

TRANS MOUNTAIN EXPANSION PROJECT

CROWN CONSULTATION AND
ACCOMMODATION REPORT

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Rapport sur les consultations et les accommodements de la couronne

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1. Purpose of the Report

On August 30, 2018, the Federal Court of Appeal (the Court) set aside the Governor-in-Council's (GiC) decision approving the Trans Mountain Expansion Project (the Project).¹ The Court held that the National Energy Board (NEB) erred in not considering the impact of marine shipping when it assessed the Project and that the Government of Canada (Canada) failed to properly fulfil its legal duty to consult with Indigenous groups.

Specifically, the Court found that while Canada had acted in good faith and selected an appropriate consultation framework for the Project, the consultations did not adequately take into account the concerns of Indigenous groups or explore possible accommodation of those concerns. In addition, Canada had been unwilling to depart from the NEB's findings and recommendations in order to address Indigenous concerns. Finally, the Court ruled that Canada had held the erroneous view that it was unable to impose additional conditions on the proponent.

Canada accepted the Court's findings and its direction to redo its consultations. This Report outlines how Canada proceeded and what it did differently. In particular, it provides an overview of consultations with Indigenous groups, including concerns raised and the measures proposed to address them. It also presents conclusions on whether the consultations upheld the honour of the Crown.

Finally, this Report builds on the first Crown Consultation and Accommodation Report (the 2016 Report),² prepared jointly with the Province of British Columbia (B.C.) in the context of the original

¹ *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153: http://www.fca-caf.gc.ca/fca-caf_eng/new_eng.html

² 2016 CCAR: https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/pdf/TMX_Final_report_en.pdf

Project approval process.³ The B.C. assessment and certification for the Project were unchanged by the Court's decision. This updated federal Report integrates information from 2016 that is relevant and applicable to the current GiC decision-making process. This ensures that the 2019 Report remains focused, serving as complementary to the 2016 Report.

The new sections in this Report, which are identified in the Table of Contents and with a note at the beginning of each chapter, reflect additional information and events that took place following the original GiC decision on the Project — including Canada's renewed approach to Phase III consultations and what Canada heard in these consultations.

1.1 CANADA'S APPROACH TO INDIGENOUS CONSULTATIONS

The Crown has a constitutional duty to consult Indigenous groups and, where appropriate, accommodate their concerns when it contemplates conduct that might adversely affect asserted or established Aboriginal or Treaty Rights and title, as recognized and affirmed by Section 35 of the *Constitution Act, 1982*. Canada also consults with Indigenous groups for many other reasons, including statutory, contractual, policy and good governance, as well as in order to build effective relationships with Indigenous peoples and work together toward reconciliation. Given the breadth of Canada's objectives in consulting, the term "Indigenous Interests" in this Report includes asserted or established Aboriginal or Treaty Rights and title, as well as other interests.

Canada's consultation and accommodation approach, as described in this Report, aligns with the principles of reconciliation as laid out by the Department of Justice Canada⁴ and follows the guidance from the Court's decision in *Tsleil-Waututh Nation v. Canada (Attorney General)*.⁵

Canada re-initiated Phase III consultations with a particular focus on rectifying the shortcomings identified by the Court, including:

- engaging in meaningful, two-way dialogue;
- understanding the nature and seriousness of potential impacts on rights; and
- responding to the concerns raised.

Canada's comprehensive approach to the re-initiated Phase III consultations is described in detail in Chapter 2 of this Report.

³ British Columbia's approval of the Project was also challenged judicially, but the adequacy of its consultations with Indigenous communities was upheld by the Supreme Court of British Columbia. See *Coastal First Nations v. British Columbia (Environment)*, 2016 BCSC 34 (CanLII).

⁴ See <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>

⁵ See http://www.fca-caf.gc.ca/fca-caf_eng/new_eng.html

1.2 PROJECT DESCRIPTION

On December 16, 2013, Trans Mountain Pipeline ULC (Trans Mountain or the proponent) submitted an application to the NEB for a Certificate of Public Convenience and Necessity (CPCN) and other requested relief to construct and operate the Project, which would run through Indigenous territory.

The existing Trans Mountain Pipeline, which runs from Edmonton, Alberta, to Burnaby, B.C., is the only major pipeline route for Western Canadian producers to transport their oil to Canada's West Coast. Once the oil arrives in Burnaby, it is loaded onto tankers at the Westridge Marine Terminal (WMT) for Pacific Rim destinations such as Washington State, California and Asia. The pipeline also provides the Lower Mainland of B.C. with 80 to 90 percent of its gasoline, diesel and jet fuel.

The Project would result in the twinning of the existing 1,147-km pipeline system with about 987 km of new buried pipeline. Most of the existing pipeline, along with two reactivated pipeline segments, would become Line 1. The proposed new pipeline segments, along with active pipeline segments, would become Line 2.

The Project would increase the capacity of the existing Trans Mountain Pipeline system from 47,690 m³/d (300 000 bbl/d) to 141,500 m³/d (890,000 bbl/d) of crude petroleum and refined products.

Currently, Panamax tankers (less than 75,000 metric tonnes deadweight tonnage [DWT]) and Aframax tankers (75,000 to 120,000 metric tonnes DWT) call at the WMT. Typically, the existing WMT loads five tankers per month. The proposed expanded system would increase the WMT's loads to approximately 34 Aframax-class vessels per month, with actual demand driven by market conditions.

Additional details on the Project can be found in Appendix 4 of the [NEB Reconsideration Report](#).

1.3 INITIAL NEB REGULATORY REVIEW AND ENVIRONMENTAL ASSESSMENT PROCESS (UP TO 2016)

Following Trans Mountain's submission of its application to the NEB, approval of the Project was subject to requirements under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) and the *National Energy Board Act (NEB Act)*. The NEB thus completed a comprehensive environmental assessment of the Project, which included a Public Hearing as part of the NEB regulatory process (jointly termed the "NEB Review") in 2016.

Additionally, the proposed Project was subject to review under the Reviewable Projects Regulation of British Columbia's *Environmental Assessment Act* and required an Environmental Certificate from the Province.

Preliminary Project Planning and Engagement

Preliminary consideration 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 Indigenous 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*. It would also include recommendations from an environmental assessment conducted under sub-section 29(1) of CEEA 2012.

Consistent with implementation of a 2007 Cabinet Directive and relevant policies and guidance, Canada developed a plan for Indigenous consultation for the Project. A Project Agreement was entered into by eight federal Deputy Ministers and the Chief Executive Officer for the NEB in September 2014 that described the roles and responsibilities of federal authorities and the NEB during the Review, as well as the Crown consultation process. As part of this agreement, the Major Project Management Office was identified as a lead Coordinator for the Crown Consultation for the Project.

In August 2013, Canada provided the proponent with an updated list of Indigenous groups whose interests may potentially be impacted by the Project. This list was reviewed and updated over the course of the Project review.

Start of the National Energy Board 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 Indigenous 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 Indigenous Interests.

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

On April 2, 2014, the NEB Panel assigned to oversee the review of the Project announced it had sufficient information to proceed with public hearings.

In accordance with the *NEB Act*, the hearings were subjected to a legislated time limit of 15 months.

A seven-month exclusion period was announced on July 15, 2014, and a second exclusion period of four months was announced on September 24, 2015 — both pursuant to sub-section 52(5) of the *NEB Act*. The two exclusion periods resulted in the hearings 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 was required to recommend whether issuing a CPCN would be in the public interest, to identify any terms and conditions that should be attached to the CPCN if issued by the NEB, and to provide recommendations based on the environmental assessment conducted under CEAA 2012.

National Energy Board Report: Trans Mountain Expansion Project (May 2016)

The NEB released the [National Energy Board Report on the Trans Mountain Expansion Project](#) on May 19, 2016.

It found that with the implementation of the proponent's environmental protection procedures and mitigation and the NEB's recommendations, the Project was not likely to cause significant environmental effects. However, the NEB found that the operation of Project-related marine vessels was likely to result in significant adverse effects to the Southern Resident Killer Whale (SRKW) and to Indigenous cultural uses associated with SRKW. The NEB also found that greenhouse gas emissions (GHG) from Project-related marine vessels would be significant.

In addition, the Board concluded that the consultation by the proponent with Indigenous groups was acceptable. The NEB found that the proponent: offered Indigenous groups adequate opportunities to provide information about their concerns and interests related to the Project; 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 Indigenous Interests was acceptable and noted that there would be impacts experienced by some Indigenous groups if the Project were to proceed. The NEB acknowledged that Indigenous groups would: sustain modest burdens to their ability to use the lands, waters and resources for traditional purposes; be temporarily impacted by construction and routine maintenance activities; and experience temporary interruptions in certain activities, such as harvesting or accessing sites or areas of traditional use.

The NEB stated that in the event of a credible worst-case spill, environmental effects to the lands, waters or resources used by Indigenous groups for traditional purposes would be adverse and

significant. However, it found that the probability of a spill would be very low and the level of risk acceptable, in view of the overall benefits and burdens of the Project.

The NEB concluded that the Project is in Canada's public interest and recommended approval by the GiC. The GiC accepted the NEB recommendation and approved the Project in Order-in-Council (OIC) P.C. 2016-1069.

1.4 KEY DEVELOPMENTS SINCE THE ORIGINAL GOVERNOR-IN-COUNCIL DECISION

Following the original GiC decision on the Project in 2016, two key developments occurred that have changed the context for the new regulatory approval and consultation processes for the Project.

Government Purchase of the Project

On May 29, 2018, the Government of Canada announced its intention to purchase the existing Trans Mountain Pipeline System and related assets for \$4.5 billion. These related assets include the Puget Sound Pipeline, Kamloops/Sumas/Burnaby Terminals and the Westridge Marine Terminal. This purchase was completed on August 31, 2018, for a final price of \$4.4 billion, net of adjustments.

With this purchase, an internal re-organization occurred. The Project proponent is now Trans Mountain Corporation (TMC), a federal Crown corporation that is a wholly owned subsidiary of the Canada Development Investment Corporation (CDEV). TMC is accountable to Parliament through the Minister of Finance and operates under an independent Board of Directors. TMC has participated in Phase III consultations as part of the Crown Consultation Teams. However, the purchase does not affect the regulatory process for the Project or the duty to consult that must be adequately and meaningfully fulfilled by the Crown before a decision on the Project can be made.

The 2018 Federal Court of Appeal Decision

As noted, federal approval of the Project was successfully challenged in the Federal Court of Appeal, and GiC approval of the Project was quashed in August 2018.

The Court found that the NEB had erred in not considering marine shipping impacts. By extension, this impacted the environmental assessment and the fulfilment of Canada's obligations under the *Species at Risk Act* (SARA). The result was a material flaw in the NEB Report such that the GiC could not reasonably rely on it in determining whether the legislative requirements for approval of the Project had been met. The Court decided that Project approval should be remitted to the GiC for "prompt

redetermination” and, with respect to the parameters for redetermination, that the GiC “must refer the NEB’s recommendations and its terms and conditions back to the NEB” for reconsideration.

In also finding that Canada had failed to properly fulfil its legal duty to consult with Indigenous groups, the Court concluded that there were flaws in the execution of Phase III of the consultations with the six Indigenous applicants (representing 14 Indigenous groups).

In particular, the Court found that Canada’s representatives had limited their mandate to listening and recording concerns and then transmitting those concerns to the decision-makers, and the record had not disclosed responsive, considered and meaningful dialogue from Canada to the concerns expressed by Indigenous applicants. In addition, Canada had been unwilling to depart from the NEB’s findings and recommendations in order to address the concerns of the Indigenous applicants. In this regard, the Court found that Canada had held an erroneous view that it was unable to impose additional conditions on the proponent.

The Court found that the concerns of the six Indigenous applicants were specific and focused and, as a result, the corrected consultation process could be brief and efficient while ensuring it was meaningful.

1.5 NATIONAL ENERGY BOARD RECONSIDERATION PROCESS: SEPTEMBER 2018–FEBRUARY 2019

On September 20, 2018, the Crown took the first step to address the Court’s decision by directing the NEB to reconsider its recommendation, taking into account the environmental effects of Project-related marine shipping under CEAA 2012 in addition to the NEB Act. To ensure the NEB Panel had access to technical expertise, the GiC appointed John A. Clarkson to be a marine technical advisor to the NEB, based on his expertise with operations and marine navigation, Transport Canada marine regulations and marine pilotage on the West Coast of Canada. The Argument-in-Chief of Mr. Clarkson was submitted to the National Energy Board on January 15, 2018.

The government required the NEB to complete a focused, 22-week review and deliver its Report by February 22, 2019. Consistent with the previous NEB review, and with the exception of oral traditional evidence described below, evidence was presented to the Reconsideration Hearing in writing and testing of that evidence was carried out through written information requests. Parties had the opportunity to ask the NEB to compel other parties to provide more complete responses to information requests and also to file final argument.

The NEB began its reconsideration process on September 26, 2018, by seeking comments from the public on the scope of the issues to be considered, the design of the hearing process and the

identification of which government departments or bodies should provide information during the hearing. The NEB released a Hearing Order outlining the steps and deadlines of the process on October 29, 2018.

Between September 26, 2018, and October 3, 2018, the NEB held a process through which individuals and groups could apply or register to participate in the reconsideration hearing. Intervenor status in the reconsideration hearing — if they chose to participate and registered — were guaranteed intervenor status in the reconsideration hearing. The level of participation was substantial, with 118 intervenors, including 52 Indigenous intervenors and eight federal government department intervenors. Members of the public could also apply to participate as an intervenor.

Between November 20, 2018, and December 6, 2018, the NEB heard oral traditional evidence from 25 Indigenous intervenors. Oral traditional evidence sessions were held in Calgary, Victoria and Nanaimo.

The NEB offered to hear oral traditional evidence in person at any of the announced locations or remotely while it sat in Calgary. Two Indigenous intervenors who could not appear before the Panel provided their oral traditional evidence by teleconference, one of which took place while the NEB was in Nanaimo. Indigenous intervenors could also supplement their oral traditional evidence presentation — for example, if they felt they required more time — with an audio or video recording. Some Indigenous intervenors provided the NEB with a video recording.

Both Squamish Nation and Tsleil-Waututh Nation filed a request on November 5, 2018, asking that intervenor evidence be moved from November 20, 2018, to December 5, 2018 (Trans Mountain and federal departments and agencies had filed direct evidence on October 31, 2018). The Board granted the 15-day extension. In doing so, the Board recognized the fundamental importance of parties being able to present their full case with evidence. The Board also took into account the volume of evidence that federal departments and agencies, in particular, had filed. These considerations all factored into the extension request being granted. The Board stated that in order to accommodate the 15-day extension, it had to shorten some other deadlines and compress the Board's own time for writing the MH-052-2018 Report.

On February 22, 2019, the NEB released its Reconsideration Report on the Project, which found the Project to be in the public interest and recommended that a CPCN be issued. Under CEAA 2012, the Report concluded that Project-related marine shipping is likely to cause significant adverse environmental effects on the Southern Resident Killer Whale and on Indigenous cultural use associated with the SRKW. The NEB also found that greenhouse gas emissions from Project-related marine vessels would likely be significant. As well, it found that while a credible worst-case spill from the Project or a Project-related marine vessel was unlikely, it could have significant environmental effects. While these effects weighed heavily in the NEB's consideration of Project-related marine shipping, the NEB recommended that the Government of Canada find that they could be justified in

the circumstances — particularly in light of the considerable benefits of the Project and measures to minimize the effects.

If approved, the NEB will impose 156 conditions on the Project, and it has made 16 new recommendations to the Government of Canada. The recommendations relate to matters that are deemed by the NEB to fall outside of its regulatory mandate and generally beyond the control of the proponent, but are considerations for the Government of Canada.

1.6 RE-INITIATION OF PHASE III CONSULTATIONS

On October 3, 2018, the Honourable Amarjeet Sohi, Minister of Natural Resources, announced the second part of the government's path forward to address the Federal Court of Appeal's decision. He reconfirmed Canada's commitment to meaningful consultations and indicated that, after careful review, the government had decided not to appeal the Court's decision but rather to move forward by engaging in a specific and focused dialogue with Indigenous groups on the Trans Mountain Expansion Project.

The government re-initiated Phase III consultations with all Indigenous groups potentially impacted by the Project. Minister Sohi began the process by engaging with groups on how to get the process right to ensure that Indigenous perspectives and views were meaningfully considered.

The government's path forward constitutes important progress toward responding to the decision of the FCA and reinforces Canada's commitment to its relationship with Indigenous peoples in Canada.

Details on the approach for the re-initiated Phase III consultations can be found in Chapter 2.

2. A Renewed Approach to Consulting Indigenous Communities

2.1 KEY ELEMENTS OF CANADA'S APPROACH TO PHASE III CONSULTATIONS

2.1.1 OBJECTIVES

In keeping with the Federal Court of Appeal's (FCA) decision and direction, Canada re-initiated its Phase III consultations with those Indigenous communities potentially impacted by the Project. In these consultations, Canada was guided by three key objectives:

1. To fully meet its consultation obligations under Section 35 of the *Constitution Act, 1982*, and its commitments to advance reconciliation with Indigenous peoples.
2. To engage in substantive, meaningful two-way dialogue in order to fully understand the concerns raised and the nature and seriousness of potential impacts on rights, and also, where appropriate, to work collaboratively to identify and provide accommodations.
3. To respond to concerns raised in these and the previous Phase III consultations in a flexible manner that takes into account the potential impacts and needs of each Indigenous group.

In order to achieve these objectives, Canada made changes to how it organized itself to conduct Phase III consultations and to the design and execution of the re-initiated consultation process.

2.1.2 GUIDING PRINCIPLES

Canada's consultation approach was designed both to fulfil the direction of the Federal Court of Appeal (FCA) and to reflect the Crown's commitment to advancing reconciliation and renewing the relationship with Indigenous peoples, based on recognition of rights, respect, cooperation and partnership. This commitment includes Canada's pledge to implement the United Nations Declaration on the Rights of Indigenous Peoples.

The government's consultation approach was supplemented by a series of guiding principles — grounded in the direction from the FCA, as well as applicable jurisprudence — to define a “meaningful” consultation process for federal officials and to facilitate successful consultation and accommodation for all parties. These principles include:

- **Mutual Respect and Trust:** A willingness and commitment to have substantive two-way dialogues on outstanding concerns with each Indigenous group, with a focus on cultural values, protocols, mutual responsiveness and respect for time considerations.
- **Compliance with Section 35:** Undertaking consultations and making reasonable accommodations, where appropriate, in line with constitutional obligations to consult and accommodate when the Crown expects an impact on section 35 rights.
- **Aim of Consent:** Meaningful consultation with Indigenous peoples that aims to secure their free, prior and informed consent.
- **Specific and Focused Process:** Building on what has already been accomplished by concentrating on outstanding issues and addressing the issues identified by the FCA.
- **Transparency:** A concerted commitment to a clear articulation of the objectives and parameters of consultations, including clarity on timelines, officials' roles and responsibilities, federal decision-making processes, and federal interests, challenges and positions, to the extent possible.
- **Responsiveness:** To be fully available to Indigenous communities and to commit to always providing timely response information where available.
- **Flexibility and Openness:** Tailoring consultation approaches to the unique needs of individual communities.
- **Mutuality:** Recognition of a reciprocal obligation on both parties to consult in good faith, availing themselves, on a timely basis, of all opportunities for engagement with one another.
- **Whole-of-Government Approach:** Consultations and accommodations will be supported and complemented by federal programs and initiatives already underway as part of Canada's reconciliation agenda.

All of these guiding principles were made public and posted on the Trans Mountain Expansion Project (TMX) website.⁶

⁶ See: <https://www.canada.ca/en/campaign/trans-mountain.html>

2.1.3 ORGANIZING DIFFERENTLY

Canada took significant steps to organize itself differently and to effectively implement a meaningful Phase III consultation process. These included establishing a designated whole-of-government Crown Consultation Secretariat to support the new approach. Led by a designated senior official at the Assistant Deputy Minister level, the Secretariat was also responsible for the Crown's Consultation Teams.

Crown Consultation Secretariat

The Secretariat was composed of individuals with expertise in policy and administration. Their first task was to launch initial work related to the re-initiated Phase III process, including the development of a comprehensive information base and inventory related to all known and outstanding concerns raised by Indigenous groups regarding the 2016 GiC decision.

Throughout the process, the Secretariat managed correspondence between the federal government and Indigenous communities; organized face-to-face meetings with representatives of the Crown and Indigenous groups; and prepared briefing materials to support regular updates to, and seek direction from, Deputy Ministers, the Minister of Natural Resources and Cabinet regarding consultation and accommodation.

Crown Consultation Teams

Nine Consultation Teams were established. They were composed of more than 60 federal officials who were present on the ground in British Columbia and Alberta from such departments as Natural Resources Canada, Department of Justice, Fisheries and Oceans, Environment and Climate Change Canada, Canadian Environmental Assessment Agency, Parks Canada, Transport Canada, Crown-Indigenous Relations and Northern Affairs Canada, and Indigenous Services Canada. Three Consultation Leads were appointed to oversee the nine teams. These three Consultation Leads reported to the Minister of Natural Resources on a weekly basis, through a Deputy Minister (DM) Oversight Committee.

The nine teams were organized to be region-specific and included teams focused on marine-based groups from the Lower Mainland and Vancouver Island; land-based groups, including Alberta; and B.C. Métis groups.

Each Consultation Team was assigned a defined number of Indigenous groups in order to maintain consistency and promote a dedicated and substantial dialogue. This structure also ensured deeper understanding of the territories and a coordinated approach to addressing shared concerns within a common geographic area. Furthermore, this structure provided Indigenous groups with a clear point

of contact that could also assist them in navigating the government system on a range of issues, including those outside the consultation process.

2.1.4 A COMPREHENSIVE GOVERNANCE FRAMEWORK

Canada built a comprehensive governance framework under the leadership of the Minister of Natural Resources to support the successful development and implementation of the consultation approach in a focused and meaningful manner. This included the creation of a DM Oversight Committee to monitor progress on the consultations and the appointment of an independent external advisor with expertise in constitutional and legal issues to guide the government throughout the consultation process. The government was transparent and clear from the outset of the Consultation Approach, sharing it first with Indigenous groups and then with the public.

Minister of Natural Resources – Crown Consultation Coordinator

The Minister of Natural Resources Canada led the planning and implementation of the Crown consultation and accommodation process, with a responsibility for ensuring that the process fulfilled the Crown's constitutional duty.

Other Ministers – Whole-of-Government Engagement

The Minister of Natural Resources regularly briefed the Cabinet Committee on Environment and Clean Growth and sought guidance from the Committee in moving forward the Phase III consultations in the right way. This ensured that a whole-of-government perspective informed the consultations and the development of offers to accommodate impacts on rights and to address broader issues raised by Indigenous groups.

The Minister of Natural Resources also consulted periodically with a small, informal group of Ministers with direct responsibilities for matters related to the project and the consultations, namely the Ministers of Transport, Fisheries and Oceans, Environment and Climate Change, Justice, Finance and Science. Discussions in this smaller group ensured coordination of work across departments in advancing the consultations and the development of offers of accommodation.

Federal Representative

Prior to re-initiating Phase III consultations, Canada appointed former Supreme Court of Canada Justice the Honourable Frank Iacobucci⁷ as a Federal Representative to oversee both procedural and substantive consultation matters. Justice Iacobucci provided advice to the Minister of Natural

⁷ See biography: <https://www.canada.ca/en/campaign/trans-mountain/how-decisions-get-made/roles-responsibilities/appointed-advisor/frank-iacobucci.html>

Resources and to the government in designing and implementing the proposed approach to consultation. Justice Iacobucci also worked closely with the Deputy Minister Oversight Committee in providing guidance to Consultation Leads to ensure that consultations were meaningful, responsive and in accordance with the FCA's direction.

In November and December 2018, Justice Iacobucci chaired four roundtable meetings with Indigenous communities in British Columbia and Alberta. These roundtables were held to explain his role as Federal Representative, to discuss Canada's proposed approach to the upcoming consultations and to clarify the parameters of a meaningful consultation and accommodation process based on the FCA's direction and existing jurisprudence. Following these meetings, Canada's consultation approach, shared with communities on December 5, 2018, was adjusted to reflect the input received from Indigenous communities. On February 20, 2019, the final consultation approach reflecting views of potentially impacted Indigenous communities was first shared with communities and then made available to the public.⁸

Special Advisor to the Prime Minister

On December 6, 2018, Serge Dupont was appointed as special advisor to the Prime Minister (a position formally known as Senior Executive Advisor) on TMX. Mr. Dupont was provided with a mandate to coordinate efforts across federal departments and agencies and to support the delivery of a whole-of-government approach to the consultations.

Deputy Minister Oversight Committee

The DM Oversight Committee was established with a membership represented by Deputy Ministers with direct responsibilities for matters related to the Project and the consultations. The Committee is responsible for implementing the Consultation Approach, coordinating responses to the consultations and addressing whole-of-government issues. The DM Committee was co-chaired by the Deputy Minister of Natural Resources Canada and by the Senior Executive Advisor.

The Committee met at least once a week and often on a more frequent and *ad hoc* basis to address key issues as they arose. Individual Deputy Ministers on the committee advised and supported their Ministers in further helping to move forward a whole-of-government approach to the consultations.

2.1.5 CLEAR ROLES AND RESPONSIBILITIES

The Government of Canada was transparent and clear about the roles and responsibilities of all parties involved in the Phase III consultations. The roles and responsibilities for the re-initiated Phase III

⁸ Read the Consultation Approach: <https://www.canada.ca/en/campaign/trans-mountain/what-were-doing-now/consulting-with-indigenous-groups/how-consultation-works.html>

consultation were defined and outlined in the Consultation Approach, which was made publically available in its final form on February 20, 2019.⁹

These roles and responsibilities can be found in Annex A of the Consultation Approach.

Minister of Natural Resources

The Minister of Natural Resources is responsible for leading the planning, development and implementation of the Consultation Approach and ensuring that the process fulfils the Crown's constitutional duty.

Cabinet

The role of the Cabinet, chaired by the Prime Minister, is to make decisions, on the advice of the Minister of Natural Resources and other Ministers as appropriate, on the Consultation Approach and on the mandate of Consultation Teams to offer accommodations to address impacts on rights and broader issues raised by Indigenous groups. This ensured that Consultation Teams were empowered by the government to engage in meaningful two-way consultation. Feedback from the Consultation Teams and Leads, through the DM Oversight Committee and the Minister of Natural Resources, informs further decisions by the government to adjust the mandate, ensuring responsiveness to the consultations.

Governor-in-Council

The Governor-in-Council (GiC) is the Governor General who, acting on the advice of the Cabinet, exercises the powers of government that are reserved for the Crown under the Constitution and federal statutes. These powers include authorities specified in the *National Energy Board (NEB) Act* and the *Canadian Environmental Assessment Act, 2012*. In particular, the GiC has the authority to make a decision on the Project under the *NEB Act* and to extend the timeline for a decision beyond the period of 90 days after the submission of the report of the NEB, as specified in the *NEB Act*.

Minister of Finance

The Minister of Finance is responsible for ensuring the proper oversight of the Trans Mountain Corporation as a subsidiary of the Canada Development Investment Corporation — a Crown Corporation that reports to Parliament through the Minister of Finance.

⁹ Read the Consultation Approach: <https://www.canada.ca/en/campaign/trans-mountain/what-were-doing-now/consulting-with-indigenous-groups/how-consultation-works.html>

Trans Mountain Corporation (TMC)

The proponent and an operator of the existing pipeline, TMC remains subject to all applicable federal laws and regulatory requirements. TMC representatives are part of the consultation and accommodation process and participate, where appropriate, in meetings with Indigenous representatives — although the Crown retains the ultimate responsibility for ensuring that the duty to consult is adequately fulfilled.

TMC officials considered potential accommodation measures and entered into various commercial contractual benefit arrangements, which took the form of relationship agreements, mutual benefit agreements and other relationships. These commercial arrangements ultimately fall under the supervision of the TMC Board of Directors in a manner consistent with the Minister of Finance's instructions on expectations to the Canada Development Investment Corporation.

Government Departments

As organizations with statutory and policy mandates, federal departments — including Natural Resources Canada, Transport Canada, Fisheries and Oceans and the Canadian Coast Guard, and Environment and Climate Change Canada — contributed to consultation efforts by identifying and discussing specific initiatives related to their mandate that could be developed and considered as accommodation measures. Their involvement required the engagement of DMs, senior executives in the regional offices and officials participating on the Consultation Teams.

2.1.6 ACCOMMODATION MANDATE

Initial Accommodation Mandate

In October 2018, Consultation Teams and Leads were provided a clear and public Initial Accommodation Mandate¹⁰ (the Mandate) to consult and discuss accommodation measures with Indigenous groups in a meaningful and responsive two-way dialogue, as per the guidance of the FCA. The Mandate included four specific elements that empowered teams to:

- Discuss accommodations tied to potential impacts to Aboriginal and Treaty Rights;
- Solicit comment from Indigenous groups on potential accommodation measures;
- Discuss improvements to existing accommodation measures; and
- Discuss new and reasonable accommodation measures with Indigenous groups to address concerns.

¹⁰ <https://www.canada.ca/en/campaign/trans-mountain/what-were-doing-now/consulting-with-indigenous-groups/how-consultation-works.html>

The Mandate was grounded in an understanding of past accommodation measures, as well as known and outstanding Indigenous concerns. It was informed by an existing information base, including the Crown Consultation and Accommodation Report that was used to support the 2016 decision; an engagement record that had been built since the November 2016 decision; and available information from Trans Mountain Corporation's engagement with Indigenous communities.

The Mandate was designed to empower Consultation Teams to pursue discussions with Indigenous groups regarding specific advancements or modifications to existing accommodation measures. The Mandate particularly enabled teams to discuss accommodation measures that would correct specific gaps that the FCA had identified with Indigenous groups.

Government Reviews of Accommodation Mandate

By design, the Mandate was created to ensure meaningful conversations from the start, while also requiring that Consultation Teams and Leads report back to Ministers through the DM Oversight Committee and the Minister of Natural Resources to inform adjustments to the mandate in order to address concerns, where required. These adjustments, decided by the Cabinet, supported ongoing, responsive consultation and the offer of reasonable accommodations.

The Accommodation Mandate was updated twice, with the intent to provide better accommodation for impacts on rights and to address broader issues raised by Indigenous groups as they were raised through the consultations.

2.1.7 IMPLEMENTING KEY CHANGES TO THE CROWN CONSULTATION PROCESS

Canada implemented several key changes to its approach that differentiate the 2018–2019 re-initiated Phase III consultations from the previous process.

Consistent Training

All Consultation Teams were enrolled in a comprehensive and mandatory training program. This included tailored training from the Federal School of Public Service and from the Consultation and Accommodation Unit of Crown-Indigenous Relations and Northern Affairs Canada. This specialized instruction ensured that Consultation Teams were aware of Canada's duty-to-consult obligations as required by the *Constitution Act, 1982*. Teams also received training from external Indigenous consulting organizations to obtain an external-to-government perspective on consultation approaches before entering into on-the-ground discussions with impacted Indigenous groups.

Participant Funding

On November 2, 2018, the DM of Natural Resources sent a letter to all potentially impacted Indigenous groups indicating that participant funding would be made available to support their immediate engagement in the development of a Crown consultation approach and their consultations with Crown representatives on a longer-term basis regarding outstanding concerns related to the Project.

The approach was intentionally designed to respond to lessons learned and the persistent challenges identified by Indigenous groups regarding the Participant Funding Program for major projects under the Interim Measures, which were announced in January 2016.¹¹ Natural Resources Canada and the Canadian Environmental Assessment Agency implemented a new participant funding approach for the re-initiated Phase III consultation process that was streamlined and responsive to Indigenous groups' unique circumstances. See Chapter 3, section 3.5.4 for additional details on the participant funding approach.

Tailored Approach

The Crown consultation approach was designed to be agile. It was also intended to be sensitive to, and adaptable to, the unique circumstances facing individual communities, including capacity challenges, as well as specific interests or impacts on Section 35 rights as protected by the *Constitution Act, 1982*. The approach also integrated TMC, as a new Crown corporation, into the consultation process, where appropriate.

Higher Bar for Transparency

From the start of the process, the Crown committed to public reporting, timely communication and transparency with Indigenous leaders, while respecting confidentiality of the consultation process.

The commitment to a more transparent process began on October 3, 2018, when the Minister of Natural Resources sent a letter to all potentially impacted Indigenous communities. The letter indicated that the government would not be appealing the FCA's decision and, instead, would be re-initiating Phase III consultations to address the direction set out by the Court.

Several letters from the DM of Natural Resources followed the Minister's initial letter. These included a letter on October 22, 2018, that clarified how consultations would be launched. The letter also invited groups to provide their views on how they wanted the consultation approach to proceed, and it signaled that participant funding would be made available. An additional letter was sent to potentially impacted groups on November 20, 2018, to indicate that Justice Iacobucci would be facilitating a series of roundtables in British Columbia and Alberta to seek input on the consultation approach. Following

¹¹ See: <https://www.neb-one.gc.ca/bts/pblctn/vltns/2016pfpvltnrprt/index-eng.html>

input received by Indigenous groups at the roundtables, the Government of Canada finalized the consultation approach and made it publicly available.¹²

To further enhance transparency, Canada launched a website to serve as a focal point to engage Canadians on the Phase III process and TMX. The website included content on governance, details on how the review process works, updates on progress and links to the NEB, TMC and other relevant websites.

2.2 IDENTIFICATION OF IMPACTED INDIGENOUS COMMUNITIES

2.2.1 GROUPS CONSULTED IN THE 2016 CONSULTATION PROCESS

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 Indigenous groups whose interests may be potentially affected. This inquiry followed direction from the NEB, through its Filing Manual, to engage and consult potentially affected Indigenous groups.

As part of the proponent's pre-Application planning in 2012, the Alberta government advised the proponent to include Indigenous 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, Indigenous Affairs and Northern Development Canada (now Crown-Indigenous Relations and Northern Affairs Canada) provided advice to the proponent on the traditional territories of Indigenous groups to inform its scope of engagement.

In August 2012, the Major Projects Management Office provided further advice to the proponent, on behalf of the federal government, on the Indigenous groups for which Crown consultation may be required.

On May 23, 2013, following receipt of a project description from the proponent, the Crown developed a preliminary list of potentially affected Indigenous groups. Approximately 130 Indigenous groups were initially identified. The Crown considered whether lands or marine areas currently or traditionally used by Indigenous groups potentially overlap or interact with the Project footprint. In addition, a 50-km buffer from the footprint and marine shipping corridor was used to identify additional Indigenous groups that might be indirectly affected. Groups whose territories were located 50 km beyond the Project footprint were not offered funding as it was determined that the potential adverse impacts from the Project would be very low to negligible.

¹² <https://www.canada.ca/en/campaign/trans-mountain/what-were-doing-now/consulting-with-indigenous-groups/how-consultation-works.html>

In August 2013, this list was shared with the proponent and the NEB, following review by implicated federal departments. That same month, the government sent letters to Indigenous groups introducing the Project and the NEB review process.

Following the proponent's submission of the Project Application to the NEB in December 2013, the government reviewed available traditional-use information for the identified Indigenous groups and considered the potential effects of the Project on traditional land and marine uses. The Project Application defined the spatial boundaries selected to assess effects on the environment or socio-economic conditions, including traditional land and marine uses.

The government subsequently refined the scope to include any Indigenous group with 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 Indigenous 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*.

The following tables identify the individual Indigenous groups in B.C. and Alberta for which a duty to consult was identified as of June 2016.

Table 1 – Alberta Indigenous Groups

Treaty Six	Treaty Seven
<p>Nakhóda Peoples: Alexis Nakota Sioux Nation (with Alexis Trappers Association)* Paul First Nation²</p> <p>Nehiyawak Peoples: Alexander First Nation* Enoch Cree Nation* Ermineskin Cree Nation* Louis Bull Tribe Montana First Nation* Samson Cree First Nation* Sunchild First Nation*</p> <p>Nakawē Peoples: O’Chiese First Nation*</p>	<p>Nakhóda Peoples: Stoney Nakoda First Nation</p>
	<p>Treaty Eight</p> <p>Dane-zaa Peoples: Horse Lake First Nation*^C Nehiyawak Peoples: Sturgeon Lake Cree Nation Sucker Creek First Nation* Whitefish (Goodfish) Lake First Nation / Saddle Lake Cree Nation*</p>
<p>* Indicates that the Indigenous group participated in the NEB hearings as an intervenor ² Indicates that the Indigenous group participated in the NEB hearings as a commenter “C” Indicates that the Indigenous group is on Schedule C of the Environmental Assessment Office (EAO) Section 11 order</p>	

Table 2 – B.C. Interior Indigenous Groups

<p>Dakelh [Carrier] Peoples: Lheidli T'enneh First Nation*^B Lhtako Dene Nation^B</p> <p>Nlaka'pamuxw Peoples: Ashcroft Indian Band*^B Cook's Ferry Indian Band^B Kanaka Bar Indian Band^C Nicomen Indian Band^C Siska Indian Band^B</p> <p>Nlaka'pamuxw Nation Tribal Council: Boothroyd Band^B Boston Bar Band^B Lytton First Nation^B Oregon Jack Creek Band^B Skuppah First Nation^B Spuzzum First Nation^B</p> <p>Nlaka'pamuxw Peoples [Scw'exmx People Sub-Group]: Coldwater Indian Band*^B Lower Nicola Indian Band*^B Nooaitch Indian Band*^B Shackan Indian Band*^C</p>	<p>Okanagan Peoples: Lower Similkameen Indian Band*^B Okanagan Indian Band*^B Osoyoos Indian Band* Penticton Indian Band*^B Upper Nicola Band*^B Upper Similkameen Indian Band*^B Westbank First Nation*^B</p> <p>Secwepemc Peoples: Adams Lake Indian Band*^B Bonaparte Indian Band^C Canim Lake Band^{B2} Little Shuswap Lake Indian Band^B High Bar First Nation (Llenlney'ten)^C Neskonlith Indian Band*^B Shuswap Indian Band^C Simpcw First Nation*^B Skeetchestn Indian Band*^B Splatsin First Nation^C Stswecem'c / Xgat'tem' [Canoe Creek Band]^C Tk'emlúps te Secwe' pemc*^B Ts'kw'aylaxw First Nation [Pavilion Indian Band]^C Whispering Pines / Clinton Indian Band*^B Williams Lake Indian Band*^C Xats' u' Il First Nation [Soda Creek Indian Band]^C</p> <p>Tsilhqot'in Peoples: Toosey Indian Band^C</p>
<p>* Indicates that the Indigenous group participated in the NEB hearings as an intervenor ^B Indicates that the Indigenous group is on Schedule B of the EAO Section 11 order ^C Indicates that the Indigenous group is on Schedule C of the EAO Section 11 order ² Indicates that the Indigenous group participated in the NEB hearings as a commentor</p>	

Table 3 – Lower Fraser River Indigenous Groups

<p>Downriver Halkomelem and Squamish Peoples: Kwikwetlem First Nation^{*B} Musqueam Indian Band^{*B} Squamish Nation^{*B} Tsawwassen First Nation^{*B} Tseil-Waututh Nation^{*B}</p> <p>Upriver Halkomelem Peoples: Chawathil First Nation^{*B} Cheam First Nation^{*B} Katzie First Nation^{*B} Kwantlen First Nation^{*B} Matsqui First Nation^{*B} Peters First Nation^{*B} Popkum First Nation^{*B} Seabird Island Indian Band^B Shxw'ó-whámel First Nation^B Sts'ailes Nation^C Union Bar First Nation^B Yale First Nation^B</p>	<p>Upriver Halkomelem Peoples (cont'd): Stó:lō Collective:^{*B} Aitchelitz Band^B Kwaw-Kwaw-Apilt First Nation^B Leq'a:mel First Nation^B Scowlitz^B Shxwhá:y Village^B Skowkale First Nation^B Skwah First Nation^B Skawahlook First Nation^B Soowahlie First Nation^B Squiala First Nation^B Sumas First Nation^B Tzeachten First Nation^B Yakweakwioose First Nation^B</p>
<p>* Indicates that the Indigenous group participated in the NEB hearings as an intervenor ^B Indicates that the Indigenous group is on Schedule B of the EAO Section 11 order ^C Indicates that the Indigenous group is on Schedule C of the EAO Section 11 order</p>	

Table 4 – Vancouver Island and Adjacent Area / Affiliated Indigenous Groups

<p>Island Halkomelem Peoples: Cowichan Tribes*^B Halalt First Nation^B Hwlitsum^{B3} Lake Cowichan First Nation*^B Lyackson First Nation*^B Penelakut Tribe*^B Snaw-naw-as (Nanoose) First Nation^B Snuneymuxw (Nanaimo) First Nation*^C Stz'uminus (Chemainus) First Nation*^B</p> <p>Straits Salish Peoples: Esquimalt Nation*^B Malahat Nation^{B2} Pauquachin First Nation*^B Scia'new (Beecher Bay) Indian Band*^B Semiahmoo First Nation^B Songhees (Lekwungen) Nation^B Tsartlip First Nation*^B Tsawout First Nation*^B Tseycum First Nation*^B T'Sou-ke First Nation*^B</p>	<p>Southern Wakashan Peoples / Nuu-chah-nulth: Ditidaht First Nation*^B Pacheedaht First Nation*^B Maa-nulth First Nation*^B Huu-ay-aht First Nations^B Ka:'yu:'k't'h'/Che:k'tles7et'h First Nations^B Toquaht Nation^B Uchucklesaht Tribe^B Ucluelet First Nation^B</p>
<p>* Indicates that the Indigenous group participated in the NEB hearings as an intervenor ^B Indicates that the Indigenous group is on Schedule B of the EAO Section 11 order ^C Indicates that the Indigenous group is on Schedule C of the EAO Section 11 order ² Indicates that the Indigenous group participated in the NEB hearings as a commenter ³ Hwlitsum are not recognized as a "Band" under the <i>Indian Act</i></p>	

Table 5 – Métis Groups

Métis Peoples (Alberta): Métis Nation of Alberta Métis Nation of Alberta – Métis Regional Council Zone 4* Métis Nation of Alberta – Gunn Métis – Local Council #55 (Lac Ste. Anne)* Mountain Métis Nation Association	Métis Peoples (B.C.): BC Métis Federation* Kelly Lake Métis Settlement Society ⁴ Métis Nation of British Columbia*
* Indicates that the Indigenous group participated in the NEB hearings as an intervenor ⁴ Applied for late intervenor status in the NEB hearings but was denied by the NEB	

2.2.2 CHANGES TO THE GROUPS CONSULTED IN 2018–2019

The government's starting point for the re-initiated Phase III consultations was to re-engage with all Indigenous groups that had been consulted in the 2016 consultation process. Canada took a principled approach to consider, on a case-by-case basis, the possible inclusion of new Indigenous groups in the re-initiated Phase III consultations. Certain communities that were part of the consultation process in 2016 asked to be consulted separately, resulting in an increased number of Indigenous groups for the Crown list for 2018–2019.

As it re-initiated Phase III consultations, the Crown sought to be inclusive in developing a list of groups to be consulted. The Crown added Indigenous groups that could be assessed at the low end of the consultation spectrum from a depth-of-consultation perspective, based on the impacts, but were included to promote overall relationship-building between the Crown and Indigenous groups.

The government established four criteria to determine who would be included in the process:

Status of engagement with the proponent: engagement of the community with the proponent conveys an interest — which the Crown may want to consider — that may be founded on asserted rights.

Involvement in NEB process: a community requesting to be included and then taking time to participate demonstrates a significant level of concern regarding the impact of the project.

Boundaries of traditional territories: interactions between traditional territories and the right of way (RoW).

Affiliations/alliances between communities: including historic linkages between communities and where the extent of allegiance/alliance between two communities with different proximities to the RoW could lead to an impact on the rights/interests of the more distant group.

After careful consideration, 12 groups were added to the list for inclusion in consultation:

- Papaschase First Nation
- Aseniwuche Winewak Nation
- Driftpile Cree Nation
- Swan River First Nation
- Hwilitsum First Nation
- Tsuu'tina Nation
- Esk'etemc First Nation
- Buffalo Lake Métis Settlement
- East Prairie Métis Settlement
- Kikino Métis Settlement

Saddle Lake Cree Nation and Whitefish (Goodfish) Lake First Nation were consulted as one band during the 2016 consultation process. However, Saddle Lake First Nation requested to be consulted separately for the 2018–2019 process, resulting in another community being added to the list.

The Métis Nation of Alberta and the Zone 4 Métis had initially been consulted together but were subsequently consulted separately. As a result, the Crown list increased to a total of 129 Indigenous groups for the 2018–2019 consultation process.

2.3 METHODOLOGY FOR ASSESSING PROJECT IMPACTS

Canada employed the same methodology outlined in the 2016 CCAR to assess levels of potential impacts on Aboriginal rights and other interests. See section 2.3.7 within the 2016 report for additional details.¹³

2.3.1 SPATIAL STUDY AREAS

Spatial study areas in environmental and socio-economic impact assessments specify the geographic area where the effects of the Project area are assessed, and these findings inform how the Crown understands the scope and seriousness of potential effects on Indigenous Interests.

¹³ See the 2016 Crown Consultation and Accommodation Report:
https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/pdf/TMX_Final_report_en.pdf

In its Application in 2013, 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 would be assessed for each valued component. The LSA varied for each valued component and reflected the area where Project construction and operations were most likely to affect it. The LSA was 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 metre-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 Indigenous Interests include traditional land and resource use (TLRU) and traditional marine resource use (TMRU). The LSA for TLRU encompassed and extended beyond the Project footprint to include the zones of influence for 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 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 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 2016 NEB Report,¹⁴ the focus of TLRU was, in some cases, on lands within a few hundred metres of the footprint, while in other cases broader territorial uses were identified that extended several kilometres from the footprint. The proponent, and subsequently the NEB, assessed potential effects on TLRU within the RSA.

¹⁴ See the 2016 NEB Report: <https://apps.neb-one.gc.ca/REGDOCS/Item/Filing/A77045>

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 metres of 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.

2.3.2. INFORMATION SOURCES

This report uses information gathered on Indigenous Interests, issues and concerns, as well as: the 2016 CCAR; related Appendices “Indigenous Group Assessments”; and submissions made to the Crown by Indigenous groups, including court documents provided for the *Tsleil-Waututh Nation et al. v. Attorney General of Canada et al.* It also draws on the February 2019 NEB Reconsideration Report, which subsumed the 2016 NEB Report.

Further, this report draws on the Project Application and information provided by Indigenous groups filed on the NEB Hearing record and during Crown consultations in both 2016 and 2018–2019. 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 information on Indigenous groups’ traditional and contemporary resource use.

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 for each Indigenous group, and any research reports have been shared with Indigenous groups upon request.

The nature, extent and importance of traditional and cultural activities practised in the Project’s vicinity are identified in the Project Application as well as by information provided by Indigenous groups and filed on the NEB hearing record. These traditional and cultural activities rely on the availability, quality and accessibility of ecosystems and natural resources, such as the land, rivers, fish, wildlife and vegetation. This information, along with consultations with Indigenous groups, has helped the Crown

understand traditional and contemporary land, marine and resource uses and associated Indigenous Interests related to the Project.

2.3.3 PRINCIPLES INVOLVED IN ESTABLISHING DEPTH OF DUTY TO CONSULT

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

- The Crown has actual or constructive knowledge of an asserted or established Aboriginal and treaty right;
- The Crown contemplates undertaking conduct, including a statutory decision; and
- That conduct or decision may have an adverse impact on the asserted or established Aboriginal and Treaty Rights.¹⁵

In *Haida Nation v. British Columbia (Minister of Forests)*, the Supreme Court of Canada (SCC, 2004) established that the Crown is required to consult with Indigenous groups on Crown-authorized activities that might adversely affect the exercise of Section 35 rights, and that the extent or level of the consultation is proportionate to a preliminary assessment of the following factors:

- Strength of the case for any claimed Section 35 rights, including title, that may be adversely affected; and
- Seriousness of potential impact of contemplated Crown action or activity to adversely impact Section 35 rights.

In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, the Supreme Court of Canada (SCC, 2005) 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)* (SCC, 2014). The Crown also has a consultation obligation in relation to potential impacts on other proven or established Aboriginal rights, including 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 supporting any claimed Aboriginal right and the more serious the impact on the right, the deeper the level of consultation that will be required.

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

- Little or no indication of any historical or current use of area by the Indigenous group; and

¹⁵ 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 minimal to no impact on the land or resources (i.e., the potential for adverse impacts on Aboriginal or Treaty Rights 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 Indigenous group; and
- Proposed Crown action or activity is anticipated to result in a moderate to severe impact on the land or resources and corresponding Aboriginal or Treaty Rights.

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 the Indigenous group to reach agreement, the Crown is required to afford the Indigenous group consultation that is meaningful (i.e., consultation that provides opportunities for Indigenous groups to learn about the Project and have their interests heard; allows the Crown and Indigenous groups to talk together to build mutual understanding; tests and is prepared to amend potential accommodation proposals in response to dialogue; and, where deep consultation is required, leads to demonstrable and serious consideration of accommodation, as appropriate).

2.3.4 INITIAL DEPTH OF CONSULTATION

The 2016 Consultation Process

Based on the application of the above legal principles and the initial scope of consultation described above, Canada conducted initial depth-of-consultation assessments for each Indigenous 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 in consideration of an Indigenous 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.¹⁶

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

- Information contained in the proponent's Project Application;
- Information provided by Indigenous groups regarding their views of how their Indigenous Interests might be adversely impacted by the Project;

¹⁶ NRCan's Written Evidence May 27, 2015 – Filing A70313

- Input received from Indigenous groups on the Canada's methodology for assessing the seriousness of potential adverse impacts , including specific criteria and thresholds that Canada should consider;
- Indigenous groups' 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 and required regulatory conditions; and
- Consultation with Indigenous groups regarding potentially outstanding issues, including recommendations for additional accommodation, as appropriate.

The 2018–2019 Consultation Process

In the re-initiated Phase III consultations, Canada revised and updated its depth of consultation assessments for Indigenous groups, where appropriate. Consultation Teams conducted reassessments when: Indigenous groups disagreed with the previous assessment; new information was provided that could have an impact on the assessment; or there was any other compelling reason to review.

2.3.5 PRELIMINARY STRENGTH OF CLAIM

The 2016 Consultation Process

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

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

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

To ensure that all potentially affected Indigenous groups were engaged in consultation, Canada 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 expressed to the Crown their view of collectively held Aboriginal rights and title interests and indicated a preference to be consulted accordingly. As a result, Canada 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.

The 2018–2019 Consultation Process

Canada revised and updated its preliminary strength of claim assessments as needed and where appropriate. Key factors in deciding whether to revise a strength of claim assessment were the presence of a community request and whether new information was provided during the consultation process that would have an impact on the previous analysis.

2.3.6 APPROACH TO ASSESSING LEVEL OF POTENTIAL IMPACT ON INDIGENOUS INTERESTS

The analytical framework for assessing the seriousness of impacts on Indigenous 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 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 Indigenous Interests.

Canada recognizes that adverse Project impacts on Indigenous Interests may not arise solely from changes to the biophysical environment. Indigenous Interests include but may not be limited to traditional practices related to hunting, trapping, gathering, fishing and marine harvesting.

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

- The location of the area understood to be the Indigenous group's area of traditional use; and past, present, and anticipated future Indigenous uses of the Project area and its surroundings, including the frequency and timing of such uses by each Indigenous group.
- The baseline conditions of valued components associated with the exercise of Indigenous 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 Indigenous 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 Indigenous group where the meaningful exercise of Indigenous Interests could reasonably occur.
- Any residual impacts and cumulative effects to VCs associated with the exercise of Indigenous Interests (informed by the NEB Report) including consideration of the magnitude¹⁷ and direction of change, geographic extent,¹⁸ duration¹⁹ and frequency of change, reversibility²⁰ of the change and probability of occurrence.²¹
- The extent to which the Project could affect each Indigenous group's access to, and use of, the area to exercise Indigenous Interests.
- Measures proposed to mitigate adverse effects on corresponding Indigenous Interests.

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

- **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 Indigenous 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 to 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.
- **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

¹⁷ 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."

¹⁸ NEB definitions for geographic extent criteria provided for project footprint (e.g., width of ROW), LSA, RSA for receptor being considered.

¹⁹ NEB definitions for temporal extent criteria provided for the short term (weeks–months), medium term (months–years) and long term (years–decades).

²⁰ NEB definitions for reversibility criteria are either: 1) reversible to baseline within the life of the Project; or 2) decades, generations or permanent.

²¹ Ultimately, the Crown's assessment of the level of seriousness of a potential impact on Indigenous 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.

effects on the experience of exercising rights in the area; effects to community health; effects 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, Canada has considered:

- **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 Indigenous community might be involved in the decision-making process; and whether the activity might be consistent/inconsistent with any cultural/other objectives of the Indigenous 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 Indigenous 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 Indigenous Interests are assessed for each individual Indigenous 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 Indigenous group, it is acknowledged that the impacts on the group always vary in time and space.

That is, impacts on Indigenous Interests in one area of a group's territory are not the same as elsewhere, and impacts during construction are not the same as those during operations. The impact assessment reported for each group is the greatest expected impact on the Indigenous Interest as a result of routine construction and operations.

Impact statements for each Indigenous group are included in the annexes to the CCAR.²²

2.3.7 FEDERAL AUTHORIZATIONS REQUIRED

Pursuant to sub-section 4(1)(d) of CEEA 2012, one purpose of the Act is to promote communication and cooperation between the federal government and Indigenous peoples. The CEEA 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 CEEA 2012 includes the effect to Indigenous 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, CEEA 2012 enables the consideration of community knowledge and Indigenous traditional knowledge in the environmental assessment process.

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

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'ōwhámel (Ohamil #1), Peters (IR #1; IR #1a), Popkum (IR #1; IR #2), Tzeachten (IR #13), and Matsqui (Main #2).

²² Annexes and independent submissions are attached to the CCAR, when submitted to the Governor-in-Council to inform its decision on the Project.

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 five Bands are operational under the *First Nations Land Management Act* (FNLMA) and have their own Land Codes in place: Shxw'ówhámél, Tzeachten, Matsqui, Whispering Pines and Lower Nicola Indian Band.

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.

Table 6 – Potential Federal Authorizations

Responsible Agency or	Permit	Legislation
Indigenous and Northern Affairs Canada ²³	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	Migratory Birds Sanctuary Regulations
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	<i>NEB Act and Canada Oil and Gas Operations Act Navigable Waters Protection Act</i>
Natural Resources Canada	Ammonium Nitrate Fuel Oil	<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>

²¹ 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.

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>

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 Indigenous Interests has 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 and modern treaties, the Crown is guided by the text of the treaty, as well as by the understandings and intentions of the Indigenous groups and Crown participants to the making of the treaty or subsequent adhesions — based on rules of treaty interpretation articulated by the Supreme Court of Canada.

Modern Treaty Nations

Tsawwassen First Nation

The Tsawwassen Final Agreement²⁴ 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

²⁴ Tsawwassen First Nation Final Agreement, https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-BC/STAGING/texte-text/tfnfa_1100100022707_eng.pdf.

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 fulfil 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 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 forever” 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 Indigenous 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 First Nations 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, which 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),²⁵ 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 include:

- 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 were reviewed to understand interactions between the Project and First Nations’ traditional use areas including 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, the Crown determined that it was appropriate to engage with these First Nations at the lower end of the consultation spectrum.

²⁵ *Mikisew* para. 56 and *Grassy Narrows* paras. 50–3.

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.

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. Canada's approach to understanding the nature of rights with non-treaty First Nations is described above. Information on the unique nature and scope of each First Nation's asserted or established Aboriginal rights and title interests is provided in the annexes to the draft CCAR.

Approach to Consultation with Métis Nations

The Métis are Indigenous 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 SCR 207.

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.

Three Métis groups in B.C. were included in consultation on the Project: Métis Nation BC, BC Métis Federation and the Kelly Lake Métis Settlement Society. The Province of British Columbia 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-holders. As referenced above, the 2003 Supreme Court of Canada decision in *R. v. Powley* set out the test to prove Métis Aboriginal rights, and Métis self-identification is only one component of this test.

3. Summary of Consultation Activities

The following sections discuss the procedural elements and chronology of Indigenous consultations and engagement activities undertaken by the proponent, the National Energy Board (NEB) and Canada. The information begins from before the proponent filed its Project Application and continues to the conclusion of the re-initiated Phase III process.

3.1 PROPONENT ENGAGEMENT

3.1.1 EARLY PROPONENT ENGAGEMENT

In 2011, the proponent began to identify Indigenous communities 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 Indigenous engagement. The proponent's list included 105 Indigenous communities, including associations, councils, tribes and two non-land based Métis groups in B.C.

In May 2012, the proponent sent letters to Indigenous communities identified as potentially impacted by the Project. These letters introduced the Project, announced the start of the 18-to-24 month pre-Application phase and outlined the anticipated review schedule and routing. The letters also invited Indigenous communities 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 path of the proposed expansion; for this sub-set, the proponent's May 2012 correspondence served as a notification letter, and groups were encouraged to contact the proponent if they were interested in being part of the engagement process. Meanwhile, the proponent determined that 62 Indigenous communities required a deeper level of engagement and invited them to be involved in early project planning and scoping. The proponent also indicated it would provide for a reasonable level of capacity funding to these groups to support their meaningful involvement.

The proponent engaged with potentially affected Indigenous communities through its Aboriginal Engagement Program and provided approximately \$12 million of capacity funding to those groups that accepted this offer. Funding was also provided to conduct Traditional Land Resource Use (TLRU) and Traditional Marine Resource Use (TMRU) studies. Some Indigenous communities did not accept the proponent's offer for funding due to their position on the proposed Project or their concern that the funding was insufficient.

The proponent has indicated that engagement consisted of direct meetings with leadership and designated staff representatives as well as community-wide discussions, phone conversations, information sessions, project newsletters 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 Indigenous communities to identify and support economic development opportunities resulting from the Project. The 2016 CCAR indicated that, as of November 2016, the Crown was aware that 33 potentially affected Indigenous communities had entered into commercial negotiations with Trans Mountain and signed a confidential Mutual Benefit Agreement (MBA), including a letter of support, with the proponent.

Should the Governor-in-Council (GiC) approve the Project, the NEB conditions would require the proponent to conduct further engagement with potentially affected Indigenous communities. The proponent committed to engaging Indigenous communities throughout the construction and operation of the Project. In addition to complying with conditions, the proponent 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 by several sources: the proponent's Project Application (Volume 3B), consultation updates filed on the NEB evidentiary record, the December 2015 Final Written Argument submitted to the NEB and the Reply Argument filed in February 2016; the supplemental Aboriginal Engagement Report submitted to the Environmental Assessment Office (EAO);²⁶ and the NEB Reconsideration Report. The interests and concerns raised by Indigenous communities 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 Indigenous communities are discussed in Volumes 5 and 8 of the proponent's Application, found on the NEB's website for the Project.

²⁶ http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_document_459_40921.html

3.1.2 ONGOING PROPONENT ENGAGEMENT

Following the initial NEB public hearing, the proponent continued to engage with Indigenous groups. The proponent continues to report on this engagement in accordance with NEB, with the most recent update filed on December 21, 2018, through [Filing A96940](#).

In the course of the NEB reconsideration hearing, the proponent indicated that it continued to develop working relationships with Indigenous communities. Where appropriate, the proponent established formal relationships with Indigenous communities that included opportunities to incorporate Indigenous knowledge into Project plans. It also said that it continues to identify opportunities to support Indigenous participation in activities related to TMC's areas of responsibility — including additional archaeological and environmental field work to inform alignment sheets and the development of Geographic Response Plans as part of the Emergency Management Program.

TMC's commitment to Indigenous engagement and participation is guided by the Indigenous Relations Policy as part of its Indigenous Engagement Program.²⁷ This includes ongoing direct engagement with Indigenous groups — during all phases of the Project — to understand issues and, where appropriate, to implement avoidance, mitigation and accommodation measures and agreements.

Since the government's purchase of the Trans Mountain Pipeline system and the Project, the proponent is now a new Crown corporation. As such, the proponent has participated in the re-initiated Phase III consultation process alongside the Crown Consultation Teams in many meetings with Indigenous groups.

The proponent brought several years of knowledge and experience working with Indigenous communities to the Phase III discussions, as well as technical expertise to support addressing community questions and concerns. In addition, some Indigenous groups with established relationships with the proponent requested that the proponent participate in the Phase III consultation meetings.

In circumstances where an Indigenous community may have declined engagement with the proponent due to its position on the Project, the Crown was sensitive to such circumstances and made efforts to encourage productive dialogue between the community and the proponent. For its part, the proponent has taken a long-term view and indicated it remains open and ready to engage with any communities at their convenience.

The proponent has also provided technical and subject matter expertise — offering both practical and creative solutions with respect to mitigation measures and potential accommodation under its responsibility, including: emergency management and response; environmental protections for

²⁷ <https://www.transmountain.com/indigenous-peoples>

species at risk; construction methods to mitigate impacts to water courses; marine safety; pipeline integrity; socio-economic considerations related to camps and worker conduct; and benefits in the form of employment, training and business opportunities.

The proponent also communicated directly with those Indigenous communities that had entered into Project Mutual Benefits Agreements (MBA) to confirm that all agreements and related commitments would be honoured. The proponent continued to meet with Indigenous groups regarding MBA implementation, in parallel with the Phase III consultation.

The proponent has also continued to engage directly with individual Indigenous groups, on a separate track, to explore potential interest and to enter into negotiations with additional communities to reach MBAs in support of the Project. As of March 20, 2019, Canada acknowledged that 43 potentially affected Indigenous groups have signed confidential MBAs with the proponent, which include letters of support for the Project with regulatory agencies.

In summary, the proponent also has indicated it remains committed to ongoing and meaningful engagement with Indigenous groups throughout the life cycle of the Project. The proponent's engagement on this Project will build on existing relationships as well as the development of new partnerships with communities — including marine communities.

3.2 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 the 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 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 threaten the integrity of a vessel's hull while navigating or transferring cargo alongside the terminal.

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

The TERMPOL review of the marine shipping component of the Project was carried out from December 2013 to December 2014. The TRC recommended that the proponent engage marine users, including Indigenous communities, to:

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

In December 2013, Transport Canada sent a letter to 30 Indigenous communities with traditional territories along the Project's shipping route, which provided information on the TERMPOL review process and advised that the TRC had recommended that the proponent engage Indigenous communities 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 Indigenous communities to explain the TERMPOL process and, in December 2014, provided technical briefings on the TERMPOL report findings and recommendations to interested Indigenous communities.

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 Indigenous communities on the type of information and research being undertaken to develop TERMPOL studies. Indigenous communities expressed interest in the timing, content and process for shaping the TERMPOL studies and in participating in the review process.

On November 13, 2013, the proponent sent a letter to Indigenous communities 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 Indigenous communities that requested copies; and
- sought 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 Indigenous communities that requested copies of TERMPOL studies. The proponent followed up with Indigenous communities to discuss:

- participating in a TERMPOL workshop;
- providing a written response to Trans Mountain;
- initiating a third-party review; and
- allocating capacity funding for the third-party review.

The proponent received three formal responses to the TERMPOL studies and conducted three TERMPOL workshops with seven Indigenous communities. Formal responses were provided to questions raised by Indigenous communities. The proponent used this feedback 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.

3.3 NATIONAL ENERGY BOARD ENGAGEMENT

3.3.1 Previous National Energy Board Hearing

In August 2013, prior to its first public hearing, the NEB carried out a program of early Indigenous engagement, consisting of correspondence to 129 potentially interested Indigenous communities and organizations introducing the Project and the associated regulatory review. This correspondence also included a letter from the MPMO introducing Canada'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 Indigenous communities and organizations.

As discussed in section 1.3, 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 Indigenous 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 limit stopped for a seven-month period. On Sept. 18, 2015, it stopped again for four months.

Commenters and intervenors in the hearing had an opportunity to express their concerns regarding impacts of the Project. For Indigenous communities, these concerns included adverse impacts on their Interests. The NEB Panel's responsibilities 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 Indigenous communities along with avoidance, mitigation and accommodation measures proposed by the proponent and recommended by the NEB.

The NEB hearing provided opportunities for Indigenous community intervenors to give traditional evidence orally, submit written evidence and information requests, file motions and provide 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 Indigenous communities on the Crown consultation list participated in the NEB hearing, either individually or as part of a collective.

In January 2016, the government announced Interim Measures²⁸ to guide environmental assessments for major projects. Through this announcement, and in direct reference to the Trans Mountain Expansion (TMX) project, the government committed to appointing a Ministerial Representative to engage communities — including Indigenous communities potentially affected by the project — to seek their views and report back to the Minister of Natural Resources.

To undertake this task, a three-member Ministerial Panel was appointed in May 2016 to complement the NEB's environmental assessment and regulatory review. The panel was composed of Annette Trimbee, President of the University of Winnipeg; Kim Baird, former Chief of the Tsawwassen First Nation; and Tony Penikett, former Premier of Yukon. A web portal was also set up to receive comments from Canadians.

The Ministerial Panel's mandate was to complement the NEB review by engaging communities and Indigenous peoples along the proposed pipeline and marine corridors and to identify additional views that could be relevant to the government's final decision. These views were captured in a report submitted to the Minister of Natural Resources on November 1, 2016, and subsequently made public.

At that time, consistent with the Interim Measures for major resource projects, the GiC extended the time limit for a decision from three months to seven months. The additional four months allowed for

²⁸ See: <https://mpmo.gc.ca/measures/254>

further public engagement and consultations with Indigenous groups and an assessment of the upstream GHG emissions associated with the Project. Please see section 3.4.3 for details.

3.3.2 NATIONAL ENERGY BOARD RECONSIDERATION

On September 20, 2018, through OIC P.C. 2018-1177, the GiC directed the NEB to conduct a reconsideration of its previous recommendations and terms and conditions, taking into account the environmental effects of Project-related marine shipping in view of the requirements of CEAA 2012 and the adverse effects of Project-related marine shipping on species at risk in view of any requirements of Section 79 of SARA.

The reconsideration hearing process was scheduled to begin on November 20, 2018, but was revised through [Ruling 9](#), resulting in an extension to the deadline for intervenors to file their opening statements and direct evidence. This extension affected subsequent steps and deadlines in the hearing. The revised process began on December 5, 2018, when intervenors were allowed to file opening statements and direct evidence.

- On September 26, 2018, the NEB announced it would hold a public hearing to carry out its reconsideration. In this announcement, it sought comments from the public on the scope of the issues to be considered, the design of the hearing process and the question of which government departments or bodies it should require information from during the hearing. The NEB released a Hearing Order outlining the steps and deadlines of the process on October 29, 2018.
- Between September 26, 2018, and October 3, 2018, the NEB held a process through which individuals and groups could apply or register to participate in the reconsideration hearing. Intervenors in the previous hearing leading up to the NEB's 2016 Report were guaranteed intervenor status in the reconsideration hearing, if they chose to register and participate. Any other member of the public was able to apply to participate as an intervenor.
- In the NEB's October 5, 2018, Ruling No. 1, it announced the List of Parties, based on the applications received by the deadline. The NEB's reasons for its decisions on participation were issued separately on October 11, 2018.
- On December 5, 2018, intervenors other than federal departments and agencies filed opening statements and direct evidence.
- On December 11, 2018, TMC filed reply evidence, served to all parties.
- Between November 20, 2018, and December 6, 2018, the NEB heard oral traditional evidence from 25 Indigenous intervenors. Oral traditional evidence sessions were held in Calgary, Victoria and Nanaimo, and groups could also choose to provide oral traditional evidence remotely by video conference or video recording.

- To ensure that the NEB had adequate objective and technical expertise in delivering its report, on December 6, 2018, the GiC appointed John A. Clarkson as Marine Technical Advisor.
- On December 17, 2018, all parties filed information requests (IRs) regarding other parties' evidence.
- All parties were required to respond to IRs asked of them no later than December 31, 2018.
- On January 4, 2019 ("Motion Day"), parties could file notices of motion on the adequacy of others parties' responses to their own IRs ("motions to compel").
- Following Motion Day, parties that had received motions to compel had until January 8, 2019, to provide responses.
- On January 10, 2019, parties that filed motions to compel and had responses provided by the other party were allowed to reply to those responses.
- On January 17, 2019, all parties were allowed to file affidavits adopting their written evidence to the record. Moreover, Trans Mountain and federal departments and agencies were able to file written arguments-in-chief, including comments on draft conditions to the Board.
- On January 22, 2019, Intervenors, other than federal departments and agencies, were able to file written arguments-in-chief, including comments on draft conditions and any reply argument, to Trans Mountain and federal departments and agencies.
- In late January, all parties were invited to participate in an optional oral hearing.
- The NEB's 22-week reconsideration process concluded with the issuance of its Reconsideration Report (the Report) on February 22, 2019.

The Report found that the Project was in the public interest and recommended that the GiC approve the Project, subject to 156 conditions (including seven revised conditions) to address environmental and other issues. The NEB also made 16 new recommendations to the Government of Canada on Project-related marine shipping that went beyond the regulatory mandate of the NEB and the control of the proponent but which the NEB identified as being within the mandate of the federal government.

On the adequacy of its hearing process, the Board concluded in Section 5.2.6.4 that it is "satisfied that its process was impartial and fair and is able to contribute, to the extent possible, to the Crown's obligation to consult and accommodate."

Furthermore, the Board concluded in Section 5.2.6.5 of its Report that Trans Mountain's "ongoing engagement activities with regard to Project-related marine shipping, including gathering input from Indigenous communities for marine-related conditions, continue to be appropriate and effective." With regard to the Crown's and TMC's mitigation measures, the Board was of the view "that there has been adequate consultation and accommodation for the purpose of the Board's recommendation on this Project." It continued: "[any] potential Project impacts on the interests, including rights, of affected

Indigenous communities, after mitigation, are not likely to be significant and can be effectively addressed, with the exception of the impacts on the traditional use of Southern Resident Killer Whales by Indigenous peoples.”

At the time that the NEB finalized its Reconsideration Report, there were 118 intervenors, the majority of whom had been intervenors during the previous hearing. A total of 52 Indigenous intervenors were represented, 26 of whom were represented by a collective (Maa'nulth Treaty Society,²⁹ Stó:lō collective, Stó:lō Tribal Council³⁰ and Stk'emlupsemc te Secwepemc³¹). In addition, one Indigenous group chose to participate as a commenter.³²

3.4 FEDERAL GOVERNMENT CONSULTATION

In 2016, the Major Projects Management Office (the MPMO) was responsible for coordinating both the Crown consultation process and the participation of federal government departments in the previous NEB review. Following the FCA decision, Canada decided to divide these responsibilities, with the MPMO coordinating federal participation in the NEB's reconsideration process and the TMX task team, established in the fall of 2018, leading the Crown consultation process.

As was the case with the other modifications and improvements to the federal governance structure of the reinitiated Phase III consultation process (see section 2.1.2 above, and 3.4.6 below), this decision was intended to provide greater focus on and increased support to consultations with Indigenous groups. Federal departments and agencies providing expertise and advice to both the MPMO and the TMX task team include the Department of Justice, Fisheries and Oceans Canada, the Canadian Coast Guard, Transport Canada, Natural Resources Canada, Environment and Climate Change Canada, Health Canada, Parks Canada Agency, Crown-Indigenous Relations Canada, Indigenous Services Canada and the Vancouver Fraser Port Authority.

3.4.1 EARLY ENGAGEMENT PHASE

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

²⁹ Huu-ay-aht First Nations, Ka:'yu:'k't'h'/Che:k'tles7et'h First Nations, Toquaht Nation, Uchucklesaht Tribe, Ucluelet First Nation (Yuulu?if?ath)

³⁰ Aitchelitz Band, Chawathil First Nation, Cheam (Pilalt) First Nation, Kwaw-Kwaw-Apilt First Nation, Leq'a:mel First Nation, Matsqui First Nation, Seabird Island Indian Band, Shxw'ōwhámel First Nation, Shxwha:y Village, Skawahlook First Nation, Skowkale First Nation, Skwah First Nation, Soowahlie Indian Band, Sq'ewlets First Nation (formerly Scowlitz), Squiala First Nation, Sumas First Nation, Tzeachten First Nation, Yakwekwioose Band

³¹ Skeetchestn Indian Band, Tk'emlúps te Secwépemc

³² Yale First Nation

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. The letter outlined how the Crown would carry out its duty to consult, noting that it would rely on the NEB Review, to the extent possible. The letter also indicated that Indigenous communities that had concerns should discuss them with the proponent and bring unresolved concerns to the NEB during the hearing process, as the NEB had the authority to develop conditions that could help address them.

This early engagement letter encouraged Indigenous communities to participate in the oral tradition evidence hearings and to apply to the NEB for participant funding. It indicated that Canada would track issues raised by Indigenous communities throughout the NEB Review to determine whether additional consultations would be 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 Indigenous communities 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 offered to meet with Indigenous communities, and, as a result, 14 meetings took place during June and July 2014 with representatives of 31 groups. Discussions addressed 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 Indigenous communities and organizations representing all 112 individual Indigenous communities included in Canada's scope of consultation at that time. This letter set out the four phases Canada's of consultation framework: 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, if the Project was approved.

This consultation framework continued to be refined, primarily as a result of changes to the timelines described below.

In May 2015, the MPMO sent 95 letters to Indigenous communities and collective organizations representing 115 individual Indigenous communities 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 Canada to support their engagement in the consultation process that would follow 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 to seek feedback on the completeness and adequacy of the Crown's tracking of Indigenous community issues and proponent commitments to that point in the process;

- provided information on the mandates and expertise of the 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 the 2016 CCAR and options for addressing potentially outstanding concerns as part of the government decision-making phase.

Federal officials participated in nine phone calls with 10 Indigenous communities and had several email exchanges during the spring of 2015. Following the May 2015 letter, 98 follow-up emails were sent and eight calls were made, introducing the newly appointed Crown Consultation Lead, Neil Ross. In addition, following the June 22, 2015, information request to other intervenors' filings, 57 email follow-ups were sent to help facilitate review and response to the Crown's information request.

3.4.2 PREVIOUS NATIONAL ENERGY BOARD HEARING

Canada used the NEB review, correspondence and other direct forms of consultations with Indigenous communities to:

- inform itself and Indigenous communities about the Project and the nature of any adverse impacts on Indigenous Interests;
- understand issues and concerns of Indigenous communities participating in the process; and
- consider mitigation measures proposed by the proponent 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, including those of Indigenous communities, which were related to the departments' mandates. In its May 27, 2015, evidence filing, as well as in subsequent information requests or responses to the NEB, the MPMO worked with federal departments and agencies to explore the connections between the issues raised by Indigenous communities, departmental mandates and potential impacts on Indigenous Interests.

On May 27, 2015, the MPMO submitted to the NEB evidence about the government's approach to Crown consultation.³³ The evidence described the role of the MPMO and the past, ongoing and future consultations through the four consultation phases, and it identified all the Indigenous communities for which the Crown recognized a duty to consult. It also provided Canada's preliminary assessment of the depth of consultation owed to each of these groups.

³³ <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2786712&objAction=browse&viewType=1>

On June 22, 2015, the MPMO filed information requests to all Indigenous community intervenors, seeking feedback on the federal department and agencies draft issues tracking tables. Through this request, the MPMO sought to ensure that the identified issues accurately reflected each group's concerns and to confirm whether proponent commitments made to date adequately addressed those concerns.³⁴ Responses from Indigenous communities were carefully reviewed and served to further inform Canada's understanding of Indigenous communities' issues and 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 Canada's interest in avoiding or minimizing potential adverse impacts from the Project on Indigenous Interests.

During the NEB hearing, Indigenous 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 to understand, on a broad level, the issues and concerns of potentially affected Indigenous communities that did not participate in the NEB Review but did engage in correspondence with Canada, expressing support for, or raising similar issues to, those noted by intervenors in the NEB hearing.

Direct Crown Consultation During the NEB Hearing

During the summer of 2015, Canada responded to various procedural concerns raised by Indigenous communities by placing a renewed focus on building relationships between Crown officials and Indigenous communities as a complement to the NEB Review. Canada increased efforts to consult potentially affected Indigenous communities directly, in addition to its reliance on the NEB process. Consultations took place through meetings, letters, emails and phone calls designed to enable Indigenous communities to:

- bring issues and information to the NEB and participate in the hearing;

³⁴ <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2791135&objAction=browse&viewType=1>

- participate in direct discussions with Canada about procedural questions or concerns and potential impacts from the Project on Indigenous Interests;
- review and comment on the draft NEB conditions (note: the MPMO offered non-intervenor Indigenous communities an opportunity to share comments on the draft NEB conditions directly with the MPMO); and
- inform the development of the 2016 CCAR.

The MPMO maintained a consultation log to track all interactions between the Crown and individual Indigenous communities or collectives throughout the process.

Excluded Period

In July 2015, the then-Minister of Natural Resources announced that Steven Kelly, an engineer, would be appointed as a permanent Board Member to the NEB. Mr. Kelly and his then-firm, IHS, had submitted expert evidence on behalf of the proponent and as part of the TMX hearing.

The Panel considered this matter and, on August 21, 2015, ruled that the evidence in question should be struck from the record — in order to avoid any apprehension of bias given that Mr. Kelly would be joining the NEB in the near future. As a result of this excluded period, oral summary arguments involving Indigenous community intervenors would be postponed (previously scheduled for September 2015). For more context, please see the [NEB Record](#).

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 completion of the hearing and extended, to January 12, 2016, the opportunity for participants to comment on the draft conditions.

On October 22, 2015, the NEB released Procedural Direction No. 19, which noted that oral summary arguments would take place between January 18 and February 12, 2016, and indicated that its 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 Indigenous communities to provide procedural updates on the NEB Review and consultation process. This correspondence encouraged Indigenous communities to make use of the extended period for commenting on the draft NEB conditions. Canada also offered opportunities to meet with Indigenous communities to discuss the consultation process and provide their preliminary views on the NEB's draft conditions.

The MPMO offered to meet with Indigenous communities 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 discuss the consultation process, related procedural matters and the draft NEB conditions for the Project.

In October 2015, the MPMO officials participated in the Kamloops Pipeline Summit attended by Indigenous communities that were being consulted on the Project. The officials presented information on how Canada approaches consultations 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 Indigenous 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 for the NEB's draft conditions. It also noted that Crown–Indigenous community dialogue on potentially outstanding issues would begin with a series of 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 Indigenous communities as another reminder of the NEB's revised deadline of January 12, 2016, for comments on its draft conditions as part of written argument-in-chief. This correspondence also invited Indigenous communities that 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 Indigenous communities with respect to the NEB review process and the extent to which Canada could rely on this process to support its consultation and accommodation obligations. As well, many Indigenous communities expressed a desire to work in partnership with Canada to implement a consultation process that would meet commonly held objectives.

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

- to work cooperatively and collaboratively with Indigenous communities during consultation on the Project;
- to communicate with Indigenous communities 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 gather input from potentially impacted Indigenous communities regarding their concerns about the Project; and
- to listen to the issues and concerns raised and to create an environment that helps identify options to further avoid, mitigate or accommodate any outstanding concerns related to the Project.

As part of this correspondence, Indigenous communities 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. This experience, as well as a detailed review of Indigenous communities' arguments-in-chief, enabled federal officials to identify potential outstanding issues, including adverse impacts of the Project.

At the oral summary argument hearing in Calgary, the Crown Consultation Lead offered Panel members the opportunity to question Canada on any aspect of its intended approach to consultation.

3.4.3 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 and 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. They also provided 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 Indigenous communities through the NEB process or direct consultations with Canada.

On January 18, 2016, the MPMO sent letters to all potentially affected Indigenous communities to note Canada'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 Canada'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 post-NEB hearing phase.

On January 27, 2016, the federal government announced interim measures to support decisions on major resource projects. The following principles would guide these decisions during the interim period:

- 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.
- Decisions will be based on science, traditional knowledge of Indigenous peoples and other relevant evidence.
- The views of the public and affected groups will be sought and considered.
- Indigenous peoples will be meaningfully consulted, and, where appropriate, impacts on their rights and interests will be accommodated.
- Direct and upstream greenhouse gas emissions linked to the projects under review will be assessed.

In order to meet these commitments, the GiC extended the time limit for a decision from three to seven months to allow further Indigenous consultation. In Budget 2016, the government also 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 Indigenous communities and adjusted its work plans and approach for the post-NEB hearing phase of consultations by dividing the extended time period into two rounds. Through a series of emails, phone calls and subsequent correspondence, the MPMO extended invitations to approximately 100 individual Indigenous communities to meet with federal government officials in a first round of meetings prior to the release of the NEB Report. Such meetings had not previously been contemplated.

3.4.4 POST-HEARING CONSULTATION

A first set of face-to-face meetings with Indigenous groups took place between the close of the NEB hearing record and the release of the NEB Recommendation Report on May 19, 2016. During this period, individual or collective consultation meetings were conducted with over 65 Indigenous

communities. The focus of these meetings was to build relationships and ensure that Canada understood procedural and substantive concerns in respect of the Project.

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

Federal officials shared meeting records and lists of follow-up action items for review and comment. The mandate of Canada's Consultation Team was to listen, understand, engage and report the perspectives of Indigenous communities to senior officials. The Minister of Natural Resources and other ministers were provided with a summary of these meetings.

Following the close of the NEB hearing record in mid-February, the MPMO sent letters to all potentially affected Indigenous communities. These letters outlined the government's interim measures; how Canada intended to use the additional four months of government decision-making time; and plans to offer additional participant funding. The letters also provided information on how Canada assesses the depth of consultation owed to each group and noted the forthcoming opportunity to comment on the draft 2016 CCAR.

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 two-fold: first, to gather feedback from Indigenous communities on the NEB Report and, second, to identify, consider and attempt to address outstanding concerns and potential adverse impacts that were not addressed by the NEB's conditions and the proponent's commitments.

By mid-July 2016, all Indigenous communities involved in consultation with Canada were invited to apply for additional participant funding to support ongoing consultation activities — including participation in meetings and the provision of written comments on the draft 2016 CCAR.

Canada's representatives endeavoured to meaningfully respond to all questions from Indigenous communities. As with the first set of meetings in the spring, summaries were prepared and shared back with the groups for comment.

In addition to conditions imposed by the NEB, the government indicated that it would propose two principle initiatives: an Indigenous Advisory and Monitoring Committee and an Economic Pathways Partnership. These initiatives aim to address, avoid and mitigate the majority of potential and known impacts to Aboriginal rights associated with TMX and to respond to broader issues raised during consultations — namely, Indigenous communities' role in project governance, oil spill response and economic benefits.

Draft 2016 Consultation and Accommodation Report

In August 2016, the draft 2016 CCAR was shared with Indigenous communities for written comment and discussion. Indigenous communities were asked to respond within 30 days, although comments were accepted into late October. Through this review process, Indigenous groups were provided the opportunity to comment on the following aspects of the draft report: characterization of the Indigenous group's participation in the consultation process; strength of claim; depth of consultation; potential impacts on Indigenous Interests; and any outstanding concerns raised, as well as their views as to the status of those concerns (e.g., were their concerns addressed by NEB conditions, proponent commitments or other accommodation measures proposed by the Crown).

Separate Submission

In addition, Indigenous communities were afforded 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 2016 CCAR, was provided directly to GiC to inform its decision on the Project.

Inaccuracies or concerns highlighted by Indigenous groups were noted by Consultation Teams in their discussions with groups and resulted in changes to the CCAR and the associated annexes.

3.4.5 2018–2019 CROWN CONSULTATIONS

Canada's Participation in the NEB Reconsideration Hearing 2018–2019

Canada participated in the NEB reconsideration process by observing the oral traditional evidence (OTE) hearings, filing an opening statement and written evidence and responding to information requests (IR) posed by the NEB and Intervenors.

On October 31, 2018, Canada filed an opening statement and written evidence in response to the NEB's IR that was issued on October 12, 2018. This evidence, filed as [Part 1](#) and [Part 2](#), consisted of specialist or expert information or knowledge related to the reconsideration hearing, in particular, the matters of greenhouse gas emissions; SARA-list species; Southern Resident Killer Whales; marine birds; marine oil spills; marine safety, navigation and disturbance; national parks and national marine conservation areas; mitigation and monitoring measures for human health effects; and mitigation, accommodation and monitoring measures proposed by Indigenous groups.

On December 10, 2018, Canada responded to the November 27, 2018, information requests from the NEB ([filing A6L8X2](#) and [filing A6L8X5](#)). Canada provided a point-by-point response to each of the 56 IRs and included a federal commitment tracker, which catalogued the various federal commitments

to meeting concerns and listed the concerns raised by Indigenous groups with cross-references to Canada's responses and proposed accommodations to them.

Between December 10 and 31, 2018, Canada responded to 798 other IRs from intervenors.

Between December 28 and 31, 2018, Canada responded again to the following intervenors:

- [Adams Lake, Ditidaht, Heiltsuk, Little Shuswap Lake, Living Oceans, Metro Vancouver, Pacheedaht](#)
- [Coldwater, Musqueam, Neskonlith, the Province of British Columbia, Snuneymuxw, Squamish, Stz'uminus](#)
- [Cheam, Chawathil, Kwantlen and Seabird Island First Nations and Sto-lo Tribal Council, Nooaitch Indian Band, Sto-lo Collective](#)
- [City of Burnaby, Cowichan Tribes, Driftpile Cree Nation, Georgia Strait Alliance, Indigenous Caucus of the Indigenous Advisory and Monitoring Committee, Louis Bull Tribe, NEB, Tsuut'ina, Tsartlip and Tsawout, Whitefish Lake First Nation](#)

Finally, on January 17, 2019, the Crown filed an [argument-in-chief](#) detailing the steps that the Crown had taken, and would continue to take, in the reconsideration process.

Task Team Activities in Re-initiated Phase III Consultations

Early activities

Following the government's decision to re-initiate Phase III Consultations in October 2018, Canada established a whole-of-government task team within Natural Resources Canada to lead the efforts. Planning and preparation for consultation began immediately, including discussions with Justice Iacobucci on designing a consultation approach that would respond to direction from the Federal Court of Appeal and guide a meaningful, two-way process.

The task team also researched and analyzed potential outstanding issues and gaps remaining from the 2016 consultations — including analyses of what had transpired since the initial project decision. This preparatory work was done concurrently with early ministerial engagement and the recruitment of additional consultation officials so that teams would be equipped with a comprehensive, up-to-date analysis as they began consultation discussions with Indigenous groups.

In November and December 2018, Justice Iacobucci³⁵ held four roundtable meetings in B.C. and Alberta that were attended by 68 Indigenous groups. The purpose of these meetings was to explain the role of the Federal Representative more fully, introduce the government's initial consultation

³⁵ The oversight and guidance role of Justice Frank Iacobucci is reflected more fully in Chapter 2, section 2.1.4 under *Federal Representative*.

approach, seek feedback from Indigenous groups and adjust the consultation approach to reflect the roundtable feedback. Discussions at the roundtables included a wide range of topics: overall comments on the consultation approach and its scope; Indigenous participation in the consultations and the Project; potential environmental impacts; concerns about rights and titles; and, accommodation measures offered by the government. Indigenous groups also expressed concerns regarding the various roles to be played by the Government of Canada in light of its recent purchase of the Project.

Following these roundtable meetings, Canada's consultation approach was adjusted to reflect the input received from Indigenous communities. A final document summarizing the approach was shared with all potentially impacted Indigenous communities and posted on the government's website for the Project in February 2019.

Nine³⁶ Crown Consultation Teams, including three Consultation Leads³⁷ and over 60 officials, were established and given a clear mandate to carry out the consultation plan. This consultation plan would include individually tailored face-to-face meetings with representatives of Indigenous groups, as well as technical working groups, conference calls, correspondence and, where desired, workshops to respond to Project-related questions, including proposed accommodations.

Early engagement and relationship building began in December 2018 with informal meetings between Consultation Leads and Indigenous groups to hear their expectations for the process.

Substantive consultations began in January 2019.

Consultations getting underway

Face-to-face consultation meetings focused on establishing meaningful and responsive two-way dialogues. The early goal was to identify and clarify outstanding impacts on Indigenous Interests and respond to the concerns of each Indigenous group. This was an ongoing exchange pursued both at the table and through correspondence, and intended in all cases: to be responsive; to ensure multiple attempts were made to find appropriate solutions; to problem-solve collaboratively, wherever possible; and, wherever collaborative solutions were not possible, to explain the Crown's interests or positions. Where the concerns expressed were Project-related, the responses involved proposed accommodation and mitigation measures. In the case of non-Project-related concerns, and recognizing that Indigenous groups may view issues in an integrated way, Consultation Teams endeavoured to leverage the whole-of-government approach in an effort to connect Indigenous groups to other departments, programs or platforms mandated to address their concerns.

³⁶ Initially, eight consultations teams were assembled at the beginning of 2018 consultations. However, an additional team was established in February 2019 to consult with new Indigenous groups added to the Crown list. See Chapter 2, section 2.2.2. for more information.

³⁷ For further details, see Chapter 2, section 2.1.3 under *Crown Consultation Teams*.

Ongoing briefing and supervisory activities

As covered more fully in Chapter 2, the Minister of Natural Resources has been responsible for planning and implementing the Crown consultation and accommodation process. The Minister is also responsible for ensuring that the Crown consultation and accommodation process fulfils the Crown's constitutional duty to consult and upholds the Honour of the Crown. In this capacity, the Minister regularly updated the Cabinet Committee on Environment and Clean Growth on the consultation process and ensured that the Consultation Teams had the necessary mandates to engage in meaningful two-way dialogue, respond to solutions proposed by Indigenous groups and propose accommodation measures.

Justice Iacobucci provided additional guidance and advice to the government throughout the re-initiated Phase III consultation process. He holds regular meetings with senior management at Natural Resources Canada, Consultation Leads, Deputy Ministers and Ministers. These meetings include bi-weekly consultations and weekly teleconferences with senior government representatives from a range of departments. Justice Iacobucci has held meetings with the Prime Minister and the Cabinet Committee on Environment and Clean Growth to discuss the progress of consultations and provide advice on how best to move forward with mitigation and accommodation measures.

In addition, Privy Council Office (PCO) Senior Executive Advisor Serge Dupont was appointed to the Project in order to facilitate and provide policy oversight and coordination, as well as to provide advice on consultations and accommodations. Together with the Deputy Minister of Natural Resources Canada, Mr. Dupont co-chairs weekly meetings of the Deputy Ministers Oversight Committee in order to update and advise the Committee on progress. Mr. Dupont also participates in frequent teleconference and face-to-face meetings with Consultation Leads and team officials.

Consultation Leads provided ongoing updates, using a variety of communications tools, to understand concerns being shared by Indigenous groups and then to convey and coordinate responses with appropriate federal departments so that Indigenous groups received follow-up in a form that best suited their needs. This involved emails, phone calls, letters and convening the best knowledge-holders — from Deputy Ministers to technical experts — to engage virtually or in person. Within this context of ongoing engagement, Consultation Teams convened 402 face-to-face and telephone consultation meetings as of May 2019. Correspondence and meeting summaries were logged to maintain a complete record and support transparency and accountability throughout the process.

These meetings with Indigenous groups were held as often as possible while still ensuring that all parties involved had time to properly prepare and subsequently document the concerns and accommodation requests. The Consultation Teams were in ongoing communication with the Secretariat to relay Indigenous groups' concerns, impacts and requests for coordination of further action. Consultation Teams also corresponded frequently, in a timely and effective manner, with their

respective Indigenous groups. The annexes to this CCAR outline details of the consultation activities with each potentially impacted Indigenous group.

Communications With Indigenous Groups

Throughout the re-initiated Phase III consultations, the Crown remained in contact with Indigenous groups through their respective chiefs, councillors or legal representatives. While nine Consultation Teams were assigned to work individually with the 129 Indigenous groups, several pieces of correspondence have been centrally managed by the task team and provided to all groups to maintain consistency and promote transparency:

- October 5, 2018: Letter from the Honourable Amarjeet Sohi, Canada's Minister of Natural Resources, discussing the recent FCA decision, the Crown's duty to consult and the plan to re-initiate the Phase III consultation process.
- November 7, 2018: Letter from Christyne Tremblay, Deputy Minister of NRCan, initiating a meaningful two-way dialogue for Phase III consultations and outlining an initial participant funding proposal.
- November 30, 2018: Letter from Jeff Labonté, Assistant Deputy Minister, Major Projects Management Office, providing the necessary information to apply for participant funding.
- February 19, 2019: Letter from Deputy Minister Tremblay providing an update on the consultations and sharing the final version of the document setting out the government's approach to consultation.
- March 15, 2019: Letter from the Honourable Bill Morneau, Minister of Finance, stating Canada's interest in engaging with Indigenous groups on the topic of economic participation — including equity and revenue sharing — should the government approve the Project.
- April 1, 2019: Letter from Consultation Leads to Indigenous groups to provide more information about accommodation measures being offered by the government in the reinitiated Phase III consultations on the proposed Project.
- April 17, 2019: Letter from the Honourable Amarjeet Sohi, Canada's Minister of Natural Resources, to Indigenous groups informing them of an extension for the decision on the Project.

In addition, the task team launched the [government's TMX website](#). The website provides information related to the re-initiated Phase III consultations, as well as information on:

- The Project, including a history of the pipeline, an explanation of ownership of the pipeline system and an interactive map;
- The previous consultation processes, including Indigenous consultations, public engagement and actions related to pipeline and marine safety;

- The regulatory processes, including the NEB reconsideration review and the decision-making process; and
- The re-initiated Phase III consultations including roles and responsibilities, an approach to consulting with Indigenous groups, respecting the relationship with Indigenous peoples, recognizing and implementing Indigenous rights, and the TMX Indigenous Advisory and Monitoring Committee.
- Routine updates — including a *What's New* section to highlight key milestones.

Ministerial Engagement in Re-initiated Phase III Consultations

In October and November 2018, Minister Sohi met with 18 Indigenous groups to discuss Canada's decision to re-initiate Phase III consultations and the ongoing process for the Project. Overall, Minister Sohi held 46 meetings with over 65 Indigenous groups along the Project route to help in building relationships and supporting meaningful engagement.

The following are some examples of the Indigenous groups Minister Sohi met with, and the topics they discussed:

- On October 4, 2018, the Minister met with Whispering Pines First Nation/Clinton Indian Band, Stk'emlipsemc te Secwe'pemic Nation (SSN), Upper Nicola and Lower Nicola Indian Bands. Topics included: potential Project-related impacts; resource taxation; revenue sharing and equity participation; and remediation measures and compensation through spillage fees.
- On October 5, 2018, Minister Sohi met with Cheam First Nation, Ts'elxweyeqw Tribal Council and the Stó:lō Tribal Council. Topics included: their frustration with the previous NEB process; the NEB reconsideration process; developing a monitoring committee; recognition to rights and title; and the groups' request that the Crown will consult and follow through with accommodations where appropriate.
- On October 31, 2018, Minister Sohi met with Squamish, Musqueam and Tsawwassen First Nations, who brought forward many pertinent points. Topics included: building trust among Nations; the government's commitment to doing things the right way; the perceived lack of openness during previous consultation rounds; and the groups' respective concerns and outstanding issues.
- On November 1, 2018, the Minister met with Nooaitch Indian Band and Coldwater Indian Band. Topics included: outstanding concerns related to environmental impacts; economic opportunities for Indigenous groups; capacity-building for emergency response; and building trust and renewing genuine consultations.

- On November 2, 2018, the Minister met with Tsleil-Waututh Nation. Topics included: outstanding concerns related to environmental impacts; economic opportunities for Indigenous groups; capacity-building for emergency response; and building trust and renewing genuine consultations.
- On November 26, 2018, Minister Sohi held discussions with the Okanagan Nation Alliance, Simpcw First Nation, and Northern Secwepemc te Qelmuw Nation. Topics included: views on the project; impact on interests; a need for consent; and a co-developed consultation approach.
- On November 27, 2018, Minister Sohi met with Yale First Nation to discuss potential Project-related impacts to each Nation's concerns with respect to fishing and harvesting practices, mutual benefit agreements and reconciliation.
- On November 28, 2018, the Minister met with the BC Métis Federation. Topics included: the Federation's work with the proponent related to creating economic opportunities for members; the need for meaningful consultations; and financial matters such as participant funding.
- On January 22, 2019, Minister Sohi held two separate meetings with Lheidli T'enneh Band in Prince George, B.C. Topics included the consultation approach and the concerns of the Indigenous representatives.
- On February 14, 2019, Minister Sohi re-engaged with Coldwater Indian Band, Musqueam Nation and Tsleil-Waututh Nation. Topics included: potential impacts to marine life, waterways and rights; nation-to-nation relationship-building; and the government's plan to consult differently by engaging in meaningful, two-way dialogue.
- On March 14, 2019, Minister Sohi met with the leadership of Tsuu'tina, Sunchild Nation, Saddle Lake and Métis Nation of Alberta. Topics included: progress on the Phase III consultations process and the concerns of each Indigenous group.
- On March 15, 2019, Minister Sohi met with the leadership of Gunn and Mountain Métis, Papaschase, Metis Settlement General Council, and Enoch. Topics included: the ongoing consultation process; groups added to the Crown list; equity and revenue-sharing; and proposed accommodation measures.
- On March 25, 2019, Minister Sohi met with council and representatives from Tsawout First Nation, Malahat First Nation, Pacheedaht First Nation and Tsleil-Waututh Nation. Topics included: the consultation process and Canada's commitment to fulfilling its duty to consult; developing accommodation and mitigation measures; outstanding concerns and impacts on rights.
- On March 26, 2019, Minister Sohi attended meetings with Stó:lō Nation, Nlaka'pamux Nation Tribal Council, and Stk'emlupsemc te Secwepemc Nation. The Minister and Indigenous participants discussed progress on the ongoing consultation process; the proposed accommodation and mitigation measures made by the Crown and proponent (with a focus on marine safety, spill response, cultural impacts); and shared decision-making.

- On April 4, 2019, Minister Sohi met with Tsleil-Waututh Nation by phone. Topics included the United Nations Declaration on the Rights of Indigenous People; the economic viability of the Project; shared decision-making; and the need for additional environmental studies of interest to the Tsleil-Waututh Nation.

3.5 PARTICIPANT FUNDING

3.5.1 PROPONENT CAPACITY FUNDING

In 2016, the proponent provided approximately \$12 million in capacity funding, delivered through consultation agreements negotiated with specific Indigenous communities.

3.5.2 NEB PARTICIPANT FUNDING PROGRAM

The NEB administers a Participant Funding Program (PFP) to provide financial assistance to individuals, Indigenous groups, landowners and non-industry, not-for-profit groups to facilitate public participation in the project hearings.

Previous National Energy Board Hearing

On July 22, 2013, the NEB announced it would make \$1.5 million available under its Participant Funding Program for the previous Trans Mountain Expansion Project hearing and that a higher amount could be considered once applications for funding had been received.

On July 16, 2014, the NEB announced it had doubled the amount of available funding to \$3 million due to the high level of interest.

By the November 28, 2014, deadline for applications, the NEB had received 95 applications requesting more than \$24 million.

The NEB offered 54 eligible Indigenous 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 Indigenous communities directly impacted by the decision to strike from the hearing record the evidence prepared by Mr. Kelly. Overall, awards to Indigenous intervenors averaged \$43,626 (\$5,000 higher than the average for non-Indigenous recipients). They ranged from a minimum of \$1,250 for individual travel to \$550,000 for a collective of 16 Indigenous communities.

National Energy Board Reconsideration Hearing

On September 26, 2018, the NEB announced a simplified funding process to reduce the administrative burden for the reconsideration hearing. Eligible groups could request up to \$80,000 and individuals up to \$12,000 to participate in the hearing. The NEB received 76 applications requesting a total of \$5,217,760.

After reviewing the applications, the NEB recommended awarding \$4,981,760 to 69 recipients. Indigenous groups account for 82 percent of the funding awarded.

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/lctnfnfnd/trnsmntnxpnsn-eng.html>.

3.5.3 B.C. ENVIRONMENTAL ASSESSMENT OFFICE FUNDING

EAO offered capacity funding to Indigenous communities on Schedule B of the Section 11 Order issued under the B.C. *Environmental Assessment Act* that stated they are actively participating in the EAO assessment process.

EAO offered individual Indigenous communities \$5,000 and Indigenous community collectives \$10,000. These funds were provided to assist with Indigenous communities' participation in consultation activities such as document review and meetings.

3.5.4 FEDERAL FUNDING

Initial Consultation Process

On three occasions, the Crown offered participant funding to Indigenous groups (2015, 2016 and 2018). The federal Participant Funding Program supported Indigenous participation in consultations 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 Indigenous Communities (as of October 25, 2016)

<i>Round 1</i>	Total amount offered in Round 1	\$753,129
	Total amount provided ³⁸	\$471,129
	Total amount dispensed ³⁹	\$187,847
<i>Round 2</i>	Total amount of outstanding funding from Round 1 ⁴⁰	\$282,000
	Total amount offered in Round 2	\$1,259,000
	Total combined offers	\$1,541,000
	Total amount provided ⁴¹	\$933,446
	Total amount dispensed ⁴²	\$4,250
<i>Total</i>	Total funding offered to Indigenous communities (in Rounds 1 and 2)	\$2,012,129
	Total funding dispensed to Indigenous communities (in Rounds 1 and 2)	\$192,097

Timing: Initially, the MPMO planned for the post-NEB hearing phase of consultations 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 Indigenous communities 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 Indigenous communities were signed between August and November 2015. However, in early 2016, additional groups expressed interest in accessing funding following the MPMO's correspondence in February 2016 and consultation meetings that took place between February and May 2016. The 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 considered in determining eligibility for participant funding and the levels of funding provided. Individual funding offers were based on four criteria: the initial depth of consultation assessment; the group's level of participation in the NEB hearing (i.e., intervenor, commenter 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 they represented.

³⁸ As per signed contribution agreements between NRCan and Indigenous communities or collectives.

³⁹ As per claims submitted to CEAA for reimbursement.

⁴⁰ Amount of funding offered in Round 1 but for which groups did not sign a contribution agreement.

⁴¹ As per signed contribution agreements between NRCan and Indigenous communities or collectives.

⁴² As per claims submitted to CEAA for reimbursement.

In total, the MPMO offered \$753,129 in participant funding to 99 Indigenous communities in the first round of participant funding (76 individual groups and four collectives). Of the 99 groups offered funding, 60 Indigenous communities (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 percent uptake rate by Indigenous communities on participant funding offers. The total amount allocated under these contribution agreements was \$471,129.

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 Indigenous communities, whereas some groups were not eligible for funding in the first round, due to the distance of Indigenous communities from the Project footprint or to the lack of participation in the NEB process. Table 9 summarizes the allocation methodologies for both rounds of consultation funding. Annexes to this CCAR indicate specific participant funding offers or disbursements made to each Indigenous community or collective.

The second round of consultation funding was based on several factors: the preliminary depth of consultation assessment; the Indigenous community'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 where 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 Indigenous communities offered participant funding in the first round did not sign a contribution agreement with the MPMO (totalling \$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 Indigenous communities (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 percent of Indigenous communities offered participant funding took advantage of the offer. The total amount allocated under Round 2 contribution agreements was \$933,446.

Table 9 – Summary of Funding Allocation Methodology for Round 1 and Round 2 of 2016 Crown Consultation

Criteria	Round 1	Round 2
General base funding for each group based on 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.	Indigenous communities included in the Crown consultation process were offered funding to support their participation in meetings or to provide written comments on the draft 2016 CCAR, regardless of the degree of the seriousness of impact from the Project.

Re-Initiated Phase III Consultations

The Minister of Natural Resources sent a letter on October 5, 2018, to Indigenous groups advising them of the re-initiation of Phase III consultations. The Participant Funding Program was subsequently re-designed to provide timely and accessible support to the iterative and meaningful two-way dialogue between the Crown and Indigenous groups.

The approach took into consideration three lessons learned from the initial consultations:

1. **Consultation Fatigue and Administrative Burden:** Indigenous groups are consulted on multiple projects and issues at the same time, and capacity funding is typically based on reimbursement. During 2016 consultations, Indigenous groups faced significant cash-flow constraints and high administrative burden, which resulted in lower levels of participation.
2. **Provision of Sufficient Funding:** In 2016, Canada provided participant funding offers of \$9,000 to \$26,000 to facilitate Crown consultations. Indigenous groups indicated that they were not provided with sufficient funding to participate and engage meaningfully in the process.
3. **Flexibility in Funds Usage:** A distinctions-based approach that recognized the unique governance structures, priorities and challenges facing individual communities was not applied to funding in the 2016 process.

NRCan completed a preliminary assessment of the Project's potential impacts on rights for all Indigenous groups based on the Crown's knowledge of Project-related impacts — including previous consultation findings. Based on this assessment, NRCan placed Indigenous groups on a spectrum of consultation from lower to deeper and allocated funding accordingly. Communities that had demonstrated Project-related marine shipping impacts were allocated higher amounts of participant funding. This approach was aligned with the level of funding NRCan and the Canadian Environmental Assessment Agency typically offer for similar environmental assessments and NEB projects that involve consultation as well as technical document review.

In early November 2018, the Deputy Minister of NRCan sent letters to 117 potentially impacted Indigenous groups advising that funding would be available to support communities' preparations for consultations and first meetings with the Crown.

The initial offers for communities owed a lower level of consultation were:

- \$24,600 with potential Project-related marine shipping impacts
- \$21,600 without marine shipping impacts

The initial offers for communities owed a middle level of consultation were:

- \$48,000 with potential Project-related marine shipping impacts
- \$35,000 without marine shipping impacts

The initial offers for communities owed a deeper level of consultation were:

- \$66,000 with potential Project-related marine shipping impacts
- \$56,000 without marine shipping impacts

As new information became available regarding Project-related impacts, the government later identified and sent offers of funding to 12 Indigenous groups that had not originally been included in the Crown's preliminary assessment of the Project's potential impacts on rights. This brought the total of potentially impacted Indigenous groups to 129.

Administration of Participant Funding

The Participant Funding Program was administered by the Canadian Environmental Assessment Agency. The fund provided financial contributions to eligible applicants in a fair and transparent manner. While participant funding was intended to support Indigenous groups' participation in consultation activities, it was not intended to cover all costs incurred. Follow-up reminders regarding available funding were sent by the Crown in December 2018 and February 2019 to Indigenous groups that had yet to apply.

A Different Approach to Participant Funding

For re-initiated Phase III consultations, the Crown has offered participant funding to all Indigenous groups on the Crown list through a single application process to minimize administrative processes. The government has also made advance payments available of up to 30 percent of the overall funding offer, which has particularly helped communities with limited cash flow.

A distinctions-based approach was implemented to take into account the unique circumstances of each Indigenous community. Flexibility was built into the funding program to ensure that communities could access funds to support a broad spectrum of activities.

Approximately \$2 million in participant funding was offered to support the initial consultation process. In comparison, approximately \$5 million in the Phase III consultations was offered to support Indigenous groups' participation, with provision to consider additional funds.

The government reserved funding to address three scenarios where Indigenous groups:

- Moved from one depth of consultation level to another (e.g., from moderate to high);
- Were added to the Crown list; and
- Identified unique concerns that required additional studies and technical expertise or additional work with the Crown (e.g., development of consultation protocols).

In the course of consultation activities, several Indigenous groups indicated concerns with the level of participant funding available to them to support re-initiated Phase III consultations. Requests for supplemental funding were made at meetings with the Crown or received through correspondence and were considered on a case-by-case basis.

New applications for additional participant funding were considered based on alignment with the following principles:

- Potential impacts from the Project and circumstances of the Indigenous group (i.e., depth of consultation, characteristics of the group, existing/known issues);
- Requests are substantiated on the basis of a demonstrable and justifiable need;
- Funds are required for use within the timeline of re-initiated Phase III consultations;
- Fairness and transparency;
- Consideration of the potential for additional funding among other Indigenous groups in consultation on the Project can be managed;
- Consideration of the potential for precedents for other major projects undergoing review;
- An activity has not already been funded (i.e., by the NEB, proponent, province); and
- Supplemental funding will be offered or added as an amendment to the agreement and provided once the initial funding has been accepted and partially expended.

For more details on specific allocations to Indigenous groups, please see the annexes to this CCAR.

4. Consideration of Impacts on Indigenous Interests and Concerns

INTRODUCTION

This chapter provides Canada's understanding of, and responses to, the impacts of the project on Indigenous Interests. It builds on the description of the new approach to consultations laid out in Chapter 2 and the description of the reinitiated consultation process itself in Chapter 3. It includes an account of Indigenous Interests as raised during the 2016 consultation process, as well as revisions and additions made since 2016 and those made in the course of the reinitiated 2019 Crown consultation process (Phase III consultations).

Canada's understanding of potential impacts on Indigenous Interests, including asserted or established Aboriginal and Treaty Rights and title, has been informed and refined through regulatory and consultation processes, including the re-initiated Phase III consultation process with potentially impacted Indigenous groups. Canada's responses to Indigenous issues presented here are also situated in an ongoing, iterative, development process with Indigenous groups at consultation tables.

This chapter will proceed in three parts. The first section provides a specific consideration of Canada's assessment of impacts to Indigenous Interests as a result of the Project. It includes a description of the potential impacts; a description of the conclusions put forward by the NEB in its 2019 Reconsideration Report, based on its study of the issue; Canada's understanding of the perspectives and concerns of Indigenous groups; and Canada's analysis of the impact of the Project on these rights and interests.

The second section sets out the steps taken so far to minimize or mitigate the Project's impacts on Indigenous Interests. These include: steps taken by the proponent to address Indigenous issues identified as part of the 2016 decision; general government measures that can support accommodation and have been put forward prior to, during and since the 2016 consultations; and the conditions and recommendations put forward by the NEB in its 2019 reconsideration report.

One of the distinct advantages to the whole-of-government approach to consultations that featured in the re-initiated Phase III consultation is that it placed representatives from several different branches of government at the consultation table with Indigenous groups. First-hand participation in discussions about specific Indigenous concerns with the Project allowed different branches of the government to better work together with Indigenous groups to develop a more complete sense of an appropriate response to a given issue. This approach also allowed for a clearer sense of the gaps that exist in current government programming. Where gaps exist in a certain area, it allowed for the development and proposal of specific, targeted, accommodation measures that would address particular concerns.

The third section of this chapter provides more detail on the cross-cutting accommodations measures that have been developed and proposed to address specific concerns raised as part of the re-initiated Phase III consultations.

Taken together, these sections will provide a picture of how Canada understands the impacts that the Project would have on Indigenous Interests and the ways in which these impacts can be minimized or mitigated, including through specific accommodation measures.

4.1 METHODOLOGY FOR ANALYZING INDIGENOUS INTERESTS AND CONCERNS

The Federal Court of Appeal (FCA) rendered its decision in *Tsleil-Waututh Nation v. Canada (Attorney General)* quashing the Governor-in-Council's (GiC) 2016 decision to approve the Trans Mountain Expansion Project (the Project) in 2018. Canada decided not to appeal the judgment of the FCA. Instead, following the release of the FCA's judgment, Canada:

- instructed the National Energy Board (NEB) to reconsider aspects of its recommendation, by, among other things, taking into account the effects of Project-related marine shipping; and
- re-initiated Phase III consultations with all Indigenous groups potentially impacted by the Project.

Marine technical advisor

On December 6, 2018, GiC appointed John A. Clarkson as a Marine technical advisor (Marine Advisor) to the NEB. The NEB asked the Marine Advisor to review the evidence filed by all parties, including the NEB draft conditions and recommendations to the GiC, as well as relevant evidence filed during

the original Project review in order to provide expert, technical and objective advice to inform the NEB's consideration of the issues in the Reconsideration. At the outset of his review, the NEB indicated that it was not the Marine Advisor's role to introduce new evidence, take a position on the outcome of the Reconsideration or advocate on behalf of any party to the proceeding. All advice provided to the Board by the Marine Advisor was provided through the Marine Advisor's written Argument-in-Chief, which was filed on January 15, 2019.

Overall, the Marine Advisor's report addressed 12 marine issues within the NEB's reconsideration process, including: the regulatory framework related to marine shipping; pilotage; tug operations; marine operations risk assessment; acceleration and deceleration of vessels; vessel no-go zones; restriction of commercial vessels at night; alternate marine shipping routes; and mitigation of underwater noise levels. In addressing these areas, the Marine Advisor drew from the evidentiary record of federal authorities and indicated support for one of the draft NEB conditions related to marine shipping (#133). The Marine Advisor did not specifically address the six other draft NEB Conditions related to marine shipping.

Of the thirteen draft NEB recommendations to the GiC, the Marine Advisor specifically identified support for recommendations #9, 10, 12 and 13. The Marine Advisor also cautioned that any measures to reduce underwater noise and marine mammal strike risk should remain feasible and not jeopardize vessel safety.

Canada's Reinitiated Consultation

Canada's new Phase III consultation process was designed to remedy the flaws identified by the FCA in Canada's previous consultation efforts. Among other things, in its August 2018 decision, the Court underscored that the concerns of Indigenous applicants, communicated to Canada, were both specific and focused and that this consideration may serve to make the reinitiated consultations process brief and efficient while ensuring it is meaningful.

With Canada's commitment to following the guidance of the FCA, this section reviews the specific concerns of Indigenous groups raised in 2016, as well as the concerns and impacts they have raised in the reinitiated consultation and through continuing dialogue in consultations.

Canada's modified approach to consultations is intended to ensure that Canada and Indigenous groups can:

- engage in a meaningful, two-way dialogue;
- collaborate to better understand Project-related impacts on Indigenous Interests;
- consult in a manner responsive to communities' individual needs; and
- develop potential accommodation measures to avoid or mitigate those impacts.

The Crown Consultation Team therefore has a mandate to discuss specific accommodation measures that may address impacts to Indigenous Interests. Where impacts cannot be mitigated or accommodated, Canada will provide an explanation for why the Crown cannot accommodate those impacts. The goal of this approach is not only to remedy the defects in the consultation and appropriate accommodation as expressed by the FCA but also to conduct consultations in a spirit of reconciliation with Indigenous peoples.

The new consultations build on the understanding of the issues and concerns developed through the 2016 consultation process, as well as on the interactions with Indigenous groups that followed, along with activities conducted by the proponent and programs put in place by the government that contribute to mitigating and reducing the potential of impacts.

Methodology and Participation

Chapter 3 set out the steps taken by the Crown in this consultation process that distinguish it from the 2016 process. It explains the Crown's whole-of-government approach and the new structure/organization of the consultation teams. The teams have doubled in size and now have a dedicated Consultation Lead, Consultation Director and a team of experts identified to work with each group. Chapter 2 also explained how officials took intensive training to learn about the historical context of Indigenous peoples in B.C. and Alberta, as well as how to meaningfully engage in dialogue. TMC representatives attended consultation meetings, when appropriate and acceptable to a particular group, where they participated in discussions on issues about the Project.

The new consultations began with Canada examining its records and the existing 2016 CCAR annex for each group on the Crown Consultation list in the spirit of building on the exchanges and knowledge gained from existing information, interactions and processes. Canada provided each group with its individual annex from the 2016 CCAR at the beginning of the 2019 consultation. This was done on the basis that an update to each CCAR annex would be required and offered through the new consultation process and that meaningful dialogue would help to validate and revise information on issues and concerns, together with work with Indigenous groups to reflect these changes as well as to remedy any missing information and assessments.

Throughout the 2016 and re-initiated Crown consultation processes, Canada kept track of Indigenous groups' comments, issues, interests and concerns raised about the Project. Information tracked by the NEB, proponent and provincial government assisted Canada in analyzing and responding to Indigenous Interests and concerns expressed during these consultation processes. Beyond issue tracking done by the proponent, the NEB and Canada, information on issues and how they were addressed is contained in meeting notes and meeting summaries, correspondence and exchange of other documents between Canada and Indigenous groups through the consultations. From these efforts, Canada also reassessed and affirmed its understanding of the impact on Indigenous issues. In certain cases where additional impacts on Indigenous Interests (i.e., above and beyond those

addressed in the 2016 process) were identified, the Crown assessment of the impact of the project was adjusted. This was addressed in the corresponding sections in the annex for each group.

In order to facilitate meaningful dialogue on the proposed Project, the Crown provided participant funding for each affected community and venues for two-way conversations. Wherever possible, when questions were raised in consultations, the Crown found the necessary information to answer them and brought relevant subject-matter experts to the consultation meetings or created technical tables to address specific concerns. The Crown also adopted an all-of-government approach to addressing the concerns and interests that were raised during consultations.

4.2 IMPACTS OF THE PROJECT

The Crown acknowledges that the project will have an impact on Indigenous Interests in a number of ways. This section will provide greater detail on the impacts on Indigenous Interests that have been identified by Indigenous peoples, the NEB and Canada, while subsequent sections will set out some of the ways in which these impacts can be avoided or mitigated.

Specifically, this section looks at impacts the project could have on Indigenous Interests in these areas:

- Impacts on Hunting, Trapping and Gathering
- Impacts on Freshwater Fishing
- Impacts on Marine Fishing and Harvesting
- Impacts on other Traditional and Cultural Practices
- Impacts on Aboriginal Title
- Elements of Common Concerns from Indigenous Groups
 - Land-related spills from accidents and malfunctions
 - Marine impacts
 - Health and human impacts
 - Cumulative effects
 - Environmental impacts
 - Cultural and social impacts

Each of these areas is considered in greater detail to examine:

- Potential impacts — Canada’s understanding of the potential impacts on Indigenous Interests, including asserted or established Aboriginal and Treaty Rights and title;
- NEB conclusions — issue specific conclusions from the 2019 NEB Reconsideration Report;
- Indigenous perspectives — Canada’s understanding of the perspectives and concerns of Indigenous groups on this specific Indigenous interest. Note that each group was also provided a group-specific annex for comment. These annexes provided more contextual detail related to particular Indigenous communities. In addition to being invited to contribute to group-specific annexes, each group was invited to provide an annex in its own voice.
- Crown analysis — Canada’s analysis of the impact on Indigenous rights and interests.

Having detailed the impacts on Indigenous Interests in this section, subsequent sections (Sections 4.2 and 4.3) will deal with the ways in which these impacts can be minimized or mitigated through the NEB conditions, actions taken by the proponent and actions taken by the federal and provincial governments.

4.2.1 IMPACTS ON HUNTING, TRAPPING AND GATHERING

Potential impacts

In its review of the Project, Canada identified that routine construction and operation of new pipeline segments, including terminals, pumping stations and expanded storage facilities, could adversely impact hunting, trapping and gathering activities for those groups who exercise rights within the Project footprint.

The Project impacts could include:

- 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-Indigenous 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 to 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 Indigenous groups; and
- changes to water and soil quality.

NEB Conclusions

With regard to these potential effects, the NEB concluded in its 2019 report (page 319) that the ability of Indigenous 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 traditional land and resource use (TLRU) would be temporarily interrupted.

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

- is unlikely to cause significant adverse effects to soil and soil productivity;
- is unlikely to cause significant adverse effects to rare plants, lichens and vegetation communities of concern;
- will produce no net-loss of old growth forests within designated Old Growth Management Areas;
- is unlikely to cause significant adverse effects to wetlands, wildlife and wildlife habitat (page 204), caribou, grizzly bear and wildlife species at risk; and
- is unlikely to cause significant adverse effects to surface water quality and quantity or to groundwater.

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 Westridge Marine Terminal (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 due to 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 in that riparian habitat may not return to pre-construction conditions within the life of the Project.

The NEB has put in place four overarching conditions (#1, 2, 3, 4) that the proponent must meet across the life cycle of the project, including compliance with all 156 NEB conditions unless otherwise directed and with the commitments the proponent has made regarding environmental protection and engineering and safety. These overarching conditions are relevant for all potential impacts on Indigenous groups' interests, including rights, outlined throughout this chapter.

Several NEB conditions directly contribute to avoiding or mitigating potential impacts on Indigenous groups' hunting, trapping and gathering practices, including:

- 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). For example, NEB condition #40 requires the proponent to file a Rare Ecological Community and Rare Plant Population Management Plan five months prior to commencing construction. The Plan will include avoidance and mitigation measures to be implemented during construction and operations. These measures concern rare plant and lichen species that have been identified through available and applicable Indigenous traditional land use and traditional ecological knowledge.
- 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). For example, five conditions (#36, 37, 128, 149, 150) explicitly require the proponent to undertake work related to caribou habitat protection across the life cycle of the project. The proponent must conduct a habitat assessment and develop a habitat restoration plan before construction; develop an offset measures plan for residual impacts on caribou habitat prior to operation; and develop a monitoring program and report on results during operation.

Other conditions (#96, 97, 98, 148) indirectly support objectives to avoid and mitigate potential impacts on Indigenous groups' Interests, including hunting, trapping and gathering. For example, condition 98 requires the proponent to file a Plan for Indigenous Group Participation in Construction Monitoring two months prior to construction that describes Indigenous groups' participation in monitoring activities for the protection of traditional land and resource use.

Indigenous Perspective

Many Indigenous groups stated that they have a significant reliance on food gathered from the land as part of their normal diet and that 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. Indigenous groups also identified many concerns related to environmental effects of the Project on hunting, trapping and plant gathering activities.

Indigenous groups are concerned about the impacts on a wide variety of wildlife species, including species at risk, through habitat loss and fragmentation; an increase in predation resulting from the creation of animal corridors; wildlife displacement; and sensory disturbance. Indigenous 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.

Indigenous 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. Indigenous 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-Indigenous recreational hunters. The result is that Indigenous groups are of the view that fewer hunting opportunities will be available for Indigenous hunters should the Project proceed.

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

Indigenous 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. Indigenous groups were concerned that the Project could impede access to hunt, trap and gather plants, and that this potential restriction 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 the possible effects on the health of community members that consume country foods.

Crown Analysis

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

For all 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, with short-term effects including woodland caribou mortality risk, some weeds/invasive species and medium-term effects 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, grasslands and terrestrial wildlife including woodland caribou and grizzly bear. The Project's adverse effects on species relied upon for hunting, trapping and plant gathering activities were found by the NEB to range from reversible to permanent.

Canada notes that there are differing views on the magnitude and significance of cumulative effects over a wide array of valued components related to hunting, trapping and plant gathering.

The baseline information related to the construction and operation of the pipeline Right of Way (RoW) and associated facilities is well understood. In Canada'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 and long-term in duration for operations and maintenance over the Project life cycle.

However, Canada notes that many Indigenous groups maintain that the cumulative effects of development activities generally have severely impacted their ability to exercise their Aboriginal and Treaty Rights to hunt, trap and gather plants. Indigenous harvesting activities continue to be adversely affected by development, with fragmentation of lands, loss of access to hunting and trapping areas, encroachment of development 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, which reflects cumulative effects of past development activities.

B.C. EAO Additional Conditions

In consideration of concerns raised by Indigenous 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 of B.C., the British Columbia Environmental Assessment Office (EAO) has imposed 37 conditions that the Province attached to the provincial EA certificate. Conditions particularly relevant to avoiding or mitigating impacts on Indigenous groups' hunting, trapping and gathering include:

- EAO Conditions 10 and 12 require Aboriginal consultation and Aboriginal construction monitors;
- EAO Conditions 16–20 and 22 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 Indigenous groups in the development of the plans; and
- EAO Condition 24 requires the proponent to prohibit hunting, fishing, trapping and plant gathering by employees and contractors.

The potential impacts of the project on Indigenous Interests associated with hunting, trapping and gathering activities for each Indigenous group are discussed in the annexes to this report.

4.2.2 IMPACTS ON FRESHWATER FISHING

Potential impacts

Early on in the review of the Project, Canada identified that routine construction and operation of new pipeline segments, terminals, pumping stations and expanded storage facilities could result in adverse impacts to freshwater fishing for those groups exercising this asserted or established Aboriginal or Treaty Right within and downstream of the proposed pipeline RoW and related facilities.

The Project could impact freshwater fishing through the following potential effects:

- Temporary loss of or impeded access to traditional fishing sites;
- Loss or alteration of instream and riparian fish habitat at pipeline watercourse crossings; and,
- Temporary reduction in water levels or quality.

NEB Conclusions in Relation to Potential Impacts on Freshwater Fishing

During the NEB hearing and Crown consultation with Indigenous groups, concerns were raised regarding the potential impacts of the Project on fish, in particular, Pacific salmon and steelhead, as

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 aquatic 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 on 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 likely not constitute serious harm to fish as defined 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/or destruction of critical habitat or require authorizations or permits under the *Fisheries Act* and/or the *Species at Risk Act* (SARA). 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 for issuing potential *Fisheries Act* authorization(s) and/or SARA permits. The NEB did not anticipate impacts on critical habitat of the Nooksack Dace and Salish Sucker (listed as Endangered under Schedule 1 of the SARA), 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 (pages 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 to 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.

Ten NEB conditions (#43, 47, 71, 75, 92, 108, 109, 110, 151, 154) explicitly help avoid or mitigate potential impacts on Indigenous groups' freshwater fishing through a focus on fish and fish habitat. For example, condition #109 requires the proponent to receive the *Fisheries Act* authorizations, as needed, for instream activities, which protect against the impacts of construction to fish and fish habitat.

Eight of the conditions outlined above also contribute to watercourse and water quality protection (#43, 47, 71, 75, 108, 110, 151, 154), which also result in indirect protections to freshwater fishing. For example, condition #75 focuses both on fish and fish habitat and on watercourse and water quality by requiring the proponent to construct all watercourse crossings located in Nooksack Dace or Salish Sucker critical habitat using specific crossing methods as defined by Fisheries and Oceans Canada Recovery Strategies for the species.

Several additional conditions indirectly contribute to the objectives to avoid and mitigate impacts on Indigenous groups' freshwater fishing, including conditions exclusively related to water quality protection (#35, 39, 87, 113, 130) and/or watercourses (#48, 65, 67, 72, 74, 87, 94, 113).

Indigenous Perspective

Many Indigenous groups stated that they have a significant reliance on food gathered from the land and water as part of their normal diet and that access to this food is directly related to the health and well-being of their people.

Indigenous groups identified many concerns related to environmental effects of the Project on fishing activities, in particular, risks to marine and freshwater habitats important to salmonids in the Fraser River, where already stressed salmonid populations have been experiencing low returns in recent years.

Indigenous 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 due to Project-related activities.

Indigenous groups expressed concern with direct and indirect effects of the Project on social, cultural, spiritual and experiential aspects of their fishing activities, and with a sense of spiritual and cultural alienation. Indigenous groups in the Fraser Basin stated that salmon are a key species in their culture, and groups in B.C. interior have indicated a similar connection with steelhead. In these cases, the species is connected to community members' social well-being, spirituality, way of life and connection to their land.

Crown Analysis

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

For all the valued components 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. Canada 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 on fish and fish habitat. Canada 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 protect 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. Accordingly, the NEB reviewed and assessed effects on fish and fish habitat associated with the pipeline component. DFO's response to effects on marine fish and fish habitat and on marine mammals (including species at risk) associated with the marine terminal and marine shipping Project components is discussed in section 4.3.

If the NEB, through its review of works, undertakings or activities proposed at pipeline watercourse crossing (including consideration of avoidance and mitigation measures), determines that serious harm to fish is likely, then it will inform DFO that a *Fisheries Act* authorization under paragraph 35(2)(b) of the Act 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 that SARA permits and/or SARA-compliant *Fisheries Act* authorization(s) may be required.

If it is determined that serious harm is likely, then the proponent will be required to submit an application for authorization to DFO. DFO will review the application; conduct consultation with potentially affected Indigenous groups on the proposed works, undertakings or activities, avoidance, mitigation and offsetting measures; 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 Indigenous consultation in the regulatory phase should an authorization or permit be required.

The Project's adverse effects on 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 valued components 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 Canada's view, the construction and operation of the pipeline, WMT and associated facilities represent a low- to negligible-magnitude change from current baseline conditions pertaining to fish and fish habitat. The majority of effects — primarily in the biophysical context — are reversible within the Project life cycle. Adverse effects on traditional freshwater fishing practices are viewed by Canada as short-term in duration and frequency during the Project construction.

Canada notes that many Indigenous groups maintain that the cumulative effects of development activities and climate change have severely impacted their ability to exercise their Aboriginal and Treaty Rights to fish. 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, which reflects cumulative effects of past development activities.

B.C. EAO Additional Conditions

In consideration of concerns raised by Indigenous 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, the EAO also proposed a number of conditions, which the province attached to the provincial EA certificate. Conditions particularly relevant to avoiding or mitigating impacts on Indigenous groups' freshwater fishing include:

- EAO Conditions 10 and 12, which require Aboriginal consultation and Aboriginal construction monitors;
- EAO Condition 22, which requires an access management plan, including measures to avoid or mitigate disruption of the access by members of Indigenous groups carrying out traditional use activities. This plan establishes incremental requirements to the NEB condition and includes the requirement to consult Indigenous groups in the development of the plan; and
- EAO Condition 24, which requires the proponent to prohibit hunting, fishing, trapping and plant gathering by employees and contractors.

The potential impacts of the Project on Indigenous Interests associated with freshwater fishing activities for each applicable Indigenous group are discussed in the annexes to this report.

4.2.3 IMPACTS ON MARINE FISHING AND HARVESTING

Potential impacts

Early on in the review of the Project, Canada 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, the Salish Sea and the Strait of Juan de Fuca in the vicinity of the designated traffic separation schemes or marine shipping lanes.

The Project could adversely impact marine fishing and harvesting through the following potential effects:

- Loss or alteration of marine fish 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 Indigenous groups, such as the Southern Resident Killer Whale; and
- Environmental effects such as routine marine-related discharges, invasive species and air and light pollution.

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

For the TMRU activities directly affected by the WMT, the NEB concluded in 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, they would nonetheless be reversible. 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 Indigenous communities. The NEB acknowledges the concerns expressed by Indigenous groups about the effects on 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. Indigenous 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 on TMRU are low in magnitude.

The NEB concluded that marine shipping from the Project would disrupt Indigenous 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 Indigenous 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 on 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 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 in view of Trans Mountain's commitments to provide regular updated information on Project-related marine vessel traffic to Indigenous communities, the Board finds that adverse effects on traditional marine resource uses, activities and sites are not likely, and that the 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 in the area around Swiftsure Bank.

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

- The Project is not likely to cause significant adverse environmental effects to marine sediment and water quality, marine fish and fish habitat, marine mammals or marine birds;
- The impact of marine shipping on marine fish and fish habitat will be low-magnitude and reversible;
- Underwater noise from marine shipping will create long-term sensory disturbances for marine mammals, but this effect is reversible;
- Marine shipping lane utilization is expected to increase whether or not the Project is approved;
- The Marine Mammal Protection Program is meant to ensure that Trans Mountain participates in the development of industry-wide best practices;
- Project-related marine vessels would have some impact on humpback whales, other baleen whales and transitory killer whales, but these effects would be inconsequential;
- Effects of marine shipping on marine birds are expected to be long-term, but reversible and of low magnitude; and

- Disruption of Indigenous traditional marine use, such as through interference or collisions with marine tanker traffic, is unlikely due to existing regulatory standards. If the Project is approved, several conditions would either directly or indirectly avoid or reduce some of the impacts and concerns raised by Indigenous groups in respect of potential impacts on marine fishing and harvesting:
 - Three conditions for protection of fish and fish habitat (#92, 109, 151). For example, condition #92 requires that the proponent must file, at least two months prior to commencing construction, a summary of any relevant updates under the *Species at Risk Act* for species that have the potential to be affected by the Project. The summary must include, but not be limited to, avoidance measures, site-specific mitigation and post-construction monitoring.
 - Three conditions for protection of marine mammals (#92, 132, 151). For example, condition #132 requires the proponent to develop a Marine Mammal Protection Program that focuses on mitigating effects from the Project, including associated cumulative effects, on marine mammals.
 - 27 conditions in total directly relate to the WMT, several of which are applicable at several stages across the Project's life cycle and commit to emergency preparedness and response. These include conditions for pre-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 prior to commencing hydrostatic testing of any Project component (#113).

Four of the above-noted conditions for the WMT include various requirements to develop more detailed mitigation plans during the permitting phase, which have the potential to mitigate impacts to harvesting or cultural practices. These include:

- Condition 35 requires the proponent to develop a Marine Sediment Management Plan, which could include possible mitigations for harvesting such as: test dredges for gauging sediment behavior; use of silk screens to contain sediment; uplands disposal of dredge materials; and disposal at sea behind a berm.
- Condition 80 requires the proponent to develop a Noise Management Plan for construction at terminals and pump stations, which could mitigate impacts on harvesting by requiring use of alternative underwater techniques (e.g., underwater bubble curtains, isolation casing for piles).
- Condition 81 requires the proponent to develop a WMT Environmental Protection Plan. The Plan could mitigate impacts on harvesting by using a Fisheries Impact Study to determine what impacts the proposed project may have on Indigenous fisheries and on fish and fish habitat; developing and implementing an oyster shell replacement plan; and allocating support funds for the Lynn Creek Estuary Legacy Project. In addition, mitigations for impacts on cultural practices could include requiring Vancouver Fraser Port Authority (VFPA) officials — in response to complaints — to ask vessels to power down lights and boilers.

- Condition 83 requires the proponent to file the final design basis for the offshore pile foundation layout of the WMT at least three months prior to commencing construction at the WMT. The final design could include mitigations for impacts on harvesting such as those that ensure construction activities are carried out outside fish migration windows, or a requirement on the proponent to use steel instead of creosote-treated piles.
- While not explicitly dedicated to the WMT, Condition #98 requires that the proponent develop a Plan for Indigenous group participation in construction monitoring that includes a consideration of traditional marine resource use at the WMT. Possible mitigations for impacts on culture or cultural practices outlined in the Plan could include instituting archaeological chance-find procedures for construction activities and, in some instances, ensuring that Indigenous monitors are on site during works.

In addition to the conditions described above, several conditions are generally applicable to protecting marine fishing or harvesting activities in the vicinity of the Project. These include:

- Conditions #117 and #124, which require the proponent to report on and implement improvements to its Emergency Response Program, respectively. They also require that the NEB be provided with updates on changes to emergency response plans for the Edmonton, Sumas and Burnaby Terminals and the WMT; site-specific geographic response plans and strategies; and tactical plans for high-consequence areas.
- Five conditions for Project-related marine shipping (#91, 132, 133, 134, 144). Condition #132 requires the proponent to develop a Marine Mammal Protection Program that focuses on mitigating effects from Project-related marine shipping on marine mammals in the Salish Sea. Conditions #133 and #144 require the proponent to confirm that it has integrated several marine spill and response commitments into its oil transportation practices, such as tug escorts for tankers, before the first tanker is loaded at WMT and each year after commencing operations, respectively.

Condition 131 would have required 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. In its 2019 Report, the NEB converted this condition into a recommendation to the Government of Canada (Recommendation 12).

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 VFPA, including adherence to VFPA's guidelines regarding noise and light pollution for tankers docked at VFPA-managed anchorages (page 356).

Indigenous Perspective

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

Indigenous 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; and erosion and damage to intertidal and shoreline habitat from wakes.

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

Indigenous 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 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. Indigenous groups raised concerns that reduced harvests would impact economic, cultural and social structures within their communities through lack of connection with historical and current traditions.

Crown Analysis

The following is a discussion of the general factors that have been considered by Canada in assessing the potential impacts on Indigenous 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 impacts on 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,

Canada 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 due to extremely strong currents and available clearance and depth of the channel. It is expected that vessels less than 20 m (including fishing vessels) will 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 Bridge and the Second Narrows Bridge, 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 within 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 would likely result in serious harm to fish, requiring a *Fisheries Act* authorization under Paragraph 35(2)(b) of the Act. In February 2017, well before the 2018 Federal Court of Appeal decision quashing federal approval of the Project, the proponent submitted an application for a *Fisheries Act* authorization to DFO for expansion of the Westridge Marine Terminal. The application for authorization detailed site-specific effects on marine fish and fish habitat, avoidance and mitigation measures and fish habitat offsetting measures to counterbalance potential losses in fisheries productivity. DFO consulted with 33 potentially affected Indigenous groups for six months prior to issuing a *Fisheries Act* authorization for construction of the terminal expansion in September 2017 (see NEB Filing No. [A85941-3](#)). The *Fisheries Act* authorization issued included legally binding conditions that the proponent was required to follow, including conditions related to: mitigating impacts on fish and fish habitat; monitoring and reporting on the efficacy of mitigation and avoidance measures; implementation of offsetting measures; monitoring and reporting on the efficacy of offsetting measures; and reporting and engagement with the Indigenous Advisory and Monitoring Committee (IAMC).

Following issuance of the *Fisheries Act* authorization, DFO conducted monthly site visits to the Westridge Marine Terminal when construction was underway to ensure compliance with the Conditions of Authorization and the *Fisheries Act*. Many of these site inspections were conducted jointly with Indigenous monitors from the TMX IAMC. In collaboration with the IAMC, DFO has been able to consider Indigenous knowledge and views through its inspection process and, where possible, has strived to provide transparency in its decision-making processes.

In the event that the Project proceeds, it is likely that the works, undertakings or activities associated with the Westridge Marine Terminal expansion would again require a valid *Fisheries Act* authorization, and DFO will endeavour to continue conducting joint inspections with the IAMC Indigenous monitors at the Westridge Marine Terminal, as this cooperation has led to information sharing, knowledge transfer and better protection of environmental values.

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 Indigenous 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 for 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.

Canada acknowledges that navigation and harvesting require special attention, as there have been measurable decreases in the ability of Indigenous groups to practise these interests 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. Decisions on when, where and how grey water is authorized to be discharged are 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 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, Indigenous groups have managed to sustain minimal levels of harvesting while pursuing re-establishment of certain species and remediation of polluted areas. Canada understands that there are five Indigenous 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.

In regard to the impacts of marine vessel traffic, Canada 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, Canada notes that the Project would result in more marine vessel traffic in eastern Burrard Inlet, which could potentially impact Indigenous groups' activities in the area.

In general, Canada views that there are 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. Canada 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 occur daily. Navigation is already significantly affected by deep-sea vessel traffic in Burrard Inlet, but 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 as a result of WMT expansion would involve offsetting potential losses in fisheries productivity through a *Fisheries Act* authorization and a VFPA Project Permit. Consultation in this regard with potentially affected Indigenous groups has already previously been undertaken by DFO and VPFA in 2017. Canada is therefore of the view that there is low likelihood of impacts to marine harvesting activities of Indigenous groups as a result of the proposed Westridge Marine Terminal expansion.

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 Indigenous 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 Transport Canada's TERMPOL Report concluded that 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 are 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, Canada notes that mariners are obliged to follow the rules of the Collision Regulations to minimize vessel interference.

However, Canada recognizes that the cumulative impacts associated with existing shipping activity inform the context in which incremental impacts on Indigenous Interests from Project-related marine shipping activities must be considered. The designated shipping lanes may currently limit access to some Indigenous groups travelling across or within the shipping lanes to access hunting, trapping, plant gathering, fishing, marine harvesting or other sites of cultural or spiritual importance to Indigenous groups. Canada 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 navigation routes different from the existing traffic, which is confined to the designated shipping lanes and monitored by the Coast Guard's Marine Communications and Traffic Services. The use of designated shipping lanes helps to protect the safety and security of all users of the marine environment.

Canada 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 hour per day of potential interference. In other words, incremental interference would be possible up to two percent of the time. The NEB noted that all other marine vessels, including Indigenous 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 the shared safe use of the preferred shipping route. Canada 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 Indigenous 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 that 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 (i.e., that Trans Mountain should provide input to the appropriate authorities for the development of an engagement and awareness strategy with respect to safety of navigation and prevention of collisions targeting recreational boaters, fishing vessel operators and operators of small vessels) is a key measure to minimizing 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, Canada's assessment considered site-specific, social, cultural, spiritual and experiential aspects of exercising Indigenous Interests, including Indigenous group perspectives. For groups that 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 the operation of Project-related marine vessel traffic would further contribute to cumulative effects that are already jeopardizing the recovery of Southern Resident Killer Whales (SRKW). The NEB also acknowledged that the effects from Project-related marine shipping will contribute to an increase in the total cumulative effects, while noting that the environmental effects from Project-related marine vessels would be a small fraction of the total cumulative effects. While noting the likely significant adverse environmental effects on SRKW and Indigenous traditional uses associated with SRKW, the NEB stated these effects will be reduced by Project-specific mitigation measures covered by Trans Mountain commitments and Board conditions.

The NEB also examined the potential impact of sensory disturbances and permanent or temporary auditory injury from vessel-based underwater noise or from the marine terminals. The NEB is of the view that construction activities associated with the expansion of WMT are unlikely to result in permanent or temporary auditory injury to marine mammals and considers such effects to be low-risk. The NEB acknowledges that construction activities at WMT have the potential to result in sensory disturbances to marine mammals, but that these will be limited to a few individuals due to the limited abundance of marine mammals in the Burrard Inlet. The NEB recognizes that there is potential for SARA-listed species to be present in the RSA during construction activities, but given the proposed mitigation and the rare occurrences of these species in the RSA, the NEB is of the view that impacts on these species are low-risk.

The proponent presented acoustic modelling that led the NEB to the view that no temporary or permanent threshold shifts are expected as a result of Project-related marine vessel operations. The

NEB accepted the proponent's acoustic modelling and found that permanent or temporary auditory injury is not expected to occur as a result of Project-related marine vessel traffic. However, the NEB also found that underwater noise produced from Project-related marine vessels would likely result in sensory disturbances to marine mammals, including the SRKW.

The NEB was of the view that Project-related vessels have the potential to strike a marine mammal, which would likely contribute to the cumulative risk of marine mammal strikes. The NEB does not provide its view on the probability of such strikes. However, based on the expert knowledge of marine mammal researchers within the DFO, Canada is of the view that the probability of collision between Project-related vessels and Southern Resident Killer Whales, Humpback Whales or Stellar Sea Lions may be low. 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.

The NEB also considered whether the Project would have an impact on prey availability through a decrease in prey abundance or through potential contamination from routine operations of Project-related marine shipping. The NEB found that, despite some potential adverse, short-term effects on marine fish, routine operations of Project-related vessels would not materially decrease prey abundance or increase contamination. It also found that routine operations of Project-related vessels would not increase contamination.

Project-related marine shipping would, however, overlap with SRKW critical habitat along the shipping route and add to both underwater noise and the risks of strikes throughout that route. The NEB remains of the view that cumulative effects are already causing significant adverse effects on the SRKW and that Project-related marine shipping will add to those effects. The NEB, therefore, takes the precautionary view that, absent further mitigation, the designated project is likely to cause significant adverse environmental effects on SRKW because of its addition to cumulative effects.

The Marine Mammal Regulations made under the *Fisheries Act* prohibit the disturbance of marine mammals and set out the approach distance requirements for vessels. However, the approach distance requirements do not apply to vessels that are in transit. All vessels in Canadian waters are subject to the requirements of these regulations. At this time, Canada notes there are a variety of initiatives and programs underway (e.g., Enhancing Cetacean Habitat and Observation (ECHO), Green Marine programs and Canada's Whales Initiative) 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. Canada's Whales Initiative is similarly aimed at reducing key threats to at-risk whale populations and is discussed further below.

The NEB has required, through NEB Condition 132, that Trans Mountain develop a Marine Mammal Protection Program and undertake or support initiatives that focus on understanding and mitigating Project-related effects. The Board acknowledges that the Marine Mammal Protection Program is meant to ensure that Trans Mountain fulfils its commitments to participate in the development of industry-wide shipping practices. Trans Mountain believes that there is merit in developing a Marine Mammal Protection Program that addresses both potential Project-related effects and combined stressors on SRKW. The proponent has recognized that alterations in ship speed and routing can be effective mitigation measures to reduce ship strike risk and, although it does not own or operate the shipping vessels or possess the regulatory authority to require such alterations, the proponent suggested “special routing instructions” for Project-related vessels in its Reconsideration Hearing direct evidence (Filing [A6J6F4](#)).

Through the NEB Reconsideration hearing, the Crown provided a review of the potential effectiveness and feasibility of a variety of potential mitigation measures to reduce impacts from Project-related marine vessels on SRKW in several documents, including:

- Assessment of Vessel Noise within the SRKW Critical Habitat (Filing [A6J6Q4](#))
- Ship Noise Mitigation Risk Assessment (Filing [A6J6Q6](#))
- Canadian Science Advisory Secretariat Science Response 2018/050 (Filing [A6J752](#), PDF pages 25–47).

The NEB’s Reconsideration Report made two recommendations that apply to impacts of Project-related vessels on marine mammals. Recommendation 5 calls for the development (with Indigenous peoples, other marine users and other levels of government) of an offset program to offset both the increased underwater noise and increased strike risk posed to SARA-listed marine mammal (including SRKW) and fish species due to Project-related marine shipping at each relevant section of the marine shipping route, at the relevant times of the year; included in the recommendation is that each of the offset measures apply to all appropriate vessels (not just the Project-related vessels). Recommendation 6 calls for the consideration of specific measures, applicable to all appropriate vessels, and the public reporting of the feasibility and likely effectiveness of each.

The Crown acknowledges the NEB recommendations, as well as its assessment (Recommendation 5) that if the additional measures to address underwater noise and strike risk from Project-related marine shipping are implemented, then adverse effects from Project-related marine shipping would be reduced to net-zero. The NEB noted that programs and initiatives are already partially implemented by those with regulatory responsibility.

Marine Vessel Wake and Shoreline Erosion

The NEB recognized the concerns with 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 Indigenous groups that exercise Indigenous Interests and have culturally important sites along the shorelines proximal to the designated shipping lanes. 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.

Transport Canada notes that mechanisms other than regulations 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 the NEB did not raise culturally sensitive sites as an issue, Transport Canada recommends that where Indigenous groups have site-specific concerns, they can contact the PPA to notify them of their concern. The PPA 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.

Overall, Canada 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 Indigenous groups that exercise traditional marine fishing and harvesting activities in the vicinity of the WMT and marine shipping corridor for the Project. In particular, Canada notes the NEB conclusion that the effects of the proposed WMT expansion on Indigenous users of the area would have an impact that would persist for the operational life of the Project.

B.C. EAO Conditions

In consideration of concerns raised by Indigenous 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 proposed 37 conditions that the province attached to the provincial EA certificate. The EAO conditions particularly relevant to avoiding or mitigating impacts on Indigenous groups' marine fishing and harvesting include:

- Conditions 10 and 12, which require Indigenous consultation and Indigenous construction monitors;
- Condition 11, which requires the development and implementation of a marine outreach program for Indigenous groups; and
- Condition 24, which requires the proponent to prohibit hunting, fishing, trapping and plant gathering by employees and contractors.

The potential impacts of the Project on Indigenous Interests associated with marine fishing and harvesting activities for each applicable Indigenous group are discussed in the annexes to this report.

4.2.4 IMPACTS ON OTHER TRADITIONAL AND CULTURAL PRACTICES

Potential impacts

Early in the review of the Project, Canada 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 Indigenous groups that exercise rights within the Project footprint. In addition, Canada 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 impacts to other traditional and cultural practices through the following potential effects:

- Changes in access may affect use of trails, travel ways and hunting, trapping and plant gathering areas by restricting access to sites or by increasing access by non-Indigenous users;
- Disruption or alteration of trails and travel ways through clearing of the Project footprint;
- Disrupted use of habitation sites or alteration of habitation sites through changes to visual quality, air quality and noise levels and through 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 on marine mammal species of importance to Indigenous groups via vessel strikes;
- Reduced abundance and quality of country (traditional) foods;

- Potential change to the ability of Indigenous 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 practising Aboriginal rights within its traditional territory into the territory of another community;
- Any reduction in fishing, hunting or harvesting resources within an Indigenous community's asserted traditional territory may result in impacts on asserted governance rights and on trade or bartering activities among Indigenous communities;
- Potential effects on 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 the project could further diminish Indigenous groups' ability to meaningfully exercise traditional and cultural practices within the project footprint and adjacent areas.

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

- Trails and travel ways;
- 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

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

On page 321 of its report, the NEB concluded that the ability of Indigenous 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 that they 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.

The NEB Report acknowledges concerns raised by the Stó:lō Collective about potential impacts of the Project on the spiritual and burial site called Lightning Rock, which the NEB accepts as a site of cultural significance (page 321). TMC has committed to work with the Stó:lō Collective to undertake assessments at the site to clearly define site boundaries and to identify and address any potential impacts the Project may have on Lightning Rock. NEB condition #77 requires that the proponent file a report on archaeological and cultural heritage field investigations undertaken to assess the potential impacts of Project construction and operations on the Lightning Rock site at least three months prior to commencing construction in the region. The report must include a summary of consultations undertaken with the Stó:lō Collective.

With respect to the WMT specifically, 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 (page 654):

- There will not be an impact to archaeological sites located on the shoreline due to an increase in marine traffic;

- The effect of Project-related vessel wakes will not be detectable from existing wave conditions; and
- Wakes will not have an impact on shoreline archaeological sites.

In relation to large marine mammals and in particular killer whales, the NEB acknowledged that Project-related marine vessels will encounter killer whales relatively often. The NEB 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 Indigenous use associated with the Southern Resident Killer Whale. 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 Project-related marine mammal–vessel strikes on a Southern Resident Killer Whale is low.

The NEB holds the view that Indigenous 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 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 NEB finds that, as described in its views in this chapter on marine mammals, 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 while the effects from Project-related marine shipping will be a small fraction of the total cumulative effects, Project-related marine vessel traffic would further contribute to total cumulative effects, which are determined to be significant overall (i.e., whether or not the Project proceeds). Given these conclusions and recognizing the stated cultural importance of the killer whale to certain Indigenous 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 Indigenous 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 any disruptions to Indigenous 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 Indigenous 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.

Indigenous Perspective

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

Indigenous 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 Indigenous 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, as discussed elsewhere in this report. Indigenous groups also were concerned that the increase in shipping will also increase the likelihood of vessel-strike mortalities for marine mammals of cultural significance.

Indigenous groups expressed concern with direct and indirect effects of the Project on social, cultural, spiritual and experiential aspects of traditional and cultural practices. Indigenous 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.

Some Indigenous groups expressed their concern that, in their view, there is not a legal requirement to compensate Indigenous groups for cultural losses, either in the context of the Project or elsewhere.

Crown Analysis

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

In 2016 and again in 2019, the NEB concluded that Indigenous 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 noted in this chapter would either directly or indirectly avoid or reduce some of the impacts and address concerns raised by Indigenous groups regarding potential impacts on other traditional and cultural practices. In addition, the NEB has established conditions broadly addressing effects to communities (including Indigenous) and specific impacts on Indigenous Interests. However, Canada 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 Indigenous groups have to the land as understood from an Indigenous 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, Indigenous 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 Indigenous Interests.

Should the Project be approved, Canada notes that the proponent will be required to manage access to culturally sensitive sites pursuant to conditions imposed by the NEB and further to 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 Indigenous groups, NEB condition 24, "Access Management Plan," includes requirements for the proponent to incorporate Indigenous Traditional Land Use and Traditional Ecological Knowledge into the design of its access management plan.

The issue of non-use value related to spills on land is primarily addressed via existing liability regimes. For example, Section 48.12 of the *National Energy Board Act* establishes that pipeline operators are liable for the loss of non-use values related to a public resource affected by a "release" (or accident) and that the Crown may institute proceedings to recover the loss of non-use values.

Responding to an issue raised during the Phase III consultations, the Ship-source Oil Pollution Fund (SOPF) has clarified that if fish for ceremonial purposes are not available due to ship-source oil pollution contamination, the costs incurred to obtain the required fish for the ceremony (i.e., the additional cost of fishing at another location or purchasing fish from an external supplier) could be compensable.

In addition, if the individual making the claim fishes for their own consumption or use or that of their family, the SOPF may provide advance compensation for future losses that have not yet occurred but will most certainly occur. This provision will allow the victims of a spill to purchase fish in replacement for what they could not catch themselves. All claims are subject to the rules set out in the *Marine Liability Act* and should follow guidance on documentation and claims.

With respect to Project-related marine shipping contributing to the cumulative impacts on the Southern Resident Killer Whale, Canada understands that the population of this species is in decline within the area to be used by Project-related tankers. Canada 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. Canada accepts the NEB's conclusion that effects to the endangered Southern Resident Killer Whale and Indigenous cultural use of Southern Resident Killer Whale from Project-related marine shipping will be significant.

Overall, Canada is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support potentially affected Indigenous 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 Indigenous Interests, as well as the involvement of Indigenous groups in emergency response planning activities.

B.C. EAO Additional Conditions

In consideration of concerns raised by Indigenous groups during the 2016 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 proposed 37 conditions that the province attached to the provincial EA certificate. In addition to the proposed conditions discussed in other parts of this chapter, conditions particularly relevant to avoiding or mitigating impacts on Indigenous groups' other traditional and cultural practices include:

- EAO Condition 13, which requires the proponent to engage with the Indigenous groups to seek to identify opportunities for cultural awareness and recognition;
- EAO Condition 23, which requires the proponent to engage Indigenous groups in the development of their workforce accommodation strategy; and
- EAO Condition 27, which requires the proponent to engage Indigenous groups on the reporting, management and mitigation of impacts on archaeological and heritage resources.

The potential impacts of the Project on Indigenous Interests associated with other traditional and cultural practices are discussed in more detail in the annexes to this report.

4.2.5 IMPACTS ON ABORIGINAL TITLE

Potential Impact

Canada 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 claimed Aboriginal title where it overlaps the Project area: use and occupation, decision-making and

economic benefits. Mitigation measures 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 the TLRU information submitted by Indigenous 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. 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 during construction of subsistence activities, including hunting, trapping, fishing and plant gathering;
- Access for Indigenous 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 travel ways over the long-term lifespan of the Project; and
- Pipeline and related facilities operations (including the WMT) may reduce Indigenous community members' enjoyment and experience of using the affected area and proximal areas, including from increased access by non-Indigenous people, routine maintenance activities, noise, light and other visual and sensory disturbances.

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

- Disruption of use of the title lands for 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 Indigenous 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
- Reduction of Indigenous community members' enjoyment and experience of using the WMT footprint and proximal areas, including from increased access by non-Indigenous people, routine maintenance activities, noise, light and other visual and sensory disturbances.

Potential impacts on claimed Aboriginal title 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 disturbances.

NEB Conclusions in Relation to Potential Impacts on Use and Occupation

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 Indigenous 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 traditional marine use 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. Indigenous 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, which are detailed in the annexes to this report.

In terms of access restrictions, the ability of Indigenous groups to use lands, waters and resources would be temporarily interrupted during construction and during routine maintenance. Canada 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 but be reversible. Canada 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.

Indigenous Perspectives

Numerous Indigenous 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 Indigenous 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 Indigenous peoples, as well as the extensive development in Indigenous 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 Indigenous groups from using particular areas, and to 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 Indigenous peoples. Several Indigenous 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.

Crown Analysis

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

- The potential impacts on an area used by Indigenous groups for exercising their asserted rights depend 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 percent of the proposed RoW for the Project would be contiguous with existing disturbances.
- 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.

In terms of access restrictions, the ability of Indigenous groups to use lands, waters and resources would be temporarily interrupted during construction and routine maintenance. Canada 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 but would be reversible. Canada 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.

Canada understands that the proponent has committed to several mitigations that would reduce access restrictions for Indigenous groups using areas impacted by routine Project activities. The proponent has committed to minimizing the development of access routes; controlling public access along the construction RoW; selecting 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 with traditional land and resource users to define locations where access control is necessary and what type(s) of access control will be implemented.

Canada appreciates that the Project could adversely impact the enjoyment and experience of Indigenous 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 Indigenous group's enjoyment, experience and use of areas, Canada acknowledges that there will be residual Project impacts on the enjoyment, experience and use of areas.

Indigenous Decision-making

NEB Conclusions

Should the Project proceed, the proponent would be required to continue consultation with potentially affected Indigenous groups and to finalize the development of its plans and measures to reduce and mitigate the potential effects and protect the environment and the resources that are of importance to and utilized by Indigenous groups. As outlined in section 4.1.3, ongoing consultation with Indigenous groups is required by several NEB conditions, including conditions specific to engagement with all potentially impacted Indigenous communities (#96, 146), traditional land use and marine resource use investigation reporting (#97) and participation in monitoring during construction (#98).

The proponent has committed to ongoing engagement with Indigenous groups including but not limited to TMC 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 Indigenous groups to manage and make decisions over the area impacted by the Project. However, Canada understands that the Project may not be consistent with the management objectives of every Indigenous group potentially impacted by the Project.

Indigenous perspectives

Indigenous 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. Indigenous groups also identified how the proposed project might be consistent or inconsistent with any cultural or other objectives for management in this area.

Several groups expressed concerns related to the source and the relevance of the traditional use information that helped inform the decision-making process. These concerns included the perspective that the traditional knowledge collected by the proponent should not be considered as sufficiently credible so as to be used in the decision-making process. Groups also expressed the view that traditional knowledge information alone 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 Indigenous groups.

Indigenous groups also raised concerns with respect to Indigenous peoples as stewards of the land. Several groups described the responsibility that Indigenous 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. Indigenous groups that 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.

Indigenous 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 Indigenous groups in a way that acknowledges interconnections among Indigenous people, families and family groupings, culture and the elements of the landscape. Many Indigenous 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.

Crown Analysis

Canada acknowledges the view of many Indigenous 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 Indigenous groups to make decisions over lands and resources or to develop lands within or proximal to the Project for many generations.

In considering potential Project impacts on the decision-making component of claimed Aboriginal title lands, Canada 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 Crown 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 Canada by the proponent.
- Canada 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 Indigenous group's approved land code. Canada 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, Canada has attempted to undertake a principled, meaningful and responsive consultation process characterized by genuine efforts to acknowledge and document Indigenous 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, Indigenous groups were provided with opportunities to describe their views of the nature and

scope of potential impacts of the Project on their Indigenous Interests and on mitigation or accommodations measures that could be applied to address those potential impacts. Canada's consultation process provided Indigenous 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.

Economic Benefits

Indigenous Perspectives

Indigenous groups have indicated that the pipeline and related facilities operations, including the WMT, may reduce Indigenous 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 Indigenous groups in relation to the economic benefit component of title include potential effects from construction and operation of the pipeline on the ability of Indigenous groups to derive future economic benefits from the area; the lack of Project-related economic, training and business opportunities for Indigenous groups; and potential negative impacts on local economies. Several Indigenous groups have also raised the issue of the historic pipeline and what they see as lack of adequate compensation for the impact that it has had on Indigenous rights and title.

Some groups raised dissatisfaction with the lack of compensation offered by the proponent for disrupting the traditional way of life of an Indigenous community.

Indigenous 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 Indigenous groups expressed interest in exploring opportunities for training and employment contracts in order to develop transferable skills and employment capacity within their communities.

Crown Analysis

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

- The NEB noted that the Project presents an economic opportunity for Indigenous communities but also concluded that the ability of Indigenous groups to use lands, waters and resources would be temporarily interrupted during construction and 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 Indigenous groups to derive direct and/or indirect economic benefits if the Project is approved include NEB Conditions for Indigenous, 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); plan for Indigenous group participation in construction monitoring (NEB Condition 98); Aboriginal, local and regional employment and business opportunity monitoring reports (NEB Condition 107); procurement opportunities for Indigenous groups (commitments 14, 440, 442, 447, 451); employment and business opportunities for Indigenous groups (commitment 952, 445); and hiring of Indigenous monitors (commitment 113), among others.

As of April 2019, the proponent had entered into 43 commercial agreements worth approximately \$400 million in economic benefits to those Indigenous groups. The details of MBAs are confidential, but they may contain provisions for financial, environmental and training benefits that could further reduce impacts on Aboriginal title claims if the Project proceeds.

Proponent team members related to Procurement and Employment and Training continued to engage directly with Indigenous communities and in parallel with Phase III consultation. The proponent announced its General Construction Contractors (GCCs) and Engineering and Procurement Contractors (EPCs) and then organized regional information sessions/workshops to introduce GCCs and EPCs to Indigenous community representatives to review respective scopes of work; to provide information on potential contract and procurement opportunities; and to confirm communication protocols to register for employment, training, as well as to consider how to add businesses to the vendor list. Follow-up meetings occurred as required to determine such matters as business capacity and interests, to meet and pre-qualify joint venture partners and to review skill qualifications. Information gathered through these processes is used to develop the execution plan for construction. The focus of the proponent-led GCC/EP- to-community engagement is to introduce the GCC and EPC companies to the MBA holders as part of the commitment to MBA obligations on the part of the proponent. However, the proponent continues to engage with non-MBA communities that express interest in the procurement and employment and training aspect of the Project.

B.C. EAO Additional Conditions

In consideration of concerns raised by Indigenous groups during the NEB hearing and Crown consultations, and in consideration of the conditions proposed by the NEB, the existing regulatory regime and the jurisdiction of the province, EAO proposed 37 conditions that the province attached to the provincial EA certificate. Specific conditions have been summarized elsewhere in this chapter. However, the conditions proposed by EAO would help support the mitigation of impacts on Indigenous groups' Aboriginal title in a number of ways:

- Many of the proposed EAO conditions ensure greater opportunity for the ongoing participation of Indigenous groups in informing the development and implementation of the Project;
- Several of the conditions require consideration of Indigenous use and practices and their integration into the development of mitigation; and
- Conditions recognize the important tie of Indigenous 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 Indigenous group are discussed in the annexes to this report.

4.2.6 OTHER CONCERNS FROM INDIGENOUS GROUPS

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

In the event of an accident or malfunction that releases 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 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 Indigenous 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 Indigenous groups;
- Impacts to human health; and
- Loss or alteration of traditional resources used for cultural or spiritual practices.

NEB Conclusions

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 cleanup 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.⁴³ 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 in its 2019 report (page 334) 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 Indigenous 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. These considerations and findings are repeated in the 2019 NEB reconsideration report.

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 those resulting from 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 cleanup, valued components that are impacted, weather conditions, and the time of year that the spill occurs. 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

⁴³ Sean Kheraj, *Historical Background Report: Trans Mountain Pipeline, 1947-2013*; City of Vancouver, C77-27-19 - Appendix 18 (A4L7X6), p. 21

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 Indigenous 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 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 14.9.1 of the Reconsideration 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 fulfilment 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 to the Standard 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 condition #133 requires the proponent to implement enhanced tug escort measures as a mandatory requirement for any certificate issued. 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 its environmental sensitivity and the probability of a tanker spill occurring (page 378), but the NEB also noted that there are no proposed or widely accepted risk acceptance criteria for marine oil spills (page 377).
- 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 (page 17) that the probability of a credible worst-case event was very low: "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."

Other specific conclusions of the NEB regarding potential spills include:

- The Board rejected evidence of a credible worst-case scenario of 8,000–16,000 m³ 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 Indigenous 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).

Should the project be approved, several NEB conditions related to emergency preparedness and response (#89, 90, 117, 118, 119, 120, 123–127, 136, 138, 145, 153) would help reduce 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. Conditions have wide-ranging impacts across the life cycle of the project. For example, conditions #136 and #153 require the proponent to complete full-scale emergency response exercises prior to commencing operations and during operations, respectively.

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 from ships are governed by the framework set out in the *Marine Liability Act*. In the event of an oil spill in Canadian waters, compensation can be sought from the ship owner, its insurer or, in the case of a tanker carrying persistent oil, from the International Oil Pollution Compensation Funds. In addition, Canada's Ship-source Oil Pollution Fund is able to provide unlimited per-incident compensation, regardless of the type of oil, type of ship or size of spill. The proponent has agreed to the following mitigation measures related to potential spills:

- Facilitating a more than \$100-million investment in new equipment by the Western Canada Marine Response Corporation;
- 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.

Indigenous Perspectives

During the NEB process and Crown consultation, most Indigenous groups expressed some degree of concern about the potential for an oil spill and its possible impacts on the environment they rely on and, consequently, on their way of life. Many Indigenous groups 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 impede the ability of Indigenous 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 Indigenous well-being by placing long-

term limits on traditional and cultural activities (such as hunting, fishing and gathering), reducing access to sacred places and diminishing 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. Many Indigenous people rely on salmon not only as their main food but also 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 plants, among other species. Alberta groups were concerned about the potential for significant adverse environmental effects on 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 groundwater. 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.

Indigenous groups also raised concerns about uncertainties of whether diluted bitumen will sink or float and that spill science research is incomplete. They argued that the 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.

Indigenous groups expressed concern about the adequacy, readiness and capacity of local oil spill response, especially in 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 in connection with emergency spill response planning, having local resources and equipment available, and training.

Indigenous 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 for damages and ecosystem recovery.

Crown Analysis

Canada 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 Indigenous 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 Indigenous Interests will depend on the size, location and conditions of a spill and the effectiveness of response measures. Canada acknowledges that Indigenous peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill regardless of its size.

A credible worst-case spill has the potential to result in serious impacts on Indigenous Interests. However, Canada agrees with the NEB's assessment of the very low likelihood of such an occurrence. Canada 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, as discussed above.

Canada 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;
- 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.

Spill response is discussed in greater detail elsewhere in this chapter.

Terrestrial Accidents and Malfunctions

If a pipeline spill incident does occur, the NEB will verify that there is adequate and appropriate cleanup and full remediation of any environmental effects resulting from the incident. The company must conduct, to the NEB's satisfaction, a complete cleanup and remediation of any adverse environmental effects. Pipeline Financial Requirements Regulations, which were also 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 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.

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), there are opportunities for First Nations interested in developing their emergency plans and/or undertaking training to receive support from the government in doing so.

When First Nations require outside assistance to manage an emergency, the government 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. The government's arrangements with these organizations ensure that First Nations have access to comparable emergency assistance services available to other nearby non-Indigenous communities.

Through the Emergency Management Assistance Program (EMAP), Indigenous Services Canada (ISC) supports an all-hazards approach to emergency management on reserve that includes the four pillars of mitigation, preparedness, response and recovery. Through EMAP, 100 percent of eligible emergency response and recovery activities carried out on reserve by First Nations are supported, 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, it is the responsibility of the party responsible for the spill, the regional emergency service provider and other public safety partners to help coordinate emergency response activities.

Marine-based Accidents and Malfunctions

Marine vessels and oil handling facilities 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 Transport Canada-certified local response organization, Western Canada Marine Response Corporation (WCMRC).

Oil handling facilities are categorized by their maximum oil transfer rate and, on that basis, are required to plan and prepare for a minimum spill size. The WMT, with a transfer rate of more than 2000 m³/h, is categorized as a Level 4 facility and therefore must plan to respond to a spill of at least 50 m³.

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.

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. More detail on Canada's marine safety system is provided in subsequent sections. The Canadian Council of Academies has found that while 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, indicate a relatively low risk profile compared with other regions (from Commercial Marine Shipping Accidents: Understanding the Risks in Canada, <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 liable party that is the ship owner or their insurer, the International Oil Pollution Compensation Funds (<https://www.iopcfunds.org/>) or Canada's domestic compensation fund, the Ship-source Oil Pollution Fund (www.ssopfund.ca/).

Trans Mountain has committed to adopting the TERMPOL 31 findings and 17 recommendations in addition to mitigation measures proposed as part of the Project. The TERMPOL Review Committee 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 Canada 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.

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 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). The costs of maintaining preparedness capacity are funded by a user fee paid by the companies that ship oil.

Transport Canada understands that Indigenous groups have concerns regarding potential spills and spill response planning. During the review of the Project and the related Crown consultation process, many Indigenous groups have requested more information and involvement in the emergency response components of the marine safety system, and have provided technical suggestions for improvement. The Area Response Planning Initiative in Southern B.C., lessons learned from the Regional Response Planning Pilot Project in Northern B.C. and the multi-agency planning undertaken as part of the Greater Vancouver Integrated Response Plan are all contributing to a more collaborative and integrated planning approach. Involving Indigenous communities in planning for marine incidents addresses some of the concerns heard related to the risks that increased tanker traffic may present to their own marine activities or the environment as well as the desire expressed for an increased role in planning and preparedness for marine environmental response.

This work will be further facilitated by recent investments in planning announced in Budget 2019. New funding for Fisheries and Oceans and the Canadian Coast Guard, Environment and Climate Change Canada and Transport Canada will advance a state-of-the-art planning approach that will contribute to a more integrated and collaborative marine safety system, including activities in the project area. Collaborative planning will provide increased clarity around roles and responsibilities for all spill response partners and help ensure that the right measures are in place to effectively respond to marine incidents. These new investments will support the advancement of reconciliation by co-developing roles with Indigenous communities for marine environmental response and will build capacity for increased participation of Indigenous communities in preparedness, planning and response.

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.

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 modelling 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.

B.C. EAO Conditions

In consideration of concerns raised by Indigenous 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 also proposed 37 conditions that the province attached to the provincial EA certificate. In addition to the proposed conditions discussed elsewhere in this chapter, conditions particularly relevant to avoiding or mitigating impacts on associated with spills include:

- EAO Condition 26 requires the proponent to provide drinking water if a person's water supply becomes contaminated as a result of a spill;
- EAO Condition 32 requires additional information regarding emergency response plans and that these plans include a description of how the proponent would coordinate the participation of Indigenous groups and other parties that may be involved in emergency response;
- EAO Condition 33 and 34 require the development of geographic response plans and the proponent's participation in coastal geographic response planning;
- EAO Condition 35 requires that Trans Mountain undertake additional research regarding the behaviour and cleanup 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 36 and 37 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 Indigenous Interests for each Indigenous group are discussed in the annexes to this report.

Ship-source Pollution

In addition to the risk of spills from marine vessels, Indigenous 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 the 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 percent, the lowest in the world, and represents a 96 percent 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 percent 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 Canada acknowledges that they 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. 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). These include all types of inspections currently under the jurisdiction of TC, such as port state (inspections of foreign vessels), oil handling facilities and security, and for Canadian Coast Guard inspections of navigation aids.

Health and Human Safety Concerns

Throughout the review of the Project, a number of Indigenous groups raised issues and concerns with respect to its impacts 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 (Indigenous) perspective, such as cultural aspects and 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, there would be no significant adverse effects to human health, including the health of Indigenous people, during construction and routine operation. With respect to the WMT, the NEB acknowledged evidence submitted on 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 are not likely to cause significant adverse effects to human health.

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 471).

In the case of a spill or accident, the NEB found that the effects to human health that may result 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 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 498).

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 increase in ambient air emissions from construction or operations;
- PM_{2.5} and NO₂ concentrations in 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 Indigenous people (page 329); 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 Indigenous communities (page 331).

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 106).

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 350).

If approved, the Board would impose a condition (#121) 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 357).

Crown Analysis

Chemical Contamination of Country Foods

Chemical contamination of country foods may occur from pipeline leaks/ruptures affecting wild game, fish and vegetation, as well as from 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. Canada notes that the NEB has recommended a number of conditions related to the protection of human health and safety that would limit potential 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 *Food and Drugs Act* and pursues its regulatory mandate under the Food and Drugs Regulations.

In the event of potential chemical contamination to country or traditional foods, Health Canada would work with other federal departments and review information and provide technical advice to support the governments of B.C. or Alberta, as well as the First Nations Health Authority. Determining the need for issuing or communicating any consumption advisory related to non-commercial country or traditional foods is a provincial responsibility, held by the governments of B.C. and Alberta.

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 the *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 Indigenous groups during the development of this plan.

Project and Environmental Review of a Project Permit

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.

Air Quality

In terms of air quality, ECCC made specific recommendations to the NEB related to mitigation and monitoring. The NEB acknowledged the specific ECCC recommendation for a monitoring site to be established at or adjacent to Tsleil-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 Tsleil-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 NO₂ and PM_{2.5}, 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.

Canada also heard concerns about potential negative impacts of the Project on intangible Indigenous cultural and psychosocial well-being. The health-related measures described here and the efforts to address cultural loss described elsewhere in this chapter can contribute in part to mitigating these impacts, although Canada acknowledges that these concerns may persist for some Indigenous groups.

B.C. EAO Conditions

In consideration of concerns raised by Indigenous groups during the 2016 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 proposed 37 conditions, which the province attached to the provincial EA certificate

In addition, EAO proposed a condition (23) to Ministers that requires the proponent to engage Indigenous 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 Indigenous 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 Indigenous groups expressed concerns about cumulative effects to the TLRU, the TMRU and the underlying valued components that support Indigenous traditional uses of these resources.

During OTE presentations, Indigenous groups shared their observations of changes to the land and waters in their traditional territories as a result of development.

In general, Indigenous 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 Indigenous groups have said that they have concerns about the pressure on the Fraser River and noted that Sockeye salmon, a species with significant importance, has suffered a long decline.

A number of Indigenous 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 that the assessment did not accurately characterize or reflect the implications of incremental impacts on their use and occupancy of their territory or on their interests, including their Aboriginal rights and title.

Within the NEB's report, the Board is explicit in its recognition of "the importance that Indigenous groups place on being able to continue their traditional uses and activities within the entire area of their traditional territories" (page 318). In respect to the evidence (oral and written) these Indigenous groups provided the Board, the NEB described the information provided to them in the following way:

... Indigenous 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 Indigenous groups about the relationships between their use of the lands, waters, and resources and the importance of these within each Indigenous society.

The NEB recognized that the Project's route, 89 percent of which is on the existing RoW, "traverses land and water areas in Alberta and B.C. that Indigenous 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 due to 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 Indigenous 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 CEEA 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 were 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 due to past industrial and urban development that 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 percent) of soils in the local study area for the Project are already disturbed, and therefore cumulative effects to soil and soil productivity are 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 due to 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;
- 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 is considered substantial due in part to linear disturbances;
- Some marine sediment and water quality contaminants are present at levels higher than the applicable criteria due to 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, taking into account measures proposed by the proponent, 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, and 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 (page 321).

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 its recovery, for which the cumulative effects are already significant.

EAO propose 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 (19) and caribou (20).

Greenhouse Gas Emissions

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

The NEB accepted the proponent's analysis that the Project would generate 1,020,000 tonnes of CO₂e during construction (primarily from land clearing) and 407,000 tonnes per year of CO₂e 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 CO₂e per year, resulting in a 2.1 percent increase in estimated marine GHG emissions in B.C. (page 396), or a 0.11 percent increase in B.C.'s total GHGs based on 2012 levels (page 388).

To address certain Project-related contributions to GHG emissions, the NEB recommended that 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, Canada notes that there are two parts to the federal government GHG and climate change assessment: direct and upstream GHGs. GHG emissions directly attributed to the Project were considered within the scope of the NEB review process, and Canada notes these GHG emissions will be partly offset via proponent compliance with NEB condition 142, which requires the proponent to develop and receive NEB approval of a GHG Emissions Offset Plan that provides offsets for all direct GHG emissions generated from project construction.

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 that direct and upstream greenhouse gas emissions linked to the projects under review would be assessed, although no project proponent would be asked to restart their review. Accordingly, ECCC conducted an assessment of the upstream GHG emissions associated with the Project. This assessment was released to the public and Indigenous 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. Canada has introduced the Pan-Canadian Framework on Clean Growth and Climate Change, which sets out actions taken to fight climate change, including GHG emissions. This will be addressed in greater detail in section 4.3, below.

Transport Canada acknowledges the significance of the Board's 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 IMO and as a participant 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 progressively more stringent. The SEEMP is required to be onboard all ships and sets 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 is updated on an ongoing basis. Canada 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 B.C. Government released its updated climate plan in fall 2018, which outlined its progress toward meeting its 2030 GHG reduction targets as well as new measures. The CleanBC Plan also includes commitments for transparency and accountability, and ongoing engagement including with Indigenous peoples.

In 2007, the B.C. Government passed the *Greenhouse Gas Reduction Act*, legislating provincial GHG reduction targets of 33 percent below 2007 emission levels by 2020 and 80 percent below by 2050. Interim reduction targets of 6 percent by 2012 and 18 percent 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 CO₂e emission levels were reported at 61,500 kt, 4.4 percent 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 proposed several conditions particularly related to greenhouse gas emissions within B.C.:

- Condition 28 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 29 requires the proponent to purchase all greenhouse gas emissions offsets for emissions within B.C. through the B.C. 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.

Greenhouse Gas Emissions from Marine Vessels

With respect to GHG emissions from marine vessels, Canada has been working with the IMO, of which Canada is a member state, to address GHG emissions in the international maritime sector. In terms of existing measures, Canada implements IMO requirements for energy efficiency that set more progressive global efficiency design standards for new vessels built from 2013 to 2025. In addition, IMO established a requirement for all vessels to have energy efficiency management plans that demonstrate what measures the vessel is taking to improve energy efficiency. These IMO requirements would apply to Project-related marine vessels.

In 2018, IMO Member States agreed to an initial strategy on the reduction of GHG emissions from ships with the intent to adopt a revised strategy in spring 2023. The initial strategy sets targets for the reduction of GHG emissions from international maritime shipping and lays out a path for the development of measures to allow the sector to meet the targets. The initial strategy seeks to reduce peak GHG emissions from international shipping as soon as possible and to reduce total annual GHG emissions from international shipping by at least 50 percent by 2050 compared to 2008. Canada will continue to actively participate in the process to assess measures proposed for potential development and implementation that were identified in the initial IMO strategy. The measures listed in Recommendation 10 are well aligned with the list of potential measures identified by the IMO. Discussions on the IMO measures are set to commence at the IMO's MEPC 74 in May 2019.

Socio-economic and Socio-cultural Effects

In its report, the Board acknowledged that the Project would pass through areas of importance to many groups and stakeholders, including Indigenous groups, landowners, communities, tourists and recreational users. A number of Indigenous groups raised concerns about socio-economic, community and socio-cultural effects. As some of these issues may relate to potential impacts on Indigenous Interests, they are also discussed in the preceding sections. Key issues identified include 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 practise 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 that Trans Mountain submitted to the NEB.

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, and 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 a Heritage Resources Discovery Contingency Plan and fulfil its obligations to meet provincial requirements, the Project is not likely to cause significant adverse environment effects to heritage resources, including with respect to Indigenous groups.⁴⁴

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 Indigenous groups, NEB condition 24 requires the proponent develop an Access Management Plan that would include 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 Indigenous 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 have other potential community effects.

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

⁴⁴ The Panel acknowledged the concerns raised by Indigenous 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.

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 due to 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 time frames for which effects might occur.

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.

4.3 GENERAL MITIGATION AND ACCOMMODATION MEASURES

A number of actions on the part of the government and the proponent can contribute to addressing the issues raised in consultations and to minimizing or mitigating the potential impact the project could have on Indigenous Interests. One of the benefits of the whole-of-government approach taken in the reinitiated Phase III process is that it placed representatives from several branches of the government together at the consultation table with Indigenous groups. This put them in a position to identify where a potential impact on Indigenous Interests could be addressed, at least in part, by existing government measures.

For example, a number of Indigenous groups raised concerns with the potential impact of the Project on aquatic habitat. Canada already has a number of initiatives designed to support aquatic habitat restoration at the national level. These will have broad benefits for aquatic habitat across the country, but can also serve to minimize or mitigate the specific impacts of the Project on aquatic habitat. Similarly, broader government work to improve spill response will address potential impacts from the Project, but will also help in spill response for spills that are not strictly Project related. Where there were still gaps, the format of the consultations also allowed government officials to work with Indigenous groups to identify these gaps and to develop and propose additional accommodation measures to address these, as described in greater detail in section 4.4.

Canada's efforts to identify and respond to Indigenous issues related to the Project are situated in a continuous process that began in the lead up to the 2016 decision to approve the project and that is ongoing through the current reinitiated Phase III process. The proponent has also taken a number of steps to address those issues identified through the NEB processes, but also through their ongoing discussions. This section sets out proponent and government programs and measures that contribute to minimizing or mitigating the impact of the Project.

This section describes actions from Canada and the proponent, which could contribute to avoiding or mitigating the impact of the Project on Indigenous Interests, including:

- steps taken by the proponent to address Indigenous issues identified as part of the 2016 decision;
- measures which were undertaken as part of the 2016 approval of the Project (e.g., the Indigenous Advisory Monitoring Committee) and which are ongoing;
- government programs and measures with a broader application, but which can also contribute to mitigating and minimizing the impact of the project (e.g., work to support the boreal caribou, government measures to reduce greenhouse gas emissions, work to support aquatic habitat restoration spill response and mitigation efforts, etc.).

The conditions that the NEB would place on the project will also contribute to minimizing or mitigating many of the impacts on Indigenous Interests identified in the previous section (e.g., impacts on SRKW). Specific NEB conditions, which could support avoidance or mitigation of the impacts on Indigenous Interests are also discussed below.

4.3.1 PROPONENT PROJECT MODIFICATIONS

The proponent has been working with Indigenous groups since the outset of the design process of the Project in 2012 and has sought to respond to interests and concerns of Indigenous groups through regular engagement and in commitments to the regulator. The proponent has also been an active participant in the re-initiated Phase III consultations and has been able, through this process, to offer and commit to additional measures to accommodate impacts.

Routing Principles

The first principle of the Project design was to choose a route that would parallel the existing pipeline RoW and/or other linear disturbances to the extent possible. This approach would minimize new disturbances to traditional use sites and avoid or reduce new or additional impacts on Indigenous Interests.

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
- 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 planning to have the new pipeline corridor beside existing rights-of-way of other linear facilities. Access to the RoW and power lines to the pump stations are already established; therefore, a co-location strategy also helps to reduce the need to create additional disturbance for ancillary facilities.

The second principle relied on gathering traditional use information, provided by Indigenous communities to the proponent, to inform routing decisions. The proponent engaged Indigenous groups whose traditional territories overlap the study corridor for the proposed route to undertake traditional use studies, both terrestrial and marine. These studies identified traditional sites or uses that, according to the proponent, would potentially 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 potential impact.

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 Indigenous group has explicitly consented to the routing and formalized this understanding in a Project agreement.

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

The following is a list of examples regarding how the above routing and other Project design considerations were applied in practice to address Indigenous Interests:

- The avoidance of some known sites of significance to Indigenous groups, e.g., burial, pit houses or other culturally important sites;
- The minimization of greenfield development by routing the Project in a proportion of 73 percent through the RoW for the existing pipeline, 16 percent through the RoW of other existing linear disturbances and only 11 percent through a new corridor.
- Deviations from the routing of the existing pipeline to avoid 22 crossings at significant fish bearing rivers such as the Fraser River near Rearguard, the Thompson River, and the upper North Thompson, Albreda, Coldwater and Coquihalla rivers.

- At watercourse crossings, the expansion pipeline will be buried deeper than current industry standard, including using 1:200 year flood design instead of current industry standard of 1:100 year flood design and accounting for climate change effects of increased flood magnitude and frequency.
- In areas such as the Coldwater and Fraser Valleys where there are sensitivities, such as groundwater supply for water wells or aquifers, a pipe wall diameter thicker than required by design will be used. The use of a thicker wall pipe would also provide an additional level of protection against any corrosion risks.
- Fibre Optic Leak Detection is becoming a viable means to provide additional mitigation for prevention of damage to pipelines and as an additional measure for monitoring of pipelines for loss of containment. This technology has been proposed in areas including the proximity of the Sumas Terminal and Coldwater Valley.
- Designing for operating conditions that will be experienced including internal conditions such as pressure, temperature, flow and external conditions, which can include location relative to developed areas such as schools or hospitals (i.e., class location designation), loads on pipe during construction (e.g., Horizontal Directional Drill pull backs) or operations (e.g., settlement, geohazards such as land slides, watercourse crossings, road crossings, rail crossings).
- Design of cathodic protection systems to mitigate against corrosion risks that will provide an additional level of protection in the event of any coating damage occurs during installation and construction that is not immediately identified.
- The replacement of the previously proposed sloped earthen wall at the WMT by a vertical retaining wall, which minimizes dredging and significantly reduces the foreshore extension footprint; and
- A refinement of construction methods at the WMT that will likely eliminate the need for a disposal at sea permit for dredging material.

As part of the original NEB hearing, the proponent provided an updated list to federal officials of where known Indigenous Interests and concerns influenced the design of the Project, noting it incorporated all Indigenous Interests and concerns into the Application and evidentiary filings with the NEB, whether resulting in a change to the Project or not.

Since 2016, the proponent has advanced seven route variance/re-alignments in response to concerns of Indigenous groups, landowners and others about route planning for the pipeline. The GiC is required to consider variances through an order-in-council:

- When the proponent varies the pipeline route from what was previously approved by the NEB outside the 1 km corridor;

- For reactivations of the existing pipeline; and,
- For other non-route variances to the Certificate.

During negotiations for land access, consultations with Indigenous groups or identification of impacts of the Project on an immediate area, the proponent may identify a need to move the route to another to mitigate concerns, adapt to design constraints or provide avoidance of a sensitive area in response to concerns.

When the proponent needs to change the route and it falls outside of the Certificate-approved corridor, GiC approval must be sought to consider such a change to the Certificate. Application for such variances occurs under Section 21 of *NEB Act*. If the NEB recommends that the variance application should be approved, it will be sent to the GiC, who has the final say in whether to approve the change to the certificate. Six of these variances were granted GiC approval in 2018, and another was recommended to the GiC.

In the proponent's Reply Evidence, filed in the original NEB hearing, the outcomes of additional 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. Trans Mountain has also developed a robust Indigenous Monitoring Program whereby communities will appoint trusted representatives to be on site to ensure that the various mitigation measures and protection plans are implemented, as required.

Project Routing and Indian Reserves

The following tables outline, respectively, the routing related to Indian Reserve crossings with the existing TMPL corridor and the proposed expansion.

Table 10 – Indian Reserves Crossed by the Existing TMPL Corridor

Indian Reserve Name	Indigenous groups with an Interest in Indian Reserve
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, Yakweakwoose First Nation
Joeyaska #2	Lower Nicola Indian Band
Zoht #4	Lower Nicola Indian Band
Zoht #5	Lower Nicola Indian Band
Kamloops #4	Tk'emlups te Secwpemc (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
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

Through engagement, the proponent reached agreement to route the expansion on certain Reserves but not others. Table 11 summarizes the Indian Reserves where consent has been achieved to cross the Reserve.

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

Indian Reserve Name	Indigenous group 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

Through engagement, the proponent revised the Project design to avoid any overlap with the following Indian Reserves:

- Coldwater #1;
- Grass #15; and
- Kawakawa Lake Reserve #16.

Trans Mountain continues its engagement with Lower Nicola Indian Band and the applicable Certificate of Possession holders within the Band, to seek the necessary approval to construct the Project across the following Indian Reserves:

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

Proponent Commitments

The proponent's Application and supporting evidence filed during the original NEB hearing and subsequent reconsideration set out mitigation measures and other commitments applicable to the potential adverse effects of the Project on Indigenous 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 potentially adverse impacts to Indigenous Interests raised throughout the Project review by Indigenous groups. These are in addition to mitigation measures that the proponent has committed to implement as part of standard practice during Project construction. The measures committed to as part of standard practice include those that would see the project operate 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 regularly files updates to its commitment tracking table with the NEB. The most recent version of Trans Mountain's commitment tracking table on the NEB's record can be found at Filing ID A98662. An up-to-date proponent tracking table can be found on TMC's website,⁴⁵ which includes commitments up to April 5, 2019.

⁴⁵ <https://www.transmountain.com/commitments-tracking>

Proponent–Indigenous Group Agreements

The proponent has entered into commercial agreements with certain Indigenous groups to build long-term relationships based on mutual interests and provide defined project benefits in exchange for project support and legal certainty with respect to land access. Negotiations of these confidential agreements began as early as 2013 and continue today. As of April 5, 2019, the proponent has entered into 44 commercial agreements worth approximately \$400 million in direct economic benefits to those Indigenous groups, in addition to opportunities for employment, training and procurement.

Although the terms of existing and new agreements are confidential, the main categories of defined benefits to Indigenous groups that enter into commercial agreements with the proponent include:

1. **Financial Compensation**, with funding that could be targeted toward specific community priorities, such as community investment projects and elder or youth education funds.
2. **Business Opportunities** and commitments to maximize, wherever feasible, opportunities for procurement contracts.
3. **Employment and Training** with commitments to maximize opportunities for members of the community to the greatest extent possible.
4. **Environment**, with funding for initiatives related to Project monitoring, cultural and heritage study, cumulative effects assessment, regional cooperation (e.g., to enhance environmental health of the Salish Sea and promote a role for First Nations as active stewards), and commitments to work with communities to identify culturally important vegetation and to include groups in reclamation and restoration activities.
5. **Joint Implementation Committees** to support implementation of the agreement and to discuss and report on construction activities, issues or concerns.
6. **Indenture Payments for Reserve Crossings**, with payments to amend existing indenture agreements or secure additional on-reserve land to construct and operate the Expansion.
7. **Emergency Management and Response**, with funding for capability and feasibility studies, equipment, emergency response centers and training.

As part of these agreements, Indigenous groups will generally confirm that:

8. Consultation (from the proponent and from Canada) has been adequate.
9. Consent has been given to construct and operate the Project, including support for regulatory and governmental processes as necessary.
10. Any gap in Crown consultation or accommodation will not be used in any way to prevent or impede construction, operations or decommissioning.

Table 12: Commercial Agreements**

Alberta Indigenous Groups:	B.C. Indigenous Groups:	B.C. Métis Groups:
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
Aseniwuche Winewak Nation of Canada	Cheam First Nation	
Asini Wachi Nehiyawak (Mountain Cree) Traditional Band	Ditidaht First Nation	
Enoch Cree Nation	Esquimalt Nation	
Ermineskin Cree Nation	Halalt First Nation	
Foothills Ojibway	Hwlitsum First Nation	
Kelly Lake Cree Nation	Kwikwetlem First Nation	
O'Chiese First Nation	Lake Cowichan First Nation	
Nakcowinewak Nation of Canada	Lower Nicola Indian Band (Shulus)*	
Paul First Nation	Malahat Nation	
Samson Cree First Nation	Matsqui First Nation	
Sunchild 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'ówhámel First Nation	
	Simpcw First Nation	
	Tk'emlúps te Secwépemc	
	T'Sou-ke First Nation	
	Tzeachten First Nation (Ch'iyáqtel)*	
	Union Bar First Nation	
	Whispering Pines / Clinton Indian Band	
	Yale First Nation	
	Kwawawapilt First Nation	

*Denotes conditional commercial agreement.

**At the time of writing, 44 groups have MBAs and one group has provided a letter of support. The proponent remains in ongoing discussions with groups, such as those listed in this table. Accordingly, the total number of MBAs remains subject to change and accounts for numeric discrepancies in this Report.

Additional Proponent Commitments Made in the Re-initiated Phase III Consultation

In addition to the commitments listed in the proponent's commitment tracker, the proponent has:

- Made three specific commitments in the context of the reconsideration hearing to address effects of Project-related shipping within the proponent's control: (1) instruct Project-related vessels to follow a slight route deviation away from productive foraging areas for Southern Resident Killer Whales within recently identified critical habitat (if the applicable federal authorities confirm that such a measure would be environmentally beneficial); (2) further evaluate the feasibility of using escort tugs to assist with oil spill response; and (3) work with Project shippers to explore optimizing and reducing the number of Project-related vessel shipments. Subject to support from responsible federal agencies, as applicable, the proponent has committed to each of these measures.
- Committed to commence a process to solicit and obtain feedback and comments from Indigenous groups on a draft version of the Marine Mammal Protection Program no later than 18 months before commencement of Project operations (despite the fact that its Condition 132 compliance filing is required three months prior to commencing operations on the Project).
- Developed a Training Policy for Indigenous peoples to create initiatives that increase the long-term capability for Indigenous people to participate in the Project. The Program development included a Project-specific workforce analysis, with the results directing the program design and included courses such as essential skills, trades foundation, safety certification, traffic control, administration, warehousing and camp support. As of April 5, 2019, over 550 individuals have participated in the training programs.
- Implemented a three-phase process for its construction contractors to meet Indigenous groups and understand their goals and objectives for employment, training and subcontracting. To support the contract execution process, the contractors will develop a sub-contracting plan that defines the list of contracting and procurement opportunities available for Indigenous communities or groups within the contractor's scope of work. The proponent will monitor implementation of the sub-contractor plans to ensure the contractors make best efforts to maximize business opportunities for Indigenous communities across the Project.

Trans Mountain has also made community-specific commitments to certain Indigenous groups based on its direct engagement with those communities. Summaries of Trans Mountain's community-specific commitments are provided in the annexes attached to this CCAR.

4.3.2 INITIAL 2016 ACCOMMODATIONS MEASURES (OFFERED 2016)

The 2016 NEB decision also led to the government undertaking a number of accommodation measures designed to minimize or mitigate Indigenous issues raised during that process.

Canada filed, as part of its opening statement and written evidence to the NEB reconsideration hearing, specialist and expert information and knowledge in the possession of federal authorities ([Part 1](#) and [Part 2](#)). This information supplemented information already provided as part of the 2016 Hearing process and, also provided the NEB with an overview of the various initiatives that have been initiated by the Government of Canada since the NEB issued its original Recommendation Report in 2016.

The below section provides an account of a number of initiatives that have been initiated since the 2016 process. This includes the two specific accommodation measures announced as part of the government's 2016 decision on the project — the Indigenous Advisory and Monitoring Committee and the Economic Pathways Partnership — which were subsequently co-developed with potentially impacted Indigenous groups.

Indigenous Advisory and Monitoring Committee

Based on what it had heard in the 2016 consultations, the 2016 CCAR report (page 69) referred to a government proposal for an Indigenous Advisory and Monitoring Committee for the project. At that time the government heard that Indigenous 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 to their communities and to manage any incremental risk to communities.

As detailed in the Government of Canada's Direct Evidence [A95292-2, pages 101–107], the Indigenous Advisory and Monitoring Committee (IAMC) was intended by government to be an accommodation in response to Indigenous concerns about the Trans Mountain Expansion Project (TMX). Following a co-development process, which established the IAMC-TMX and Indigenous representation, the Committee began work to dialogue and to address the concerns of the Indigenous communities. The Committee does this through its work, the work of subcommittees, the advice it provides to regulators and government, and ongoing engagement with communities. The Committee also provides funding to potentially impacted communities to address and mitigate specific concerns.

The IAMC serves as a collaborative forum with financial and technical resources to support effective and meaningful Indigenous participation in the review and monitoring of the environmental, safety and socio-economic aspects of the Project activities over its full life cycle. The continuing operation of this Committee will reinforce the capacity of Indigenous groups to address their concerns and interests

related to Project-related activities and to exercise their right of self-determination and governance in partnership with the Government of Canada.

The IAMC is a collaborative forum, not a rights-holding or representative body. In order to enable all potentially impacted Indigenous communities in the pipeline corridor to participate regardless of their position on the Project, the Terms of Reference (ToR) make clear that all parties participate on a “without prejudice” basis.

The ToR was co-developed through a process that invited the participation of all potentially impacted Indigenous communities, government and the National Energy Board (NEB). The ToR establish the Committee as a body comprising 13 Indigenous and six federal representatives with a goal of providing for collaborative, inclusive and meaningful Indigenous involvement in the review and monitoring of the Trans Mountain Activities (existing line, expansion project and associated marine shipping) over their full life cycle. The ToR also establish the five key purposes of the Committee:

- To provide a collaborative forum supported by technical resources, for Indigenous groups, the government and Regulators to enhance environmental protection and safety of the Trans Mountain activities.
- To support Indigenous groups’ effective and meaningful participation in the monitoring of the environmental, safety and socio-economic aspects of the activities.
- To enable Indigenous groups to collaborate in identifying common priorities and perspectives related to the activities and to express these interests to the government and regulators.
- To build an understanding of issues of concern to Indigenous groups with the goal of developing a common perspective between government, the NEB and Indigenous groups regarding Project-related activities and to provide informed advice to the government and the NEB on how to address those concerns.
- To share information as it relates to environmental, safety and socio-economic aspects of the project.

Indigenous members raised some concerns with the IAMC, including that the government and NEB members of the Committee may prevent them from taking the strong positions necessary to protect lands and waters. This concern was addressed by recognizing a distinct agenda-setting role for the “Indigenous Caucus,” which comprises Indigenous members of the Committee and is supported by dedicated resources. Further, the Indigenous members form a majority of the Committee, and, if consensus cannot be reached at the Committee, then a majority of the Committee may provide input and advice to government and regulators.

The membership of the Indigenous Caucus includes: one member from each of: Vancouver Island – Western Approach; Vancouver Island – South; Vancouver Island – Southeast; Burrard Inlet/Lower Fraser; Fraser Valley; Mid-Fraser/Thompson; B.C. Interior; Okanagan; three members from Alberta

First Nations; one member from B.C. Métis; and one member from Alberta Métis. In addition to the Indigenous members, NRCan, the NEB, DFO, Coast Guard, TC and ECCC are represented on the Committee.

Through its initial planning and first 18 months of work, the Committee has adopted four overarching goals that enable it to respond to the interests and concerns of Indigenous communities, identified by the Indigenous Caucus and through active engagement with communities:

1. Safe, environmentally and socio-economically sound TM activities.
2. Respect for Indigenous Rights and perspectives in the monitoring of TM activities.
3. Well-informed and supported Indigenous groups engaging effectively with government, regulators and the proponent in relation to TM activities.
4. Collaboration, shared learning and integration of knowledge.

In addition to these overarching goals, the Committee adopted five strategic goals for the period from 2018 to 2021, each with their own set of objectives:

(1) Conduct land and water-based monitoring and provide advice

- 1.1 Complete Indigenous monitoring pilot program.
- 1.2 Develop and roll out full monitoring program.
- 1.3 Support Indigenous groups' interest in monitoring opportunities on their lands and waters.
- 1.4 Explore and develop concept of Indigenous marine stewardship program.

(2) Assess proponent plans and provide advice

- 2.1 Identify gaps in existing submissions on watercourse crossings and advise on improvements.
- 2.2 Provide advice on the proponent's Indigenous construction monitoring program.
- 2.3 Provide advice on Indigenous inclusion in emergency management.
- 2.4 Liaise on an ongoing basis with others' compliance verification efforts and share knowledge.
- 2.5 Assess other plans and submissions identified as priorities.

(3) Review legislation, policy and operational practices and provide advice

- 3.1 Identify gaps in marine conditions and advise on improvements.
- 3.2 Provide advice on changes to federal environmental and regulatory review processes.
- 3.3 Provide advice on important federal legislative, regulatory, policy and operational matters.

(4) Enhance Indigenous groups' capacity

- 4.1 Reduce potential harm to Indigenous women and girls by working with communities to mitigate the impacts of construction work camps.
- 4.2 Support Indigenous capacity to participate in employment, training and procurement.
- 4.3 Maximize Indigenous groups' knowledge gathering in relation to TM activities and promote sharing, guided by appropriate protocols.
- 4.4 Identify and address priority areas of Indigenous inclusion in emergency prevention, preparedness and response.

(5) Optimize governance and operations

- 5.1 Communicate clearly and effectively to build trust between Committee and Subcommittee members, partners and Indigenous communities.
- 5.2 Explore and develop a relationship with the proponent.
- 5.3 Resource the Committee to meet its needs.
- 5.4 Implement Committee decisions efficiently and transparently.
- 5.5 Learn, evaluate and improve.

The Committee pursues its strategic goals and objectives through the work of five Subcommittees and one working group:

- Indigenous Monitoring Subcommittee
- Emergency Management Working Group
- Marine Shipping Subcommittee
- Socio-economic Impacts Subcommittee
- Engagement Subcommittee
- Grants and Contributions Subcommittee

Indigenous communities along the pipeline route have expressed a common interest in having greater Indigenous involvement in the federal monitoring, regulation and oversight of the Project.

The Indigenous Monitoring Subcommittee was established by the Committee to further its goal of inclusive and meaningful Indigenous involvement in the monitoring of environmental and safety issues, both in-land and marine, related to the Project, the existing pipeline and the associated marine shipping.

The Subcommittee is currently implementing an Indigenous Monitoring Program, in which IAMC-TMX Indigenous Monitors will participate in inspections, site visits and other compliance verification activities with federal regulators, including the NEB, DFO and Parks Canada. In December 2017, the IAMC funded an Indigenous Monitoring Pilot Project as part of the co-development process. The Pilot provided funding support for (a) the training and deployment of Indigenous Monitors to accompany NEB Inspection Officers and DFO representatives during in-field compliance verification activities; and (b) the co-development of a monitoring program framework, including processes that guide inspections, reporting, issues management, community engagement, communications and culturally appropriate dispute resolution.

Between December 2017 and November 2018, IAMC Indigenous Monitors participated in 10 inspections and site visits, and in four emergency management exercises. The Pilot team worked with NEB and DFO representatives to develop Framework Agreements, describing the roles and responsibilities of Indigenous Monitors, the NEB and DFO staff during compliance and verification activities. For example, many of the site inspections of the Westridge Marine Terminal included members from the IAMC alongside DFO officials. Through this collaboration with the IAMC, DFO has been able to consider Indigenous Knowledge and views through its inspection process and has strived to provide transparency in its decision-making processes.

The Pilot Project led to the establishment of a *Tri-lateral Monitoring Discussion Forum* between Trans Mountain Corporation, the IAMC and the NEB. This forum provides an opportunity for these groups to explore issues of importance to Indigenous Monitors identified in the field that cannot be addressed through the inspection process and is another example of how the IAMC advances the common interests of Indigenous communities through joint learning and action with regulators and the proponent. The first Discussion Forum took place in February 2019 and focused on increasing emergency management training opportunities for Indigenous communities, access to data on species at risk, use of spawning deterrents at water crossings, invasive species and biosecurity plans, and heritage resource discovery (chance finds) plans.

The Emergency Management Working Group has been established to increase Indigenous inclusion in emergency management prevention, preparedness and response. The Emergency Management Working Group has developed a work plan with two areas of focus relevant to both terrestrial and marine environments: (1) analysis of gaps in proponent plans and development of options or advice to improve plans; and (2) analysis of gaps in community capacity to prepare and respond to emergencies. To date, IAMC members and Indigenous Monitors have participated in five emergency management exercises and one environmental inspection of a spill. Additionally, the IAMC is working with Indigenous groups, TMC, and NEB representatives to develop pilot projects aimed at increasing Indigenous inclusion in emergency management.

The first pilot seeks to increase Indigenous participation in the Incident Command System (ICS). The second pilot project aims to improve all-hazards emergency preparedness plans, including for

hazardous spill response, which is not included in many B.C.-based Indigenous community plans. This pilot is designed to increase emergency management capacity at the community and regional level by building relationships between Indigenous communities, regulators and federal authorities. The remaining two pilot projects are in earlier stages of development but are likely to include a focus on IAMC-convened technical workshops on emergency preparedness and emergency response for Indigenous communities in B.C. Workshop topics may include, but not be limited to, spill prevention and spill response, occupational health and safety and emergency response, and reclamation and remediation.

In addition to developing the IAMC emergency management pilot projects, the Committee has approved \$638,550 in funding for one project that supports a land-based community's priority related to incident prevention, emergency preparedness and response. The Committee has also approved \$1,361,776 in funding for six projects that support marine communities' priorities in emergency management, as noted in the marine shipping section.

Overall, Canada has committed \$64.7 million over five years (from 2017 to 2021) to support the IAMC-TMX. That includes \$42 million in contribution funding to support the work of the Committee and to fund projects that address the priorities of potentially impacted Indigenous communities. The Committee identifies, assesses and selects proposals that address the priorities of potentially impacted Indigenous communities. NRCan administers the capacity funding based on recommendations from the Committee.

That funding has included:

- \$1,447,774 in funding for six projects that support community priorities related to participation in economic opportunities associated with the Project;
- \$1,361,776 in funding for six projects that support community priorities related to the effects of Project-related marine shipping, including projects that enhance emergency planning and response capacity in individual First Nations;
- \$638,550 in funding for one project that supports a land-based community's priority related to incident prevention, emergency preparedness and response; and
- \$390,500 in funding for one project that supports communities' priorities in engagement related to the Project.

These resources have enabled the Committee to establish itself and to begin addressing the common priorities of the Indigenous communities through its own work, the work of subcommittees, the provision of advice to regulators and government, ongoing engagement with communities and the provision of funding to potentially impacted communities to address specific needs or concerns. The NEB notes in its Reconsideration Report (page iv) that they are supportive of the role of the IAMC for the Project, and that they are of the view that the IAMC is "well placed to have a role in facilitating

effective and ongoing Indigenous consultation and participation in Project-related Salish Sea monitoring and follow-up measures.”

Economic Pathways Partnership

Following the approval of the Trans Mountain Expansion Project (TMX) and the Line 3 Replacement Project (Line 3), the Government of Canada announced the establishment of the Economic Pathways Partnership (EPP). The objective of EPP is to make it easier for Indigenous groups to access existing federal programs and services that help them participate in direct and indirect opportunities related to the pipeline projects, and advance their broader economic development interests. Implementation of this initiative is expected to strengthen the ability of Indigenous groups to exercise their rights and interests related to deriving economic benefits from the use and enjoyment of their traditional lands.

The EPP is a pilot initiative that is intended to complement the actions being taken by proponents to support Indigenous participation in economic opportunities associated with TMX and Line 3. The five departments currently involved in the EPP are Natural Resources Canada (NRCan), Indigenous Services Canada, Western Economic Diversification Canada, Employment and Social Development Canada and Public Services and Procurement Canada.

Through the EPP, departments work together to provide a whole-of-government mechanism for Indigenous groups to request funding and non-funding supports from the federal government and explore new ways of working together to build partnerships. The approach includes:

- A federal liaison to provide tailored supports such as serving as a long-term liaison between an inquiring Indigenous group and federal departments, pathfinding, proposal development and research.
- A regional coordinating group in each of the four western provinces, with representatives from each partnering federal department. These groups convene regularly to review Indigenous queries and proposals; consider funding and non-funding mechanisms across different departments; and align potential partnership opportunities in order to develop a whole-of-government response to queries and proposals.
- A shared inter-departmental tracker of queries, proposals and projects to integrate federal supports.
- Exploration of single window delivery models for G&C projects.

Partner departments hosted six inter-departmental EPP workshops across the four western provinces between June 2017 and February 2018 to discuss how the initiative can effectively respond to the needs identified by Indigenous communities, organizations and businesses. Approximately 400 participants attended the workshops, including representatives from about 80 Indigenous communities and 48 Indigenous organizations and businesses.

Through the EPP, partner departments have funded 10 projects in B.C. and Alberta to date valued at over \$4.5 million, to support Indigenous communities along the proposed TMX corridor. Departments continue to utilize the EPP approach to actively engage with Indigenous communities, organizations and businesses on economic development priorities related to the TMX project, as well as their broader economic interests.

4.3.3 GENERAL CROWN MEASURES THAT ADDRESS INDIGENOUS INTERESTS

The federal Crown has made, and continues to make, investments in areas that address many of the Indigenous concerns related to the Project. The section below describes a number of areas where Canada has taken steps to address Indigenous concerns about a particular issue (e.g., conservation and recovery areas for caribou), which will also contribute to mitigating or minimizing the effect of the project in these areas. Canada's efforts in this area include measures on pipeline safety, environmental response, species at risk, fish and fish habitat protection and GHG reduction and climate change adaptation. This section also includes more detail on the Oceans Protection Plan and the Whales Initiative. Canada's marine safety regime, the Oceans Protection Plan and the Whales Initiative are each being implemented across Canada, but also include measures and responses that are directly related to the Project and potential impacts associated with it.

Many of these measures can respond in whole or in part to the concerns raised by Indigenous groups at the consultation tables. Through the whole-of-government approach, consultation teams were able to draw simultaneously on the knowledge and expertise of government experts from a number of different fields where appropriate. This allows for linkages to existing initiatives to be made and communicated quickly and clearly. For example, in the re-initiated Phase III consultations, Indigenous groups raised concerns about marine safety and spill response as they pertain to potential spills caused by the Project. Canada's existing spill response regime, described in greater detail below, would minimize many of the Project-specific issues which could arise from a Project-related spill. Canada has also developed and proposed additional marine safety measures, which complement the existing system but which also respond to specific concerns about marine safety that arose out of consultations. These measures are described in greater detail in section 4.4 below. The provincial government in B.C. has also taken steps in certain areas (e.g., spill response) that will contribute to mitigating or minimizing the impacts of the Project. These are also included below.

Marine Safety and Security

Transport Canada supports a safe, secure, efficient and environmentally responsible marine transportation system that is designed to protect life, property and the marine environment. More than 100 regulations, 30 acts and international agreements and commitments make up Canada's marine safety regime, which is focused on preventing accidents from occurring. Accordingly, many components of the existing system are responsive to some of the Indigenous concerns identified

through the consultation process. The system was further enhanced through implementation of initiatives under the Oceans Protection Plan, which was introduced in 2016.

The marine safety and security system is under the legislative and regulatory oversight of Transport Canada. It is implemented by many partners including other government departments, Pilotage Authorities and Canada Port Authorities, advisory councils and enforcement agencies.

Canada's Marine Incident Prevention, Oversight and Enforcement, Preparedness and Response regimes are designed to create a safe marine transportation system and protect the marine environment by reducing the pollution of water from transportation sources. Specifically, this is achieved by decreasing the number of occurrences and by preventing pollution in the marine environment from vessels operating in waters under Canadian jurisdiction.

Canada's marine safety system comprises the collective efforts of the Government of Canada, its partner organizations, such as pilotage authorities and Canadian port authorities, and industry to support a safe, secure, efficient and environmentally responsible marine transportation system. This system is built on international and domestic cooperation, and is supported by a robust domestic regulatory regime as well as international agreements and commitments that establish standards and best practices for prevention, preparedness, response, compensation and cooperation.

In Canada, the primary legislation that governs marine safety is the *Canada Shipping Act, 2001*. The Act protects the health and well-being of people and the marine environment, regulates marine transportation and provides authority to investigate and, if necessary, to prosecute.

Specific to oil spills, the Canadian ship-source oil spill regime helps to ensure that the people, procedures and equipment needed to respond to ship-source oil spills exist in Canada. This regime is primarily administered by Transport Canada and the Canadian Coast Guard, while Fisheries and Oceans Canada, Environment and Climate Change Canada, and Natural Resources Canada provide scientific expertise.

The following sections are organized to provide a comprehensive overview of the marine safety and response system along the continuum from prevention to preparedness, response and compensation.

Marine Safety and Incident Prevention

A number of federal departments work collaboratively with the marine industry as well as pilotage and port authorities to support the safe movement of vessels in Canadian waters. Transport Canada's role is to develop laws and regulations and enforce industry's compliance with these rules through oversight and monitoring programs.

For example, Port State Control is an international ship inspection program that allows Transport Canada inspectors to board vessels in Canadian waters to ensure compliance with regulatory requirements. All Canadian tankers are required to be inspected once a year and all foreign tankers must be inspected on their first visit to Canada and at least once a year afterward. Another example is the National Aerial Surveillance Program, whose aircraft perform vessel surveillance and are capable of detecting discharges of pollutants as small as one litre from an altitude of 20,000 feet. These aircraft also help monitor shipping impacts on marine mammals like the North Atlantic Right Whale and the Southern Resident Killer Whale.

The Canadian Coast Guard manages marine traffic and ensures Canada is prepared and able to respond to all pollution incidents in Canadian waters. Marine Communications and Traffic Services monitors vessels within Canada's Exclusive Economic Zone (waters within 200 nautical miles from shore), broadcasts maritime safety information, screens vessels entering Canadian waters, and helps manage marine traffic to ensure the safe and efficient movement of vessels in Canadian waters. This includes the power to direct vessels for the purpose of promoting safe and efficient navigation or environmental protection.

Pilotage Authorities have the power to establish compulsory pilotage areas, waterways where vessels must have a certified marine pilot on board. These marine pilots have extensive local knowledge to guide vessels through busy ports and waterways and work with a vessel's captain to facilitate safe and efficient navigation in coastal waters. Laden project tankers will be required to have two marine pilots on board until they reach Race Rocks (off Victoria).

Port Authorities also support the safe movement of vessels within their jurisdiction through monitoring vessel traffic and enacting port-specific safety measures. For example, the Vancouver Fraser Port Authority has established rules for vessels transiting through First and Second Narrows, two areas in Burrard Inlet that are challenging to navigate.

Industry also plays a role in marine safety through programs like Trans Mountain's vetting and inspection program for oil tankers. This program looks at the age, design and construction of a vessel, its operating history and a number of other factors to determine if an oil tanker can load oil from the Westridge Marine Terminal.

Project-specific safety measures can also be implemented, such as the enhanced tug escort program outlined in NEB Condition 133. This program would ensure on-time and on-site rescue tug support should any laden tanker become disabled, and it enhances the existing tethered tug requirements along the TMX tanker route.

Ultimately, ship owners and the marine transportation industry are responsible for preventing marine incidents and oil spills under Canadian law. Should an incident occur, the Canadian Coast Guard is prepared and able to respond.

Canada's Ship-source Oil Spill Preparedness and Response Regime

One of the objectives of Canada's marine safety system is the protection of the marine environment from damage due to navigation and shipping activities. To help meet this objective, government and industry partnered in 1995 to create the ship-source oil spill preparedness and response regime. The regime was designed to ensure that the people, procedures and equipment needed to respond to ship-source oil spills existed in Canada. The regime follows the polluter pays principle, whereby industry is responsible for costs related to cleanup and pollution damage.

The *Canada Shipping Act, 2001* requires prescribed vessels and oil handling facilities (OHFs) operating in waters under Canadian jurisdiction to have an arrangement with a Transport Canada-certified Response Organization. Vessels are also required to have a Shipboard Oil Pollution Emergency Plan, whereas OHFs must have an oil pollution emergency plan and an oil pollution prevention plan.

As a result, all tankers bound for the Westridge Marine Terminal, and the terminal itself, have both an emergency response plan and an arrangement with a response organization. On the West Coast, the response organization is WCMRC. Transport Canada provides oversight of vessels, oil handling facilities and response organizations through regular inspections and other oversight activities.

Transport Canada sets the level of preparedness that response organizations must maintain, which includes the capacity to respond to spills of various sizes (e.g., up to 10,000 tonnes) within specific timelines. The location of a response organization's equipment and people is based on the time standards for the overall area they serve and any specially designated areas. Response organizations can also "cascade in" additional equipment from across the country or internationally, pursuant to existing agreements with other spill organizations, should that be required. A response organization's capacity can also be supplemented by the Canadian Coast Guard, as required.

When a spill occurs, the polluter is required to report the pollution to the Canadian Coast Guard and can also activate their arrangement with a response organization. The Canadian Coast Guard is the lead operational agency for all ship-source spills in waters under Canadian jurisdiction. During a spill, the Canadian Coast Guard monitors industry's cleanup efforts and also has the ability (including the legal authority and equipment) to respond to a spill, if the polluter is unknown, unable or unwilling to respond.

Greater Vancouver Integrated Response Plan

The Greater Vancouver Integrated Response Plan for Marine Pollution Incidents is designed to serve as the guide for multi-agency, on-water response to serious oil pollution events in the area of English Bay and Burrard Inlet, and reiterates that the Canadian Coast Guard is the lead federal agency to oversee the management of marine pollution spills. It is the product of a cooperative effort by federal

departments, First Nations, provincial ministries, municipalities, the Port Authority, industry (including the Western Canada Marine Response Corporation) and non-governmental organizations, such as the Vancouver Aquarium. This plan focuses on ship-source and mystery-source spills of liquid petroleum in the marine environment as covered under the *Canada Shipping Act, 2001*.

Oceans Protection Plan

Canada has a world-leading marine safety regime that continues to advance and improve in the areas of prevention, preparedness and response, and liability and compensation. The \$1.5-billion Oceans Protection Plan is a demonstration of this commitment and is developing and implementing national initiatives designed to: prevent and respond to marine safety and pollution incidents, and protect and restore marine habitats and ecosystems in key strategic areas.

The Oceans Protection Plan is transforming the Government of Canada's working relationships with Indigenous groups and coastal communities by increasing their participation in Canada's marine safety system. These activities are ongoing and include the participation of Indigenous groups to build new partnerships, facilitate their inclusion in the marine safety system and work to collaborate on specific initiatives under the Oceans Protection Plan.

The Oceans Protection Plan is a national program designed to address marine safety issues and concerns that Canadians have raised through previous consultations on various projects, including those raised by Indigenous groups during the 2016 TMX consultations and again during renewed consultations. Many of the initiatives under Oceans Protection Plan, outlined below, have been specifically designed to address and accommodate these concerns, which align with the Oceans Protection Plan's objective of building a world-leading system in Canada.

The Oceans Protection Plan was launched in 2016 and initiatives are being implemented over the course of five years. Many of the advances under the Oceans Protection Plan are already, or will be, in place before marine shipping associated with the proposed project would begin. The results in this period will inform the ongoing implementation beyond five years of funding for the Oceans Protection Plan. For many Oceans Protection Plan initiatives, notably pilot projects such as the Enhanced Maritime Situational Awareness and Proactive Vessel Management initiatives, the participation of Indigenous groups is necessary to inform long-term implementation options.

Indigenous groups will continue to be engaged on various Oceans Protection Plan initiatives to: inform; enhance transparency; establish partnerships; and work toward inclusion in the marine safety system. Through this cultivated working relationship, the Oceans Protection Plan aims to identify shared issues and develop solutions for relevant initiatives.

Oceans Protection Plan Engagement

The Oceans Protection Plan aims to build strong relationships and partnerships with Indigenous coastal communities and organizations. Through the Oceans Protection Plan's engagement activities, Canada has heard Indigenous coastal communities are seeking to play an active and meaningful role in marine safety; have an interest in being informed about Oceans Protection Plan to understand how it will strengthen marine safety in Canada; and gain an understanding of the benefits they can expect to receive, including capacity building and the protection of Indigenous coastal communities' way of life, culture, environment, food sources and commerce.

To better understand the concerns of Indigenous groups and their desired involvement in marine safety, the Oceans Protection Plan has undertaken broad and meaningful engagement across Canada.

To date, more than 389 meetings and workshops have been held across Canada with Indigenous peoples, communities and associations regarding the Oceans Protection Plan, including more than 240 in British Columbia. These engagement sessions have ranged from providing broader information on the Oceans Protection Plan to initiative-specific discussions.

Over \$13 million is available to eligible Indigenous groups and local communities to support their engagement and participation in the Oceans Protection Plan between 2017 and 2022, with an additional \$2 million in ongoing engagement funding earmarked beyond 2022. This funding gives recipients the opportunity to take part in developing and improving initiatives and to contribute their knowledge toward tailoring Canada's marine transportation system to local conditions and the environment. To date, over \$3 million in engagement funding requests have been approved with a majority of that supporting Indigenous communities and organizations.

The availability of this funding has supported increased engagement on the Oceans Protection Plan and assisted in establishing relationships and partnerships that will provide opportunities for Indigenous communities to play a long-term meaningful role in marine safety. This includes increased engagement and involvement of Indigenous groups in environmental protection and emergency response, such as the first Indigenous Coast Guard Auxiliary Chapter in British Columbia, the Indigenous Community-Boat Volunteer Program and Indigenous Community Response Training. More specifically, the Indigenous Community-Boat Volunteer Program will provide funding to strengthen the capacity of coastal Indigenous communities to participate in maritime search and rescue response activities within their communities as members of the Canadian Coast Guard Auxiliary. Similarly, Indigenous Community Response Training will give members of coastal Indigenous communities in British Columbia additional knowledge, skills and training to help build on the role they play in marine safety in their communities. Ultimately, this will help to enhance important search and rescue and environmental response capabilities within Indigenous communities through

the delivery of a training curriculum tailored to meet the needs of individual communities. This will enhance emergency response partnerships between the Coast Guard and Indigenous communities.

Indigenous Relations and Partnerships

Under the Oceans Protection Plan, Indigenous Relationships and Partnerships teams were established to support the goal of building long-term relationships and partnerships with Indigenous communities, allowing for meaningful participation in Canada's marine safety system, as well as providing opportunities to be a part of decision-making and environmental protection.

Indigenous Relationships and Partnerships teams play an essential role for the Coast Guard in implementing the Oceans Protection Plan as they work with teams delivering initiatives at the planning stage to determine which communities should be engaged and how that engagement should be structured. They provide advice and support on Indigenous engagement and consultation to regional and national project teams, and lead and/or coordinate Indigenous engagement in a large range of Oceans Protection Plan initiatives. Indigenous Relationships and Partnerships teams in all regions (Western, Central and Arctic, and Atlantic) have been active since spring 2017, advising on various Oceans Protection Plan initiatives in the Project route and all Oceans Protection Plan initiatives coast-wide.

The intent of the Indigenous Relationships and Partnerships teams is to strengthen Indigenous partnerships in several ways, including increased participation of Indigenous communities in marine safety; ongoing engagement with Indigenous communities on protecting and managing the marine environment; enhanced capacity and readiness in Indigenous communities to prevent and respond to marine incidents; strengthened exchange of information and Indigenous Traditional Knowledge to inform sound decision-making that respects Indigenous rights and interests; and greater business and employment opportunities for Indigenous communities that foster economic prosperity and community well-being.

Looking at the outcomes of Indigenous Relationships and Partnerships more specifically, the Coast Guard is working with Indigenous communities to build capacity in key areas to further enhance preventative measures for on-water activities and to safely and effectively respond to marine incidents. This work has been demonstrated through a number of Oceans Protection Plan initiatives, including: launching the Collaborative Situational Awareness Portal; organizing multiple and ongoing Indigenous Community and Response Training sessions; engaging Indigenous communities in Risk-based Analysis of Maritime Search and Rescue Delivery; extending the inclusion of Indigenous communities in the Incident Command System incident management system through training exercises; as well as, establishing the first Indigenous Coast Guard Auxiliary Chapter. These initiatives will strengthen the capacity of coastal Indigenous communities to participate in maritime search and rescue response activities within their communities as well as enhance emergency response partnerships between the Coast Guard and Indigenous communities.

Oceans Protection Plan Initiatives Corresponding to Project-Specific Issues

Through consultations on the Project, Indigenous communities have expressed concerns about the risks that increased tanker traffic may present to marine activities and the environment. While not designed to address the project-specific impacts to Indigenous Interests associated with the Project, the Oceans Protection Plan is implementing initiatives that correspond to these concerns and are described in greater detail below.

Cumulative Effects of Marine Shipping: To better understand the effects of marine shipping activities on coastal environments, the Cumulative Effects of Marine Shipping initiative is working with Indigenous peoples, local stakeholders and coastal communities. The results of this initiative will include a National Cumulative Effects Assessment Framework for Marine Shipping, which will be developed and applied in a collaborative manner to ensure coordination between scientists, Indigenous communities, industry and regulators. The desired outcome of this initiative is to enhance knowledge of the cumulative impacts and stressors of marine shipping. The collaborative approach for the development of a National Cumulative Effects Assessment Framework will include the input of Indigenous peoples to reflect how they feel their areas of interest may be affected by marine vessel activities. The data, framework and tools developed through this initiative will inform future project assessments and support evidence-based decisions that will guide economic growth while preserving marine ecosystems. This initiative is meant to be collaborative in nature and as such, planned timelines for the completion of specific activities and results are not definite. Timelines will be influenced by the collaborative process. The approach to collaborative framework development and methodology testing is meant to support the establishment of meaningful relationships and the provision of input by all interested parties throughout the process.

Through regional and national engagement with Indigenous peoples, coastal communities, Port Authorities, environmental non-governmental organizations, marine science organizations and academics, industry and other government departments' feedback has been received with respect to marine vessel activities of concern and vessel environmental and Indigenous use stressors. This has led to the identification of seven broad categories of marine vessel activities, and resulting stressors, across the country. A list of how Indigenous peoples feel their areas may be affected by marine vessel activities has also been developed with their input, and includes such issues as: risks to safety and traveling on the water; disruption of migration routes and life cycles; contamination and disruption of fishing resources; and impacts on Nation's connections to water and land, transfer of knowledge, and customs, traditions or practices.

In order to research and evaluate potential tools, methodologies and options for assessment, a contract was awarded in the summer of 2018. The findings of this work were discussed at a national workshop in February 2019, which included participation by South Coast B.C. Indigenous Nations, and will be presented for further discussion at subsequent regional workshops. The selection of an

assessment methodology(s) will be collaborative in nature and informed by experts and input from interested communities and Indigenous groups across the country.

Additionally, through the Oceans Protection Plan, initiatives are underway to work with Indigenous and coastal communities to collect data on priority wildlife and coastline features (such as beaches) that could be affected by a marine oil spill. Information on the location and characteristics of migratory birds, fisheries, other wildlife and shoreline types are geographically mapped so that this information is readily available for decision-making should an incident occur.

Coastal Environmental Baseline Program: Launched as part of the Oceans Protection Plan in 2017, the Coastal Environmental Baseline Program is a five-year program to develop nearly 40 projects for the collection of comprehensive baseline data at six pilot sites across Canada with existing or potential high vessel traffic. One of these pilot sites is the Port of Vancouver in B.C., where new baseline data is being collected in partnership with the Port, Indigenous groups and non-governmental organizations. The baseline data collected will enable the government and its partners to better detect changes in the local ecosystem over time as a result of multiple activities, which include Project-related marine shipping. The baseline data collected will help characterize the current state of the marine ecosystem and support evidence-based decisions to minimize impacts to sensitive marine habitats and species. This can ultimately make a contribution to responding to Indigenous concerns about marine habitat disturbance and destruction.

Situational Awareness and Small Vessel Safety: To support local decision-making, enhance marine safety and environmental protection, the Enhanced Maritime Situational Awareness initiative is developing a user-friendly maritime awareness information system to share a wide range of maritime information — including vessel traffic, weather and hydrography — with Indigenous and coastal communities. The overall intent is to provide a web-based, near-real time common operating picture that will assist with maritime awareness, planning and analysis. Transport Canada has partnered with the T'Souke First Nation and the Pacheedaht First Nation, two of 10 pilot hosts across Canada, to test and enhance the maritime awareness information system over the duration of the pilot project.

As a complement to this initiative, the Coast Guard has developed and released the Collaborative Situational Awareness Portal initiative, providing a web-based platform for Indigenous and coastal communities to access information on local marine traffic. The Portal is based on the Coast Guard's own operational systems. This information is combined with other relevant marine information to provide a single window on marine traffic in local waters. Access to enhanced maritime domain awareness information enables Indigenous and coastal communities to more effectively prevent and report to marine incidents, improve ongoing communication with response authorities, and leverage technology to support them as meaningful partners in the maritime safety system. A desired outcome for these initiatives is a long-term strategy, by 2020, on how the Government of Canada will provide Indigenous and coastal communities access to real-time information on marine shipping in order to heighten their understanding of marine shipping activities in their local waters and enhance their role

as an on-the-water partner increasing on-water safety through enhanced situational awareness information and systems.

Collaborative Waterways Management: To reduce conflicts at the local level, the Proactive Vessel Management initiative is developing a new, collaborative approach with Indigenous and coastal communities in order to address and manage marine traffic issues in local waterways. This initiative supports improved marine safety, environmental protection and partnerships, while recognizing economic opportunities with these communities. While Proactive Vessel Management is not currently being piloted in the project area, pilot projects are being assessed and ongoing engagement is underway on the development of the national proactive vessel management framework. Meaningful collaboration on potential adverse effects of Project-related marine traffic could be identified through Proactive Vessel Management forums between Indigenous communities, industry, non-governmental organizations and federal and other authorities. The desired outcome of this initiative is to co-develop a national framework that could be implemented across Canada, by 2020.

Oil Spill Science and Research: Through the Oceans Protection Plan, investments have been made in oil spill research and spill response methods. Since 2012, the federal government has improved its understanding of the fate and behaviour of petroleum products, including diluted bitumen, in the event of spills in marine and freshwater environments. With respect to diluted bitumen specifically, federal scientists, in collaboration with partners, have published more than 60 peer-reviewed papers or conference presentations. In addition, there are more than 30 additional peer-reviewed papers published by external organizations.

Canada believes that these investments contribute to addressing some of the issues and concerns raised by Indigenous groups through the Crown consultation process in relation to potential oil spills (accident or malfunction) by expanding the information base available for spill responders to predict the fate, behaviour and trajectory of a spill; determine the best response plans and actions; and be equipped with the best spill response technologies and equipment.

Liability and Compensation: Through the Oceans Protection Plan, legislative amendments to the *Marine Liability Act* were passed on December 13, 2018, which would remove the limit of liability for any person in Canada, including individuals, businesses and all levels of government, who have been affected by a spill of oil from a ship. In this instance, the affected party will file a claim directly with the Administrator of the Ship-source Oil Pollution Fund within two years of the day on which the oil pollution damage occurred. In the event of a large oil spill scenario, the Ship-source Oil Pollution Fund offers unlimited compensation for claimants who have suffered losses or damage, as well as costs or expenses from a ship-source oil pollution incident. With the removal of the per-incident limit it will enable eligible claims from a single incident to be paid in full even if compensation exceeds the balance of the Fund (currently about \$405 million). While cultural losses are not specifically compensated, it should be noted that compensation can be available for subsistence fishing, hunting and harvesting

of marine resources (e.g., anyone who fishes or hunts for food or animal skins for their own consumption or use).

Further amendments were made under the *Canada Shipping Act, 2001*, which enhance deterrence and enforcement by increasing the maximum amount of Administrative Monetary Penalties to \$250,000 per infraction. This increased maximum penalty will be a more effective deterrent to non-compliance, particularly for repeat offenders and large vessel operators whose vessels could cause significant damage to the environment with a pollution incident.

Oceans Protection Plan Initiatives Supporting the Protection and Recovery of Whales

Through consultations on the Trans Mountain Expansion Project, Indigenous communities have expressed concerns about the risks that increased tanker traffic may present to marine mammals, such as the SRKW. When the NEB first approved the Project in 2016, the Government of Canada recognized the need for action given the potential for increases in underwater noise and committed to addressing the increase in underwater noise resulting from the vessel traffic associated with the Project. Under the Oceans Protection Plan, funding was provided to develop a strategy that would more than mitigate the effects of the Project and support the protection and recovery of the SRKW more broadly. This resulted in the Whales Initiative, a \$167.4-million investment by Canada for measures that will address all three key threats to the SRKW as well as key threats to two other at-risk whale species. As noted above, the NEB acknowledged that the effects from Project-related marine shipping will contribute to an increase in the total cumulative effects, while noting that the environmental effects from Project-related marine vessels would be a small fraction of the total cumulative effects.

In addition to developing the Whales Initiative (which is described in more detailed in the subsequent section), the Oceans Protection Plan included investments to support the protection and recovery of marine mammals, including the SRKW.

Southern Resident Killer Whales: To mitigate the risk factor for endangered whales (e.g., as it relates to prey availability), the Coastal Restoration Fund initiative has funded 14 projects in British Columbia to date. Thirteen of these projects contribute to rehabilitating the depleted salmon stocks, an important source of food for the SRKW, which have a cultural significance for Indigenous communities in British Columbia. Of the Coastal Restoration Fund projects nationally, over 40 percent are led by Indigenous organizations, with most projects including Indigenous participation in the design, implementation and/or management of the project. The desired outcome of the Coastal Restoration Fund is to help protect and restore coastal marine ecosystems that are vulnerable to increased marine shipping and development. The habitat restoration projects will contribute to the mitigation of stressors affecting marine life and their habitats and will work with Indigenous communities, local groups and communities leading restoration activities. This initiative is being implemented over the course of five years, starting in November 2016.

The Oceans Protection Plan's funding for stronger ecosystem conservation would also help support the protection and recovery of SRKW. For example, in support of improved science the Marine Environmental Quality initiative (\$26.6M over five years) allocated resources to understand the impacts of underwater noise on various kinds of whales, including the SRKW.

The Oceans Protection Plan has also supported the development of an amended Recovery Strategy and Critical Habitat Order for the Northern and Southern Resident Killer Whales (*Orcinus orca*). On December 5, 2018, a final amended Recovery Strategy for the Northern and Southern Resident Killer Whales in Canada, which identified new areas of critical habitat for these populations, was published on the Species at Risk Public Registry. The newly identified critical habitat off the west coast of Vancouver Island was protected from destruction by a Critical Habitat Order that came into force on December 13, 2018. Within these areas of critical habitat, the government is exploring the feasibility of establishing one or more SRKW sanctuaries, with further restrictions on activities that can disrupt foraging and communication. As well, research will continue in an effort to identify any additional areas of critical habitat that might be necessary to support SRKW survival and recovery.

Whale Collision and Avoidance Initiative: Launched as part of the Oceans Protection Plan in 2017, this is a five-year initiative to develop and test technologies that detect the presence of whales in near-real time in Canadian waters. In B.C., testing and evaluation of a Whale Tracking Network in the Salish Sea is underway. The trial Whale Tracking Network uses approximately 25 cabled hydrophones to pinpoint the location of SRKW. This measure has the potential to reduce the risk of vessel-whale collision (strikes) from Project-related marine shipping and other vessel traffic in the Salish Sea by seeking to improve the detection and avoidance of SRKW in real time.

Marine Environmental Quality Initiative: Launched as part of the Oceans Protection Plan in 2017, this five-year initiative is investing in scientific research to help better understand the impact of underwater noise on marine mammals, including SRKW. In 2017, DFO hosted a national science peer review meeting that resulted in science advice on the effectiveness of mitigation measures for reducing shipping-related noise levels received by SRKW. In early 2018, acoustic recorders were purchased and deployed in five key areas in SRKW critical habitat to establish ambient underwater noise levels. This baseline data can then be used to evaluate the effectiveness of measures aimed at reducing underwater noise (e.g., vessel slow-downs, lateral displacement of vessels away from SRKW foraging areas). This initiative may contribute to addressing some of the issues and concerns raised by Indigenous groups in relation to potential acoustic impacts of Project-related marine shipping on SRKW by helping us better understand and measure the noise levels of different commercial vessel types, to monitor ambient noise over time and to detect how frequently whales are present. In addition, this information will provide us with a better understanding of the acoustic environment, which is a key feature of SRKW critical habitat, as underwater noise impacts the whales' ability to use their echolocation to communicate and detect prey.

Marine Mammal Response and Marine Protected Areas Surveillance and Enforcement: This initiative, launched as part of the Oceans Protection Plan in 2017, builds on DFO's capacity to assist and support the response to marine mammal incidents, including whale-vessel collisions. The enhanced marine mammal response capacity includes dedicated resources in B.C. for equipment, training of fishery officers, communication and outreach, and enhanced surveillance and enforcement of Marine Protected Areas. The measure may contribute to addressing issues and concerns raised by Indigenous groups in relation to potential project impacts on SRKW by enhancing DFO's capacity to respond to potential whale-vessel collisions as a result of an increase in Project-related marine shipping.

Whales Initiative

The SRKW is a vital component of the local marine ecosystem and has cultural significance for Indigenous peoples and coastal communities in British Columbia. The Government of Canada recognizes that the SRKW faces imminent threats to its survival and recovery; the key threats being prey availability, physical and acoustic disturbances, and environmental contaminants. In its 2019 Reconsideration Report (page 419), the NEB states that “[a]lthough the effects from Project-related marine vessels on Southern Resident Killer Whales would be a small fraction of the total cumulative effects, the Board recognizes the increase in Project-related marine vessels would further contribute to cumulative effects that are already jeopardizing the recovery of the Southern Resident Killer Whale.”

Announced as part of Budget 2018, the Whales Initiative is a \$167.4-million investment by the government for measures that would address threats to several at-risk whale species, including SRKW.

This initiative includes funding for research to better understand the factors affecting the health of these whales, as well as actions that can be taken to help address threats arising from human activities. In addition, under the Whales Initiative, DFO made investments to support the Marine Mammal Response Program (MMRP), including \$1 million in federal funding each year moving forward to support the program, as well as \$4.5 million over four years to increase response capacity. The MMRP is the program responsible for assisting marine mammals and sea turtles in distress.

In June 2018, the Ministers of Fisheries, Oceans and the Canadian Coast Guard, and Environment and Climate Change found that SRKW was in fact facing imminent threats to its survival and recovery. As a result, on October 31, 2018, an additional \$61.5 million in funding was directed for additional measures to further address the imminent threats to the survival and recovery of SRKW. These measures include identifying additional critical habitat for SRKW, advancing feasibility work on SRKW sanctuaries within sub-areas of critical habitat used for foraging and implementing fisheries management measures aimed at increasing prey (Chinook) availability in key foraging areas for the 2019 fishing season.

Through these efforts, the government is taking comprehensive actions tailored to address the threats to SRKW and help support the survival and recovery of the species. The following measures, funded under the Whales Initiative and Additional Measures for SRKW protection, are all designed to help reduce the three key threats to the species, recognizing that the threats are inter-related and must all be reduced in order to stop the decline in the population:

- Conservation agreements – On May 10, 2019, Canada signed a Conservation Agreement with the Vancouver Fraser Port Authority and six other member organizations of the ECHO Program. The goal of this agreement is to reduce acoustic and physical disturbances from large commercial vessels in Pacific waters, in particular those vessels that call at the Port of Vancouver. This agreement commits the parties to do so through the development and implementation of threat reduction measures to support SRKW recovery and in advancing research and educational outreach. Canada has also issued an interim order, which prohibits vessels from approaching any killer whale, within a certain distance. Canada has also entered into agreements with certain whale watching companies this season to implement additional stewardship measures, including measures that will commit them to refrain from offering tours of SRKW.
- Legislative Amendments – Recent amendments (December 13, 2018) to the *Canada Shipping Act, 2001* strengthen the government's authority to better protect the marine environment from the impacts of shipping. These amendments provide the government with the authority to, for example, implement interim orders or introduce regulations that could limit vessel speeds, create areas to be avoided, require certain equipment or designs or develop plans for reducing noise. No regulations have been developed to date.
- Amendments to the *Marine Mammal Regulations (MMR)* – These amendments to the MMR, made in June 2018 under the *Fisheries Act*, provide greater protection for marine mammals, including the SRKW. This includes a minimum approach distance of 200 metres for all killer whale populations in B.C. This increased approach distance keeps vessels further away from SRKW, reducing vessel/whale interactions and mitigating the impacts of physical and acoustic disturbance from vessels.
- Amendments to Automatic Identification System (AIS) Requirements – *Navigation Safety Regulations* requirements for AIS carriage are being extended to smaller passenger vessels (vessels over eight metres or capable of carrying 12 or more passengers). In addition to enhanced navigation safety, the AIS data gathered will allow Canada to better understand traffic density and patterns, the contribution of smaller vessels to underwater noise and marine mammal strikes and to target measures to reduce impacts in the future. Amendments to the regulations are planned to be in place for the 2019 season.
- Enhancing Regulatory Control of Five Key Organic Pollutants – These controls on organic pollutants also include two flame retardants to lessen contaminants impacting these whales.

- Conservation and other Agreements – Canada is developing Conservation Agreements (CA) with industry to formalize commitments of stakeholders to undertake actions to reduce underwater noise from their vessels. Three agreements are planned:
 - 1) A signed agreement by the Canadian Ferry Association to work with ferry operators on noise reduction targets and engage on research for quiet vessel design and retrofit options;
 - 2) A CA is being negotiated with the Vancouver Fraser Port Authority (VFPA), B.C. Chamber of Shipping, Shipping Federation, Cruise Lines International, Chamber of Marine Commerce, International Ship-Owners Alliance of Canada and Pacific Pilotage Authority to participate in measures like slowdowns and lateral displacements to reduce underwater noise; and,
 - 3) A CA is being negotiated with BC Ferries to implement an Underwater Noise Management Plan with timelines for actions.
- Continuing to identify and protect new areas of habitat necessary for survival or recovery of the SRKW population by introducing important measures aimed at protecting and recovering Chinook salmon stocks that are an important prey item.
- Slowdown in Haro Strait – In the summer of 2017, the VFPA's ECHO program asked large vessels to slow down through Haro Strait so researchers could measure how reducing speed changes the underwater noise large vessels generate in that part of the Salish Sea. Results showed significant underwater noise reductions and a second voluntary slowdown in Haro Strait was conducted in 2018. Slowdowns are expected to be an ongoing measure for the foreseeable future and, for 2019, the slowdown has been extended to include Boundary Pass.
- 2018 Lateral Displacement Trial – This voluntary measure requested that deep-sea vessels travel further south in the shipping lanes in the Strait of Juan de Fuca to move away from key SRKW foraging areas to reduce noise. If results indicate that moving vessels reduced the noise as received by the SRKW, a voluntary lateral displacement will be considered again for this coming summer.
- Underwater Noise Management Plans (UNMP) – Through UNMPs, fleet owners and operators will be asked to identify measures that they will take over the short, medium and long term to reduce underwater noise from their fleets. UNMP guidelines will be developed in 2019 with an aim to have fleet owners and operators begin developing plans in late 2019/early 2020. Consultations took place across Canada in February and March 2019 to get feedback on what should be included in UNMPs and how they should be structured, monitored and reported on. First Nations (Lax Kw'alaams, Lyackson, Semiahmoo) participated in consultation sessions held in B.C. on February 26–27, 2019.

- Real-time Hydrophone Deployment – An underwater listening station will be deployed at Boundary Pass to increase TC’s understanding of how vessel noise varies depending on various factors (e.g., class of ship, age of vessel, speed travelled, sea conditions, etc.) to build on the existing database of vessel noise profiles and help the government monitor actual noise reductions achieved by mitigation measures. While the infrastructure for the listening station is being set up, autonomous recorders are being used to begin capturing data. Autonomous recorders were deployed in August 2018 and will be in use until the real-time hydrophone is deployed. The real-time hydrophone will be deployed in fall 2019 and will be operational until March 31, 2023.
- Funding for the WhaleReport Alert System – Funding is being provided to OceanWise to further develop and improve their WhaleReport Alert System. This system is being designed to alert vessels when whales are present in a given area, allowing for more effective and real-time mitigation measures to be implemented.
- International activities – Canada has been active on the international stage raising the issue of underwater noise at the IMO’s MEPC. This includes organizing and hosting a technical workshop to share knowledge and advance work on quiet designs and technologies and working closely with partners in the U.S. and Washington State to ensure a coordinated and collaborative approach to reducing underwater noise. Canada’s work with the IMO on the management of GHG emissions in the international maritime sector includes a requirement for all vessels to have energy efficiency management plans. This requirement would also apply to Project-related marine vessels and could contribute to addressing the concerns with greenhouse gas emissions from marine tankers and pipeline transmission facilities that have been raised by a number of Indigenous groups.
- Fisheries Management Measures: During the 2018 salmon fishing season (June 1 to September 30), measures were introduced under the Whales Initiative to increase prey availability in key SRKW foraging areas. This involved full closures of recreational finfish and commercial salmon fisheries in portions of the Strait of Juan de Fuca (San Juan Point to Otter Point) and Gulf Islands, and partial closures at the mouth of the Fraser River. Additional measures for Chinook fishery reductions across the B.C. coast included reduced harvest limits, size limits, time restrictions and select area closures to protect wild Chinook stocks of concern. Closures amounted to 25–35 percent of overall Chinook harvest reductions.

Management measures associated with increasing prey availability are undertaken independent of the Project and are as such not targeted exclusively at underwater noise from Project-related vessels, although these measures may contribute to mitigating some of the effects of underwater noise from marine shipping by increasing prey availability. Reductions in fisheries and fisheries closures in key foraging areas may also contribute to reducing the impacts associated with disturbance from total vessel noise through reductions in fishing vessel activity.

- Technical Working Groups – To help inform the additional protection measures announced in October 2018 (see above), the Government of Canada has convened the following five new Technical Working Groups (TWGs):
 1. Prey availability and accessibility (led by DFO)
 2. Identification/development of proposed SRKW sanctuaries (led by DFO)
 3. Vessel noise measures related to large commercial vessels (led by Transport Canada)
 4. Additional vessel noise measures (led by Transport Canada)
 5. Contaminants (led by Environment and Climate Change Canada)

These TWGs comprise technical and subject matter experts from Indigenous and coastal communities, stakeholders and other levels of government. The TWGs are tasked with providing recommendations to Ministers and departments on a range of measures to address key threats to SRKW, including recommendations for immediate action in 2019, in addition to recommendations for longer-term recovery actions. The TWGs are focused on measures to address the primary threats to SRKW, and as such may contribute to addressing some of the issues and concerns raised by Indigenous groups through the Crown consultation process about the status of SRKW. For example, the Technical Working Group 2 on General vessel noise reduction measures is looking at immediate measures that could be put in place to reduce underwater noise from smaller vessels, including recreational and commercial fisheries, recreational boaters and commercial whale watchers.

The Technical Working Group on Contaminants is working toward identifying additional measures for 2020 by identifying key contaminants of concern, the contribution of point and non-point sources to contaminant loadings to the SRKW and their prey and by assessing the effectiveness of existing control measures. ECCC has increased scientific research (this includes looking at the contribution of microfibres from laundry washing) and monitoring of contaminants (this includes air, freshwater, landfill leachate) to improve our understanding of the sources and possible impacts on whales and their prey.

Strategic Partnership Initiative and West Coast Energy Infrastructure Program

The West Coast Energy Initiative was launched in 2014 to facilitate a coordinated federal presence in British Columbia, to enhance Indigenous participation in the development of Canada's energy resources and protection of the environment, and ensure that federal engagement with Indigenous communities translated into concrete outcomes. Some of the projects supported through this program are specific to the marine environment and/or are relevant to marine shipping concerns, including environmental, accidents or malfunctions and cumulative effects.

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 (U.S., U.K. and Australia). Companies continue to have unlimited liability when at fault or negligent;
- Providing the NEB authority to order reimbursement of any cleanup costs incurred by federal, provincial, municipal and Indigenous governments, 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);
- Requiring companies operating pipelines to hold a minimum level of financial resources, set at \$1 billion for companies operating major oil pipelines; and,
- Companies continue to have unlimited liability for all costs and damages when they are at fault.

In legislating effective preparedness and response measures to prevent and limit damage from oil spills, the *Pipeline Safety Act* is expected to contribute to the ability of Indigenous groups to exercise their rights or practise cultural activities in the manner preferred by the community members.

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

B.C. Spill Response Regime: Key elements of the new spill regime, including an initial set of detailed regulations, came into force in October 2017. The legislation, part of the B.C. *Environmental Management Act, 2003*, is divided into two phases: the first being a Regulations phase, the second is focused on Engagement.

The province released its policy intentions for the proposed regime earlier in April 2016 and, through spring 2016, conducted seven regional First Nations workshops as well as a symposium attended by stakeholders and First Nations.

Marine Safety and response to marine spills falls under federal jurisdiction. Canada has developed a marine safety system that exceeds international conventions and standards in important aspects. The province continues to work with federal partners where the land and water regimes interface to align regulatory processes for a consistent spill response framework across B.C.

National Ship-source Oil Spill Regime

The Government of Canada has established a national ship-source oil spill regime comprising three key areas: prevention, preparedness and response, and liability and compensation.

Prevention: taking all reasonable steps to prevent marine incidents from happening. This includes a broad legislative and regulatory framework, as well as oversight and enforcement of regulatory requirements. When appropriate, new legislation and regulations can be proposed.

Preparedness and response: preparing to respond to marine incidents. Government and industry share this responsibility. The government regulates and monitors and industry responds with oversight from the Canadian Coast Guard. This pillar includes activities to confirm that there is a plan, arrangement and capacity to respond to ship-source oil spills.

Liability and compensation: Canada has established a robust ship-source oil pollution liability and compensation regime under the *Marine Liability Act* that holds the polluter liable and shares responsibility between the ship owner and the cargo owner. The ship owner is first and foremost strictly liable — meaning that they will always pay for oil pollution damage up to their limit of liability. Additional compensation may also be available from the International Oil Pollution Compensation Funds and/or the domestic Ship-source Oil Pollution Fund (SOPF), which are financed with contributions from cargo owners (i.e., oil companies).

Recent amendments to the *Marine Liability Act* made in December 2018 further strengthen the regime and ensure that the SOPF is able to provide effective and adequate compensation to all Canadians affected by marine oil spills. Significantly, the amendments included removing the limit as to how much compensation is available under the SOPF: as such, there is now unlimited compensation available under the SOPF to supplement what is available from ship owners and the international funds. This ensures that Canadian victims and responders will receive 100 percent compensation for eligible claims. Another amendment to note is the introduction of an expedited process for small claims under \$35,000 to get funds to those who need them quickly, and the SOPF Administrator has the discretion to increase this amount to \$50,000 in the event of a significant spill. The expedited process differs from the regular process as claimants provide a shorter, simpler description and are not required to submit all supporting documentation (they must attest that supporting documentation can be provided upon request).

While these are important improvements to the liability and compensation regime, the Government of Canada is also attentive to concerns expressed regarding how the regime might respond to the wider impacts that marine oil spills may have on individuals and communities.

Responding to a question raised during the Phase III consultations, the SOPF has clarified that if fish for ceremonial purposes are not available due to a ship-source oil spill, the costs incurred to obtain the required fish (i.e., the additional cost of fishing at another location or purchasing fish from an

external supplier) could be compensable. In addition, if the individual making the claim fishes for their own consumption or use, or that of their family, the SOPF may provide compensation in advance for future losses that have not yet occurred but will most certainly occur. This would allow the victims of a spill to purchase fish in replacement for what they could not catch themselves. The government also notes that the SOPF intends to issue a discussion paper in the coming months to consult on the process for filing fishery-related claims, which will provide an opportunity for a valuable two-way exchange of information.

Canada's Marine Incident Prevention, Oversight and Enforcement, Preparedness and Response regimes are designed to create a safe marine transportation system and to protect the marine environment by reducing the pollution of water from transportation sources. Specifically, this is achieved by decreasing the number of occurrences and by preventing pollution in the marine environment from vessels operating in waters under Canadian jurisdiction.

SARA Listing Process

The *Species at Risk Act* (SARA) was proclaimed in 2003 and is part of Canada's strategy to protect hundreds of wild plants and animal species from becoming extinct and to help in their recovery. Attached to the Act is Schedule 1, the list of the species provided for under SARA, also called the List of Wildlife Species at Risk. Extirpated, Endangered and Threatened species on Schedule 1 benefit from the protection afforded by the prohibitions and from recovery planning requirements under SARA. Special Concern species benefit from its management planning requirements. Species become eligible for addition to Schedule 1 once they have been assessed as being at risk by the Committee on the Status of Endangered Wildlife in Canada.

The decision to add a species to Schedule 1 is made by the Governor-in-Council further to a recommendation from the Minister of Environment and Climate Change. SARA Schedule 1 is evolving and subject to change throughout an Environmental Assessment process. On April 23, 2014, the NEB advised the Ministers of the Environment and Fisheries and Oceans that if the project was approved and constructed it may affect species listed on Schedule 1 of SARA and/or their habitat. On November 14, 2018, the NEB updated its notification to include Schedule 1 listed species potentially affected by Project-related marine shipping.

ECCC and DFO included a list of species listed on Schedule 1 (or that could potentially be listed) that occur in the project area in their written evidence in 2014 (ECCC: Exhibit C123-3-1, tables 2-1 and table 2-2; DFO: Order number A4LK7D4, page 14). Additionally, each department provided a list of species at risk that could be affected by Project-related marine shipping or that have critical habitat likely to be affected by such shipping that had been newly listed or where the designation of the species had changed as part of the direct evidence for the Project Reconsideration (Order number A95292-2-2018, pp. 112, 136).

ECCC and DFO, on behalf of the Minister of the Environment and Climate Change, are currently consulting on changes to Schedule 1 for the species assessments COSEWIC sent to the Minister in October 2018. These species include some found in B.C. and Alberta whose ranges may overlap with the TMX project.

Southern Mountain Caribou and Boreal Caribou

Conservation and Recovery Actions for Southern Mountain Caribou in British Columbia and Alberta

The protection and recovery of the southern mountain caribou (SMC) is a high priority for the Government of Canada. Budget 2018 allocated \$20.5 million over five years to implement conservation measures for this species throughout its range in British Columbia and Alberta. More than \$13 million of this allocation is to support partnerships with provinces, Indigenous communities and other stakeholders. Additional funding from existing resources and from other Budget 2018 allocations may also be allocated to accomplish habitat protection and Indigenous partnership objectives.

Relative to the Project, the Project design and proposed mitigation measures have minimized the likely impacts from the Project on southern mountain caribou and its critical habitat within the Wells Gray–Thompson local population unit. However, any amount of critical habitat destruction is likely to contribute to the cumulative effects that have resulted in the ongoing declines of the species. The habitats that may be destroyed as a result of the residual impacts of the project are matrix and low elevation habitat, where SMC are unlikely to occur at this time due to local population declines. The management objective for matrix critical habitat is to maintain or establish, at a landscape level, ecological conditions that support low densities of predators. For low elevation habitat, management objectives include access to food and low densities of predators. ECCC continues to work with the proponent in the development of management and mitigation plans to address outstanding issues related to caribou.

Conservation and Recovery Actions for Boreal Caribou in Alberta

ECCC is deploying a multi-pronged approach for the recovery of boreal caribou in Alberta, with targeted investments, direct support for multi-stakeholder collaboration and, most importantly, collaboration with provinces and territories to advance boreal caribou conservation and protection, including, where possible, through the negotiations of conservation agreements with provinces, territories and others.

A draft SARA Section 11 conservation agreement between Canada and Alberta is being developed. The draft agreement contains conservation and recovery commitments for both boreal caribou and southern mountain caribou and identifies incremental measures to support the conservation of the species and the protection of its critical habitat. These measures include a commitment to complete range planning by 2021, restoration activities, short- and long-term habitat and population goals,

monitoring and population management. Work to finalize the agreement is expected to resume in summer 2019 after the Alberta election.

ECCC is also negotiating a SARA Section 11 conservation agreement with the Cold Lake First Nations. This will include commitments to landscape-level planning, habitat and population management, monitoring and capacity/community development.

In FY 2018–19, ECCC funded six Indigenous-led initiatives for boreal caribou recovery in Alberta and British Columbia under the Canada Nature Fund and the Aboriginal Funds for Species at Risk (AFSAR), many with multi-year commitments.

ECCC also funded a multi-stakeholder table in NW AB (and another one in NE AB/NW SK) in FY 2018–19 that brought together partners and stakeholders to accelerate range planning, recommend protected areas and complete multi-species planning.

Fish and Fish Habitat Protection Initiatives

DFO oversees a number of ongoing programs and new initiatives that support the protection and growth of fish stocks and fish habitat in B.C., particularly for iconic Pacific salmon.

Sustainable Fisheries and Precautionary Approach Frameworks: DFO takes a conservation-based approach to managing all stocks, and decisions around resource use are consistent with the Sustainable Fisheries Framework (SFF) and the Precautionary Approach Framework. The SFF supports conservation and sustainable use of Canadian fisheries through monitoring and assessment. The *Decision-Making Framework Incorporating the Precautionary Approach* supports evidence-based and precautionary decision-making by establishing limit reference points for fisheries management. Each year, the department develops and consults on 22 Integrated Fisheries Management Plans for a number of species including salmon, groundfish, pelagics and shellfish.

Wild Salmon Policy Implementation: *Canada's Policy for the Conservation of Wild Pacific Salmon* guides the management of Pacific salmon by the department. The goal of this policy is to restore and maintain healthy and diverse salmon populations and their habitats. In October 2018, the *Wild Salmon Policy 2018–2022 Implementation Plan* set out nine overarching approaches and 48 specific activities that the department is undertaking over the next five years to deliver on this goal. Collaboration with the B.C. government, Indigenous groups and stakeholders is a cornerstone of the Implementation Plan and many of the activities being undertaken. In November 2018 and March 2019 Wild Salmon Policy Implementation roundtables were hosted by the federal government and involved senior B.C. government, Indigenous and stakeholder representatives to discuss shared priorities for addressing wild salmon protection in B.C. The first annual report on the status of all activities in the five-year Implementation Plan will be published in spring 2019, and inter-agency collaboration will be ongoing.

Salmonid Enhancement Program: The Salmonid Enhancement Program, a \$26-million annual program, began in 1976 with the goal of rebuilding vulnerable salmon stocks, providing harvest opportunities and improving fish habitat to sustain salmon populations. The program operates 23 major enhancement facilities as well as Community Economic Development activities, which provide support to community-based groups to operate local enhancement projects and facilities. There is a Resource Restoration Unit supports salmon habitat restoration work and activities of over 10,000 volunteers. Community Advisors in DFO work alongside the stewardship community, building partnerships within the community to support salmon and salmon habitat protection and education activities at the local level across B.C.

Pacific Salmon Treaty — Recent Chapter Renewal and Investment: Led by DFO, Canada recently completed negotiations for the renewal of the Pacific Salmon Treaty (PST) to update key obligations under the PST, which provides the framework used by Canada and the U.S. to work together to conserve and manage Pacific salmon. Along with new investments to address new obligations agreed to as part of the negotiations, the new obligations reflect the government's commitment to protect and conserve the Pacific salmon resource, including stronger measures that will protect Pacific Chinook salmon.

Indigenous Contribution Programs: Annually, DFO spends approximately \$25 million on Indigenous programs in Pacific Region, which support and increase First Nations involvement in the management and use of fish stocks in B.C. The Aboriginal Aquatic and Resource and Ocean Management program assists Indigenous aggregates with capacity building, technical expertise and the establishment of collaborative structures to contribute to integrated ecosystem and watershed management and planning processes. The Aboriginal Fisheries Strategy provides Indigenous communities with an opportunity to participate in the management of fisheries and contributes toward economic self-sufficiency, as well as a foundation for the development of self-government agreements and treaties. The Aboriginal Fund for Species at Risk was established in 2004 to support the development of Indigenous capacity to participate actively in the implementation of the SARA. The Aboriginal Fund for Species at Risk also supports projects that will proactively prevent species, other than species at risk, from becoming a conservation concern.

The conservation and protection of critical wildlife species by means of the Aboriginal Fund for Species at Risk and the conservation and recovery programs for boreal and southern mountain caribou in B.C. and Alberta, provide for funded partnerships with Indigenous groups in the planning, design and implementation of targeted actions. Together with the proponent's Project planning, which includes the application of site-specific measures and route selection to avoid or mitigate adverse impacts, these initiatives will help sustain wildlife populations upon which Indigenous groups depend for the exercise of their Aboriginal rights to hunt, trap and harvest.

Increased Habitat Protection Under the New Fisheries Act: DFO works with others to manage the impacts on fisheries resulting from habitat degradation or loss, alterations to fish passage and flow, and aquatic invasive species. Specifically, DFO ensures the administration of the fisheries protection provisions of the *Fisheries Act*, including the establishment of guidelines and regulations and the administration of the SARA.

New Nature Legacy Fund — The Canada Nature Fund for Aquatic Species at Risk is part of Canada's Nature Initiative, launched in May 2018. Canada Nature Fund for Aquatic Species at Risk will provide \$55 million over five years to support projects that address priority threats and contribute to the protection and recovery of at-risk aquatic species in priority places. Specifically, the Canada Nature Fund for Aquatic Species at Risk will fund projects that address priority threats to aquatic species at risk in the marine environment and that address threats to help aquatic species at risk to recover in freshwater priority places.

Integrated and Collaborative Oceans and Freshwater Management: DFO works collaboratively with Indigenous groups and stakeholders on fish habitat issues including integrated oceans management — a holistic approach that includes Marine Protected Areas, Conservation Areas (such as the Rockfish Conservation Areas) and integrated planning including Marine Spatial Planning — and more local area-based management, including protecting freshwater fish habitat in consultation with the Province of B.C.

Canada's Action on Climate Change

The Pan-Canadian Framework on Clean Growth and Climate Change (PCF) was adopted on December 9, 2016, as Canada's plan to take ambitious action to fight climate change, build resilience to a changing climate and drive clean economic growth. It is the first climate change plan in Canada's history to include joint and individual commitments by federal, provincial and territorial levels of government and to have been developed with input from Indigenous peoples, businesses, non-governmental organizations and Canadians from across the country. The PCF is built on four pillars: pricing carbon pollution; complementary actions to reduce emissions across the economy; adaptation and climate resilience; and clean technology, innovation and jobs. It includes more than 50 concrete actions that cover all sectors of the Canadian economy and puts Canada on a path toward meeting our Paris Agreement GHG emissions reduction target of 30 percent below 2005 levels by 2030.

Pricing carbon pollution is central to Canada's plan. It is the most efficient way to reduce greenhouse gas emissions and helps drive innovation and clean growth. Provinces and territories have the flexibility to implement either an explicit price-based system or cap-and-trade system. A federal carbon pollution pricing system will apply in any province or territory that requests it or that does not have a system in place that meets federal requirements. This federal system has two parts: a regulatory charge on fossil fuels and a performance-based system for large industry, known as the output-based

pricing system (OBPS). In most jurisdictions, the OBPS went into effect January 1, 2019, and the fuel charge took effect on April 1, 2019. Pricing systems in the territories will take effect July 1, 2019.

The complementary mitigation measures included in the PCF will enable Canada to achieve emissions reductions across all sectors. Expanding the use of clean electricity and low-carbon fuels are foundational actions that will reduce emissions across the economy. Specific regulatory measures including phasing out coal-fired electricity by 2030, reducing methane emissions from oil and gas by 40 to 45 percent by 2025, advancing a clean fuel standard and phasing down the use of hydrofluorocarbons used for refrigeration and air conditioning. Canada is taking action to reduce energy use including by improving energy efficiency, encouraging fuel switching and developing net-zero energy ready building codes. Canada's climate plan is supported by historic investments in public transit (\$28.7 billion); green infrastructure (\$26.9 billion) such as renewable energy, smart grid and electric vehicle charging stations; and the Low Carbon Economy Fund (\$2 billion).

Through these investments, the Government of Canada is supporting the deployment of clean energy infrastructure that will reduce reliance on diesel for electricity and heating in northern, remote and Indigenous communities. Federal programs directly focused on this include:

- Infrastructure Canada's Investing in Canada Infrastructure program, Arctic Energy Fund and the Canada Infrastructure Bank;
- Natural Resources Canada's Clean Energy for Rural and Remote Communities program and Impact Canada Fund;
- Crown-Indigenous Relations and Northern Affairs Canada's Northern Responsible Energy Approach for Community Heat and Electricity program; and
- Environment and Climate Change Canada's Low Carbon Economy Challenge Fund.

Under the "adaptation and climate resilience" pillar of the PCF, federal, provincial and territorial governments made commitments to address the significant risks posed by climate change, particularly in Canada's northern and coastal regions and for Indigenous peoples. A broad suite of programs support this pillar, related to information and capacity, climate-resilient infrastructure, human health and well-being, vulnerable regions and climate-related hazards and disaster risks. This support includes investments in infrastructure to support enhanced resilience, such as the Disaster Mitigation and Adaptation Fund, a national merit-based program that will invest \$2 billion to support large-scale infrastructure projects to help communities better manage the risks of disasters triggered by natural hazards, and updating codes and standards to ensure buildings and infrastructure are built to withstand impacts.

The Government of Canada is working with Indigenous peoples to enhance resilience, better understand climate change and enable adaptation actions by:

- establishing a Canadian Centre for Climate Services, which is giving individuals and decision-makers throughout Canada increased access to climate-related science and information;
- providing funding to First Nation communities located below the 60th parallel to assess and respond to climate change impacts on community infrastructure and emergency management through the First Nation Adapt program;
- supporting community-led assessments and adaptation strategies related to climate change impacts on health through the Climate Change and Health Adaptation Program; and
- supporting Indigenous communities through the Indigenous Community-Based Monitoring Program to monitor climate change impacts by documenting Indigenous Knowledge and climate information.
- examining the impacts of climate change on fisheries, ecosystems and coastal infrastructure to provide decision-makers and Canadians with the information they need to plan and adapt to a changing climate through the Aquatic Climate Change Adaptation Services program.

To support clean growth, Canada is unrolling investments of \$2.3 billion in clean technology including nearly \$1.4 billion in financing dedicated to supporting clean technology firms and \$400 million to support the development and demonstration of clean technologies. In addition, the Government of Canada's Clean Growth Hub provides a single point of contact for access to clean technology knowledge, expertise and relationships across the federal government.

Climate Action Fund: provides up to \$3 million annually to support projects that raise awareness and increase participation on climate change across Canada, especially among: youth, students, Indigenous peoples and organizations and small and medium businesses.⁴⁶

Canada's most recent greenhouse gas emissions projections (ECCC 2018a) estimated that Canada's GHG emissions in 2030 will be 223 million tonnes lower than projected prior to the PCF. This improvement in Canada's emissions outlook reflects the breadth and depth of Canada's climate plan. When the PCF is fully implemented, it will put Canada on a path toward meeting our 2030 target and to continue to achieve emission reductions beyond 2030.

The Government of Canada, through Environment and Climate Change Canada, has three dedicated senior-level tables on climate change and clean growth with First Nations, Inuit and Métis peoples. This results from a commitment made by the Prime Minister and the three National Indigenous organization leaders at the First Ministers Meeting in December 2016. The purpose of the tables is to

⁴⁶ See: <https://www.canada.ca/en/environment-climate-change/services/climate-change/climate-action-fund.html>

identify opportunities and address challenges to ensure full involvement of Indigenous peoples in the implementation of Canada's climate change plan, including through jointly defining priorities for action to reduce emissions and building resilience to the changing climate. ECCC also works with Indigenous peoples to advance international climate change negotiations and successfully negotiated an Indigenous Peoples and Local Communities platform as part of the Paris Agreement implementation work program.

The legislative and policy initiatives underway to reduce greenhouse gas emissions in Canada, such as the PCF, *Greenhouse Gas Pollution and Pricing Act* and Canada's Changing Climate Report operate in concert with those project-specific measures designed to reduce greenhouse gases related to marine shipping (e.g., see NEB Recommendation to the GiC on the development and implementation of greenhouse gas reduction measures related to marine shipping to align with the International Maritime Organization Strategy). These steps will help address the concerns with greenhouse gas emissions from marine tankers and pipeline transmission facilities that were raised by Indigenous groups in consultation.

National Energy Board Conditions and Recommendations

In *Tsleil-Waututh Nation v. Canada*, the FCA found that the NEB had unjustifiably excluded the issue of Project-related marine shipping from its review of the Project. On February 22, 2019, The NEB delivered its Reconsideration Report to the Government of Canada, which included consideration of the effects of Project-related marine shipping. Its overall recommendation was that the Project is in the Canadian public interest and should be approved. The NEB reconsideration report recommended the certificate include 156 conditions on the proponent and also made 16 new recommendations to Canada, if the Project is approved by the GiC. In the Report, the NEB states (Introduction, page v) that its conditions and recommendations are made in a manner consistent with the precautionary principle and the requirements of the *NEB Act*, the *CEAA 2012* and the *SARA*. The recommendations relate to matters that are deemed by the NEB to fall outside of its regulatory mandate and outside the authority of the proponent to implement.

The conditions on the proponent cover a wide range of matters, including emergency preparedness and response, protection of the environment, consultation with affected Indigenous communities, socio-economic matters, pipeline safety and integrity, commercial support for the Project prior to construction, and financial responsibility on the part of Trans Mountain.

The Board's recommendations to the GiC relate to Project-related marine shipping, which was the subject of the reconsideration process. They include recommendations on cumulative effects management for the Salish Sea, measures to offset increased underwater noise and increased strike risk posed to *SARA*-listed marine mammal and fish species, marine oil spill response, marine shipping and small vessel safety, reduction of greenhouse gas emissions from marine vessels, and the *IAMC*.

The NEB conditions and recommendations will form part of the information the GiC must consider in making its decision on whether to approve the Project. They include mitigation measures that may address Indigenous Interests and concerns raised during the regulatory review process and which potentially outstanding interests and concerns remain to be addressed in Phase III.

2016 Conditions

Prior to submitting its OH-001-2014 Report, the NEB had issued two draft versions of the conditions to apply to the project and invited all hearing participants to provide feedback. Specifically, The NEB issued a preliminary set of draft conditions on April 16, 2014, and an updated set of draft conditions for comment on August 12, 2015. The NEB added further conditions on December 11, 2015. The comment period on these draft conditions closed on January 12, 2016.

Thirty-five Indigenous groups provided comments on the draft conditions. Issues raised with respect to the draft conditions included environmental protection, risk of accidents or malfunctions and Indigenous participation 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.

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).

2019 NEB Conditions and Recommendations

In its 2019 Recommendation Report, the NEB revised seven of its original conditions (#9, 131, 132, 133, 134, 144, 151) and added 16 recommendations to GiC. The revised conditions address marine impacts with respect to marine spill prevention and response, Marine Public Outreach and Marine Mammal Protection Programs, post-construction environmental monitoring reports, and a Vessel Acceptance Standard and Westridge Marine Terminal Regulations and Operations Guide. The

conditions and recommendations are a product of the evidence gathered and provided during the MH-052-2018 hearing process.

On January 10, 2019, as part of the reconsideration process, the NEB invited comments on NEB draft conditions and recommendations. Comments were submitted by the following Indigenous intervenors:

- Ditidaht First Nation
- T'Sou-ke First Nation
- Tsleil-Waututh First Nation
- Malahat First Nation
- Musqeam Indian Band
- Shackan Indian Band
- Simpcw First Nation
- Metis Nation of British Columbia
- Tsartlip First Nation
- Tsuut'ina First Nation
- Driftpile Cree Nation
- Whitefish Lake First Nation
- Cowichan Tribes
- Nooaitch Indian Band
- Pacheedaht First Nation
- Sto-lo Collective
- Stz'uminus First Nation
- Shxw'ōwhámel First Nation
- Snuneymuxw First Nation

Some federal departments (DFO, ECCC, NRCAN, Parks Canada, TC) were also intervenors. A list of adjustments made to NEB Conditions and Recommendations can be found on the NEB website:

<https://www.neb-one.gc.ca/pplctnflng/mjrpp/trnsmntnxpnsn/trnsmntnxpnsnrprtcdtn-eng.html>.

The Reconsideration report also provides a table outlining the NEB conditions by subject matter and regulatory life cycle stage (page 30).

The 16 new recommendations suggest relevant actions that could be taken by the GiC, should the Project be approved.

4.3.4 PROVINCIAL EA CERTIFICATE CONDITIONS

On January 10, 2017, British Columbia issued an environmental assessment certificate (EAC) for the Project. The certificate is subject to 37 conditions in relation to areas of provincial jurisdiction. Pursuant to Section 17 of B.C.'s *Environmental Assessment Act*, the province may attach any conditions to the EAC considered necessary and which are within provincial jurisdiction. Such conditions are legally binding on the certificate holder.

Many of the EAC conditions are incremental to NEB's conditions. As stated in the joint Canada–B.C. Crown Consultation and Accommodations Report, the 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 EAC conditions were in response to concerns raised by Indigenous groups during Post-NEB Hearing Phase consultations where Crown consultation was undertaken jointly by and Canada for the Project. The conditions were 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 and in consideration of the existing regulatory regime. The conditions address a variety of issues, including: the consultation and engagement of Indigenous groups; the public and provincial agencies; the mitigation and offsetting of vegetation and wildlife impacts; greenhouse gas emissions; drinking water; archaeology and heritage resources; access management; workforce; 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 Indigenous groups in the activities of Trans Mountain, including in implementing the requirements of NEB conditions and proposed provincial conditions.

Prior to the FCA decision, Trans Mountain had submitted most of the EAC condition management plans required prior to the start of construction. Trans Mountain Corporation is currently in the process of applying for and receiving approval for permits in B.C. Trans Mountain requires over 1,000 permits from the Ministry of Environment and Climate Change Strategy (BC Parks), BC Oil and Gas Commission, the Ministry of Health, the Ministry of Transportation and Infrastructure and others.

4.4 ADDITIONAL ACCOMMODATION AND OTHER MEASURES (OFFERED IN 2019)

Accommodation Measures Proposed

Guided by the Federal Court of Appeal's decision in *Tsleil-Waututh Nation v. Canada*, Canada has renewed its approach to developing accommodation measures to address potential Project-related impacts on Indigenous Interests. In the re-initiated Phase III consultations, consultation leads and team officials were given a mandate to discuss the concerns of Indigenous groups and develop and agree to accommodation measures to address those concerns. The process was designed to create meaningful, two-way dialogue between Indigenous groups and Canada.

As part of the re-initiated consultation process, Consultation Teams worked closely with Indigenous groups to identify and understand Indigenous Interests related to the Project, and tracked these against proponent commitments, regulatory conditions and existing federal actions to identify potential gaps requiring additional accommodation. Canada also approved additional measures to directly respond to issues and interests being raised by Indigenous groups. These measures were presented as a starting point for discussion with Indigenous groups during consultations, with the objective of jointly developing reasonable accommodations that appropriately addressed Indigenous issues related to the Project.

On April 1, 2019, the federal Consultation Leads sent a letter to the Indigenous groups who had been engaged in the consultation process. The letter offered information on potential accommodations that had been identified by the government. Several of the Oceans Protection Plan initiatives were already underway and had been designed to address and accommodate the concerns raised during the 2016 consultation process, while the 2019 proposed accommodations are intended to enhance or increase those measures. The potential accommodations have been identified with a view to further address concerns and impacts raised by communities in consultations. The letter included the following information on eight specific accommodations measures:

1. **Salish Sea Initiative (SSI)**, a joint Indigenous–government governance structure, to be co-developed, with funding to support Indigenous capacity to better understand and put in place mechanisms to monitor and address cumulative effects in the Salish Sea.
2. **Co-Developing Community Response**, a measure to co-develop a role for Indigenous communities in the Project Area in preparedness and response to marine incidents. This could include: knowledge sharing; training and exercises; response planning; personnel; equipment; and, communications technologies and tools.
3. **Enhanced Maritime Situational Awareness** to develop partnerships with Indigenous groups to pilot the new system and tailor it to user needs to increase domain awareness in the project area.

4. **Marine Safety Equipment and Training** to provide funding for safety equipment such as Automatic Identification Systems, marine radios and emergency position-indicating radio beacons and funding for training to improve marine safety on the water.
5. **Quiet Vessel Initiative** to test safe and effective quiet vessel technologies and operational practices that reduce underwater noise at its source as a complement to various other measures currently underway to support the recovery of the Southern Resident Killer Whale (e.g., slowdowns, reductions of containments and increased prey availability).
6. **Fish Habitat Restoration Fund** that would support collaboration with Indigenous groups to protect and restore aquatic habitats that would be impacted by the Project.
7. **Terrestrial Cumulative Effects Initiative** to enable co-development of a cumulative effects framework with a focus on understanding the current state of the environment and monitoring changes in response to development and natural processes, for example, to inform and complement projects to restore fish habitat or to conduct watershed analysis.
8. **Terrestrial Studies** program to support improved understanding of land and cumulative impacts, for example, on traditional land use, to potentially inform cumulative effects monitoring and/or construction, operations and maintenance phases of the Project.

These measures, which are described in greater detail below, include measures designed to address overall concerns with the project (e.g., the impact of underwater noise on the marine environment) and also those that can be tailored for application to a particular local context, further to ongoing discussion at the consultation tables. For example, the funding provided as part of the Marine Safety Equipment and Training measure can, through consultations, be tailored to local circumstances and the specific marine safety needs of a particular Indigenous community.

Salish Sea Initiative (SSI)

Through consultation in 2016 and again in 2019, Indigenous groups raised concerns related to their capacity to understand and contribute to address cumulative effects in the Salish Sea. Understanding cumulative effects is key to implementing appropriate actions to reduce their impacts. For example, cumulative effects in the Salish Sea are caused by human and industrial activities and have the potential to impact shorelines, fish habitat, water quality and to increase marine noise.

The National Energy Board's Recommendation 1 also calls for the development and implementation of a Regional Cumulative Effects Management Plan for the Salish Sea, including the Strait of Juan de Fuca to the 12-nautical-mile limit. The government is considering this recommendation.

Addressing cumulative effects requires a concerted approach from all stakeholders. The NEB Report also recognizes the impacts of cumulative effects of human and industrial activities in the Salish Sea, particularly on SRKW.

In response to this, the government has proposed to co-develop a SSI, which will provide a collaborative governance structure and long-term funding for Indigenous groups to fully engage on addressing cumulative effects in the Salish Sea, in collaboration with other stakeholders, through monitoring, management activities and research. As currently proposed, and further to ongoing co-development, the SSI will include funding mechanisms to support capacity building, monitoring, research, knowledge acquisition, knowledge integration and sharing, to inform adaptive management. The ultimate objective of the initiative is a co-developed governance arrangement that enables Indigenous leadership and participation in the collection of information/identification of opportunities to address cumulative effects in the Salish Sea.

This can be an important contribution to enhancing the exercise of Indigenous Interests related to marine resource harvesting and self-determination and governance over their traditional territories, in partnership with the Government of Canada.

The proposed details of the SSI, explained further below, are being brought forward to Indigenous groups through the consultation tables with a view to co-development. DFO and ECCC have also proposed to create a team to lead on the implementation of SSI, which will include additional SSI-specific meetings with Indigenous groups.

The SSI is intended to provide an avenue for Salish Sea Indigenous communities to:

- engage in a collaborative governance among themselves and within broader integrated oceans planning. Funding would be provided through SSI to support governance of the initiative and to interact efficiently with other multi-stakeholder governance and planning initiatives being implemented (e.g., Marine Spatial Planning, Whales Initiative, etc.);
- develop the capacity to consistently organize and collect baseline data into a common dataset, monitor changes in conditions and share views on cumulative effects. A new Contributions program would be developed to support capacity building for interested Indigenous communities to participate in this work; and
- provide ongoing monitoring, management of cumulative activities and research at the regional scale through the creation of a long-term fund.

The development and implementation of the SSI is subject to further co-development, but Canada has proposed some elements as a starting point. As proposed, this initiative would cover the Salish Sea region and the tributaries that feed into the Salish Sea upstream to the areas of tidal influence.

As proposed, the SSI would include three components:

- 1) Funding Technical **Capacity** for First Nations to collect environmental data, fund studies, conduct ecosystem assessment and monitoring;

- 2) Creating an **Indigenous-led administrative structure**, supported by Government of Canada officials, to report on and make recommendations on managing the cumulative effects of human activities on the health of the Salish Sea;
- 3) Establishing an **Indigenous-led Investment Fund** to generate own-source revenue to participate in marine spatial planning and support projects that are priorities for First Nations and that improve the health of Salish Sea ecosystems.

As proposed, Canada would initiate this partnership with Salish Sea First Nations through the following steps:

- 1) **Develop agreements** with the 33 First Nations on the Salish Sea to fund technical capacity in each community to assess and monitor the local marine environment and participate in broader planning processes (summer and fall 2019);
- 2) **Co-organize a Salish Sea Summit** of federal, Indigenous and other leaders and stakeholders to review the state of the Salish Sea's ecosystems and develop common goals, objectives and investment strategies for overall ecosystem health (winter 2020);
- 3) **Establish an Indigenous-led secretariat** (with federal support) to develop a cumulative effects monitoring plan based on information gathered through scientific and Indigenous Knowledge systems. It could be an assembly of community representatives, overseen by an Indigenous board (fall 2019 and ongoing);
- 4) **Create a Salish Sea Investment Fund**, in partnership with First Nations, through an initial investment of \$50 million from the Trans Mountain Corporation and the establishment of an Indigenous-majority Board of Directors (2019 and ongoing).

As the SSI evolves through discussion with Indigenous groups, it will do so through a collaborative process. In that process, Canada will be seeking to learn more about the interests of Indigenous groups and cumulative effects in the Salish Sea, what opportunities Indigenous groups see for community engagement/participation in cumulative effects assessment and how communities can work together with the government on this issue.

Co-Developing Community Response

The Co-Developing Community Response (CDCR) accommodation measure provides an opportunity to reconcile community priorities with the needs of the overall response system to mitigate marine risks.

This measure is designed to respond directly to First Nations' interests regarding increased involvement and a formalized role in marine incident management. It builds on the existing environmental response system in Canada by providing a meaningful role for First Nations and would establish new capacity in communities and integrate First Nations in decision-making and response

activities. It aims to empower Indigenous communities along the marine route with knowledge, personnel, training and equipment to protect culturally important and sacred sites on their traditional territories and provide technology and tools to improve alerting, notifications and enhance communications during a marine incident.

The co-developed role will also position First Nations as a formal part of the overall response system to mitigate marine risks alongside industry and government. It will leverage the proponent's planned investment in marine response capacity for the Project, while building on the current public-private partnership for environmental response.

CDCR is leveraging momentum gained under the Oceans Protection Plan on the initial development of the web-based Collaborative Situational Awareness Portal to co-develop enhanced capabilities with Indigenous communities along the tanker route and accelerate its deployment to expedite access to information on local marine traffic. This will improve communications and information sharing with Indigenous communities and between spill response partners before and during marine incidents.

Similarly, this proposal complements a number of other recent Oceans Protection Plan investments that contribute to strengthening the marine safety and emergency response system while producing tangible results outcomes for Indigenous communities:

- *Regional Response Planning* — The two-year Oceans Protection Plan pilot project in the Northern Shelf Bioregion directly addressed similar concerns related to the risks that increased tanker traffic may present to First Nations marine activities or to the environment by involving Indigenous communities in collaborative marine environmental response planning. Budget 2019 announced additional investments to expand this state-of-the-art approach to response planning, which will contribute to a more integrated and collaborative marine safety system, including activities in the project area. Specifically, these new investments will support deeper engagement and participation by co-developing roles with Indigenous communities for marine environmental planning and response and help to build community capacity in those roles.
- *Indigenous Community Response Training* — This ongoing Oceans Protection Plan project across the project area and the B.C. coast is meeting the strong interest voiced by Indigenous communities for targeted training to support internal capacity development and equip their members with skills and knowledge in incident management. The initiative helps to enhance important search and rescue and environmental response capabilities within Indigenous communities through the delivery of a training curriculum tailored to local needs and serves to further enhance emergency response partnerships between the Coast Guard and communities.
- *Coastal Nations Coast Guard Auxiliary* — To address the concerns and requests of coastal Indigenous communities to bolster their capacity to respond to marine emergencies in their communities, the Coast Guard worked in partnership with several First Nations in B.C. to create a new Indigenous Coast Guard Auxiliary in 2018. Oceans Protection Plan investments are

supporting dedicated funding agreements with several coastal First Nations, with more anticipated to participate in the coming years, to support their participation in marine emergency response activities within their communities as Auxiliary volunteers.

- *Community-Boat Volunteer Pilot Program* — This Oceans Protection Plan pilot program provides contribution funding, on an application and assessment basis, to support Indigenous communities in B.C. and nationwide to purchase a vessel and/or the necessary safety equipment required to participate as responders within the Coast Guard Auxiliary.

Through the reinitiated Phase III consultation process, Indigenous communities along the marine route have shown strong positive support for the CDCR accommodations measure and many are eager to advance the dialogue by formalizing relationships and contribution agreements. On April 12, 2019, Canada hosted an information session in Sidney, British Columbia, to discuss the details of the co-developing community response and marine safety measures. During the session, the 20 participating Indigenous groups emphasized the importance for ongoing dialogue to sustain Crown–Indigenous relationship building, and at the same time expressed concerns about the sort of episodic and project-driven conversations lacking long-term funding commitments, that they have experienced in other, previous contexts.

The ultimate objective of the Co-Developing Community Response measure is for communities along the marine route to be empowered with capacity to protect culturally important and sacred sites on their traditional territories and to define a clear role for Indigenous communities in the broader marine response system.

Having heard concerns from communities about the risks increased tanker traffic may present to their own marine activities or to the environment, the Government of Canada will work with communities to address their concerns.

As part of the Oceans Protection Plan, the Government of Canada is developing, in partnership with Indigenous communities, a new web-based maritime situational awareness system that will provide a range of maritime information, such as vessel traffic, sensitive environmental areas, hydrography, weather and other key information as defined by users including local and Traditional Knowledge. This web-based system will help to address safety on the water. It will support informed local decision-making to help plan vessel routes, identify sensitive areas, or provide assistance in emergency situations in local waters. Information in this system will come from sources such as Environment and Climate Change Canada, Canadian Coast Guard and satellite-based data and can be used on computers, smart phones and tablets to display, in a user-friendly way, a range of maritime information including vessel traffic, hydrography, weather, and other key information. The system can also be tailored to include local and Traditional Knowledge.

The Government of Canada has launched pilot projects across Canada's coasts to test the new system and sent a letter to First Nations in the TMX Project area seeking three additional partner communities interested in hosting pilot projects. During the pilot projects, host communities will have access to funding for capacity, infrastructure and equipment, and act as hubs for other users of the system in the Project area to provide input and feedback that will directly inform system upgrades and ensure it meets local community priorities and needs.

This system will help mitigate concerns raised during engagement with Indigenous communities in the Project area who have expressed the desire to monitor real-time vessel traffic using a system that displays areas of traditional use, as a potential means to lessen impacts on their use. Further, Indigenous communities have indicated during engagement that they may want sensitive areas, such as SRKW habitat, displayed in the system. By doing so, it will help to enable the protection of certain species at risk.

Marine Safety Equipment and Training and New Pilot Projects

In order to increase marine safety for Indigenous vessels along the tanker route and shipping lanes, Canada is proposing funding for marine Indigenous communities involved in the reconsideration of the Project that can be used for equipment for certain Indigenous community vessels, as well as marine safety training. The intent is that measures will be tailored to individual community interests and needs and that eligibility criteria of the program would be co-developed.

For the equipment, the desired outcome is to enhance marine safety, ensure other vessels are aware of the presence of vessels owned and operated by Indigenous communities, permit easy communication with the Canadian Coast Guard's Marine Communications and Traffic Services and passing vessels, and improve search and rescue efforts, should an incident occur. For the marine safety training, the desired outcome is that it would contribute to the prevention of incidents in areas of higher traffic and interaction with Project tankers, shipboard incidents and better response to emergencies. Training on certain types of safety equipment would also be part of the program.

The Government of Canada has invited Indigenous communities to work in partnership to determine what equipment and for which types of vessel funding would be eligible, as well as the type of training and option for delivery. The program is designed to complement the commitments made by the proponent to fund marine safety equipment. For example, the proponent has committed to financially assist smaller vessels registered in the WCMRC's FOSET program to be fitted with Automatic Identification Systems and radar reflectors to enhance safety, aid in locating other vessels and improve search and rescue efforts (Commitments: 390853, 1623, 1652). Canada's efforts in this particular area will be targeted to those vessels that are not eligible for the FOSET program.

Overall, by improving marine safety on the water, this initiative is anticipated to facilitate the exercise of fishing rights, as Indigenous communities along the marine route will be better equipped to manage marine safety issues.

Quiet Vessel Initiative

During consultations, a number of Indigenous groups voiced concerns about the impacts of underwater vessel noise on the marine environment and the SRKW, which was identified as a species of cultural significance to Indigenous peoples. Underwater noise from vessels is one of the top threats to the endangered SRKW, because it decreases their ability to navigate, communicate and locate food.

Recent efforts to decrease the impact of noise on the SRKW (e.g., under the Oceans Protection Plan and Whales Initiative, see section 4.3) have focused on slowing vessels or shifting traffic away from their critical habitat. While this has been successful, long-term noise reductions will require new technologies. Making vessels quieter is a relatively new concern for shipbuilders and operators. It has not been the focus of extensive research. As a result, there are significant gaps in our understanding about the different sources of on-board ship noise (i.e., engines, propellers, etc.), how these sources contribute to the overall noise of the vessel and the most effective available noise mitigation technologies and designs. To address this, a Quiet Vessel Initiative (QVI) is being considered to address these knowledge gaps and lay the groundwork for additional noise management measures in the Salish Sea.

Through rigorous testing and evaluation, modeling, data analysis and research collaboration on quiet vessel technologies, the QVI would evaluate the safety, environmental and operational feasibility of various solutions. By addressing underwater noise at its source, the QVI would play an important role in helping to make sustained reductions in vessel noise and reduce impacts on SRKW, and in supporting Canada's efforts at the IMO to influence the development of international quiet vessel design standards.

Indigenous participation and guidance would be crucial to the success of the QVI and could be facilitated through a number of opportunities, including: participation on a QVI Advisory Committee, participation in technical workshops, and participation in sea trials, in particular where there may be co-benefits for the community (e.g., assessing the effectiveness of quiet hybrid-electric fishing vessels).

Aquatic Habitat Restoration Fund

During the re-initiated Phase III consultations, Indigenous groups raised concerns about the potential impacts that TMX could have on fish and fish habitat, as well as the general state of fisheries resources based on cumulative effects from development projects. In order to address those concerns, the

government has offered the creation of a fund designed to increase capacity within Indigenous communities to protect and restore aquatic habitats that may be impacted by the project or by the cumulative effects of development

The objective of this accommodation measure, called the Aquatic Habitat Restoration Fund (AHRF), is to have Indigenous communities and the Government of Canada co-develop projects for habitat restoration and to address direct and indirect threats posed by the project on aquatic habitats and species. Consultation Teams have sought to initiate discussions with Indigenous communities on the proposed approach and help define the geographic scope of the initiative. As proposed, the AHRF will be designed to help advance an ecosystem approach to improving and restoring fish and fish habitat, through the support provided to projects in areas of interest to Indigenous communities. Improved and restored fish habitat could ultimately have a positive effect on the ability of Indigenous groups to exercise their rights and interests related to the harvesting of fish.

While there are many restoration programs that are national in scope, the AHRF, as proposed, would cover three specific areas: the Salish Sea, the Fraser River Watershed and inland watersheds along the TMX pipeline corridor. It is envisaged that the AHRF would support Indigenous-led projects that address concerns associated with cumulative impacts on aquatic habitats and species. The AHRF is anticipated to have a positive impact on the general state of fisheries resources and fish habitat by improving fish habitat, contributing to the restoration of valued marine and freshwater habitats and the long-term sustainability of fisheries resources. This program would help to advance an ecosystem approach to improving and restoring fish and fish habitat, through the support provided to projects in areas of interest to Indigenous communities.

As proposed, the AHRF will support activities that aims to restore fish habitat. Such projects could be:

- Studies;
- Restoration projects;
- Coastal/Riparian Engineering projects; and
- Monitoring of and reporting.

More precisely, such projects could consist of the stabilization of eroding shore by using breakwaters, the improvement of spawning habitat by adding appropriate sediment (gravel) and the improvement of fish feeding areas by planting aquatic plants.

Canada has proposed to create the AHRF as a directed funding program of five years in duration. A directed funding program means that a predetermined amount of funding, to be determined after a joint planning exercise, would be allocated to each Indigenous group that is part of the process. To access the funds, Indigenous groups will have to provide a project proposal containing, for example, project objectives, a project description and a budget.

Each project could also include capacity-building activities to assure tangible and long-term positive outcomes in Indigenous communities. For example, in the context of a project aiming to map an ecological phenomenon, Indigenous peoples could benefit from courses or training on Geographic Information System to enable them to participate in the project or give them knowledge and capacity to follow up once the project completed.

Existing initiatives such as the Coastal Restoration Fund, Habitat Stewardship Program, Aboriginal Fund for Species at Risk, and the Canada Nature Fund for Aquatic Species at Risk, discussed previously, can also be applied to increasing capacity for Indigenous communities to participate in on-the-ground restoration activities to benefit fish and fish habitat.

Terrestrial Cumulative Effects Initiative

Over the course of the consultations, many Indigenous groups raised concern about potential cumulative impacts of development, including the potential Project, on fish and fish habitat, particularly for salmon and Chilcotin and Thompson River steelhead upstream in the Fraser River, wildlife (e.g., spotted owl, grizzly bear, southern mountain caribou) and the contribution of climate change and other natural processes (e.g., wildfires) to those effects. Canada heard that this will threaten Indigenous groups' traditional way of life and access to fish for food, social and ceremonial purposes and economic opportunities. Indigenous groups also stated that cumulative effects are not well understood or adequately addressed through environmental assessment and regulatory processes.

In response to these concerns, the government is proposing the co-development of a cumulative effects initiative, with a focus on understanding the current state of the environment and monitoring changes in response to development and natural processes. Cumulative effects monitoring can be useful in many contexts, such as: providing early warning of unintended or undesired impacts; confirming trends in levels or effects outside natural variation; helping to inform appropriate mitigation options; assessing restoration (or mitigation) effectiveness; and assisting with environment assessment activities.

A cumulative effects initiative, co-developed with Indigenous groups, will help continue meaningful dialogue started during Phase III consultations, improve understanding of concerns related to historic and potential increased terrestrial cumulative effects, establish baselines with a focus on identifying and addressing information gaps, and contribute to a monitoring and analysis system that allows early identification of issues. The initiative would also include work on watershed studies to better understand the stressors and their contribution to cumulative effects on fish and fish habitat.

As part of the initial discussions, Canada has proposed to utilize a regional approach based on four major regions — Island/Lower Mainland, Fraser Valley, Thompson Valley, and Boreal/Parkland region of Alberta — to co-develop and deliver the Terrestrial Cumulative Effects Initiative (TCEI). A regional approach would recognize ecosystems and geography and respect the particular environmental

concerns, perspectives, rights and responsibilities of the Indigenous communities that have raised issues with the potential impact of the Project on cumulative effects.

The purpose is to collaborate with Indigenous peoples and co-develop a cumulative effects initiative, which seeks to:

- Gather data and information on the state of the environment, or valued components of the environment, within a region;
- Monitor and analyze how the environment, or components of the environment, change in response to development and natural processes; and,
- Make this information publicly available for evidence-based decision-making.

Consultation Teams introduced the initiative, and they are seeking to clarify Indigenous concerns and explore opportunities to partner to understand how cumulative effects are impacting environmental components of value and to begin a dialogue to develop options for governance of this proposed initiative, drawing on existing cumulative effects work.

The principles of the TCEI would be developed collaboratively with Indigenous peoples. Some principles have already been raised through consultations:

- Co-development and co-management of the TCEI with Indigenous communities and other relevant partners;
- Inclusive to all Indigenous communities who feel that cumulative effects are impacting their traditional use of lands and resources;
- Participation and support by federal departments in the governance and projects;
- Coordinated with existing initiatives; and,
- Long-term investment in relationship building as cumulative effects extend beyond the scope of a single project.

Key features of this approach would include:

- Identify and discuss common groups of concerns related to terrestrial cumulative effects.
- Establish regional baselines (e.g., the state of the environment) based on the concerns raised, addressing identified gaps in information.
- Implement cumulative effects monitoring and analysis to better understand how development is affecting environmental components of concern to Indigenous peoples.
- Develop regional solutions to specific cumulative effects concerns that have been raised by Indigenous peoples.

In the consultations discussions, Canada made clear that it recognizes that co-development of a cumulative effects initiative will take time. In order to facilitate that process, Canada identified short-, medium- and long-term opportunities for participation in the TCEI, as set out below:

Short term (e.g., 2019–2020)

Creating a forum to co-develop the approach:

- Participant funding is available for Indigenous participation.
- A series of workshops would be held.
 - These workshops will provide a forum for Indigenous representatives, the Government of Canada, and potential partners to collaborate on the mandate, goals, vision, desired governance features and principles of the cumulative effects initiative.
 - The workshops will also seek to identify and discuss regions of interest or environmental components of value and seek to aggregate common concerns.
 - Finally, these workshops will seek to identify the elements of success for the initiative.

Identify and fund specific regional cumulative effects studies

- Proposals for Indigenous-led cumulative effects studies (e.g., establishing baseline information) that are raised during consultations may be eligible to receive funding in 2019–2020 should the Project be approved.

Cumulative Effects Advisors

- The Government of Canada has cumulative effects advisors who are available to provide information on existing cumulative effects initiatives, such as: science, research and monitoring activities or conservation and recovery actions. They can help connect cumulative effects concerns to existing federal and provincial initiatives and programs that may be of interest. They will also be available to help design additional initiatives to address concerns that are not covered by existing activities.

Medium term to long term (e.g., past 2020)

Participation in the Governance of the Initiative (if the Project proceeds)

- Once the initiative has been established, longer-term participant funding is available for Indigenous participation in the governance and management of the initiative.
- The scale and focus of governance could be flexible to ensure that actions are focused on regions where common interests and concerns on cumulative effects have been identified. If a regional scale approach is taken, the overarching principles designed through the forum workshops would guide activities.

- Governance could include: setting priorities for regional cumulative effects studies, reviewing proposals for Indigenous-led studies in keeping with the approach and principles of the TCE initiative, sharing data and information that is collected through these studies and making it available for decision-making.

Funding for Identifying Valued Components of the Ecosystem

- Grants and Contributions for Indigenous-led workshops at the community and/or regional scale to identify concerns related to historic and potential increased terrestrial cumulative effects and the valued ecosystem components.

Funding for Indigenous-Led Cumulative Effects Studies

- Training to build community capacity to conduct studies and monitoring.
- Grants and Contributions for local studies and regional baseline (e.g., the state of the environment) studies based on the concerns raised, addressing identified gaps in information.
- Grants and Contributions for cumulative effects monitoring and analysis to better understand how development is affecting environmental components of concern to Indigenous peoples.

Potential Opportunities for Partnered Regional Studies

- Results of the workshops may include the identification of opportunities for regional studies to gather information on state of the environment, assess cumulative effects and prepare a report for consideration in future environmental assessments and decision-making.
- These would need to be developed and undertaken with the province and other partners.

Information on an Open Science and Data Platform

- Information and data collected through the TCE initiative could be made available on the Open Science and Data Platform. The activities and information generated through this initiative would be presented in a way that is accessible to different audiences.

Terrestrial Studies

Canada heard in consultations that Indigenous groups are concerned about the potential land-based impacts of the Project. This includes concerns about impacts on traditional land use and the impacts that could come from the construction, operation and ongoing maintenance of the Project. For example, Indigenous groups are seeking to better understand:

- Impacts on harvesting plants on the land
- Impacts on land-based animals that are hunted
- Cultural impacts of changing the landscape and resources

Indigenous groups are also seeking to update, if necessary, existing Traditional Land Use Studies in order to update key data points, which will likely have changed over time, to revisit the scope of the studies to ensure they cover the full range of cultural uses of the land and to seek additional funding beyond the original funding for the studies.

In response to the issues raised, Canada is proposing to support Indigenous-led studies to better understand the potential land-based impacts of the Project. The Terrestrial Studies Initiative (TSI) is specifically designed as an accommodation measure to enhance the shared understanding about potential cumulative effects on the land base. The conduct of studies designed and led by Indigenous groups with incorporation of Indigenous Knowledge, will enrich the level of baseline information on the terrestrial environment on which Indigenous groups depend on to exercise their rights and interests related to harvesting of wildlife, fish and plants. It is anticipated that, once put in place, the TSI would complement the Terrestrial Cumulative Effects Initiative led by ECCC (described above).

In their discussions, the Consultation Leads provided a clear path forward for government assessment of the proposed studies. This included providing a clear sense of the assessment that would be used, such as: how it would assess whether there was a sound project plan; whether it aligned with the program priorities; the nature and extent of Indigenous involvement in the study; the expected impact and cost and; the plan for maintaining the impact of the project after it was completed.

During the consultations, Indigenous groups were also provided with an up-to-date list of existing programs that can be used in some cases to fund part or all of some of the proposed studies. Where it was determined that a study was a better fit for an existing program, the Consultation Team facilitated the connection with the relevant department.

Other Measures — Economic Opportunities in the Project

The Crown acknowledges Indigenous groups' interest in opportunities to participate economically in the Project, including equity and revenue sharing. On March 15, 2019, the Minister of Finance, the Honourable Bill Morneau, wrote to all potentially impacted Indigenous groups to acknowledge that Canada has heard their interests. The letter also confirmed that should the Project be approved, the Department of Finance would engage with groups on this topic, in a manner that would ensure that they could have an opportunity to explore the possibilities for economic participation in the Project.

This letter was followed by a public announcement to the same effect by the Minister of Finance on March 25. Both the letter and the announcement set out a set of principles that would guide the exploratory discussions:

- That the potentially impacted Indigenous communities could have an opportunity for meaningful economic participation in the Project;

- That the participation of Indigenous groups could help the economic development of their communities in keeping with the spirit of reconciliation;
- That the government invested in the Trans Mountain Corporation to benefit all Canadians; and,
- That the Project would be built and operated on a commercial basis.

4.5 INDIGENOUS CONCERNS ABOUT NEB AND CONSULTATION PROCESSES

Throughout the Project review and Crown consultation process, many Indigenous group participants expressed their opposition to the Project, criticized the NEB Review as fundamentally flawed, and raised various concerns regarding Canada's approach to consultation including reliance on the NEB Review, to the extent possible, to satisfy aspects of Canada's legal duty to consult.

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 a 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 Indigenous 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 Indigenous 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.

Indigenous 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 Indigenous 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 Indigenous Interests. In each instance, Indigenous 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 Indigenous groups' evidentiary filings with the NEB. In the view of many Indigenous 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 Indigenous Interests.

Some Indigenous 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 Indigenous 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 Indigenous 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 Canada'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.⁴⁷

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 Indigenous 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 Indigenous groups as it proceeds to final design. A number of NEB conditions for the Project require ongoing engagement of Indigenous groups; however, Indigenous 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.

As noted in more detail in Chapters 2 and 3 and at the outset of this chapter, Canada has redesigned and reinitiated the Phase III consultation process that will be used to inform the GiC decision on the project. The redesign of the project has been done with the intention of ensuring that Project-related

⁴⁷ 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].

impacts on Indigenous Interests are understood and that appropriate steps are taken to see that they are avoided or mitigated as much as possible.

NEB Hearing Process

Indigenous groups raised concerns that the NEB did not offer an oral hearing in the initial and reconsideration processes 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 for addressing issues raised by Indigenous groups through a written testing of the evidence. In addition, several Indigenous groups expressed that the quasi-judicial nature of the Board's hearing process made it adversarial, and some Indigenous 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 Indigenous groups engaged in consultation with Canada stated that the NEB Review places an unreasonable burden on intervenors to assess the Project. The view strongly expressed by Indigenous 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, Indigenous groups expressed concern with the perceived lack of flexibility shown by the NEB for the provision of oral evidence, filing of evidentiary updates by Indigenous group intervenors, and the refusal to accept late submissions of traditional use information.

In addition, Indigenous groups felt that the requirement placed on them to participate as formal intervenors was at odds with meaningful engagement, as Indigenous groups would have preferred to work collaboratively with Canada to understand the impacts of the Project on their specific Indigenous Interests and other interests.

In the reinitiated 2018 process, the NEB made significant steps in rectifying past issues with respect to oral traditional evidence hearings and responses to information requests. Nonetheless, certain Indigenous groups raised a concern over the reconsideration process, including concerns about the scope of the process.

Level of Participant Funding

Many Indigenous 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 Indigenous groups in the consultation process.

In particular, it was noted 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 Canada.

Crown's Reliance on the NEB Hearing to Inform Crown Consultation

Given the above procedural concerns, most Indigenous group participants in the NEB hearing expressed concern over what they viewed as Canada'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 Indigenous Interests.

Many Indigenous 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 many groups was that the NEB process did not adequately incorporate consultation and accommodation considerations in respect of Canada's duty to consult.

A key element of this concern was the view that the NEB's recommendation for the GiC to approve the Project did not consider justification under the constitutional framework in place for protecting Aboriginal rights or whether Canada's duty to consult and as, appropriate, accommodate was adequately met.

In the reinitiated process, Canada is taking all the necessary steps to meaningfully consult with all impacted Indigenous groups. As such, it has consulted meaningfully during the post-NEB hearing phase of consultation on the Project and continues to identify measures available to avoid or minimize potential adverse impacts on Indigenous Interests. In addition, Canada has sought to work closely with potentially impacted Indigenous groups to identify, develop and refine accommodation measures or other actions to address potential impacts, as appropriate, in an effort to reconcile Indigenous Interests with other public interests.

Canada is committed to meeting its duty to consult and conduct the reinitiated process in the right way, which includes a consideration of the seriousness of the potential impacts of Crown decisions in relation to the Project on Indigenous Interests. This consideration includes 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 Indigenous groups in a manner that is commensurate to the degree of seriousness of the impact.

Through Canada's efforts during the NEB review process and the post-NEB hearing phase, Canada has provided opportunities for Indigenous 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 government's decisions are informed by a record that reflects the views and concerns of Indigenous groups and presents actions recommended to meaningfully respond to those concern.

5. Conclusions

Throughout the reinitiated Phase III consultations chronicled in this report, Canada committed to doing consultations differently, informed by the findings of the Federal Court of Appeal (FCA). The FCA found that although Canada had acted in good faith and that its 2016 consultation framework was appropriate, those 2016 consultations did not adequately take into account the concerns of Indigenous groups or explore possible accommodation of those concerns. Canada reinitiated the Phase III consultations with a view to creating an improved process that allowed for more meaningful consultation and better accounted for and responded to Indigenous groups' concerns.

In practice, this meant building on the foundation of the original consultation record while taking a focused approach to address known gaps. This included addressing gaps outlined in the FCA decision (e.g., lack of “responsive, meaningful, two-way dialogue”) as well as shortfalls identified through the course of the consultation process itself — such as situationally specific concerns about spills and cumulative effects. Throughout the process, Canada engaged in meaningful dialogue about how the Project's impacts on Indigenous Interests could be avoided or mitigated. Canada sought to be responsive, to the extent reasonably possible, to individual communities on the matters that were of priority to them and on how they wanted to be involved in the consultations. Canada also undertook consultations with Indigenous communities governed by a Modern Treaty in keeping with its obligations. Canada also offered potential accommodations where appropriate and responded to accommodations that were put forward by communities.

By virtue of the reinitiated Phase III consultation meetings, Canada was better informed as it worked to assess the impacts of the Project on Indigenous Interests and how those impacts could be avoided or mitigated. A number of factors were considered, including the conditions placed on the Project by the National Energy Board (NEB) and Canada's existing and ongoing work to address issues in related areas (e.g., general environmental conservation and protection measures such as the OPP and the

Whales Initiative). It also included the specific commitments made by the proponent to accommodate concerns and the specific accommodations measures proposed or implemented by Canada as part of the 2016 process (e.g., the IAMC) or in the re-initiated Phase III consultations.

This Chapter summarizes how the reinitiated Phase III process was different — both in terms of the consultation approach and the way in which potential impacts on Indigenous Interests were identified and addressed (Note: Table 5-1 provides an overview of how the reinitiated process built on the 2013–16 process with enhanced and new elements). It also provides an account of Canada’s conclusions regarding the depth of consultation owed to Indigenous groups and the impacts of the Project on Indigenous Interests, considered in light of the accommodations measures offered. It then presents Canada’s overall conclusions on the reinitiated Phase III consultations and accommodations, as well as Canada’s rationale supporting its assessment that the duty to consult and accommodate has been met.

5.1 REINITIATED PHASE III CONSULTATION PROCESS

The reinitiated Phase III consultation process built on the initial consultation process (2014–2016) but made adjustments to respond to the FCA decision and to account for changes to the context for the Project since 2016. This included enhancing certain elements of the prior consultation approach and taking new steps within the reinitiated Phase III process. The key features of the reinitiated Phase III consultations include:

Expert oversight — Canada appointed the Honourable Frank Iacobucci to provide oversight and direction to Canada on the revised consultation and accommodation process with the goal of ensuring that the process was faithful to the spirit and intent of the FCA decision. Justice Iacobucci hosted a series of roundtables with Indigenous people in late 2018 (see Chapter 4), and he continued to provide advice to Canada throughout the course of the reinitiated Phase III consultation process. Mr. Serge Dupont was also appointed as special advisor to the Prime Minister, with a mandate to coordinate efforts across federal departments in the response to the August 30 FCA decision. Both Justice Iacobucci and Mr. Dupont met regularly (at times on a weekly and even daily basis) with officials and Consultation Leads to provide advice and guidance on the process and to support follow-up.

Consultation team — Canada more than doubled the size of the consultation team relative to the team dedicated to the 2016 consultations and provided appropriate training to better prepare them to work effectively and respectfully with Indigenous groups. The consultation team drew on its broad expertise in Indigenous engagement and consultation, in regulatory processes, and in relevant federal government programs and legislative responsibilities on matters related to the Project to inform and deliver meaningful two-way consultations.

Whole-of-government approach and participation of the proponent — When needed, the consultation team ensured there was representation from relevant federal departments during consultation sessions to enable Canada to meaningfully and expertly respond to concerns and discuss accommodation measures where appropriate. This approach also allowed consultation teams to connect Indigenous groups to a wide range of existing government programs, platforms and resources that could be used to help minimize or mitigate the potential impacts they were identifying during consultations. Trans Mountain Corporation, as Project proponent and a Crown corporation, was a full participant in the consultations and was able to contribute to identifying solutions to avoid or mitigate potential impacts of the Project on Indigenous Interests. The issues addressed by the representatives from other departments and the proponent were wide-ranging and pertinent to specific Indigenous Interests, including emergency preparedness, environmental impacts and construction, as well as work camp protocols.

Consultation approach — Working closely with Justice Iacobucci, Canada modified the way it developed its consultation approach for the reinitiated Phase III consultation process. Canada outlined its draft proposed approach to consultation and accommodation and circulated it to Indigenous groups for reaction and feedback at roundtables hosted by Justice Iacobucci in November and December 2018. The final consultation approach was shared with Indigenous groups February 18 and 19, 2019, and was made publicly available online. The consultation approach guided the efforts of the consultation teams and governed interactions with Indigenous groups throughout the reinitiated Phase III consultation process.

Wherever possible, consultation teams prioritized face-to-face meetings with Indigenous groups within their territories and communities. In many cases, this involved touring the Project right of way to see its location in relation to the community. Consultation teams also often met with communities in community-wide meetings, which allowed teams the opportunity to engage dynamically with the community as a whole. In a number of these cases, the core consultation team was also joined by representatives from other federal departments (e.g., Environment and Climate Change Canada, Fisheries and Oceans Canada, Transport Canada, Parks Canada) as well as the proponent and the NEB. This approach helped to provide context to the issues being raised in discussions. Where specific proposals by Indigenous groups were not accepted, Canada strove to provide a rationale for the decision.

Re-assessing depth of consultations — In general, Canada's consultation team built on what was known from the 2013–2016 process as well as the initial discussions with Indigenous groups (in-person and through the exchange of correspondence such as letters or phone/text) to establish a starting point for the reinitiated Phase III process. As with the 2016 process, Canada engaged in dialogue with Indigenous groups in order to clarify the methodology and information that would be used to inform Canada's assessment of the depth of consultation owed in each case. This included discussions about Canada's analytical framework for understanding the potential adverse Project impacts on Indigenous Interests. Canada provided opportunities for all potentially impacted Indigenous groups to comment

on those assessments — both in the course of consultation meetings and through their review of the draft of this Report — and considered whether any modifications were required to its original assessments.

Where it was warranted, Canada revised and updated the depth of consultation assessments for some of the Indigenous groups on the Crown consultation list. Reassessments were conducted where: Indigenous groups disagreed with the previous assessment; new information was provided that could have an impact on the assessment; and/or there was another compelling reason to review. As a result of this updated assessment for depth of consultation, Canada assessed that deeper consultation was required for 11 groups. A list of these groups and the basis of Canada's assessment is provided in Table 5-2. In practice, Canada approached consultation with all groups in a fashion consistent with consultations at the deep end of the *Haida* spectrum.

Responding to process concerns — In the correspondence reinitiating Phase III consultations, Canada made clear the need for “timely and accessible support for participation” in the form of participant funding that was offered up front and delivered in a timely fashion. This helped to reduce the administrative burden faced by Indigenous groups participating in the reinitiated Phase III process. Where discussions called for it, Canada worked with Indigenous groups to co-develop situationally and culturally appropriate approaches to consultations. For example, in one instance the consultation team and an Indigenous group co-developed a series of joint technical working groups, bringing together experts from both the group and other government departments with the aim of reaching shared understandings of potential impacts on the group's Indigenous Interests.

Senior government officials (i.e., Deputy Ministers, Associate Deputy Ministers and Assistant Deputy Ministers) also met with groups when requested and appropriate. The Deputy Minister of NRCan met often with Indigenous groups and engaged in a regular exchange of correspondence to respond to questions and provide updates on the process. Deputy Ministers from Indigenous Services Canada, Transport Canada, Fisheries and Oceans Canada, the Canadian Coast Guard and Environment and Climate Change Canada also met with Indigenous groups to discuss the process and the development of specific accommodation measures. Ministerial engagement was also extensive, as discussed below.

Mandate for meaningful dialogue — In response to the FCA's concern that consultations lacked someone “with the confidence of Cabinet” that could engage interactively, Canada established a system to communicate and seek direction from senior management and decision-makers, including Ministers, on the issues being raised at the consultation table. These issues were discussed on a regular basis (weekly and at times daily), which allowed for dynamic, iterative and ongoing consideration of the issues raised by Indigenous groups at the table. This empowered the consultation teams to engage in a true two-way dialogue — both at the table and through correspondence — proposing accommodations, considering Indigenous group proposals, adjusting and refining proposals, and providing and explaining responses, wherever possible, to Indigenous groups.

Throughout the reinitiated Phase III process, Canada demonstrated that it was willing to meet with groups as often as possible and as often as the groups wanted. In some cases, this meant multiple meetings.

Consultation Leads met weekly (generally via conference call) with the Deputy Minister of NRCan, Justice Iacobucci, Mr. Dupont and senior officials from the Department of Justice to communicate the issues the Leads were hearing at the table and to discuss possible accommodations to address those issues. To that end, the Consultation Leads also met on occasion, as required, with Deputy Ministers from other relevant departments. In addition, they met with the Minister of NRCan and with a group of other Ministers with involvement in the Project.

The Minister of NRCan reiterated clearly to Indigenous groups, both in meetings and through correspondence, that the Consultation Leads were in regular communication with him and senior public servants, and that the Leads had the full confidence of the Minister to explore accommodations to avoid or mitigate the impacts on Indigenous Interests.

Leadership of Minister of Natural Resources — Minister Sohi provided regular updates to ministerial colleagues and met with Consultation Leads and Justice Iacobucci to discuss the consultations process and specific accommodations. Minister Sohi held 46 meetings with over 65 Indigenous groups along the Project route to help in building relationships and supporting meaningful engagement.

Accommodations — The nature of the reinitiated Phase III process allowed for specific and focused proposals for accommodations to be developed in response to concerns being raised at the tables. These proposed accommodations, initially communicated to groups via a letter on April 1, 2019, were conceived and initially developed and refined by government officials on the basis of the issues emerging from the prior record of consultations, the roundtables held by Justice Iacobucci and the early feedback from the consultation tables. These proposals for accommodations were created as starting points for discussion with groups that were invited to work with Canada and the proponent and that the proposals would be further developed and tailored to specific situations. For example, following initial discussions on the proposed accommodations, the scope of the proposed terrestrial cumulative effects measure was expanded to include inland waterways that were important to supporting socially, culturally and economically important fish populations — notably salmon. Some specific examples are described in greater detail in Chapter 4.

Reporting — A draft version of the first four chapters of this report was shared with all Indigenous groups who were part of the reinitiated Phase III consultations. Each group was also provided with a draft annex that reflected Canada's understanding of the consultations and accommodations process with that specific group (as of the day the draft was shared). Groups were invited to provide comments to the consultation Team Leads within five weeks of the date of the letter. At that time, Canada also acknowledged that many groups had indicated that they wished to provide their views on the Project and the process in their own voice. Arrangements were outlined for groups to convey their views in

this regard to Canada and to be appended to the final Crown Consultation and Accommodation Report (CCAR).

In some cases, having all relevant parties at the table simultaneously allowed for particular questions or concerns about accommodation measures to be answered more completely. For example, a number of communities requested more information about the transport of dangerous goods, specifically the transportation of oil by rail. The consultation team arranged for federal experts to come to the consultation table to address specific community concerns about this issue. A number of other communities requested that representatives from the proponent make an emergency preparedness presentation at community meetings. The proponent met with communities who made this request and was able to clarify emergency management roles and responsibilities in the event of a spill.

In other cases, proposed Crown accommodations were effectively merged with community proposals to create a made-in-community approach to addressing impacts and concerns. One such approach emerged from two-way dialogue with Pacheedaht First Nation which aimed to reconcile the community's vision for enhanced response capacity with the Crown's proposed accommodation measures. Through meaningful discussions that included Indigenous leadership and senior representatives from the Canadian Coast Guard, a collaboratively developed solution emerged that responds to Pacheedaht First Nation's concerns, aligns with their vision of a multi-purpose facility that would improve co-ordination of search and rescue as well as environmental response in the region, and addresses a current gap on response capacity on the west coast of Vancouver Island. At another table, two-way dialogue between the Crown and the Indigenous group led to an alignment exercise of specific marine accommodation measures (co-developing community response, marine safety equipment and training, and Salish Sea Initiative) with a community's highly developed stewardship and monitoring proposal.

5.2 SUMMARY OF IMPACTS ON INDIGENOUS INTERESTS

In 2016, Canada was of the view that the Project's routine construction and operation would result in a minor level of impacts on Indigenous Interests. At that time, the NEB also identified the cultural impacts on the SRKW, but considered Project-related marine shipping as out of scope for its assessment under CEAA 2012. Since 2016, Canada has taken a number of steps to bolster its efforts to protect the SRKW, including new measures addressing conservation areas and marine vessel restrictions introduced in May 2019. Pursuant to the 2018 FCA decision, the GiC also directed the NEB to broaden the scope of its review to include marine impacts associated with Project-related shipping. Through its Reconsideration Report on Project-related marine shipping, the NEB found that the Project is likely to cause significant adverse environmental effects specific to the SRKW and on Indigenous cultural use of the SRKW.

The reinitiated Phase III process and the NEB's reconsideration of Project-related marine shipping has led Canada to conclude that potential impacts to groups that rely on the SRKW for cultural use are likely to be moderate, rather than minor. This includes, but is not limited to the following groups: Lyackson, Malahat, Pacheedaht, Pauquachin, St'zuminus (Chemainus), Tsartlip, Tsawout, T'Sou-ke, Tsawwassen and Tsleil-Waututh.

Table 5.3-5.7 summarize Canada's conclusions regarding the depth of consultation owed to each Indigenous group, the potential Project-related impacts on specific Indigenous Interests for each group, and the overall range of potential Project-related impacts. Through the reinitiated Phase III consultation process, Canada developed a more thorough understanding of the nature of asserted and established Aboriginal and Treaty Rights for potentially impacted communities. This helped to inform the assessment of the impacts that the Project may have on each Indigenous group's interests.

As mentioned above, a specific annex was developed for each Indigenous group on the Crown consultation list. Each group-specific annex sets out Canada's assessment of the Project's impacts on Indigenous Interests for that particular Indigenous group or groups, with a summary of Canada's understanding of the specific nature of those asserted and established rights, the key issues and concerns raised as part of their consultation discussions with Canada and an account of specific consultation activities and accommodations proposed. In addition, all Indigenous groups who have been part of this process have been invited to offer their own submissions, presenting their views, in their own voice, of the impacts of the Project on their rights and interests and of the reinitiated Phase III consultation and accommodation process that was undertaken. Canada initially advised Indigenous groups via letter that the input that was received by May 29, 2019, would be appended to the final annex and would form part of the CCAR. This deadline was extended to June 6, in response to requests from some Indigenous groups that requested additional time.

Breadth and Depth of Information Relied Upon by Canada

For the reinitiated Phase III process, information previously submitted by Indigenous communities was taken together with the 2013–2016 consultation record to provide a solid starting point. This was supplemented with the extensive information submitted through the NEB Reconsideration process, including information from Indigenous groups, as well as through information shared in the reinitiated Phase III consultations.

Over the course of the reinitiated Phase III process, Indigenous groups expressed their views to Canada on how the Project would impact their rights and other interests and identified the areas of greatest concern to them. They also offered their perspectives on whether and how the proponent's commitments, NEB conditions and Canada's proposed accommodations might, or might not, address those impacts. This helped to deepen Canada's understanding of impacts and tailor accommodation measures to specific Indigenous Interests. Indigenous groups communicated their views and perspectives on issues related to the reinitiated Phase III consultations through face-to-face dialogue

with the Crown consultation teams, in meetings with the Minister and Deputy Minister of NRCan, as well as through correspondence with Canada. As a whole, these exchanges helped Canada to better align existing and newly proposed measures with specific potential impacts on Indigenous Interests.

NEB Reviews

Some Indigenous groups have questioned the extent to which Canada could rely on NEB reviews to identify, consider and address how the Crown's conduct in relation to the Project might adversely impact potential or established Aboriginal or Treaty Rights. The Supreme Court of Canada confirmed in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* that Canada is able to rely on the NEB, provided that they advise Indigenous groups that they intend to do so.

As part of the reinitiated Phase III consultation process, Canada advised Indigenous groups of the intent to rely on the NEB Reconsideration to the extent possible, and that the Reconsideration therefore constituted part of Canada's overall consultation process. Additionally, in order to ensure that the NEB was made aware of Canada's understanding of Indigenous Interests and concerns related to the Project (and in particular to Project-related marine shipping), NRCan filed the 2016 CCAR and annexes in evidence for the Reconsideration process (Hearing MH-052-2018). Canada recognizes that a number of potentially affected Indigenous groups are of the view that not all of the concerns they raised have been expressly addressed or accommodated through the NEB Reconsideration process. Following the release of the NEB Reconsideration Report (MH-052-2018) on February 22, 2019, consultation teams were open to discussions about Indigenous groups' views on the Report in its entirety.

5.3 ADDRESSING IMPACTS ON INDIGENOUS INTERESTS

As described in Chapter 4, a range of factors could contribute to avoiding or mitigating the impacts of the Project on Indigenous Interests. Among these factors are the conditions set out by the NEB, commitments on the part of the proponent, existing measures put in place to address outstanding cross-cutting Indigenous concerns, such as the Oceans Protection Plan, Southern Resident Killer Whale (SRKW) Recovery Strategy, the Whales Initiative, and measures such as the Indigenous Advisory and Monitoring Committee (IAMC).

Nevertheless, Indigenous groups raised concerns for their communities that they believed were not adequately addressed by Canada's existing and ongoing efforts to address impacts to Indigenous Interests or by the proponent's commitments and the NEB conditions that would be placed on the Project. The issues raised in the reinitiated Phase III consultations include:

- Ensuring adequate safety, spill prevention and response capacity in the marine environment;

- Addressing cumulative effects in the marine environment, including effects on SRKW and effects on aquatic habitat;
- Addressing cumulative effects in the terrestrial environment and interest in terrestrial studies;
- Addressing specific routing concerns of the Project, including the impacts on cultural and sacred sites, aquatic and wildlife species; and
- Creating opportunities for economic participation in the Project.

In direct response to these issues, Canada proposed additional and complementary accommodation measures that were further refined through consultations. These accommodation measures were also focused on outcomes that:

- Respected Crown jurisdiction and asserted Aboriginal rights and title
- Responded to NEB recommendations to the Crown in the Reconsideration Report, in addition to conditions the NEB set out for the Project
- Built on proponent and Crown actions and commitments
- Were — and can be further — developed in consultation with Indigenous groups to advance government and Indigenous Interests
- Remained economically reasonable and environmentally responsible
- Reflected scientific and Indigenous Knowledge
- Developed whole-of-government solutions, with flexibility on specific issues
- Established clear parameters to enable transparency and clear communication

Chapter 4 highlighted the additional accommodation measures proposed by Canada for co-development with Indigenous groups. These measures were designed to address concerns related to safety, spill prevention and response capacity, as well as addressing the marine and terrestrial cumulative effects of development that the Project may contribute to, including the impacts on SRKW.

The consideration or implementation of these measures will help to address the impacts associated with temporary and ongoing use of lands or waters by the Project; acknowledge the potential impacts on Indigenous Interests; and support the strong interest of Indigenous groups to meaningfully participate in decisions taking place within their traditional territories or territories subject to treaty provisions.

Many Indigenous groups remain of the view that more time is needed for Canada 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. In 2016, the timeline for decision-making was extended by up to four months to specifically provide additional

time for Indigenous consultations. In 2019, in response to concerns about consultation timelines from a number of Indigenous groups, the GiC extended the deadline for a decision on the project from May 22, 2019, to June 18, 2019. The additional time allowed for further engagement between Canada's consultation teams and Indigenous groups to ensure the best possible process to inform the GiC decision. Canada is of the view that the combination of its consultations and those by the NEB and the proponent — through the prior and latest rounds of engagement — have provided sufficient time to identify and meaningfully accommodate impacts on Indigenous Interests.

With the close of reinitiated Phase III consultations, Canada has committed to further discussions in Phase IV. Should the Project be approved by the GiC, Phase IV would focus on co-development and collaborative implementation of several of the accommodations measures to ensure they are responsive to the needs and interests of communities. The proponent is also committed to sustaining engagement with communities through Project permitting, construction and operation. Moreover, if the Project is approved, the Minister of Finance has committed to exploring the possibilities of Indigenous economic participation in the Project, should communities be interested.

5.4 OVERALL CONCLUSION

Canada's consultation objectives are to meet the legal duty to consult, to uphold the honour of the Crown and to help build long-term relationships that further the overarching goal of reconciliation with Indigenous peoples. Fulfilling the legal duty to consult, as well as the scope of that duty, depends on the specific context and facts of the particular decision before Crown decision-makers, although it is always the case that the duty requires meaningful dialogue with potentially impacted groups to ensure all related concerns are understood and addressed. In general, the practice for meeting this duty is informed by government policies, best practices and evolving jurisprudence. In this instance, and of vital importance, Canada's 2018–19 efforts were also guided by the FCA decision in *Tsleil-Waututh Nation v. Canada (Attorney General)*.

In 2018–19, Canada built the re-initiated consultation process on the significant baseline knowledge provided by the 2016 process. This helped to inform Canada's assessment of potential impacts from the Project and consideration of the effectiveness of measures to avoid or mitigate such impacts. The process was made more robust by layering on key improvements — summarized above and elaborated upon in Chapter 3 — to ensure that the consultations were meaningful and responsive, as directed by the FCA in *Tsleil-Waututh Nation v. Canada (Attorney General)*. The consultation process undertaken with each Indigenous group met the depth of consultation identified by Canada, as appropriate in each case, and a response to new information was provided in all cases. Concerns raised and accommodations proposed by Canada as well as by Indigenous groups were tracked with a view to ensuring that each issue was appropriately considered and responded to in a timely fashion.

Canada considers the consultation with Indigenous groups to be procedurally adequate to allow for the Governor-in-Council (GiC) to take informed decisions regarding potential impacts on Indigenous Interests. Taking into account the overall process of consultation, federal departments and agencies are of the view that consultation throughout the reinitiated Phase III consultation process was carried out in good faith, that it was consistent with the direction of the FCA decision, and that Canada established a reasonable process of seeking to understand and address potentially outstanding issues and impacts.

In this report and its annexes, Canada has provided its understanding of the potential adverse impacts of the Project on each group's Indigenous Interests, and it bases this understanding on a thorough and meaningful engagement process. Canada has also set out how certain initiatives would avoid, mitigate or otherwise accommodate for adverse Project impacts on Indigenous Interests, including: Project modifications; proponent commitments and agreements entered into with Indigenous groups; NEB conditions that would be legally binding to a potential Certificate of Public Convenience and Necessity, and; B.C. EAO's conditions for the provincial EA certificate.

Canada's assessment is that all impacts on rights resulting from Project-related construction and routine operation and maintenance were determined as falling between the range of negligible-to-moderate impacts for all Indigenous groups consulted. The seriousness of the impact of spills on Indigenous Interests would depend on the size, location and conditions of a spill and the effectiveness of response measures. Although the overall likelihood of a spill, as well as the potential impacts on Indigenous Interests, could range from negligible to serious, there is a very low likelihood of serious impacts. Chapter 4 provides more detail on spill prevention and Canada's spill liability regime, in both land and marine environments, which is designed to mitigate the risks and consequences of a spill. It is supported by NEB conditions and proponent commitments and is further augmented by government programs and accommodation measures. This includes Oceans Protection Plan investments in oil spill research and spill response methods, as well as changes to the spill liability regime to compensate for any losses in the unlikely event of a spill. The industry funded and federally certified Western Canada Marine Response Corporation also provides additional support to spill response capabilities in the marine areas that could be impacted by any Project-related spill.

Detailed individual assessments are important to fully understand the impacts on each unique Indigenous group. The nature of the potential impact should also be assessed against the steps taken by Canada to set out accommodation measures that minimize or mitigate the potential impact of the Project on Indigenous Interests and rights.

The size and complexity of the Project — including the development of a new pipeline, the operational expansion of a marine terminal and the resulting increase in marine vessel traffic — along with the large number of potentially affected First Nation and Métis groups, made the reinitiated Phase III consultation process an extraordinarily complex one. This complexity, together with the substance and wide-ranging nature of the issues raised in the consultations, often led to challenging dialogue between

Canada and the Indigenous groups involved. Through the discussions, even in cases where Indigenous groups strongly oppose the Project; where they objected to any part of the process, including timelines; or where the parties were unable to agree on the degree of impacts of the proposed accommodation to address that impact — the parties worked hard to ensure that their engagement was respectful. Canada's officials made every effort, as a first principle, to listen, to understand and to respect Indigenous views and perspectives, and to be responsive to those views and perspectives. Canada is appreciative that Indigenous groups approached the consultations with the same disposition. Canada believes that the overall process represented a constructive step in strengthening the relationship and building trust. Canada believes that the entirety of the consultation process, including the Phase III consultation process reinitiated further to the direction from the FCA, has resulted in a meaningful and responsive two-way dialogue between Canada and potentially impacted Indigenous groups on both procedural and substantive matters.

This report finds that the consultation process, including the re-initiated Phase III consultations, has addressed the issues identified by the FCA decision; has been conducted in good faith; has offered meaningful two-way engagement; has provided responses and, where appropriate, reasonable accommodations to address potential impacts on Indigenous Interests. Accordingly, this report concludes that Canada has met its Constitutional duty to consult and accommodate.

This report, its annexes and independent submissions from Indigenous groups, will be submitted to the GiC to inform its judgement whether the Crown's constitutional duty to consult and accommodate Indigenous peoples has been met. The GiC will also consider information related to the *National Energy Board Act*, the *Canadian Environmental Assessment Act, 2012*, and the *Species at Risk Act* for its decision making on the Project. Canada is committed to continuing the meaningful relationship with Indigenous groups established throughout the reinitiated Phase III consultation process.

Table 5.1 – Features of Enhanced Phase III Consultation Process

	Enhanced elements	New elements
Design		
Depth of consultation	- Reassessed depth of consultation assessments for 11 groups	- Added 12 groups to the consultation list - Shared depth of consultation assessment up front
Expert oversight		- Appointment of Justice Iacobucci - Appointment of Mr. Serge Dupont
Transparency		- Consultation approach shared with groups upfront
Upfront participant funding	- Participant funding provided at the outset of the process, to better enable timely and meaningful consultation	- Increased amounts of funding made available to Indigenous groups on the Crown consultation list
Approach		
Consult team and leads	- More than doubled the size of consultation team - Appointed consultation leads with extensive experience in Indigenous relations, including consultations - Steps were taken to ensure Indigenous representation in consultation teams	- Every member of the core consultation team was provided with training on how to work effectively and respectfully with Indigenous groups
Better whole-of-government approach	- Officials with a range of expertise were included as core consultation team members	
Engagement of proponent		- Status as Crown corporation means proponent included as full participant in consultations
Interactive engagement		- Development of system to communicate and seek direction from decision-makers, up to and including Ministers - Regular meetings between Consultation Leads and DMs - Multiple meetings between DMs and Minister and communities

Response to process concerns	- Co-development of agendas, meeting protocols, etc.	- Focus on meeting groups in communities, including at community meetings
Understanding and addressing impacts		
Better understanding of impacts	- Able to draw on new developments (e.g., OPP, Whales Initiative) in assessing potential project impacts	- Focus on two-way dialogue
Accommodations		<ul style="list-style-type: none"> - More focused and responsive measures proposed for co-development - Addressed accommodations proposed by groups - Gave rationale where Canada did not accept proposed accommodation

Table 5.2 – Revised Depth of Consultation Assessment

GROUP	DOCA – Nov 2016	DOCA - Re-initiated Phase III Consultations	Rationale
Pacheedaht	Moderate	High	Cultural importance of SRKW
Ditidaht	Moderate	High	Cultural importance of SRKW
Lyackson	Moderate	High	Cultural importance of SRKW
Stz'uminus	Moderate	High	Cultural importance of SRKW
Malahat	Moderate	High	Recognition of Douglas Treaty
Pauquachin	Moderate	High	Recognition of Douglas Treaty
Tsartlip	Moderate	High	Recognition of Douglas Treaty
Tsawout	Moderate	High	Recognition of Douglas Treaty
T'sou-ke	Moderate	High	Recognition of Douglas Treaty
Whispering Pines	Low	Moderate	More accurately reflects the pipeline route in relation to their traditional territory
Yale	Moderate	High	Alignment with the other members of the Tiy't Tribe with which they share traditional territory

Table 5.3 – Alberta Groups: Conclusions Regarding Impacts on Indigenous Interests and the Depth of Consultation

Indigenous Group	Depth of Consultation	Assessed Impact on Indigenous Interests				Greatest Assessed Impact on Indigenous Interests
		Hunting, Trapping, and Plant Gathering	Fishing and Harvesting	Other Traditional and Cultural Activities	Aboriginal Title/Related Governance	
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
Aseniwuche Winewak Nation	lower	minor-to-moderate	--	minor-to-moderate	--	minor-to-moderate
Driftpile Cree Nation	lower	minor	minor	minor	(treaty)	minor
Enoch Cree	deeper	minor-to-moderate	minor	minor-to-moderate	(treaty)	minor-to-moderate
Ermineskin Cree	middle	minor-to-moderate	negligible-to-minor	negligible-to-minor	(treaty)	minor-to-moderate
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	minor-to-moderate	(treaty)	minor-to-moderate
Montana	middle	minor-to-moderate	negligible-to-minor	negligible-to-minor	(treaty)	minor-to-moderate
O'Chiese	middle	minor-to-moderate	minor	minor-to-moderate	(treaty)	minor-to-moderate
Papaschase	lower	minor	--	minor-to-moderate	--	minor-to-moderate
Paul	deeper	minor-to-moderate	minor	minor-to-moderate	(treaty)	minor-to-moderate
Saddle Lake Cree Nation	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	(treaty)	negligible-to-minor
Samson Cree	middle	minor-to-moderate	negligible-to-minor	minor-to-moderate	(treaty)	minor-to-moderate
Stoney Nakoda Nations	lower	minor	negligible-to-minor	minor	(treaty)	minor
Sturgeon Lake Cree Nation	lower	minor	minor	minor	(treaty)	minor

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Sucker Creek First Nation	lower	minor	minor	minor	(treaty)	minor
Sunchild First Nation	middle	minor	minor	negligible-to-minor	(treaty)	minor
Swan River First Nation	lower	negligible to minor	negligible	minor	negligible	minor
Tsuut'ina	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	negligible-to-minor	negligible-to-minor
Whitefish (Goodfish) Lake First Nation	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	(treaty)	negligible- to-minor

Table 5.4 – B.C. Interior Groups: Conclusions Regarding Impacts on Indigenous Interests and the Depth of Consultation

Indigenous Group	Depth of Consultation	Assessed Impact on Indigenous Interests				Greatest Assessed Impact on Indigenous Interests
		Hunting, Trapping, and Plant Gathering	Fishing and Harvesting	Other Traditional and Cultural Activities	Aboriginal Title/Related Governance	
Adams Lake	middle	minor	minor	minor	minor	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 (Tsquesen)	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
Esk'etemc	lower	negligible	negligible	negligible	negligible	negligible
High Bar	lower	negligible	negligible	negligible	–	negligible
Kanaka Bar	middle	-	minor	minor-to-moderate	minor	minor-to-moderate
L'heidli T'enneh	lower	negligible-to-minor	minor	negligible	negligible	minor
Lhtako Dene	lower	negligible	minor	negligible	negligible	minor
Little Shuswap Lake	lower	negligible-to-minor	minor	negligible-to-minor	negligible	minor
Lower Nicola	deeper	moderate	minor-to-moderate	minor-to-moderate	minor-to-moderate	moderate
Neskonlith	lower	negligible-to-minor	minor	negligible-to-minor	negligible	minor
Nicomén	middle	minor	negligible	negligible	–	minor
Nooaitch	middle	minor	minor-to-moderate	minor	minor	minor-to-moderate
Nlaka'pamux Nation Tribal Council⁴⁸	middle to deeper	minor	minor	moderate	minor	moderate

⁴⁸ NNTC includes Boothroyd Band, Lytton First Nation, Oregon Jack Creek Band, Skuppah First Nation, and Spuzzum First Nation.

Shackan	middle to deeper	minor	negligible-to-minor	up to moderate	minor	up to moderate
Shuswap	lower	negligible	negligible	negligible	negligible	negligible
Simpcw	deeper	moderate	minor	minor-to-moderate	moderate	moderate
Siska	middle	minor-to-moderate	minor	minor-to-moderate	minor	minor-to-moderate
Splats'in	middle	negligible	minor	negligible	–	minor
Stk'emlupsemc te Secwepemc Nation⁴⁹	deeper	minor	minor	up to moderate	minor	up to moderate
Stswecem'c Xgat'tem	lower	negligible	minor	negligible	–	minor
Syilx (Okanagan Nation Alliance)⁵⁰	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	minor	minor	minor	minor-to-moderate	minor-to-moderate
Williams Lake	lower	negligible	minor	negligible	negligible	minor
Xatsull First Nation (Soda Creek)	lower	negligible	minor	negligible	negligible	minor

⁴⁹ Stk'emlupsemc te Secwepemc Nation member groups are Skeetchestn Indian Band and Tk'emlups Band.

⁵⁰ 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 5.5 – B.C. Lower Fraser Groups: Conclusions Regarding Impacts on Indigenous Interests and the Depth of Consultation

Indigenous Group	Depth of Consultation	Assessed Impact on Indigenous Interests				Greatest Assessed Impact on Indigenous Interests
		Hunting, Trapping, and Plant Gathering	Fishing and Harvesting	Other Traditional and Cultural Activities	Aboriginal Title/Related Governance	
Chawathil	deeper	minor	minor	minor	moderate	moderate
Cheam (Pilalt)	deeper	minor	minor	minor	minor	minor
Katzie	deeper	minor	minor	minor	minor-to-moderate	minor-to-moderate
Kwantlen	deeper	minor	minor-to-moderate	minor	minor	minor-to-moderate
Kwaw-kwaw-apilt	deeper	minor	minor-to-moderate	minor-to-moderate	minor-to-moderate	minor-to-moderate
Kwikwetlem	deeper	minor	minor	minor	minor-to-moderate	minor-to-moderate
Leq'amel	deeper	minor	minor-to-moderate	minor-to-moderate	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	moderate	minor	moderate
Peters	deeper	minor-to-moderate	minor-to-moderate	moderate	moderate	moderate
Popkum	deeper	minor	minor-to-moderate	minor	negligible	minor-to-moderate
Seabird Island	deeper	minor	minor	minor	moderate	moderate
Semiahmoo	lower	negligible-to-minor	minor	moderate	negligible	moderate
Shx'wow'hamel	deeper	minor-to-moderate	minor	minor-to-moderate	moderate	moderate
Squamish	deeper	negligible-to-minor	moderate	moderate	minor-to-moderate	moderate
Skawahlook	deeper	minor	minor-to-moderate	minor-to-moderate	moderate	moderate
Skwah	deeper	minor	minor-to-moderate	moderate	moderate	moderate
Sq'ewlets	deeper	minor	minor-to-moderate	minor-to-moderate	minor-to-moderate	minor-to-moderate
Sts'ailes (Chehalis)	lower	negligible	negligible	negligible	–	negligible

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Sumas	deeper	minor	minor-to-moderate	moderate	moderate	moderate
Tsawwassen	deeper	negligible-to-minor	minor	moderate	(treaty)	moderate
Ts'elxweyeqw Tribe⁵¹	deeper	minor	minor-to-moderate	moderate	moderate	moderate
Tsleil Waututh	deeper	minor	moderate	moderate	minor-to-moderate	moderate
Union Bar	deeper	minor	minor	minor	moderate	moderate
Yale	deeper	minor	negligible-to-minor	minor	moderate	moderate

⁵¹ Ts'elxwéyeqw Tribe represents the communities of Aitchelitz, Shxwhá:y Village, Skowkale, Soowahlie, Squiala, Tzeachten and Yakweakwoose First Nation.

Table 5.6 – B.C. Vancouver Island: Conclusions Regarding Impacts on Indigenous Interests and the Depth of Consultation

Indigenous Group	Depth of Consultation	Assessed Impact on Indigenous Interests			Greatest Assessed Impact on Indigenous Interests
		Hunting, Trapping, Plant Gathering, Marine Fishing and Harvesting ⁵²	Other Traditional and Cultural Activities	Aboriginal Title/ Related Governance	
Cowichan Tribes	deeper	minor	moderate	negligible-to-minor	moderate
Ditidaht	deeper	minor	moderate	negligible	moderate
Esquimalt	deeper	minor	moderate	minor	moderate
Halalt	deeper	minor	moderate	negligible	moderate
Hwlitsum⁵³	middle	negligible-to- minor (hunting) minor (fishing)	moderate	negligible	moderate
Lake Cowichan	middle	negligible-to- minor	negligible-to-minor	negligible	negligible-to-minor
Lyackson	deeper	minor	moderate	negligible-to-minor	moderate
Maa-nulth⁵⁴	deeper	minor	moderate	(treaty)	moderate
Malahat	deeper	minor	moderate	minor	moderate
Pacheedaht	deeper	minor	moderate	moderate	moderate
Pauquachin	deeper	minor	moderate	minor	moderate

⁵² The Crown understands hunting, trapping and gathering to be interrelated with marine fishing and harvesting. As such, the Crown undertook a combined assessment for Indigenous groups on Vancouver Island.

⁵³ 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.

⁵⁴ Maa-Nulth Treaty Society is composed of five Nations including Ka:'yu:'k't'h'/Chek'tles7et'h', Uchucklesaht, Ucluelet, Toquaht, Huu-ay-aht

Penelakut Tribe	deeper	negligible-to- minor (hunting) minor (fishing)	moderate	negligible	moderate
Scia'new (Beecher Bay)	deeper	minor	moderate	minor	moderate
Snaw-naw-as (Nanoose)	lower	negligible-to- minor	moderate	negligible	moderate
Snuneymuxw (Nanaimo)	middle	negligible	moderate	minor	moderate
Songhees (Lekwungen)	deeper	minor	moderate	minor	moderate
St'zuminus (Chemainus)	deeper	negligible-to- minor	moderate	negligible-to- minor	moderate
Tsartlip	deeper	minor	moderate	minor	moderate
Tsawout	deeper	minor	moderate	minor	moderate
Tseycum	deeper	minor	moderate	minor	moderate
T'Sou-ke	deeper	minor	moderate	minor	moderate

Table 5.7 – Métis Groups: Conclusions Regarding Impacts on Indigenous Interests and the Depth of Consultation

Indigenous Group	Depth of Consultation	Assessed Impact on Indigenous Interests				Greatest Assessed Impact on Indigenous Interests
		Hunting, Trapping, and Plant Gathering	Fishing and Harvesting	Other Traditional and Cultural Activities	Aboriginal Title/Related Governance	
British Columbia Métis Federation	lower	negligible-to-minor	negligible-to-minor	negligible-to-minor	–	negligible-to-minor
Buffalo Lake Metis⁵⁵	lower	minor	negligible	negligible-to-minor	--	minor
East Prairie Metis Settlement*	lower	minor	negligible	negligible-to-minor	--	minor
Gunn Métis Local 55, Lac Ste. Anne Métis (Alberta)	middle	minor-to-moderate	minor-to-moderate	minor-to-moderate	–	minor-to-moderate
Kikino Metis Settlement*	lower	minor	negligible	negligible-to-minor	--	minor
Métis Nation of Alberta	lower	minor	minor	minor	–	minor
Métis Nation of Alberta – Regional Zone 4	lower	minor	minor	minor	–	minor
Métis Nation of British Columbia	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	minor	negligible-to-minor	minor	–	minor

⁵⁵ As consultation was initiated for the first time in 2019, this assessment is based on the limited information available to the Crown.