

NATIONAL ENERGY BOARD

IN THE MATTER OF the *National Energy Board Act, R.S.C. 1985*
c. N-7, as amended (“NEB Act”) and the Regulations made thereunder;

AND IN THE MATTER OF an application by Trans Mountain
Pipeline ULC as General Partner of Trans Mountain Pipeline L.P.
(collectively, “Trans Mountain”) for a Certificate of Public
Convenience and Necessity (“CPCN”) and other related approvals
pursuant to Part III of the NEB Act for the Trans Mountain
Expansion Project;

AND IN THE MATTER OF the National Energy Board’s
reconsideration of aspects of its OH-001-2014 Report as directed by the
Governor in Council through Order in Council P.C. 2018-1177
(“Reconsideration”).

ARGUMENT-IN-CHIEF OF TSARTLIP FIRST NATION

January 22, 2019

To: The Secretary
National Energy Board
Suite 210, 517 – 10th Avenue S.W.
Calgary, AB T2R 0A8

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1. INTRODUCTION AND BACKGROUND

The Salish Sea is one of the most diverse and complex marine ecosystems in the world. However, it has also suffered significant ecological consequences as a result of development, including from shipping traffic, overuse, pollution, and climate change. These consequences have in turn impacted the ability of coastal First Nations, particularly the Tsartlip First Nation (“**Tsartlip**”), to practice their constitutionally guaranteed Aboriginal and Treaty rights in the area.

The effects of the increased shipping related to the Trans Mountain Expansion Project (the “**Project**”) will have significant adverse effects from both an environmental and an Aboriginal and Treaty rights perspective. Whether it be by the impacts to the Southern Resident Killer Whales, the impacts from an oil spill, or through the lack of access to preferred harvesting sites, the impacts of Project-related marine shipping on the Aboriginal and Treaty rights of Tsartlip and other coastal First Nations will be profound. Tsartlip has already suffered significant impacts to its ability to practice these rights as a result of increased shipping traffic, pollution, and other restrictions. To ask them to suffer further incursions upon their rights is simply unjustified.

This Reconsideration affords an opportunity for the NEB has the opportunity to revisit their assessment of Project-related marine shipping, and an opportunity to get it right. The potential economic benefits to Canadians do not outweigh the significant adverse impacts the Project is likely to bring to the Salish Sea, to its marine inhabitants, and to the Aboriginal and Treaty rights of First Nations.

1.1 Background

This is a reconsideration of certain aspects of National Energy Board (“**NEB**”, or the “**Board**”) proceeding OH-001-2014 proceeding (the “**Original Proceeding**”).

On May 19, 2016, the NEB released its report to the Governor-in-Council (“**GIC**”),¹ which concluded that the Project was in the public interest and recommended in its final report that it be approved by the GIC, with conditions (the “**Original Report**”). On November 29, 2016, the GIC issued an Order-in-Council conditionally approving the Project and directed the NEB to issue a CPCN, with conditions.

Tsartlip is an intervenor in this Reconsideration. It participated as an intervenor in the Original Hearing. It is a “band” within the meaning of the *Indian Act*, and its members are an “Aboriginal people within the meaning of section 35 of the *Constitution Act, 1982*”² and hold and exercise constitutional protected Aboriginal and treaty rights that may be adversely impacted by the Project. Its traditional territories include the lands and waters of the *WSÁNEC* people, and range from the Saanich Inlet to the mouth of the Fraser River and through the Salish Sea to around Mayne Island and south to San Juan Island.³

1.2 Tsartlip’s Evidence

Tsartlip’s evidence in this Reconsideration Hearing includes the Oral Traditional Evidence (“**OTE**”) of Elders John Elliott, Linda Elliott, and Tom Sampson, as well as Chief Don Tom and

¹ A77045-1 NEB - Report - Trans Mountain - Expansion Project - OH-001-2014.

² (U.K.), 1982, c. 11 [*Constitution Act*].

³ 14-11-24 – OH-011-2014 Hearing Transcript Volume 19 – A4F2L3 at para 9435; Exhibit C354-10-1 – Tsartlip First Nation – Oral Aboriginal Traditional Evidence Exhibit 8 – A4F2V3, at p. 1.

1 Tsartlip fisherman Mark Sampson. Their evidence described the deep cultural connection that
2 W̱SÁNEĆ people have to the lands and waters in their traditional territory, and their
3 responsibility as stewards of their territory. It also addressed the importance of the Southern
4 Resident Killer Whales (“SRKW”) in W̱SÁNEĆ culture, and the cultural impacts that would result
5 if the recovery of the SRKW were further threatened or if they failed to recover altogether and
6 were extirpated. Tsartlip’s OTE also included evidence of its frustrations with the Board’s
7 processes, both present and past, and its concerns that the community has voiced about the
8 Project. Fisherman Mark Sampson shared his knowledge of the waters in the Project shipping
9 lanes, including the significant overlap between SRKW and salmon migration routes and
10 shipping lanes, as well as the risks inherent in those areas to vessel operators unfamiliar with
11 the waters. He also gave evidence of many of Tsartlip’s traditional fishing and gathering places
12 within the proposed Project shipping lanes.

13
14 Tsartlip also filed a marine use report prepared by cultural anthropologist Dr. Peter Evans of
15 Trailmark Systems (“Trailmark Report”).⁴ That report describes Tsartlip’s traditional and current
16 use of the area in the proposed Project shipping lanes, explains the history of the W̱SÁNEĆ, the
17 Douglas Treaty, and describes the deep, spiritual relationship between W̱SÁNEĆ peoples and
18 their “relatives of the deep” - the fish and mammals that inhabit the ocean.

19
20 Tsartlip filed written evidence and presented OTE to the NEB in the Original Hearing.⁵ Tsartlip
21 continues to rely on that evidence in this Reconsideration.

22 **1.3 Tsartlip’s Position in this Reconsideration**

23 In the Original Hearing, Tsartlip opposed a CPCN being issued for the Project.⁶ Tsartlip
24 maintains this position in this Reconsideration. Tsartlip submits that the Board should
25 recommend to the GIC that the GIC not direct it to issue a CPCN, on the grounds that Project-
26 related marine shipping is likely to cause significant adverse effects, none of which are justified.
27 These unjustified significant adverse effects include:

- 28
29 a) Impacts to SRKW and other whales, including Tsartlip cultural uses thereof;
30
31 b) Impacts to Tsartlip’s Douglas Treaty and Aboriginal rights, including its ability to fish,
32 harvest and to access and use many cultural sites; and
33
34 c) The risks and consequences of accidents and malfunctions, particularly a significant
35 oil spill event, which would devastate the Salish Sea, causing untold environmental
36 effects, which would in turn cause significant impacts to Tsartlip’s Aboriginal and
37 Douglas Treaty rights.

38
39 Additionally, Tsartlip submits this Reconsideration is procedurally unfair, and contrary to the
40 principles of natural justice, as described in section 2.3, below.

⁴ A96474-3 2018-12-05 Tsartlip TMX TUS Submission (A6L7C0) (“TrailMark”). See also Dr. Evans’ Affidavit and CV: A97391-1 Affidavit of Peter Evans, sworn January 17, 2019 (00202384xE1C2E) - A6R1S6; A97391-2 CV Peter Evans (00202392xE1C2E) - A6R1S7.

⁵ C354-11 - Tsartlip First Nation - Written Evidence of Tsartlip First Nation (A70305); C354-10 - Tsartlip First Nation - Oral Aboriginal Traditional Evidence (A64565); C354-09 - Tsartlip First Nation - Oral Traditional Evidence Hearing (A64520).

⁶ C354-14 - Tsartlip First Nation - Tsartlip First Nation - Written Argument-in-chief (A75111).

2. LEGAL FRAMEWORK

2.1 Procedural Background of this Reconsideration

On August, 30, 2018, in the decision of *Tsleil-Waututh Nation v Canada (Attorney General)*⁷ [*Tsleil-Waututh*], the Federal Court of Appeal quashed the GIC's approval of the Project. In that decision, the Federal Court of Appeal determined the NEB did not conduct an adequate inquiry into whether Project-related marine shipping forms part of the "designated project" for the purposes of the *Canadian Environmental Assessment Act*, 2012 [CEAA, 2012],⁸ and that Crown consultation following the Original Hearing was inadequate.⁹

As a result of the *Tsleil-Waututh* decision, on September 20, 2018, the GIC issued Order-in-Council P.C. 2018-1177 (the "**Order in Council**"), which referred back to the NEB for reconsideration certain aspects of its Original Report. The Order in Council directed the NEB to conduct the Reconsideration taking into account: (i) the environmental effects of Project-related marine shipping in view of the requirements of CEAA 2012; and (ii) the adverse effects of Project related marine shipping on species at risk, including the Northwest Pacific SRKW population, and their critical habitat, in view of the requirements under section 79 of the *Species at Risk Act* ("**SARA**").¹⁰

On October 12, 2018, the Board determined that it would include, on a principled basis, Project-related marine shipping between the Westridge Marine Terminal and the 12-nautical mile territorial sea limit in the "designated project" to be assessed under CEAA, 2012.¹¹

2.2 This Assessment under CEAA, 2012 must be meaningful

The combined effect of the *Tsleil-Waututh* decision and the Order-in-Council require the NEB, in this Reconsideration, to make recommendations to the GIC under sections 29(1) and 30(4) of CEAA, 2012, whether, in taking into account the factors described in paras 19(1)(a) through (h) of CEAA, 2012, as well as the implementation of any mitigation measures, Project-related marine shipping is likely to cause significant adverse environmental effects, and whether these effects are justified in the circumstances.

Trans Mountain submits in its Argument-in-Chief that the NEB's environmental assessment conducted in the Original Hearing covered all regulatory requirements and as such, it is functionally or legally the same as an assessment under CEAA, 2012.¹² Tsartlip respectfully submits this is incorrect and not in accordance with the guidance set out by the Federal Court of Appeal in *Tsleil-Waututh* or of CEAA, 2012.

The Board's environmental assessment in this Reconsideration under CEAA, 2012 is not functionally or legally the same as its environmental assessment conducted in the Original Hearing. Section 19 of CEAA, 2012 requires the NEB to consider a specific list of factors which were not considered in the Original Hearing, including mitigation measures that are technically and economically feasible that would mitigate any significant adverse effects.¹³ The NEB did not do so in the Original Report. The NEB is also required to make a recommendation to the GIC under that CEAA, 2012 as to the existence of significant adverse effects, and whether they can

⁷ 2018 FCA 153 [*Tsleil-Waututh*].

⁸ S.C. 2012, c. 19.

⁹ *Tsleil-Waututh*, at para 754.

¹⁰ (S.C. 2002, c. 29).

¹¹ A94793-3 NEB HO - Trans Mountain Expansion - Reconsideration - A61718.

¹² A97422-2 Argument-in-Chief of Trans Mountain - A6R2D0 ("Trans Mountain Argument-in Chief"), at p. 3-4.

¹³ CEAA 2012, s. 19(1)(d).

1 be justified. Again, the NEB did not do so in the Original Report. Both are separate legal
2 requirements which differentiate the present environmental assessment under CEAA, 2012 from
3 that conducted in the Original Hearing.

4
5 Tsartlip submits that the purpose of this Reconsideration is to conduct a proper environmental
6 assessment under CEAA, 2012 with respect to Project-related marine shipping, and
7 consequently to remedy the errors made by the NEB in its Original Report. This proceeding
8 should not be used simply to “rubber stamp” the Original Report, to quickly remedy a
9 “technicality”, or to “pad the record” in anticipation of a further judicial review. The decision in
10 *Tsleil-Waututh* makes clear that the failure to consider the effects of Project-related marine
11 shipping under CEAA, 2012 was a serious error. Tsartlip submits it is incumbent on the Board to
12 properly consider this issue in this Reconsideration process, and not to simply accept its past
13 assessment in the Original Report as sufficient for this purpose.

14
15 Trans Mountain also argues in its Argument-in-Chief that many of the intervenors are seeking to
16 reargue aspects of the Original Hearing.¹⁴ Contrary to Trans Mountain’s position, by filing new
17 evidence related to these matters, the intervenors, including Tsartlip, are not rearguing aspects
18 of the Original Hearing, but rather are participating in the NEB’s present environmental
19 assessment under CEAA, 2012. This is a new and legally distinct environmental assessment
20 under a different statute, and the Board is not bound to its past assessments in the Original
21 Hearing. Further, should the Board accept Trans Mountain’s position, then there is little merit to
22 this process, and it becomes nothing more than “padding the record” to correct a procedural
23 technicality. In Tsartlip’s submission, the Board must do more. It must conduct a full and
24 meaningful environmental assessment of Project-related marine shipping under CEAA, 2012. In
25 doing so, it must consider all new evidence submitted in this Reconsideration with an open mind
26 and in concert with the previous evidence received in the Original Hearing. It is essential the
27 NEB do so in order to make this process a meaningful one for all parties involved.

28 **2.3 Procedural Concerns**

29 As it did in the Original Hearing,¹⁵ Tsartlip objects to the procedure chosen by the Government
30 of Canada and by the NEB for a number of reasons, and submits that the Reconsideration
31 process has neither complied with the requirements of natural justice nor procedural fairness.

32
33 The 122-day time limit is not a reasonable amount of time to have a hearing on a matter as
34 complex, technical, and significant as this Project. Tsartlip, along with the other intervenors,
35 have had very limited time to process all of the lengthy evidence, filings and board rulings
36 (sometimes more than one in a day), and has been stretched to capacity in order to even
37 participate.

38
39 Tsartlip received very limited funding in order to participate. Participation in a process as
40 technically and legally complex as this requires multiple technical and legal advisors to review
41 and digest material and provide input on the evidence and other filings, as well as to prepare
42 evidence in the proceeding. This is extremely expensive, and impacts upon Tsartlip’s ability to
43 participate meaningfully in this procedure.

44
45 Further, Tsartlip submits the hearing process itself was manifestly flawed, and lacked many of
46 the essential components of a fair hearing. As with the Original Hearing, there was no ability to
47 test the evidence of Trans Mountain through cross examination. The Information Request

¹⁴ Trans Mountain Argument-in Chief.

¹⁵ See C354-14 - Tsartlip First Nation - Tsartlip First Nation - Written Argument-in-chief (A75111) (“2014 Tsartlip Written Argument in Chief”), section 7 “Tsartlip’s concerns with the NEB Process”.

process in many cases yielded unsatisfactory answers to many requests. Despite this, the NEB saw fit to order Trans Mountain or Canada to provide further information in only 9 out of approximately 280 total requests for further information.¹⁶ Finally, the NEB's decision not to allow oral argument¹⁷ deprived the intervenors of an audience with the NEB. In a case where there are as many participants at the present, and one with such a vast record of evidence, it is essential for the parties to be allowed an audience with the decision-maker. Otherwise, there is a significant risk that party's voice becomes lost in the fray. There is a serious risk of that happening here, particularly in the case of smaller intervenor First Nations such as Tsartlip.

3. THE W̱SÁNEĆ NATION

This section of Tsartlip's Argument-in-Chief describes Tsartlip's history and cultural connection with its traditional territory, including Tsartlip's use and occupation of lands and oceans in its traditional territory, and the Indigenous laws which guide their stewardship of that territory. It also describes Tsartlip's deep cultural connection with SRKW. It is in this context that the Board must understand the potential impacts of Project-related marine shipping on Tsartlip's Indigenous interests.

3.1 History

The W̱SÁNEĆ (Saanich) people are part of the larger Coast Salish cultural group, who have occupied the Strait of Georgia continuously for thousands of years.¹⁸ They are classified as "Northern-straits-speakers" because they belonged to a group of Coast Salish groups who collectively used and occupied the straits of Juan de Fuca, Haro, Rosario and Georgia, and who spoke slightly different dialects of a common language, often called "Northern Straits Salish".¹⁹ The W̱SÁNEĆ term for their language is SENĆOŦEN.²⁰

Prior to the signing of the North Saanich Treaty in 1852 and the subsequent creation of discrete reserves and "bands" under the *Indian Act*, the W̱SÁNEĆ comprised a single group of extended families who shared the SENĆOŦEN language and a cultural order that revolved around their relations with marine creatures, terrestrial animals, spirit beings, and with one another.²¹

On February 11, 1852, the Crown entered into two treaties with the W̱SÁNEĆ people.²² These treaties, now collectively known as the "Douglas Treaty", arbitrarily divided the W̱SÁNEĆ into "North Saanich" and "South Saanich".²³ Tsartlip is a successor to the W̱SÁNEĆ people who entered into the Douglas Treaties.

The Douglas Treaty contains a provision that allows the W̱SÁNEĆ to be "at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly".²⁴ Tsartlip members still actively practice these rights year-round throughout their traditional territory.²⁵ The hunting and fishing

¹⁶ A97280-1 NEB Ruling No. 28 – All Parties – Trans Mountain Expansion – Reconsideration – Motions to compel full and adequate responses to information requests – A6Q9V5.

¹⁷ A97236-1 NEB PD No. 4 – All Parties – Trans Mountain Expansion – Reconsideration – Affidavits and written argument-in-chief, including comments on draft conditions and recommendations.

¹⁸ Trailmark, *supra* note 4 at p. 5.

¹⁹ *Ibid.*

²⁰ *Ibid* at p. 6; W̱SÁNEĆ School Board, HISTORY OF THE SENĆOŦEN LANGUAGE, online: W̱SÁNEĆ School Board <<https://wsanecschoolboard.ca/history-of-the-sencoten-language>>.

²¹ Trailmark, *supra* note 4 at p. 6-9.

²² Exhibit C354-9-4 – Tsartlip Exhibits 3-7 – A4F2C6, at Exhibit 3; Trailmark, *supra* note 4 at p. 8.

²³ Trailmark, *supra* note 4 at p. 8.

²⁴ *Ibid* at pg. 8; Hearing OH-001-2014, Exhibit C354-11-1 – Written Evidence of Tsartlip First Nation – Tsartlip Documents for Filing – A4Q0K0, at p. 1.

²⁵ See Mark Sampson, 2561-2571.

rights maintained by this provision has been recognized by numerous Canadian Courts,²⁶ including the Supreme Court of Canada.²⁷ Despite this, Canada has refused to explicitly recognize Tsartlip's right in this regard, including in this Reconsideration.²⁸

3.2 W̱SÁNEĆ Law and Responsibilities

W̱SÁNEĆ Indigenous laws and teachings are the core of W̱SÁNEĆ values, beliefs, and relationship to the natural world. Tsartlip elders have the responsibility to pass on this knowledge to future generations,²⁹ in order to move forward with their culture and beliefs.³⁰ Part of doing so is the revitalization of the SENĆOTEN language, which in itself contains a view of life and how the W̱SÁNEĆ people see the world.³¹

W̱SÁNEĆ law teaches a deep and sacred connection to the natural world,³² and the responsibility W̱SÁNEĆ people have to care for all parts of the environment.³³ Elder Linda Elliott explains in her OTE that "[t]he teaching was, leave no stone overturned. Leave no blade of grass bent. When you leave that place, it has to be the same".³⁴ Tsartlip elders shared origin stories of how the world was created in the Original Hearing, and how these and other oral histories are passed down from Elder to Elder.³⁵

W̱SÁNEĆ Indigenous law teaches that all creatures are important, right down to the "smallest bug", and that it is our responsibility to look after and care for all of them.³⁶ W̱SÁNEĆ traditional beliefs hold that all non-human creatures were once human, but were transformed by XALS and then given to the W̱SÁNEĆ as gifts.³⁷ The right to exist on this earth and in this natural environment is a gift from XALS, the creator.³⁸ With that right comes a corresponding obligation to take care of and to protect the lands, waters, and the creatures that live on the earth with us.³⁹ This includes educating those who do not understand the importance of protecting the natural world and its creatures.⁴⁰ Elder Linda Elliott explains the deep responsibility W̱SÁNEĆ people have to maintain and protect the natural environment:

"We're only the caretakers here. We're given the job to know right from wrong. We know that it's wrong to spill oil in the ocean or on the land or cut off the migration of those creatures that were also given a place on this earth. If we're lucky, we can be equal to them."⁴¹

²⁶ *R v White and Bob*, [1964] BCJ No 212; aff'd, [1965] SCJ No 80; *R. v. Bartleman*, [1984] BCJ No. 1760, *Saanichton Marine Ltd. v Claxton*, [1989] 3 CNLR 46; *R v Morris*, [2006] 2 SCR 915 [*Morris*]; Trailmark, *supra* note 4 at p. 9.

²⁷ *Morris*, *supra* note 26.

²⁸ A97121-12 Response to Motion to Compel of Tsartlip First Nation - A6Q7U7; A95292-17 Annex 04.C.01 Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Expansion Project, Appendix D.19 – Tsartlip First Nation.

²⁹ John Elliott, at 2391

³⁰ *Ibid* at 2389.

³¹ Linda Elliott, at 2458.

³² *Ibid* at 2458.

³³ *Ibid* at 2463-246-5.

³⁴ *Ibid* at 2471.

³⁵ OH 001-2014 Hearing Transcript Volume 19 – A4F2L3 at paras 9194, 9197-9200, 9205-9206, 9207, 9212, 9210, 9232, 9245-9252, 9234-9244, 9216; 2014 Tsartlip Written Argument in Chief, *supra* note 14 at p. 8-10.

³⁶ Linda Elliott, at 2465-2466.

³⁷ Trailmark, *supra* note 4 at p. 10.

³⁸ *Ibid* at 2474; 14-11-24 – OH 001-2014 Hearing Transcript Volume 19 – A4F2L3 at paras 9197-9200.

³⁹ *Ibid* at 2465, 2473.

⁴⁰ *Ibid* at 2469.

⁴¹ *Ibid* at 2473.

1 The W̱SÁNEĆ see themselves as equal actors amongst all others within their natural
2 environment, who they also perceive to be animated by life-forces in the same sense as human
3 beings.⁴² Because of this, relations with all animals, marine and terrestrial – must be maintained
4 through proper treatment according to the observance of respectful laws, mores taboos, rituals
5 and other observances.⁴³ As Elder Linda Elliott explains: “The Great Spirit left us these things
6 and these were his wishes for us, to look after the land, our relatives, and they would look after
7 us.”⁴⁴

8 3.3 Killer Whales (KELLOLEMEĆEN) - “Relatives of the Deep”

9 “[KELLOLEMEĆEN]” are greatly revered by our people. When they enter our bay -- and
10 I'm talking about Brentwood Bay -- they enter our bay in May and it's a big deal.
11 Everybody is very happy to see them coming. That's our relatives.”⁴⁵
12

13 The reciprocal protective relationship W̱SÁNEĆ people have with the creatures inhabiting our
14 world is nowhere more pronounced than with the Killer Whales.⁴⁶ W̱SÁNEĆ people refer to
15 Killer Whales as KELLOLEMEĆEN, or “the mind that left the earth”.⁴⁷
16

17 KELLOLEMEĆEN have always been a part of W̱SÁNEĆ culture, and often come into
18 Brentwood Bay in the Saanich inlet in May to give birth to their young.⁴⁸ After their babies are
19 born, they ascend up the water to have a drink, and this is how they begin life. This brings a
20 great sense of joy and reverence to the Tsartlip people.⁴⁹ However, they never see the
21 KELLOLEMEĆEN leave, as there is an underwater pathway under the mountains which goes to
22 the waters on the other side of Vancouver Island.⁵⁰
23

24 The KELLOLEMEĆEN is a prominent figure in W̱SÁNEĆ cosmology and oral history, and often
25 poses as a helper in W̱SÁNEĆ oral history, and as a spiritual intermediary between W̱SÁNEĆ
26 families and the sea.⁵¹ In many stories, the KELLOLEMEĆEN is connected by fate to two other
27 important W̱SÁNEĆ protector figures, Thunderbird and Raven.⁵²
28

29 In his evidence in this Reconsideration, Elder John Elliott shared oral history which describes
30 the deep cultural connection between the W̱SÁNEĆ and the KELLOLEMEĆEN, and how they
31 are thought of as relatives,⁵³ as opposed to simply “creatures”. In that oral history, he described
32 how a W̱SÁNEĆ girl met the human spirit of the KELLOLEMEĆEN, a young man, and travelled
33 with him to his home under the sea. They fell in love, and she went to live with him under the
34 sea. As time passed, she began to change into a whale. While this hurt her family, they
35 understood, and they gave her a special way of calling out to them, which the W̱SÁNEĆ people
36 still use today.⁵⁴
37

⁴² Trailmark, *supra* note 4 at p. 10.

⁴³ *Ibid.*

⁴⁴ Linda Elliott, at 2465.

⁴⁵ *Ibid* at 2481.

⁴⁶ See Trailmark, *supra* note 4 at p. 19, for further discussion of this reciprocal protective relationship.

⁴⁷ John Elliott, at 2394.

⁴⁸ Linda Elliott, at 2481.

⁴⁹ *Ibid* at 2482.

⁵⁰ *Ibid* at 2483.

⁵¹ Trailmark, *supra* note 4 at p. 15.

⁵² *Ibid* at p. 17.

⁵³ John Elliott, at 2408.

⁵⁴ *Ibid* at 2395-2405.

1 Oral histories involving the KELLOLEMEĆEN inform rituals observed by the WŚÁNEĆ people
2 when travelling throughout the islands within their marine territory.⁵⁵ Elder John Elliott also
3 described one such cultural practice of calling out to the KELLOLEMEĆEN when making a
4 crossing across the water.⁵⁶ The whales would come and join the travelers on the journey, and
5 when they had made safe passage, the travelers would feed the whales salmon and thank them
6 for coming.⁵⁷ At other times, WŚÁNEĆ people would call out to the KELLOLEMEĆEN to protect
7 them, and to protect their families.⁵⁸ Many WŚÁNEĆ people still pray to the KELLOLEMEĆEN.⁵⁹

8
9 The deep respect and reverence that WŚÁNEĆ people have towards the KELLOLEMEĆEN is
10 demonstrated by the practice of maintaining silence when one approaches a place where the
11 KELLOLEMEĆEN are known to reside. Elder John Elliott described a story told to him by his
12 father, Dave Elliott:

13
14 “And they were paddling and my dad said – he came to Grandma and he said, ‘why
15 aren’t you guys talking? How come nobody’s saying anything?’

16
17 She says, ‘You don’t talk out here in the dark like this. We’re travelling in their home.
18 This is their home. We must respect them. This is their place.’ Talking about her
19 relatives that we call KELLOLEMEĆEN. ‘Respect them. We don’t make a lot of noise
20 around here. We’re going to respect them when we’re in their place’.

21
22 He says, ‘Well, I’m getting sleepy, tired.’

23
24 She says, ‘That’s good. Go up the blanket up there and lay down and go to sleep.’

25
26 So he laid up on there. And he said he was watching the stars and going by and he
27 could hear the paddles paddling and he could hear the bubbling of the canoe behind,
28 and that’s how he went to sleep. And he said, ‘That was a favourite part of my life’ when
29 he was old. And then before he passed, he said, ‘That was a favourite part of my life
30 travelling along there. I felt totally secure and safe there with my mom and my aunt and I
31 felt so peaceful and I went to sleep’.⁶⁰

32
33 Tsartlip marine users use the behaviour of the KELLOLEMEĆEN as key indicators for tracking
34 the salmon run and for monitoring other aspects of the environment.⁶¹ Tsartlip fisherman and
35 provider Mark Sampson stated in his oral evidence that the Orcas now follow the shipping
36 lanes.⁶² By seeing this, they know that the salmon are nearby.⁶³

37 **3.4 WŚÁNEĆ Territory and Use**

38 **Traditional Territory**

39
40 The WŚÁNEĆ have traditional SENĆOŦEN place names for all of the lands and islands in the
41 Project shipping lanes and vicinity, including on San Juan and Mayne Islands, the Saanich

⁵⁵ Trailmark, *supra* note 4 at p. 15.

⁵⁶ John Elliott, at 2406-2407.

⁵⁷ *Ibid.*

⁵⁸ *Ibid* at 2416.

⁵⁹ *Ibid* at 2433, 2435.

⁶⁰ *Ibid* at 2422-2426.

⁶¹ Trailmark, *supra* note 4 at p. 18.

⁶² Mark Sampson, 2640, 2643.

⁶³ *Ibid.*

1 Peninsula and the lands adjacent to Juan de Fuca Strait (see Figure 3, Trailmark Report).⁶⁴ This
2 has been described by both W̱SÁNEĆ elders and scholars studying the W̱SÁNEĆ people as the
3 most culturally meaningful method of communicating territoriality.⁶⁵

4
5 Prior to 1850, W̱SÁNEĆ settlements were distributed throughout their traditional territory, from
6 the Saanich Peninsula through the San Juan and Gulf Islands, to Point Roberts and Boundary
7 Bay, and occupied seasonally according to tradition and the availability of preferred resources.⁶⁶
8 It is well understood that W̱SÁNEĆ people lived on many of the Gulf Islands and most of the
9 San Juan Islands.⁶⁷ After 1850, for a variety of reasons (including disease, raids, and white
10 settlement), most of these W̱SÁNEĆ families settled on the Saanich Peninsula, but continued to
11 use and occupy these settlements on a seasonal basis.⁶⁸

12
13 The W̱SÁNEĆ, and by extension W̱SÁNEĆ territory, were defined by their pursuit of the five
14 salmon species in the straits between Vancouver Island and mainland British Columbia.⁶⁹ Their
15 reliance on salmon is so central that they, along with other Coast Salish Nations, are often
16 referred to as the “salmon people”.⁷⁰

17 **Fishing and Harvesting in the Project Area**

18
19 Tsartlip members continue to actively practice their Douglas Treaty rights to “hunt and fish as
20 formerly”. Tsartlip has a combination of commercial and subsistence fishing and harvesting
21 activities within and cutting across the shipping lanes throughout traditional W̱SÁNEĆ territory.⁷¹

22
23 The Project’s route for oil tanker traffic is through the traditional marine territories of the Tsartlip
24 people, where Tsartlip people harvest resources, practice cultural and spiritual activities, and
25 have many sacred sites.⁷²

26
27 Tsartlip fishermen have extensive and specialized knowledge of the lands and waters in the
28 Project area, as well as salmon behaviour and fishing practices specific to this area.⁷³ This
29 includes knowledge of migration routes and how the salmon use tide lines.⁷⁴ This knowledge is
30 both received from previous generations and gained through lifelong firsthand experience.⁷⁵

31
32 Tsartlip marine harvesters harvest seaweed at sites exposed to the shipping lanes, including at
33 the Trial Islands, Great Chain Island, Discovery Island, along the east shore of San Juan Island,
34 on the south shore of D’Arcy Island, along the southeastern shore of Sidney Island, on the east
35 shore of Henry Island, and on the south shore in the eastern foreshore of Moresby Island.⁷⁶
36 They harvest seagull eggs throughout the Chain Islets and along the eastern shore of Mandarte
37 Island (both of which are exposed to the shipping lanes).⁷⁷

⁶⁴ Trailmark, *supra* note 4 at p. 20, 28; Map, Figure 3.

⁶⁵ *Ibid* at p. 20.

⁶⁶ Trailmark, *supra* note 4 at p. 21, 27.

⁶⁷ *Ibid* at p. 27.

⁶⁸ *Ibid* at p. 22.

⁶⁹ *Ibid*.

⁷⁰ *Ibid* at p. 23.

⁷¹ *Ibid* at p. 30.

⁷² Exhibit C354-0-1 – Tsartlip First Nation – Oral Aboriginal Traditional Evidence Exhibit 8 – A4F2V3, at p. 1.

⁷³ Trailmark, *supra* note 4 at p. 30.

⁷⁴ *Ibid*.

⁷⁵ *Ibid*.

⁷⁶ *Ibid* at p. 31.

⁷⁷ *Ibid*.

1 Tsartlip marine harvesters use fishing sites for spring and Chinook salmon in the Strait of Juan
2 de Fuca in a part of their traditional territory shared with the T-Souke First Nation.⁷⁸ They have
3 numerous harvesting sites for chiton and sea urchin (both of which have special cultural values),
4 including on the shores of Discovery Island, close to the shipping lanes on the south and east
5 shores of the Island.⁷⁹

7 Tsartlip have waterfowl hunting sites in the southern and eastern foreshore of the Discovery
8 Islands, and the western foreshore of Prevost Island.⁸⁰ It has deer hunting sites, which require
9 accessibility through the shipping lane across the southern and northern shores of Saturna
10 Island.⁸¹ There are also sea urchin harvesting sites exposed to the shipping lanes on the
11 western and northern foreshore of D'Arcy Island, the southern tip of Sidney Island, a reef
12 between Gooch Island and the shipping land, along the western shore and foreshore of Prevost
13 Island, and throughout the southern and eastern foreshore of Tumbo Island.⁸²

15 Tsartlip fishermen Mark Sampson also gave evidence to the NEB of his family's preferred use
16 sites around a number of the Gulf Islands, including on Saturna and South Pender Islands,
17 where they harvest clams and shellfish, and fish for salmon and cod.⁸³

18 **4. ADVERSE EFFECTS OF PROJECT-RELATED MARINE SHIPPING**

19 Tsartlip submits that the adverse effects arising from Project-related marine shipping are
20 unjustified, for the reasons which follow.

21 **4.1 Effects on Southern Resident Killer Whales (KELLOLEMEĆEN)**

22 Tsartlip submits that the effects on SRKW (KELLOLEMEĆEN) arising from Project-related
23 marine shipping will be significant and profound. In this regard, Tsartlip adopts the following
24 reports as its evidence in this proceedings, all prepared for Raincoast Conservation Foundation:
25

- 26 • "Population Viability Analyses for Southern Resident Killer Whales", prepared by Lacy et
27 al ("**Lacy Report**");⁸⁴
- 28 • "Trans Mountain Expansion Project Threats to Southern Resident Killer Whales", by
29 Veirs et al ("**Veirs Report**");⁸⁵
- 30 • "Oil Spills in the critical habitat of Southern Resident Killer whales (*Orcinus orca*)
31 prepared by MacDuffee et al;⁸⁶ and
- 32 • "Report on Southern Resident Killer Whales", prepared by Dr. Deborah Giles.⁸⁷

34 There is little, if any, dispute in this proceeding about the perils facing the SRKW: The
35 Government of Canada's own Imminent Threat Assessment concluded: "Based on the
36 information reviewed and analysis undertaken as part of this assessment, it is considered that
37 Southern Residents are likely facing imminent threat to survival. Unless alleviated or reduced

⁷⁸ *Ibid* at p. 30.

⁷⁹ *Ibid* at p. 31.

⁸⁰ *Ibid*.

⁸¹ *Ibid*.

⁸² *Ibid*.

⁸³ Mark Sampson, 2593-2598; *Ibid* at p. 29.

⁸⁴ A96429-3 A - Expert Report of Lacy et al - 2018 - Final - A6L5R2 ("**Lacy Report**").

⁸⁵ A96429-5 C - Expert Report of Veirs et al - 2018 Final - A6L5R4 ("**Veirs Report**").

⁸⁶ A96429-4 B - Expert Report of MacDuffee et al - 2018 - Final - A6L5R3.

⁸⁷ A96429-7 E - Expert Report of Giles - 2018 - Final - A6L5R6.

(i.e. mitigated), the current threats may make survival of the population unlikely or impossible”.⁸⁸ The population has been in decline since 2015, and the SRKW are at a serious risk of extinction.⁸⁹

The three main threats to SRKW survival are the lack of availability of Chinook salmon, physical and acoustic disturbances, and the toxic effects of contaminants.⁹⁰ None of the proposed federal mitigation measures sufficiently address these threats. Chinook salmon stocks have been consistently low since 1998, and those that are returning are “younger, smaller, and less nutritionally dense than they have been in recent decades”, which “increases the demand for the number of [individual salmon] Southern Residents need to consume to meet demands”.⁹¹ These problems are exacerbated by the physical and acoustic disturbances created by vessel traffic, which will only get worse should the Project proceed.⁹² While the federal agencies have proposed a number of measures regarding vessel noise, they are untested and made without a clear understanding of the effects of how any such reductions in noise would benefit the SRKW population.⁹³ To wit: Fisheries and Oceans Canada, in its Information Response to Tsartlip, confirmed that there is no known benchmark for noise reductions in vessel traffic which would result in quantitative prediction of recovery of SRKW.⁹⁴

Finally, with respect to the effects of contaminants on SRKW, there is little by way of immediate mitigation measures which can be done which will improve the health of SRKW.⁹⁵ While the Whales Initiative does seek to reduce contaminants by preventing their release and promises funding for further research, neither operates upon a comprehensive understanding of all existing contaminants that impact SRKW.⁹⁶

The Veirs Report concludes that the SRKW population lacks the resilience to tolerate any further anthropogenic stressors.⁹⁷ Introducing Project-related vessel traffic will only make the survival of the SRKW population that much less likely. The Lacy Report concludes that subjecting the SRKW population to any additional harm from the Project is “destined to hasten the decline of this iconic and unique population of killer whales”.⁹⁸

The decline and serious possibility of the extirpation of a marine species can never be justified. For this reason alone, Tsartlip submits the Board ought to conclude that Project-related marine shipping will cause significant unjustified adverse effects.

4.2 Impacts to Tsartlip’s cultural uses of the *KELLOLEMEĆEN*

The significant adverse impacts to SRKW will also have a profound and irreparable cultural impact on Tsartlip’s cultural connection to the SRKW.⁹⁹

⁸⁸ Evidence of Raincoast: A96429-8 F – Recovery Strategy for North and South Killer Whales; Viers Report, *supra* note 85 at p. 3; Southern Resident Killer Whale Imminent Threat Assessment (24 May 2018), online: <https://www.canada.ca/en/environment-climate-change/services/species-risk-public-registry/related-information/southern-resident-killer-whale-imminent-threat-assessment.html>, Filing ID A6J7A1 at page 867 (“Imminent Threat Assessment”).

⁸⁹ Veirs Report, *supra* note 85 at p. 3.

⁹⁰ *Ibid* at p. 5.

⁹¹ *Ibid* at p. 8-9.

⁹² *Ibid* at p. 7.

⁹³ *Ibid* at p. 11.

⁹⁴ DFO Response to Tsartlip I.R. 1.2.4 – Underwater Vessel Noise Initiatives.

⁹⁵ Veirs Report, *supra* note 85 at p. 13.

⁹⁶ A95280-2 Direct Evidence - A6J6F4.

⁹⁷ Veirs Report, *supra* note 85 at p. 3.

⁹⁸ Lacy Report, *supra* note 84 at p. 13-14.

⁹⁹ See section 3.3 of this Argument in Chief.

1 Tsartlip elders, in their oral evidence in this Reconsideration Hearing, expressed their deep
2 concern for the well-being of the KELLOLEMEĆEN, and the profound cultural effects that would
3 result if the SRKW were no longer around. Elder John Elliott described it as a “great loss and a
4 great shame” if the KELLOLEMEĆEN died off. He stated that if WŚÁNEĆ people were in control
5 of this, it would never happen: “The beaches weren’t going spoiled. The rivers were clean, and
6 we related to everything in prayerful way”.¹⁰⁰

8 Elder Linda Elliott stated that the WŚÁNEĆ people would no longer be the same, as great part
9 of creation would no longer exist. She explains that these effects: “would go down the line
10 because we all depend on each other. And when it affects the people and the ocean and the
11 other creatures of the ocean can no longer live, then I know that what I feel, is the Saanich
12 people can’t live.”¹⁰¹

14 Chief Don Tom also voiced his community’s concerns about the safety and health of the
15 KELLOLEMEĆEN. He stated that the community was concerned about their safety and well-
16 being, particularly in wake of their steady decline, and the slowness by which Canada,
17 particularly Fisheries and Oceans Canada, has moved to address the problem.¹⁰²

4.3 Oil Spills and Spill Response

19 Tsartlip submits that the risk of an oil spill in the Salish Sea, particularly in light of the likely
20 difficulties in adequately and promptly cleaning up any such spill, is itself a significant unjustified
21 adverse effect. In this regard, Tsartlip adopts the evidence listed below. This evidence has been
22 created for or updated for this Reconsideration, and as such, should be preferred to Trans
23 Mountain’s previous assessments done for the purposes of the Original Hearing as well as over
24 Trans Mountain’s direct evidence in this Reconsideration:

- “The Potential Impacts of Dispersant Use on the Marine Environment” by Kate Logan,
and prepared for Raincoast;¹⁰³
- “Limits to effectiveness of containment booms in the Project marine area”, prepared by
the Georgia Strait Alliance;¹⁰⁴
- “Further Report on the Fate and Effect of Oil Spills from the Trans Mountain Expansion
Project in Burrard Inlet and the Fraser River Estuary”, prepared by Jeffrey W. Short, for
Tsleil-Waututh Nation, Squamish Nation, Stz’uminus First Nation, Snuneymuxw First
Nation, City of Vancouver, and the Living Oceans Society (“**Short Report**”);¹⁰⁵ and
- “A Technical Evaluation Related to Reconsideration of Marine Transportation Aspects of
the Trans Mountain Pipeline Expansion Project”, prepared for Cowichan Tribes by
Stafford Reid.¹⁰⁶

41 In the NEB’s Original Report, the NEB found that the adverse effects of a credible worse-case
42 oil spill from marine tankers would result in significant adverse environmental and socio-

¹⁰⁰ John Elliott, at 2437.

¹⁰¹ Linda Elliott, at 2488.

¹⁰² Don Tom, at 2532.

¹⁰³ A96429-6 D Expert Report of Logan – 2018 Final A6L5R5 (“Logan Report”), ATTACHMENT D to the Written Evidence of Raincoast Conservation Foundation.

¹⁰⁴ A96417-3 APPENDIX A Limits to effectiveness of containment booms in the Project marine area – A6L5I1.

¹⁰⁵ A96430-3 A Expert Report of Short – Final – A6L5S2 (“Short Report”), ATTACHMENT A To the Written Evidence of Living Oceans Society.

¹⁰⁶ A96437-2 Cowichan Tribes, 2018 Introduction, Preamble and Report of Stafford Reid.

1 economic effects, as well as on Indigenous uses of lands, waters and resources for traditional
2 purposes.¹⁰⁷ Ecological damage from a credible, worst-case spill could result in mass mortalities
3 of marine mammals such as SRKW, and permanently alter ecosystem functioning in the Salish
4 Sea.¹⁰⁸ This will all but guarantee that people will encounter lingering pockets of oil on high-
5 retention shorelines for many years to decades following a spill.¹⁰⁹

7 The potential impacts of an oil spill in the Salish Sea are made more severe by the uncertainty
8 that comes with cleaning up a Project-related spill, which the federal Oceans Protection Plan
9 fails to adequately address. For one, the rough conditions encountered on the BC coast can
10 render booms and skimmers – traditional spill response methods – not just ineffective, but
11 unusable.¹¹⁰ Second, diluted bitumen can submerge in the water column and sink, which, by
12 Trans Mountain's own admission, "reduces the effectiveness of a conventional spill response",
13 particularly where conventional recovery methods are unsuccessful.¹¹¹ As a result, Trans
14 Mountain has suggested the use of dispersants such as Corexit 9500, the use of which is not
15 only of limited effectiveness, but which is toxic to wildlife, including SRKW, and to humans.¹¹²

17 Tsartlip agrees with and adopts Dr. Short's critique of Trans Mountain's original ecological risk
18 assessment where he states that it "violates a basic precept of risk assessment, which is that
19 probability of occurrence and severity of effects (or consequences) must be evaluated
20 separately and independently".¹¹³ Trans Mountain failed to consider spills smaller than their
21 "credible mean", and thus eliminated adverse outcomes associated with their extremely limited
22 selection of "credible" oil spill locations, making it arbitrary, incomplete, and greatly
23 underestimating the risks of small, medium, and large oil spills from Project-related vessels.¹¹⁴
24 In Tsartlip's respectful submission, the risks of a Project-related oil spill are much higher than as
25 stated by Trans Mountain, and as found by the Board at the Original Hearing. In Tsartlip's
26 submission, this is an unjustified adverse effect. However, even if the NEB prefers Trans
27 Mountain's evidence about the likelihood of a significant spill, the consequences of such a spill
28 could irreparably damage the coastline for generations. Accordingly, even if the NEB finds an oil
29 spill to be unlikely, Tsartlip submits these severe consequences constitute an unjust adverse
30 effect.

32 The consequences an oil spill in the Salish Sea would also have devastating effects on
33 Tsartlip's Aboriginal and Treaty rights in the Project area. In this regard, Tsartlip members have
34 expressed grave concerns about the possibility of a spill in the Salish Sea, the impact it would
35 have on their Treaty rights,¹¹⁵ their fisheries and harvesting,¹¹⁶ the SRKW,¹¹⁷ as well as with the
36 time it will take authorities to respond to a spill.¹¹⁸ In the words of Tsartlip fisherman Mark
37 Sampson, it would "put an end to all of [our] foods that we've known and grown up as
38 [WSÁNEĆ] people. There would be no more."¹¹⁹

¹⁰⁷ Canada, National Energy Board (NEB), National Energy Board Report, Trans Mountain Expansion Project, OH-001-2014 (Calgary: NEB, May 2016) at p. 136 (A5A9H0).

¹⁰⁸ Short Report, *supra* note 105 at p. 7.

¹⁰⁹ *Ibid* at p. 7.

¹¹⁰ Logan Report, *supra* note 103 at p. 3; A96417-3 APPENDIX A Limits to effectiveness of containment booms in the Project marine area - A6L511.

¹¹¹ Logan Report, *supra* note 103 at p. 3-4.

¹¹² *Ibid* at p. 7-17.

¹¹³ Short Report, *supra* note 105 at p. 22

¹¹⁴ *Ibid* at p. 22-23.

¹¹⁵ Trailmark, *supra* note 4 at p. 33.

¹¹⁶ *Ibid* at 33; Mark Sampson, at 2577, 2648.

¹¹⁷ Trailmark, *supra* note 4 at p. 32-33; Mark Sampson, at 2652.

¹¹⁸ Mark Sampson, at 2618.

¹¹⁹ *Ibid* at 2577.

4.4 Other Impacts to Aboriginal and Treaty Rights

Project-related marine shipping will have significant adverse effects on Tsartlip's Aboriginal and Douglas Treaty rights. This Argument-in-Chief has already described the adverse impacts on Tsartlip cultural uses of SRKW arising from the likely Project impacts on SRKW, as well as the adverse impacts arising from a potential oil spill in the Salish Sea.

An increase in Project-related vessel traffic will also have an adverse impact on Tsartlip's Douglas Treaty right to "hunt and fish as formerly", as well as their access to cultural and spiritual sites of significance.¹²⁰ Access to marine resources is essential to Tsartlip for sustenance, for feasts and for other ceremonial purposes.¹²¹

The existing cumulative effects of current ecological conditions,¹²² particularly the high density of vessel traffic in the Project area, has made it difficult for Tsartlip members to access their preferred fishing and harvesting spots.¹²³ Tsartlip members are small-boat, mostly subsistence harvesters who gather food for their community, their families and inter-community trade. Sustainable subsistence harvesting requires intimate knowledge of a defined territory, highly adaptable technical skills, flexibility in the face of changing tides, fish, and other conditions, and a high degree of mobility.¹²⁴ An increase in large vessel transport through the Project area will make these practices unsafe at many high value, traditional places preferred by Tsartlip adjacent to or near the Project shipping lanes.¹²⁵ For example, in many of the small islands adjacent to the Project shipping lanes in the triangle between Fairfax Point across to Turn point on the other side of the channel, it requires the crossing of busy shipping lanes, to which Tsartlip harvesters are not equipped to cross.¹²⁶ This is already a significant disruption to Tsartlip's ability to undertake traditional practices in this area.

5. CONCLUSION

The marine ecosystem that is the Salish Sea has suffered significant ecological consequences as a result of development. The environmental consequences of adding Project-related shipping traffic to a sensitive marine ecosystem which has already suffered significant consequences of heavy shipping traffic, overuse and climate change are simply unjustified. Doing so will have significant adverse impacts from both an environmental and an Indigenous rights perspective.

The evidence in this Reconsideration demonstrates that consequences of adding approximately 34 Aframax class tankers per month to an already significantly crowded marine shipping route will be profound. The SRKW, an already threatened population, cannot withstand further disruptions from increased shipping traffic, and further vessel noise, the lack of availability of prey and increase in contaminants may hasten their decline and, at worst, result in their extirpation. The impacts on Tsartlip as a result would be serious and irreparable; a part of their culture would be lost forever. This kind of adverse effect can never be justified.

¹²⁰ Trailmark, *supra* note 4 at p. 34; See also: 2014 Tsartlip Written Argument in Chief, *supra* note 14 at 6.3

¹²¹ Mark Sampson, at 2569-2571, 2573 (see particularly, his description of his role as a provider for members in need, and for feasts and rituals).

¹²² Trailmark, *supra* note 4 at p. 38 (which include foreshore activities, development, poor wastewater management, sewage, increases in shipping, ferry traffic and recreational boating.).

¹²³ *Ibid.*

¹²⁴ *Ibid* at p. 34.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

1 The risks of an oil spill in the Salish Sea, whether in Burrard Inlet or in other places in the Salish
2 Sea, simply do not outweigh the benefits of this Project. The evidence demonstrates that
3 cleaning up such a spill will be difficult, if it is possible at all, due to the roughness of the open
4 waters, and the uncertainty of cleaning up diluted bitumen transported by Project vessels. The
5 consequences of such a spill could likely irreparably damage the marine ecosystem, and the
6 creatures that live within it for generations.

7
8 Finally, the effect on Tsartlip and other coastal First Nations' Indigenous rights arising from
9 Project shipping will be significant. Whether it be by the impacts to SRKW, the impacts from a
10 spill, or through the lack of access to preferred harvesting sites, the impacts of Project shipping
11 will be profound. Tsartlip has already suffered significant impacts to its ability to practice these
12 rights as a result of the cumulative effects increased shipping traffic, pollution, and other
13 restrictions. To ask Tsartlip to suffer further incursions upon their rights is simply unjustified.

14
15 The NEB now has the opportunity to revisit their assessment of Project-related marine shipping,
16 and an opportunity to get it right. The potential economic benefits to Canadians do not outweigh
17 the significant adverse impacts the Project is likely to bring to the Salish Sea, to its marine
18 inhabitants, and to the Aboriginal and Treaty rights of coastal First Nations. For all of the
19 foregoing reasons, Tsartlip submits that the Board should find that Project-related marine
20 shipping is likely to cause significant unjust adverse effects, as set out herein, and recommend
21 the GIC direct it not to issue a CPCN.

22
23
24
25
26 All of which is respectfully submitted, this 22nd day of January, 2019,
27



28
29
30 Eamon Murphy and Peter W. Jones
31 Woodward & Co. Lawyers LLP
32 Lawyers for the Tsartlip First Nation
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1 **6. APPENDIX “A” – COMMENTS ON DRAFT PROJECT CONDITIONS AND**
2 **RECOMMENDATIONS**

3 While Tsartlip’s position is that the NEB ought not recommend the GIC direct it to issue a
4 CPCN, Tsartlip makes the following submissions with respect to the draft conditions and
5 recommendations:

6 **6.1 The Board’s recommendations should be conditions**

7 Tsartlip submits the Board should include as conditions to a CPCN any measures which it
8 concludes should be taken by federal authorities. Section 52(1)(b) of the NEB Act gives the
9 Board a responsibility to impose terms or conditions it considers necessary or desirable in the
10 public interest. The CPCN will be subject to those terms and conditions if the GIC directs the
11 Board to issue the CPCN. There is no requirement that Trans Mountain nor the NEB have
12 control or authority over these federal authorities, only that the Board consider the conditions in
13 question in the public interest. Accordingly, if the NEB concludes that its recommended that a
14 CPCN be issued subject to certain matters occurring, then it should include those matters as
15 conditions, not as recommendations. Otherwise, any such “recommendations” are non-binding,
16 and provide no certainty that they will be followed.

17 **6.2 Additional Conditions**

18 **Tsartlip and other coastal First Nations must be specifically included in Federal**
19 **Programs and Initiatives**

20
21 Tsartlip submits that it should be a condition that the Federal Agencies be directed to
22 specifically include Tsartlip and other coastal First Nations in the various mitigation measures
23 and programs they have proposed in their direct evidence in this Reconsideration (collectively
24 “**Federal Programs**”).¹²⁷

25
26 Despite having a stated commitment of \$1.428 Billion dollars towards the Federal Programs,
27 including both the Oceans Protection Plan and the Whales Initiative¹²⁸, the Government of
28 Canada has failed to include Tsartlip in any of its measures whatsoever. This is the case
29 despite Tsartlip’s Douglas Treaty Rights to “hunt and fish as formerly” in many parts of the
30 Salish Sea, including the Project area, Tsartlip’s demonstrated significant use of the Project
31 area, as well as its deep concern for the health and safety of the area and the marine life within
32 it. Tsartlip has not been asked to provide input on any of the Federal Programs, including any
33 monitoring measures, and has not been asked to share any of its traditional knowledge. This is
34 surprising, given Canada’s stated commitment to include traditional knowledge in many of its
35 programs, including in its Information Responses to Tsartlip,¹²⁹ as well as Tsartlip’s
36 demonstrated traditional knowledge of the area.¹³⁰

¹²⁷ A95292-2 2018-10-31 Opening Statement and Evidence - A6J6L9.

¹²⁸ A97265-2 Response to National Energy Board Information Request No. 4 – A6Q9S0.

¹²⁹ A97222 Tsartlip First Nation - Reply of Tsartlip First Nation re Motion to Compel to Natural Resources Canada.

¹³⁰ See, e.g. Evidence of Mark Sampson, at 2591, 2593-2599, 2603, 2605, 2608-2612, 2621, 2623, 2614-2616, 2619; 2634-2635, 2639-2640, 2650, 2653, 2656, 2660.

Comprehensive marine use planning process (“MAPP”) to protect the South Coast

Tsartlip submits that the NEB should include as a condition of approval of the Project that Canada initiate, develop and implement a comprehensive, multi-stakeholder marine use planning process (“MAPP”) for the Salish Sea.

Taken together, the NEB’s recommendations and present patchwork of laws, regulations and policies applicable to the Salish Sea and the South Coast, highlight the need for such a MAPP. These various programs and policies will lack coordination and focus without an overarching regional planning process. A properly-designed MAPP would provide this coordination and focus.

Such a MAPP has been created with success in other areas of the Province, even where there is comparably less shipping traffic than in the Salish Sea. One example is a marine use plan created for the North Coast of BC in 2015 by the North Coast-Skeena First Nations Stewardship Society & the Province of British Columbia.¹³¹ That plan set out a framework for joint or shared management of marine and coastal areas in the North Coast, including policy, planning and direction, and managing future growth and other marine resource decisions.¹³² It also includes support for First Nations cultural and social wellbeing and continuity through the protection of cultural values, resources, and practices.¹³³

Given the importance of the South Coast, and particularly the Project area to all stakeholders, including all levels of government, First Nations and industry, as well as the sensitivity of its marine ecosystem, Tsartlip submits that it is long past due that a MAPP be developed in order to protect the South Coast. Canada, despite all of its various commitments to the South Coast as set out in its evidence in this Reconsideration Hearing, has failed to even consider it.

Indigenous Traditional Knowledge Policy

The NEB should include as a condition that Trans Mountain and the Federal Authorities develop, in cooperation with Tsartlip and other First Nations, an Indigenous traditional knowledge policy, in order to guide the incorporation of aboriginal traditional knowledge (“ATK”) into project design, execution, the development of monitoring programs, and Project-related programs such as ECHO and initiatives under the Oceans Protection Plan.

Because of the absence of a clear overarching policy, there is a lack of direction or standards for the incorporation of ATK into any Project initiatives and mitigation or monitoring programs. As a result, there is a paucity of baseline data from an ATK perspective against which to monitor Project effects, predications, or the success of any particular mitigation measures.

Monitoring of ongoing effects on Aboriginal and Treaty rights

Despite the various monitoring initiatives set out in the Federal Programs, none assure adequate monitoring of impacts to Indigenous peoples and Indigenous rights. The full extent of Project-related impacts on Indigenous rights may not be apparent until years later. The

¹³¹ A97056-1 Motion to Compel Full and Adequate Responses to Noaaitch IR to Department of Fisheries and Oceans - A6Q6X0 at page 7, North Coast-Skeena First Nations Stewardship Society and the Province of British Columbia, “North Coast Marine Plan” (2015), online: Marine Plan Partnership for the North Pacific Coast (MAPP) Ocean <http://mappocean.org/wp-content/uploads/2016/07/MarinePlan_NorthCoast_WebVer_20151207_corrected.pdf> (“North Coast Marine Plan”).

¹³² North Coast Marine Plan, at page vi.

¹³³ *Ibid.*

1 Indigenous Advisory and Monitoring Committee (“IAMC”) does not adequately address this
2 issue, nor is it a substitute for proper monitoring of the impacts to Indigenous rights.

3
4 Tsartlip submits that as a condition of the Project, that the Board require the GIC to work
5 together with Tsartlip and other coastal First Nations to develop a process to monitor and
6 evaluate the ongoing effects of the Project on Aboriginal and Treaty rights. This process should
7 include an evaluation of the Project effects on Aboriginal marine use practices, food security,
8 and the ability of First Nations such as Tsartlip to exercise their Aboriginal and Treaty rights.

9 **6.3 Specific Comments on Recommendations**

10 ***Recommendation 4 – Feasibility study for establishing a Southern Strait of Georgia*** 11 ***National Marine Conservation Area***

12
13 Tsartlip, through its W'SANEC Leadership Committee, is consulting with Canada on the
14 establishment of the Southern Strait of Georgia National Marine Conservation Area Reserve
15 (“NMCAR”), alongside other members of the W'SANEC. While Tsartlip is generally supportive of
16 this recommendation, the expedited feasibility study must respect the existing consultation
17 processes in place. As such, Tsartlip submits that the expedited feasibility study should be co-
18 produced with the First Nations who are already participating in the NMCAR consultation
19 process.

20
21 Additionally, the establishment of protected areas in the NMCAR process should include a
22 regional marine planning process, which presently does not exist.

23 24 ***Recommendation 5 – Measures to offset underwater noise and increased strike risk***

25
26 The development of the suite of measures referred to in this recommendation must include
27 Tsartlip's input and participation as well as that of other coastal First Nations. This is necessary
28 in order to ensure that aboriginal marine uses, traditional knowledge, and (in the case of
29 Tsartlip) Douglas Treaty rights are respected.

30
31 The ECHO program provides an example of why this input and participation is necessary. The
32 ECHO program is a voluntary pilot program with the objective of reducing noise through
33 voluntary slow-downs. By reducing vessel speeds, this results in additional vessel transit times,
34 and in consequence, an increased displacement of Indigenous harvesters who are using the
35 area.

36
37 Tsartlip's input and participation in this suite of measures should include the co-development of
38 initiatives, participation in monitoring program design (such as selection of sites, timing as to
39 when the measures will be in effect, techniques for implementing the measures and data
40 collection), the analysis of results, what the reporting mechanisms will be, and application of the
41 results of the measures.

42 43 ***Recommendation 6 – Specific measures to offset underwater noise and increased strike*** 44 ***risk***

45
46 As with Recommendation 5, each of these initiatives should be examined and developed in
47 cooperation with Tsartlip and other coastal marine First Nation communities. This should include
48 the co-development of initiatives, participation in monitoring program design (such as selection
49 of sites, timing as to when the measures will be in effect, techniques for implementing the

1 measures and data collection), the analysis of results, what the reporting mechanisms will be,
2 and application of the results of the measures.

3
4 Moreover, the diversity of the proposed recommendations highlights the need for an
5 overarching multi-stakeholder marine use planning process (MAPP) to inform and guide
6 initiatives such as these (as discussed earlier).

7
8 ***Recommendation 7: Specific measures related to federal marine shipping oil spill***
9 ***response requirements***

10
11 This recommendation, which lists a number of specific measures related to federal marine
12 shipping oil spill response requirements (the “**Response Measures**”) provides only for the
13 “inclusion of Indigenous peoples and local communities in response planning.” This
14 recommendation is vague, and Tsartlip submits that it must go further in describing how
15 Indigenous communities will be included in marine shipping oil spill response planning. The
16 recommendation should include the requirement to use aboriginal traditional ecological and
17 local observational knowledge in the Response Measures.

18
19 This recommendation should also include a requirement for a federal commitment to include
20 Tsartlip as an ongoing participant in emergency response planning activities. This should be
21 done through capital investment programs in Tsartlip and other First Nation communities in
22 order to rebuild capacity lost through displacement of their commercial fisheries.

23
24 ***Recommendation 11 – Indigenous Advisory and Monitoring Committee (“IAMC”)***
25

26 The GIC should facilitate opportunities to engage and seek input on the marine safety system,
27 including on the marine inspections and enforcement regime, from each potentially impacted
28 Coastal First Nation, including Tsartlip. This should include identifying engagement
29 opportunities for Project related marine shipping activities that intersect with CCG operational
30 programs for each of these Coastal First Nations, including Tsartlip.

31
32 Although it is reasonable for the GIC, Transport Canada, and the Canadian Coast Guard to
33 engage with and seek the input from the marine sub-committee of the IAMC on certain matters,
34 the IAMC is not a rights-bearing First Nation and does not represent the interests of Tsartlip.
35 Consultation and engagement with the IAMC is not a substitute for consultation and
36 engagement with potentially impacted First Nations themselves.