbia; Montana; Neskonlith; Stoney Nakoda Nations; Snaw-naw-as (Nanoose); Whispering Pines/Clinton; Whitefish (Goodfish) Lake First Nation & Saddle Lake Cree Nation	Lake Cowichan; Scia'new (Beecher Bay); Songhees; Sunchild; Tseycum	
	<b>Negligible</b>	High Bar; Lhtako Dene; Shuswap; Sts'ailes (Chehalis); Stswecem'c Xgat'tem; Toosey; Ts'kw'aylaxw (Pavilion); Williams Lake; Xatsull First Nation (Soda Creek)	Bonaparte; Esquimalt; Kanaka Bar; Nicomen; Splats'in; Snuneymuxw (Nanaimo)	
			<b>Low</b>	<b>Middle</b>
<b>Depth of Consultation</b>				

As shown in Table 18, 17 Aboriginal groups were assessed as having Aboriginal Interests that have the potential to be up to moderately impacted by the Project (all in B.C.). Thirty-four Aboriginal groups are expected to have up to a minor-to-moderate level of impact (25 First Nations in B.C., 7 First Nations in Alberta, and 2 Métis), 27 would have up to a minor level of impact (25 First Nations in B.C., 2 First Nations in Alberta), 24 would have up to a negligible-to-minor level of impact (14 First Nations in B.C., 6 First Nations in Alberta, and 4 Métis), and 15 would have up to a negligible level of impact (all in B.C.).

The nature of the impacts on Aboriginal Interests from the Project itself (that is, the pipeline, terminals and supporting infrastructure) would differ from impacts associated with Project-related marine shipping activities. In general, the Crown is of the view that the Project's routine construction and operation would result in a minor level of impacts on Aboriginal groups' Aboriginal Interests. There are a range of factors that contributed to a greater assessed impact on groups' Aboriginal Interests, including a greater number or proportion of sites or areas that would be impacted by the Project; important sites or areas that would be impacted by the Project; and increased ways in which the Project would impact cultural or experiential aspects for an Aboriginal group. This information was made available by Aboriginal groups through the NEB process and Crown consultation.

Project-related marine vessels have the potential to impact the Aboriginal Interests of coastal Aboriginal groups who rely on the marine environment for traditional use. The Crown is of the view that the routine operation of Project-related marine vessels would result in a negligible-to-minor level of impacts on Aboriginal groups' Aboriginal Interests. The Crown concluded that Aboriginal groups that identified cultural use of Southern Resident Killer Whale would be moderately impacted as a result of the significant adverse effects to Southern Resident Killer Whale and to the traditional use of Southern Resident Killer Whale found by the NEB. The 10 Aboriginal groups that identified cultural use for Southern Resident Killer Whale are Lyackson, Malahat, Pacheedaht, Pauquachin, St'zuminus (Chemainus), Tsartlip, Tsawout, T'Sou-ke, Tsawwassen and Tseil-Waututh.

The NEB found that there is a very low probability of either a Project spill (i.e. from the pipeline, tank terminals, pump stations, Westridge Marine Terminal) or a marine spill from a Project-related tanker that may result in a significant effect (high consequence). However, over the life of the Project the probability of small spills is high. 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 regardless of its size. The seriousness of impact on Aboriginal Interests will depend on the size, location and conditions of a spill and the effectiveness of response measures, and the Crown is of the view that spills have the potential to result in impacts on Aboriginal Interests that could range from negligible to serious.

## 5.2 Adequacy of Consultation

### Principles

The Crown's consultation objectives are to meet the legal duty, uphold the honour of the Crown and to help build long-term relationships based on shared reconciliation objectives. Meeting the legal duty to consult depends on the context and facts for the particular decision before the decision makers. The practice for meeting this duty is informed by government policies, best practice and evolving jurisprudence. The principles that guide the Crown's efforts to ensure a meaningful and responsive consultation process include:

- The process needs to reflect that the Crown has made meaningful efforts to understand Aboriginal concerns, potential impacts, and identify solutions for accommodation;
- The process needs to afford Aboriginal groups opportunities appropriate to their depth of consultation to learn about the Project and its potential impacts, evaluate the Project, communicate their concerns to the Crown;
- The Crown should also demonstrate that it has sought to accurately understand all issues and potential impacts on Aboriginal Interest raised by Aboriginal groups and respond to issues in a meaningful way, including through consideration of appropriate mitigation and accommodation measures;
- Through its consultation record, the Crown needs to demonstrate that the process remained flexible and had the ability to amend the proposal to address impacts on Aboriginal Interests;
- Responses to Aboriginal groups need to be reasonable and meaningful, where "meaningfulness" is measured by sufficiency, quality, and consistency;
- As appropriate, accommodation should be considered and commensurate to the degree of seriousness of the potential impact to Aboriginal Interests;
- Responsiveness is central to both procedural and substantive aspects and needs to be readily demonstrated and evaluated;
- Overall, the process is accessible, reasonable, flexible and fair;
- The process is founded in the principles of good faith, respect and reciprocal responsibility; and
- The process is respectful of the uniqueness of each Aboriginal group or nation.

### Adequacy Assessment

During consultation, the Crown considered Aboriginal Interests and other interests to inform the assessment of potential impacts from the Project and considered the appropriateness of measures to avoid, mitigate and, as appropriate, accommodate such impacts.

The Crown communicated the framework for consultation early on during Project planning and adapted it, to the extent possible, over the course of the Project review process to:

- Incorporate lessons learned and best practices from other consultation processes;
- Reflect changes resulting from the federal government's January 2016 Interim Strategy;
- Keep pace with case law and evolving government policy informing the conduct of Crown-Aboriginal consultation processes; and
- Reflect the feedback provided by Aboriginal groups.

Crown officials developed a process for gathering relevant information, assessing the level of potential adverse impacts, making preliminary assessments of Aboriginal rights and title claims, interpreting treaty provisions, understanding Aboriginal concerns with the Project, and considering the potential impacts on Aboriginal Interests and the adequacy of mitigation measures (e.g. conditions, commitments, and existing regulatory requirements), and considering the need for additional accommodation.

The Crown's conclusions of the impacts of the Project on Aboriginal Interests have been considered for each Aboriginal group, including how aspects of the Project may interact with the exercise of the different aspects of Aboriginal Interests. Information made available through this process, including information made available by Aboriginal groups, the proponent and the NEB, have also been documented in this report, including how they have helped to inform decisions on the Project and any accompanying rationale for these decisions.

The Crown's view is that consultation on the Project, beginning in June 2014, has enabled a meaningful and responsive two-way dialogue to take place between the Crown and potentially impacted Aboriginal groups on both procedural and substantive matters. During this period, the policy and legal environments have evolved, with the Government of Canada re-setting its priorities with Indigenous peoples.

The size and complexity of the Project – spanning new oil pipeline development, operational expansion of a marine terminal and increases in marine vessel traffic – combined with the large number of potentially affected First Nation and Métis groups, led to complex discussions among Canada, British Columbia and Indigenous groups.

Throughout the Project review, Aboriginal groups were provided opportunities to describe their views on the nature and scope of potential impacts of the Project on their Aboriginal Interests and on the environment in general and on mitigation or accommodations measures that could address those potential impacts. When Aboriginal groups raised concerns, the Governments meaningfully considered the concerns and communicated their understanding and responses to these concerns during meetings, in correspondence or in this report.

Both governments have relied on the NEB Review to assess and seek to avoid or minimize, to the degree possible, the potential adverse impacts of the Project on Aboriginal rights, title and interests, thereby supporting the Crown's broader duty to consult obligations.

Some Aboriginal groups have questioned the extent to which the Crown can rely on the NEB Review. Some of the specific concerns raised by Aboriginal groups regarding the NEB process include:

- The time-bound, quasi-judicial regulatory review process has impaired their ability to participate meaningfully or at all; to explore issues related to Aboriginal Interests, particularly title, or seek to fully understand and resolve their key issues of concern;
- Additional studies were required following the completion of the NEB process, particularly in relation to the impacts on Aboriginal Interests, and there has not been sufficient time, capacity and resources to conduct this;
- It is uncertain how traditional knowledge, traditional ecological knowledge, up-to-date TLU and TMRU information, and other site-specific detail would be integrated into NEB-required Project mitigation plans and other conditions, should the Project proceed;
- It is uncertain whether Aboriginal groups will have the ability to work collaboratively with the proponent and regulator to develop and review draft management plans in advance of the proponent submitting final plans to the NEB; and
- There is uncertainty as to whether the NEB will grant standing in a detailed route alignment hearing process to Aboriginal groups who assert Aboriginal Interests to lands affected by the proposed pipeline.

Consultation on the Project occurred within a defined timeframe, as specified under the NEB Act, and many Aboriginal groups are of the view that more time is needed for the Crown to consult meaningfully, develop a comprehensive understanding of concerns and potential impacts related to the Project and strive for consensus or consent for the Project at a nation-to-nation level. The timeline for decision making was previously extended by up to four months to specifically accommodate additional time needed for Aboriginal consultation, and the GIC retains the option of further extending the timeline pursuant to the NEB Act.

With respect to perceived inadequacies in the NEB review process, the Crown notes the Government's commitment to modernize the NEB and to restore public trust in federal environmental assessment processes. The Crown further notes that consultations on these processes have been launched and will include the engagement of Indigenous groups. Overall, however, Government, through its Interim Strategy, indicated that no project proponent would be sent back to the beginning, which means that project currently undergoing regulatory review would continue to do so within the current framework.

Throughout and after the NEB Review, the Crown has answered questions regarding the methodology and information used to inform the Crown's assessment of the depth of consultation owed to an individual Aboriginal group, including the Crown's analytical framework for understanding the potential adverse Project impacts on Aboriginal Interests. The Crown has provided an opportunity for all potentially impacted Aboriginal groups to comment on those assessments, which in turn will be relied upon to establish the basis for whether additional accommodation measures may need to be considered by the Crown, either federal or provincial.

The Crown will also continue to respond to ongoing correspondence, and engage in other consultation activities, leading up to and following a decision on the Project.

For consultation following the release of the NEB Recommendation Report, the Crown sought an understanding of the following:

- The nature and severity of the impact of the Project on the exercise of each Aboriginal group's Aboriginal Interests;
- Whether there are outstanding issues that the NEB's recommendation report and conditions do not fully address in respect of potential impacts on Aboriginal Interests;
- Whether the resulting depth of consultation in respect of these potential impacts gives rise to a duty to accommodate; and
- Recommendations for action that Governments may need to consider in contemplating decisions on the Project.

Consultation involved discussions about a variety of potential actions by decision makers including potential incremental measures that could further mitigate or accommodate impacts on Indigenous rights; additional time for consultation prior to a decision; reconsideration by the NEB of its recommendation; or specific terms and conditions for the Project.

More than 75 individual Aboriginal groups participated in the post-NEB hearing stage of consultation by providing written comments on documents and/or participation in consultation meetings with Crown officials. The consultation process undertaken with each Aboriginal group has been commensurate with the depth of consultation identified by the Crown as appropriate, and was responsive to new information to the extent possible within the timelines. Through the NEB's recommended conditions and the regulatory permitting stage that would occur if the Project proceeded, the Governments recognize that consultation and engagement in respect of the Project, if approved, will continue.

This report is provided to federal and provincial decision makers to inform their respective decisions. Crown officials also invited Aboriginal groups to provide a short separate submission that outlines any outstanding concerns in their own words. These submissions were provided to the respective federal and provincial decision makers along with this report and other referral material to inform their respective decisions.

Taking into account the overall process of consultation, federal government departments and agencies and the EAO are of the view that consultation has been carried out in good faith and that the Crown's process of seeking to understand potentially outstanding issues and impacts was reasonable. In the following section, some additional details are provided on what we heard from Aboriginal groups regarding possible ways to address potential impacts. Crown officials consider the consultation with Aboriginal groups during the review of the Project, as documented in this report, to be procedurally adequate to allow for informed decisions regarding potential impacts on Aboriginal Interests.



## 5.3 Status of Accommodation

In applying the principles described above for a meaningful and responsive consultation process, Governments retain flexibility in how they seek to meet any need for accommodation. A “spectrum of duties” is used by courts in order to measure the depth of consultation required in a particular context and the level of effort to accommodate and be responsive to the concerns raised.<sup>39</sup> This spectrum of duties is based upon the degree of adverse impacts that the proposed activities may have on Aboriginal Interests and the strength of any claimed Aboriginal rights or title. The level of responsiveness or “accommodation” that may be required increases the more severe the impact and, where relevant, the stronger the claimed Aboriginal rights or title.

Aboriginal group-specific appendices provide details on the assessment of the strength of any Aboriginal rights and title claims for each Aboriginal group, as appropriate and the assessment of the impacts that the Project may have on each Aboriginal group’s Aboriginal Interests. Proposals for mitigation and accommodation provided by Aboriginal groups are also referenced in these sections, along with a summary of feedback that was provided by the Crown.

If the Project is approved, the general recommendations for incremental federal Crown accommodation or action, which are reflective of input received from Aboriginal groups are:

1. Commitment to design, fund and implement, in full collaboration with potentially affected Aboriginal groups and appropriate government and regulatory authorities, an Indigenous Advisory and Monitoring Committee for the Project; and
2. Recognition of historical impacts associated with the existing Trans Mountain Pipeline System.

In addition to the above, the federal Crown intends to work with potentially impacted Aboriginal groups to ensure that they are supported in making submissions for any future detailed route hearing process, should the GIC approve the project. This may afford Aboriginal groups further opportunities to raise concerns related to the best possible detailed route and methods and timing of construction.

The consideration or implementation of these Crown measures could help to address the impacts associated with temporary and ongoing use of lands or waters by the Project, acknowledge the potential impacts on Aboriginal Interests, and support the strong interest of Aboriginal groups to meaningfully participate in decisions taking place within their traditional territories or territories subject to treaty provisions.

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<sup>39</sup> For a detailed description of the spectrum of duties and the core assessments required to inform it please refer to *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, March 2011 at pp.42-44. [Note, Guidelines under revision]

Providing potentially affected Aboriginal groups with a role in oversight or monitoring throughout the life of the Project would provide a meaningful opportunity for Aboriginal groups to have a deep, ongoing engagement in the Project. This process has the potential to provide opportunities to continue to incrementally address key concerns of groups, including related to the risk and consequence of a spill that could ultimately affect the future use of a territory, resource or culturally important site.

The recognition component of the recommended accommodation measures seeks to acknowledge, in part, that the establishment of the existing pipeline had an impact on Aboriginal groups and that that impact may not have been considered in the same way we consider impacts on Aboriginal Interests today. To be clear, there is no duty to consult on or accommodate in relation to past actions. Nevertheless, by acknowledging past and present Government-authorized use of land by a third party, and respecting the desire of both Governments and Aboriginal groups to strive toward consensus for future projects, it is hoped that recognition and an oversight role for the Project can together represent a form of collaborative partnership in sustainable resource development.

The Crown also acknowledges that key concerns remain for many Aboriginal groups with respect to the Project at the time of finalizing this report. Concerns related to specific Aboriginal Interests are discussed in Section 4.3, and concerns raised by individual Aboriginal groups are discussed in greater detail in each group's respective appendix.

One of the key concerns of many Indigenous groups is that the NEB's recommended conditions do not adequately mitigate impacts on Aboriginal Interests and would not establish a comprehensive and active role for Aboriginal groups in relation to compliance oversight. In consideration of this concern, the approach suggested here is to consider implementing the proposed Indigenous Advisory and Monitoring Committee for the Project to increase the level of certainty that condition compliance by the proponent will avoid or reduce to the extent possible, impacts on Aboriginal Interests. An alternative approach available to the GIC pursuant to the NEB Act is to order reconsideration of the NEB Recommendation Report.

## 5.4 Weighing Impacts on Aboriginal Interests With Other Interests

Decision makers in respect of the Project have a duty to weigh impacts on Aboriginal Interests with other societal interests, including the potential social, environmental and economic costs and benefits of the Project. In weighing the Project costs and benefits with the impacts on Aboriginal Interests, the following factors regarding the Project are relevant to consider:

- Significance of any environmental or socio-economic effects of the Project;
- Potential adverse impacts of the Project on Aboriginal Interests, including potential consequences of a major oil spill in the marine environment;
- Resources or values that may no longer be available for future generations;
- Benefits and costs of the Project on local communities, including Aboriginal peoples;

- Potential economic contribution of the Project at the local, regional and national scales;
- Potential contribution of the Project to local and regional communities, to provinces and to Canada as a whole; and
- Economic viability of the Project.

In terms of ensuring a fair distribution of any Project-related benefits with potentially affected Aboriginal groups, the governments of Canada and B.C. can rely on proponent-led or existing provincial and federal programs to help provide direct or indirect economic development opportunities and financial benefits to potentially affected Aboriginal groups. These benefits are discussed in section 4.2 and 4.3.5 of this report and section 11.5 of the NEB Report.

## 5.5 Overall Conclusion

The Crown has provided its views on the potential adverse impacts of the Project on each Aboriginal group's Aboriginal Interests. The Crown recognizes that in the view of a number of potentially affected Aboriginal groups, not all concerns they raised have been expressly addressed or accommodated through the NEB process.

Project modifications, proponent commitments and agreements entered into with Aboriginal groups, NEB conditions that would be legally binding to a potential Certificate of Public Convenience and Necessity and EAO's proposed conditions for a provincial EA certificate would all help to avoid, mitigate or otherwise accommodate for adverse Project impacts on Aboriginal Interests. In addition, to assist in addressing residual impacts on Aboriginal Interests, various options exist for decision makers, including implementing incremental Crown measures beyond the recommended regulatory conditions as is suggested in this report.

Given the uniqueness of each Aboriginal group, and in recognition of the different ways in which biophysical, area-specific and experiential impacts could affect each specific group's exercise of Aboriginal or treaty rights, the Crown has attempted to document its understanding and assessment of these potential impacts in each Aboriginal group's appendix to this report. Similarly, the Crown's assessment of impacts on Aboriginal title has also considered a wide range of factors unique to each Aboriginal group, including the impacts on a group's use and occupation of the land, decision-making, and economic benefits.

As summarized in tables 13 through 18 above, all impacts resulting from the routine construction and operation of the Project are assessed to fall between the range of none or negligible to moderate for the Aboriginal groups consulted. While the seriousness of impact of spills on Aboriginal Interests would depend on the size, location and conditions of a spill and the effectiveness of response measures, the potential impacts on Aboriginal Interests could range from negligible to serious, with serious impacts occurring with a very low likelihood. The details of the individual assessments for each Aboriginal group are important to consider in order to fully understand the impacts on each unique Aboriginal group.