

## Appendix D.10 – Pacheedaht First Nation

### I - Background Information

Pacheedaht First Nation (Pacheedaht) is an Indigenous group whose traditional territory is located on the Southwest Coast of Vancouver Island and the waters of the Strait of Juan de Fuca. Pacheedaht filed a *Writ of Summons* in December 2003, asserting Aboriginal title to a territory identified in the *Writ*. Pacheedaht's asserted traditional territory would not be affected by the Project pipeline construction or expansion of the Westridge Marine Terminal. However, Pacheedaht's traditional territory is crossed by the marine shipping lanes in the Strait of Juan de Fuca that are used by tankers calling at Westridge.

There are 281 registered Pacheedaht members, of whom 93 live on Pacheedaht reserves, 30 live on a non-Pacheedaht reserve, and 158 live off reserve. There are four Pacheedaht reserves: *Pacheena 1*, *Gordon River 2*, *Cullite 3*, and *Qeesidaquah 4*, all located in the southwest Corner of Vancouver Island near Port Renfrew, British Columbia (BC).

Pacheedaht is jointly participating in the BC Treaty Process with Ditidaht First Nation. They signed a Framework Agreement (Phase IV) with the federal and provincial Crowns in 1997.

While Pacheedaht is part of the Nuu-chah-nulth ethno-cultural group, they are not members of the Nuu-chah-nulth Tribal council. Pacheedaht has close cultural and familial ties with Ditidaht First Nation. Prior to European contact, Pacheedaht members lived in small villages and camps, moving several times throughout the year to take advantage of seasonally abundant resources.

Pacheedaht make extensive use of marine resources in their traditional territory, fishing in the Strait of Juan de Fuca in the area around Swiftsure Bank for salmon, halibut, yelloweye, and ling cod, as well as harvesting crabs, shellfish, marine plants, deer and other species near the shore. Their close ties to the sea and marine resources are demonstrated by their name, which in English means "people of the seafoam."

### II - Preliminary Strength of Claim Assessment

- The marine shipping route would pass through the southern portion of Pacheedaht's traditional territory in the Juan de Fuca Strait for over 62 kilometers (km) and the southern portion of the Swiftsure Bank closure area.
- The Crown's preliminary assessment is that Pacheedaht has a strong *prima facie* claim to Aboriginal rights to fish and harvest resources within the marine shipping corridor of the Project in the coastal waters between Bonilla Point in the west and Sheringham Point in the east and to Swiftsure Bank. These areas fall within what ethnographers considered to be the historic territory of the Pacheedaht and there is evidence of fishing (e.g. salmon), hunting of sea

mammals, and marine resource harvesting (e.g clams, mollusks, barnacles, chitons) in the area at around the time of contact.<sup>1</sup>

- The Crown's preliminary assessment is that Pacheedaht has a strong *prima facie* claim for Aboriginal title to the upland areas between Bonilla Point and Sheringham Point, proximate to the marine shipping corridor. This area of land falls within what ethnographers considered to be the historic territory of the Pacheedaht at 1846. There was numerous permanent habitation sites located along this section of Vancouver Island's coast, some of which were fortified, at 1846. There is also information that shows intensive use in this area by the Pacheedaht at 1846.<sup>2</sup>

### III - Involvement in the NEB and Crown Consultation Process

Given the nature and location of the Project, and the potential impacts of the Project on Pacheedaht's Aboriginal Interests, the Crown is of the view that the legal duty to consult Pacheedaht lies at the middle portion of the *Haida* consultation spectrum. Pacheedaht was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office (EAO), which afforded Pacheedaht opportunities to be consulted at a deeper level.

Pacheedaht participated in the National Energy Board (NEB) review process as an intervenor and submitted a written final argument, and responded to the Crown's Issues Tracking Table Information Request by further elaborating their concerns [[A71214](#)].

Pacheedaht has expressed concerns regarding the NEB's failure to consult them on the list of issues. Pacheedaht did not participate in an early engagement meeting with Crown officials, and did not meet with the Crown during the NEB hearing process. Pacheedaht expressed concern that they were not offered pre-NEB hearing Crown engagement with respect to Project impacts. Pacheedaht corresponded with the Major Projects Management Office (MPMO) outside of the formal NEB process. Responses have been provided to correspondence received.

Pacheedaht signed a contribution agreement with the NEB for \$150,000 in participant funding plus travel for three to the hearing. The MPMO offered Pacheedaht \$12,000 in participant funding for

---

<sup>1</sup> PACHEEDAHT FIRST NATION, Review of Ethnographic and Historical Sources, Ministry of Justice Legal Services Branch, Aboriginal Research Division, September 17, 2013; CLA YOQUOT SOUND INDIAN LAND USE, by: Randy Bouchard and Dorothy Kennedy, November 1990 [https://www.for.gov.bc.ca/hfd/library/Documents/Bouchard&Kennedy\\_\(1990\)\\_ClayoquotSoundIndianLandUse.pdf](https://www.for.gov.bc.ca/hfd/library/Documents/Bouchard&Kennedy_(1990)_ClayoquotSoundIndianLandUse.pdf); A Traditional Use Study of Pacheedaht First Nation Territory Volume 1: Report, Pacheedaht First Nation, March 1999; Summary Report (Draft) PFN Traditional Use and Occupancy Sites and the Proposed Pacific Gateway Marina, by Traditions Consulting Services Inc., Revised March 4th, 2013; Pacheedaht First Nation Traditional Marine Use and Occupancy Study (TMUOS) 2014 – Final Report, In relation to Kinder Morgan Canada Trans Mountain Expansion Project.

<sup>2</sup> Ibid.

consultations following the close of the NEB hearing record. MPMO offered Pacheedaht an additional \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Pacheedaht signed contribution agreements with the MPMO in response to both of these offers, for a total of \$18,000 in allocated funding.

On October 6, 2016 Pacheedaht was issued \$5,000 in capacity funding by EAO to assist with the consultation process.

Pacheedaht signed a letter of support with the proponent on January 22, 2016 and has entered into a Mutual Benefits Agreement with the proponent.

Pacheedaht met with the Crown consultation team on May 10, 2016 and September 30, 2016 to discuss their concerns with the Project.

The Crown provided a first draft of this Report to Pacheedaht for review and comment on August 17, 2016. Pacheedaht provided comments on the draft Report to the Crown on September 19, 2016. A second draft of this Report was provided to Aboriginal groups for review and comment on November 1, 2016 and Pacheedaht provided comments on November 15. Pacheedaht provided a separate Aboriginal group submission to the Crown on November 15, 2016.

#### **IV - Summary of Pacheedaht's Key Issues and Concerns Raised**

The Crown has gained its understanding of Pacheedaht's issues and concerns through the community's involvement in the NEB process, including submissions made through the NEB hearings process, the responses Pacheedaht provided to the Crown on its Information Request (IR), the Traditional Marine Use study conducted by Pacheedaht in 2014 titled "Pacheedaht First Nation Traditional Marine Use and Occupancy Study (A4L5K4) redacted version; A4L5Q7 final redacted version, and through other engagement with the Crown.

This section offers a summary of the key issues raised by Pacheedaht, and does not present the views of the Crown as to whether it agrees or not with the issues. The Crown's assessment of the impact of the Project presented in the subsequent section incorporates a consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Pacheedaht's key Project-related issues and concerns are summarized below

##### *Cultural and Social Impacts*

- Increases in marine vessel traffic could cause shoreline erosion, which Pacheedaht assert will damage archaeological sites and their ability to harvest marine resources along the shoreline. This damage may have an adverse impact on Pacheedaht's ability to engage in cultural practices and to fully experience their spiritual connectedness with their traditional territory;
- Pacheedaht people have a historical and spiritual connection to Pacheedaht Banks (Swiftsure Bank). Pacheedaht have stated that damage or a loss of access to their most valuable harvesting

site, Swiftsure Bank, either from a spill or increased tanker traffic, would be “genocidal” to the Pacheedaht people;

- Compensation is not available for indirect or non-economic losses due to an oil spill that impact the community’s social, cultural, or psychological well-being; and
- Identified travelways were not included in the updated Traditional Marine Resource Use (TMRU) study.

#### Methodology, Process, and Consultation

- Pacheedaht asserts that the NEB process cannot be used by the Crown to adequately fulfill the duty to consult;
- Disagreement with the NEB’s decision to establish a list of issues for the hearing without consulting Aboriginal groups;
- Pacheedaht disagreed with the NEB approach relating to: oral cross examination, the scheduling of oral traditional evidence hearings, and the knowledge gaps resulting from the Project;
- Pacheedaht highlighted concerns that the NEB had not conducted biophysical studies outside Burrard Inlet;
- Lack of sufficient participant funding contributions from NEB and the MPMO to ensure adequate community engagement; and
- Pacheedaht has articulated its disagreement with the Crown’s assessment of Musqueam’s preliminary strength of claim. Pacheedaht is of the view that the Crown’s legal duty to consult lies at the high end of the spectrum.

#### Economic Impacts

- Increased costs Pacheedaht will incur to harvest marine resources due to an increase in marine traffic (i.e. having to purchase radar systems or charter boats due to safety concerns);
- Potential damage tanker traffic and/or potential spills could have on Pacheedaht’s existing campground operations and future residential and commercial development plans; and
- Lack of information on level of employment opportunities that will be available to communities along the marine corridor, the type of contracting opportunities that will be available, whether training will be available, and whether community members will be prioritized in selection.

#### Marine Impacts

- Potential damage from ship traffic and noise to shoreline and marine ecosystems, including sea birds, mammals, fish, shellfish and marine invertebrates; and
- Knowledge gaps resulting from the proponent not undertaking biophysical studies outside Burrard Inlet, which is not representative of all Project-affected marine contexts.

#### Health and Human Safety

- Damage or a loss of access to Pacheedaht’s most valuable harvesting site, Swiftsure Bank (known as “Pacheedaht Bank” by the Pacheedaht people), either from a spill or increased tanker traffic;

- Health impacts of bilge dumping directly on communities and via contamination of marine food sources; and
- Safety risks to small fishing vessels posed by an increase in tanker traffic associated with the Project.

#### Impacts from Increased Vessel Traffic

- Potential impact of increased project-related tanker traffic on Pacheedaht's ability to engage in subsistence fishing and gathering, in particular on the Swiftsure Bank and a specific Pacheedaht-regulated area that is envisioned as a potential future marine protected area which would offer exclusive use to First Nations and U.S. Tribes;
- Increase in marine tanker traffic that could contribute to the already serious degradation of fisheries in the Strait of Juan de Fuca;
- Potential impacts of shoreline erosion resulting from increased marine shipping within Pacheedaht's traditional territory on archaeological sites, shoreline resources, harvesting practices, community wellbeing and social structures, transmission of knowledge, and spiritual connection to the land;
- Potential cumulative effects of a significant increase in the number of tankers and the effects of a potential oil spill on Pacheedaht's ability to harvest marine resources, including at Pacheedaht's hereditary fishing grounds at Swiftsure Bank;
- Increased tanker traffic, including the effects of ship wakes, pollution, bilge dumping, hull fouling and noise, and potential oil spills could be damaging to shorelines and marine species throughout Pacheedaht waters, including sea birds, land and marine mammals, fish, shellfish, marine invertebrates, plant and tree species, marine vegetation and the habitats for all the above;
- Increased tanker traffic and potential oil spills may negatively impact current campground income, as well as future plans to select lands for residential and commercial purposes, including tourism and ecotourism; and
- The location of and changes to designated shipping lanes are a concern to Pacheedaht's continued harvesting practices and their own vessel safety.

#### Accidents and Malfunctions

- Methodology the proponent used when modeling the impacts of marine accidents and malfunctions;
- The challenges posed to navigation and fishing activities result primarily from sea conditions, such as fog, tidal effects, winds and currents, which can affect fishing practices and the cultural/spiritual aspect of this practice;
- Potential adverse impacts that a marine oil spill could have on Pacheedaht's vision of a treaty, in particular the significant negative economic impact that an oil spill would have on Pacheedaht's ability to develop an eco-tourism industry;
- Inadequate assessment of the likelihood and consequences of a spill, and the need to develop specific response plans with clearly defined actions, roles, timelines, and priorities;

- Impacts of tanker traffic and a potential spill on marine life, including salmonids, halibut, marine mammals, abalone, etc.;
- Pacheedaht is concerned by the lack of communication infrastructure which could play an important role into oil spill response capacity;
- Pacheedaht requests that the proponent use an updated oil response plan and strategize specific response actions, roles, timelines, and priorities;
- Tanker traffic and the potential for oil spills will result in avoidance by Pacheedaht members from exercising harvesting rights;
- A marine oil spill could wipe out marine resource harvesting areas, including the Swiftsure Bank harvesting area, with areas of long-term oil residency; and
- The potential effects of an oil spill could be far greater than the impact to traditional foods and could strain the cultural fabric of Pacheedaht and cause extreme emotional distress and psychological stress.

### ***Accommodation Proposals***

Pacheedaht provided the federal and provincial Crown with proposed accommodation measures to consider in relation to accommodating potential impacts of the Project on Pacheedaht's Aboriginal Interests.

Pacheedaht identified the following outstanding issues: Interference of tanker traffic with harvesting activities at Swiftsure Bank, and lack of emergency response capacity to respond to an oil spill in Pacheedaht's asserted territory.

Pacheedaht's proposed accommodation measures are outlined below:

- Relocate existing Transport Canada regulated shipping lanes to avoid Swiftsure Bank;
- Implement an emergency response centre located in Port Renfrew, which would reduce response times in the event of an incident at that portion of the coastline;
- Year-round marina with spill response capacity of Western Canadian Marine Response Corporation;
- Potential port of entry fee for shipping within Pacheedaht's asserted traditional territory; and
- The enhancement of VHF Radio Communication Infrastructure in the Port Renfrew area to improve communications in relation to safety and emergency response.

Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Pacheedaht that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.

The Crown is aware that the proponent has entered into a Mutual Benefits Agreement with Pacheedaht First Nation in an attempt to offset potential impacts, should the Project proceed.

### ***Pacheedaht's Response to the NEB Recommendation Report***

No specific comments were received by the Crown from Pacheedaht on *the NEB Recommendation Report*.

### **V - Potential Impacts of the Project on Pacheedaht's Aboriginal Interests**

A discussion of the Crown's assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests is provided in Sections 2.4.3 and 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted traditional territory of each Aboriginal group, including areas within the vicinity of marine shipping related to the Project, may be particularly important and valuable for specific qualities associated with traditional cultural or spiritual practices. These areas may also be used for traditional harvesting activities (e.g., hunting, trapping, fishing and gathering), by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Pacheedaht's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Pacheedaht's ability to practice Aboriginal Interests. Where information was available, the Crown considered the following:

- Biophysical effects to values linked to Aboriginal rights (e.g. fish) that were assessed by the NEB;
- Impacts on specific sites or areas identified as important to traditional use; and
- Impacts on social, cultural, spiritual, and experiential aspects of exercising Aboriginal Interests.

Additional factors considered in the assessment of impacts on Aboriginal Interests are described in Section 2.4.3 of this Report. The Crown's conclusion on the seriousness of Project impacts on Pacheedaht's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Pacheedaht, Pacheedaht's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate (EAC) issued by the Province.

Pacheedaht completed a TMRU study in 2014 titled "*Pacheedaht First Nation Traditional Marine Use and Occupancy Study*" ([A4L5K4](#) redacted version; [A4L5Q7](#) final redacted version), which was submitted to the NEB. The focus of the study was on Crown lands and waters within the asserted territory of Pacheedaht crossed by the Marine Regional Study Area (RSA).<sup>3</sup> The TMRU reports that there are currently 689 traditional use and occupancy sites documented in the Pacheedaht First Nation traditional use and occupancy site database, of which 500, comprising 73% of the total, are intersected by the Project Study Area.

---

<sup>3</sup> The area extending beyond the LSA boundary (i.e. the zone of influence or area where the element and associated indicators are most likely to be affected by Project-related marine vessel traffic.) where the direct and indirect influence of other activities could overlap with project-specific effects and cause cumulative effects on the environmental or socio-economic indicator.

In its Supplemental Technical Report ([A4A0W1](#)), the proponent estimated approximate distances and directions from the marine shipping lanes based on information in Pacheedaht's report. Traditional marine and land uses identified by Pacheedaht include hunting aquatic birds, coastal mammals and marine mammals, gathering plants, and information on fishing sites, habitation sites and travelways.

### ***Impacts on Hunting, Trapping, and Plant Gathering***

As summarized in the TMRU study, Pacheedaht historically hunted raccoon, wolf, sea otter, river otter, northern sea lion, grey whale, and humpback whale. Community members currently hunt coastal deer, bufflehead duck, brant goose, common merganser, common goldeneye, Roosevelt elk, surf scoter, trumpeter swan, spruce grouse, mallard duck, rufous hummingbird, harbour seal, northern fur seal, California sea lion, harbour porpoise, and northern right whale. Plants gathered by Pacheedaht community members include western red cedar, Sitka spruce, basketry grasses, American dune grass, salal berries, silverwood, wild clover, stinging nettle, salmon berry, huckleberry, seaweed, red laver, bull kelp, eel grass, Scouler's surf grass, bladderwrack, leafy kelps, short kelp, sea palm, and sea lettuce.

Pacheedaht community members hunt and gather plants throughout their traditional territory. During the TMRU study, six hunting sites and one plant gathering site were identified within the Marine RSA. The shipping lanes are crossed to access Swiftsure Bank; however the shipping lanes are not crossed to access the other hunting sites or the plant gathering site identified. The nearest plant gathering site is approximately 8.5 km northeast of the shipping lanes.

Pacheedaht raised several specific concerns with potential Project impacts relating to their hunting, trapping, and gathering activities:

- Potential damage from ship traffic and noise to shoreline and marine ecosystems, including sea birds and mammals;
- Potential impacts of shoreline erosion resulting from increased marine shipping within Pacheedaht's traditional territory on harvesting practices;
- Increased tanker traffic, including the effects of ship wakes, pollution, bilge dumping, hull fouling and noise, and potential oil spills could be damaging to shorelines and marine species throughout Pacheedaht waters, including sea birds, land and marine mammals, plant and tree species, and the habitats for all the above; and
- Impacts of tanker traffic and a potential spill on marine mammals.

The general direct and indirect effects of the Project on hunting, trapping, and gathering, along with key mitigation measures, are described in Section 4.3.1 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with hunting, trapping, and plant gathering sites (Section 4.3.1 of this Report). The proponent would implement a range of mitigation measures that would reduce potential effects associated with Pacheedaht's hunting, trapping, and plant gathering activities, including plans to implement, monitor and comply with marine shipping-related commitments in

cooperation with affected Aboriginal groups, scheduling and notification of Project activities (via the proponent's marine public outreach program), and a marine mammal protection program.

In consideration of the information available to the Crown from the NEB process, consultation with Pacheedaht, Pacheedaht's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in a negligible-to-minor impact on Pacheedaht's hunting, trapping and plant gathering activities.

### ***Impacts on Marine Fishing and Harvesting***

As described in the TMRU study, fishing and harvesting activities are integral to community members' traditional connection to Pacheedaht territory. Fished and harvested species include salmon, sole, trout, sand lance, smelt, red tailed perch, skate, salmon, steelhead, flounder, sturgeon, cabezon, halibut, sablefish, rockfish, cod, greenling, pomfret, shad, Jack mackerel, skipjack tuna, Greenland turbot, dogfish, sea bass, lingcod, ratfish, sardine, octopus wolf eel, Humboldt squid, mussel, clam, geoduck barnacle, gooseneck barnacle, chiton, limpet, whelk, sea urchins, crab, prawn, shrimp, scallop, cockle, pile worms, and sea cucumber.

Pacheedaht community members fish and gather seafood throughout their traditional territory. During the TMRU study, 14 fishing sites were identified within the Marine RSA. Pacheedaht community members must cross the shipping lanes to access Swiftsure Bank, and the shipping lanes currently overlap with a portion of the Swiftsure Bank closure area. In consultation with the Crown, Pacheedaht emphasized the importance of access to Swiftsure Bank to the community and culture, which is described in Pacheedaht's TMRU study.

Pacheedaht raised several specific concerns with potential Project impacts relating to their marine fishing and harvesting activities:

- An increase in marine vessel traffic could cause shoreline erosion, which Pacheedaht asserts will damage their ability to harvest marine resources along the shoreline;
- Increase in marine tanker traffic will contribute to the already serious degradation of fisheries in the Strait of Juan de Fuca;
- An increase in marine vessel traffic is safety concern for Pacheedaht members exercising Aboriginal right to fish and harvest;
- Increased costs Pacheedaht will incur to harvest marine resources due to an increase in marine traffic (i.e. having to purchase radar systems or charter boats due to safety concerns);
- Ship traffic and noise are damaging to shoreline and marine ecosystems, including sea birds, mammals, fish, shellfish and marine invertebrates;
- Damage or a loss of access to Pacheedaht's to Swiftsure Bank would significantly impact Pacheedaht;
- Impact of increased tanker traffic on Pacheedaht's ability to engage in subsistence fishing and gathering, in particular on the Swiftsure Bank and a specific Pacheedaht-regulated area that is

envisioned as a potential future marine protected area which would offer exclusive use to First Nations and U.S. Tribes;

- Impacts of tanker traffic and a potential spill on marine life, including: salmonoids, halibut, marine mammals, abalone, etc.;
- Cumulative effects of a significant increase in the number of tankers and the effects of a potential oil spill on Pacheedaht's ability to harvest marine resources;
- Increased tanker traffic, including the effects of ship wakes, pollution, bilge dumping, hull fouling and noise, and potential oil spills could be damaging to shorelines and marine species throughout Pacheedaht waters, including sea birds, land and marine mammals, fish, shellfish, marine invertebrates, marine vegetation and the habitats for all the above; and
- The location of and changes to designated shipping lanes are a concern to Pacheedaht's continued harvesting practices and their own vessel safety.

The direct and indirect effects of the Project on Aboriginal rights to marine fishing and harvesting, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report. Project-related marine vessels would increase the amount of marine traffic traveling in the established shipping lanes. The *NEB Recommendation Report* found that project effects on marine fish and fish habitat are expected to be low to moderate and effects on marine mammals are expected to be low.

Project-related marine vessels are expected to cause temporary disruptions to Pacheedaht's marine fishing and harvesting activities. The Crown appreciates that community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes. As described in Section 4.3.3, the proponent will be required to communicate Project-related vessel timing and scheduling to Aboriginal groups through a public outreach program (NEB Condition 131). This communication would allow Pacheedaht community members to take measures to reduce potential disruptions from tankers and allow planning for fishing activities to take place that minimizes disturbance from Project-related tankers.

The conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts associated with marine fishing and harvesting sites (Section 4.3.3 of this Report). The proponent would implement a range of mitigation measures that would directly or indirectly reduce potential project-related marine fishing impacts on Pacheedaht's marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups, and scheduling and notification of Project activities (via the proponent's marine public outreach program).

Pacheedaht expressed concern about the direct and indirect effects of Project-related marine shipping activities on social, cultural, spiritual, and experiential aspects of its marine fishing and harvesting activities. From Pacheedaht's perspective, an increase in tanker traffic may, discourage community members from travelling in the Strait of Juan de Fuca, interfere with travel in Pacheedaht's traditional territory, and adversely impact the ability of community members to exercise their fishing and

harvesting rights and cultural practices. This concern is heightened at Swiftsure Bank, an offshore fishing and harvesting area of historical significance to the Pacheedaht, and where the Pacheedaht share aboriginal rights and Interests with the Ditidaht First Nation and the Makah Nation. This area was exceptionally rich and heavily fished. Today, a closed area has been established at Swiftsure Bank for retention of halibut, rockfish, lingcod and all finfish, other than for use by Aboriginal groups. Pacheedaht's TMRU study indicates that Pacheedaht exercise their traditional practice of issuing intertribal fishing protocols to members from all other First Nations in order to manage the fishery at Swiftsure Bank.

Pacheedaht expressed concern that community members may not feel safe to take their small vessels out to fish at Swiftsure Bank due to the increase in project-related marine traffic that would be transiting the area. Pacheedaht shared with the Crown that the fish harvested in Pacheedaht's asserted traditional territory, and especially at Swiftsure Bank is shared among elders and other community members. Youth are taught the traditional culture and history by participating in fishing and harvesting in the traditional territory. Reduced harvests, while not expected to occur from temporary access restrictions, could impact Pacheedaht's cultural activities and sharing of marine food with the community. Pacheedaht expressed concern that the potential for reduced access and harvests would impact economic, cultural and social structures within the community through a lack of connection with historical and current traditions.

In consideration of the information available to the Crown from the NEB process, consultation with Pacheedaht, Pacheedaht's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in minor impacts on Pacheedaht's marine fishing and harvesting activities.

#### ***Impacts on Other Traditional and Cultural Practices***

Pacheedaht's TMRU study references other traditional and cultural sites, including archaeological, cultural, spiritual sites and travel site and routes; however, the locations of these sites in relation to the marine shipping route are not known as the map information was redacted. However, during the September 30, 2016 meeting with the Crown, Pacheedaht noted use of historic travelways, including canoe routes along the coast and across the straight to the United States to trade with Makah Nation. The Crown is not aware of the number and location of historic travelways that may cross the shipping lanes. Nineteen historical habitation sites (both villages and camp sites) were identified as important sites to community members for harvesting resources and cultural identity, along the coastline, although none are located in the Marine RSA. The nearest gathering place is approximately 8.3 km northeast of the shipping lanes.

Pacheedaht identified cultural use of or concerns regarding Southern resident killer whales during the NEB and Crown consultation processes. Pacheedaht's TMRU study describes sacred ceremonies and rituals to prepare for the rigorous and dangerous whale hunt. While Humpback whales, grey whales, and the northern right whale were the preferred species for Pacheedaht hunters, killer whales were also

hunted during training exercises to hone the hunters' agility and speed.<sup>4</sup> Most of the rituals were done in remote or sacred places and Pacheedaht's TMRU does not indicate that any of these sites overlap with the marine shipping route. The *NEB Recommendation Report* concluded that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Aboriginal use associated with the Southern resident killer whale. The Crown understands that the Southern resident killer whale population is in decline, and that additional adverse environmental effects from project-related marine shipping would be considered significant.

Pacheedaht raised specific concerns with potential Project impacts relating to other traditional and cultural practices:

- An increase in marine vessel traffic causing shoreline erosion, which Pacheedaht asserts will damage archaeological sites which may have an adverse impact on Pacheedaht's ability to engage in cultural practices and to fully experience their spiritual connectedness with their traditional territory;
- Pacheedaht people have a historical and spiritual connection to Pacheedaht Banks (Swiftsure Bank). Pacheedaht asserts that damage or a loss of access to Swiftsure Bank would have a significant impact on their traditional and cultural practices;
- Potential effects of an oil spill could be far greater than the impact to traditional foods as it could strain Pacheedaht's cultural practices; and
- Potential damage tanker traffic and/or potential spills could have on Pacheedaht's existing campground operations and future residential and commercial development plans.

The general direct and indirect effects of the Project on other traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this Report. Conditions in the *NEB Recommendation Report*, if the Project is approved, would either directly or indirectly avoid or reduce potential impacts on physical and cultural heritage resources (Section 4.3.4 of this Report). The Crown understands that there will be temporary interruptions to Pacheedaht's traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities. It is noted that the proponent has committed to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project.

In consideration of the information available to the Crown from the NEB process, consultation with Pacheedaht, Pacheedaht's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant Provincial proposed conditions of any EAC issued by the Province, Project-related marine shipping activities are expected to result in moderate impacts on Pacheedaht's other traditional and cultural practices.

---

<sup>4</sup> Pacheedaht First Nation Traditional Marine Use and Occupancy Study (TMUOS) 2014 – Final Report, In relation to Kinder Morgan Canada Trans Mountain Expansion Project.

### ***Impacts Associated with Accidental Tanker Spills***

Pacheedaht expressed the following concerns regarding the impact of a potential oil spill on their Aboriginal Interests:

- Potential impacts on coastline within Pacheedaht's asserted traditional territory;
- Potential impacts on species and marine resources harvested by Pacheedaht, including at Pacheedaht's hereditary fishing grounds at Swiftsure Bank;
- The community's social, cultural, or psychological well-being, linked to harvesting rights ;
- Pacheedaht's existing campground operations and future residential and commercial development plans;
- Shorelines and marine species throughout Pacheedaht waters, including sea birds, land and marine mammals, fish, shellfish, marine invertebrates, plant and tree species, marine vegetation and the habitats for all the above;
- Pacheedaht's vision of a treaty, in particular the significant negative economic impact that an oil spill would have on Pacheedaht's ability to develop an eco-tourism industry; and
- Impacts to traditional foods and could strain the cultural fabric of Pacheedaht and cause extreme emotional distress and psychological stress.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a tanker spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. Section 4.3.6 of the main body of this Report sets out the impacts associated with accidental spills from marine shipping vessels. In consideration of this information and analysis, as well as information available to the Crown on Pacheedaht's Aboriginal Interests and concerns raised during the NEB process and Crown consultation process, an accidental oil spill associated with the Project could result in minor to serious impacts, with low likelihood, on Pacheedaht's Aboriginal Interests. In making this general conclusion, the Crown acknowledges that Aboriginal peoples who rely on subsistence foods and natural resources are at greatest risk for adverse effects from an oil spill.<sup>5</sup>

### **VI - Conclusion**

The Crown understands the Project could adversely impact the ability of Aboriginal groups to use lands, waters and resources for traditional purposes. The Crown acknowledges that proponent commitments, recommended NEB conditions and the existing marine safety regime would only partially address these ongoing burdens and risks. Under the typical conditions for marine vessel use of the area between the Westridge Marine Terminal and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the marine-shipping component of the Project on the exercise of Pacheedaht First Nation's Aboriginal Interests would be up to moderate.

---

<sup>5</sup> Trans Mountain Final Argument, p. 85 and 207

However, given existing use of the marine shipping corridor within areas proximate to the exercise of Pacheedaht First Nation's Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of Pacheedaht First Nation's Aboriginal Interests, the federal Crown is considering additional measures to further offset the potential impacts of the marine-shipping component of the Project on Pacheedaht First Nation. Transport Canada has offered to meet with Pacheedaht to further discuss the issues around the location of the shipping lanes near Swiftsure Bank. Please see Sections 4 and 5 of the main body of this Report discuss proposed accommodation and responsive measures.