

## Appendix D.2 – Ditidaht First Nation

### I – Background Information

Ditidaht First Nation's (Ditidaht) main community is located on the west coast of Vancouver Island, about 130 kilometers (km) northwest of Victoria, British Columbia (BC). Ditidaht (pronounced "Dee-tee-dat") has identified its asserted traditional territory in a *Statement of Intent* submitted as part of the BC Treaty process. Ditidaht is currently in Stage 4 of the BC Treaty process (i.e. developing an Agreement-in-Principle).

Ditidaht has 17 reserves, ranging in size from 3.8 hectares to 100.6 hectares, and a registered population of 774 (247 on-reserve and 527 off-reserve). Ditidaht members historically spoke a dialect of the Coast Salish language.

Ditidaht is culturally and linguistically a member of the Nuuchahnulth (pronounced "New-chah-nulth") group of First Nations and has close historical ties to the Pacheedaht First Nation. Notwithstanding these links, the community has acted on their own behalf in treaty negotiations and in the NEB panel review of the Project.

### II – Preliminary Strength of Claim Assessment

- Approximately 6 km of the marine shipping route would pass within the southeastern part of Ditidaht's asserted traditional territory in the Juan de Fuca Strait and over a portion of the Swiftsure Bank closure area. The marine shipping corridor is located approximately 9 km off the coast.
- The Crown's preliminary assessment is that Ditidaht 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 from Bonilla Point in the east to Pachena Point in the west and to Swiftsure Bank. These areas fall within what ethnographers considered to be the historic territory of the Ditidaht. There is also evidence of fishing (e.g. chum salmon, sockeye salmon, trout and coho salmon), hunting sea mammals (e.g. seals), whaling (e.g. humpbacks) and marine resource harvesting (e.g. marine vegetation) in the area at around the time of contact.<sup>1</sup>
- The Crown's preliminary assessment is that Ditidaht has a strong *prima facie* claim for Aboriginal title to the upland areas between Bonilla Point and Pachena Point, proximate to the marine shipping corridor. This area of land falls within what ethnographers considered to be the historic territory of the Ditidaht. There were numerous permanent habitation sites located along the Pacific coast within Ditidaht territory at 1846. There is also information that shows evidence of intensive use in this area by the Ditidaht at 1846.<sup>2</sup>

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<sup>1</sup>Ministry of Justice, Legal Services Branch, Aboriginal Research Division. Ditidaht First Nation: Review of Ethnographic, Historical Archeological Sources. February 6, 2015; Bouchard, Randy.

<sup>2</sup> Ibid.

### 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 Ditidaht's Aboriginal Interests, the Crown is of the view that the legal duty to consult Ditidaht lies at the middle portion of the *Haida* consultation spectrum. Ditidaht was placed on Schedule B of the Section 11 Order issued by the Environmental Assessment Office, which afforded Ditidaht opportunities to be consulted at a deeper level.

Ditidaht participated in the National Energy Board (NEB) review process as an intervenor, and submitted written evidence as well as a final written argument.

Ditidaht received funding from the NEB in the amount of \$30,000, plus travel for one to the hearings. The Major Projects Management Office (MPMO) offered Ditidaht \$6,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Ditidaht an additional \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Ditidaht signed contribution agreements with the MPMO in response to both of these offers, for a total of \$12,000 in allocated funding. On September 21, 2016, EAO issued \$5,000 in capacity funding to Ditidaht to assist with the consultation process.

Ditidaht met with the Crown on May 12, 2016, and September 12, 2016 to discuss the Project.

Ditidaht signed a letter of support with the proponent on July 11, 2014 ([A3Z3R7](#)). The letter states: "we express our support for the Project by formally withdrawing any objections to Trans Mountain's application for a Certificate of Public Convenience and Necessity ("CPCN") before the NEB and all other required approvals in respect of the Trans Mountain Expansion Project." The Crown is aware that the proponent has entered into a Mutual Benefits Agreement with Ditidaht First Nation in an attempt to offset potential impacts, should the Project proceed.

The Crown provided a first draft of the Consultation and Accommodation Report to Ditidaht for review and comment on August 17, 2016. Ditidaht provided comments on the draft Report to the Crown in a letter on September 16, 2016. In summary, Ditidaht's comments on the initial draft Report are as follows:

- The Crown hasn't shared its views on the mitigation and accommodation measures that Ditidaht has proposed;
- The Crown hasn't shared its views on how to address the NEB's lack of authority to address many of the marine shipping concerns identified by Ditidaht;
- The Crown hasn't commented on what mitigation measures are required to ensure that the approval of the Project promotes reconciliation;
- The Crown hasn't clarified how it will work with Ditidaht going forward should the Project be approved to address Ditidaht's marine shipping concerns; and
- No reason is given for not assessing the strength of Ditidaht's claim to Aboriginal title over aquatic areas, despite those areas being a core part of Ditidaht's territory.

A second draft of this Report was provided to Aboriginal groups for review and comment on November 2, 2016 and Ditidaht provided comments in a letter on November 15, 2016. Through the letter, Ditidaht expressed concern that the Crown Consultation Report is non-responsive to Ditidaht's specific comments and concerns. Ditidaht also believes that the Crown has not adequately addressed or accommodated Ditidaht's marine impact concerns relating to the Project. Ditidaht closed their letter by re-stating a previously articulated desire that the Crown and Ditidaht move towards a credible engagement process for marine shipping concerns by entering into a clear and effective marine shipping consultation protocol to deal with those measures set out in Appendix 1 of this Report where the Crown cannot provide a clear, binding commitment prior to mid-November.

Ditidaht provided a separate Aboriginal group submission to the Crown on November 17, 2016.

In a letter to both Chief Jeff Jones of Pacheedaht First Nation and Chief Robert Joseph of Ditidaht – dated November 8, 2016 – Transport Canada, together with their colleagues from Canadian Coast Guard, offered to meet with both First Nations in order to discuss and further understand the considerations around the location of shipping lanes and any potential measures to improve marine safety for community members who travel across and fish within the shipping lanes at Swiftsure Bank.

#### **IV – Summary of Key Ditidaht Issues and Concerns Raised**

The Crown has gained its understanding of Ditidaht's issues and concerns through the community's involvement in the NEB hearing process, including written evidence and additional correspondence with the NEB, and through consultation meetings. In addition, the Crown has considered information regarding the proponent's engagement with Ditidaht, as described in the proponent's Aboriginal Engagement Report (July 2016).

Ditidaht has indicated its support for the Project and is collaborating with the proponent to ensure that their outstanding concerns are addressed and risk to the Ditidaht community is minimized. Ditidaht's own assessment of the Project, filed as evidence with the NEB, sets out Ditidaht's views of the consequences of the Project proceeding to construction and operation.

This section offers a summary of the key issues raised by Ditidaht, 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 Ditidaht's key Project-related issues and concerns are summarized below:

##### *Methodology, Process, and Consultations*

Ditidaht expressed concerns with the depth of consultation afforded by the NEB process, especially with respect to spill response planning.

### Environmental Impacts

Ditidaht expressed concerns with the possibility for further declines of fish stocks due to Project-associated increases in pollution and marine traffic.

### Impacts to Aboriginal Interests

Ditidaht expressed concerns that the Project could potentially compromise Ditidaht's ability to hunt and fish in its traditional territory, due to increased marine traffic. Ditidaht have asked for affected sensitive fish habitat to be addressed by specific remediation plans.

### Accidents and Malfunctions (marine/terrestrial)

Ditidaht expressed concerns that poor weather conditions increase the likelihood of collisions between tankers and Ditidaht fishing vessels. Ditidaht also identified concerns over the adequacy of spill response mechanisms, given the region's inclement weather, marine environment characteristics (e.g. strong tidal currents), and the remoteness of the Ditidaht community.

In June 2016, Ditidaht sent a letter to MPMO after the release of the NEB Report highlighting additional issues and concerns raised by the community. The Crown's understanding of additional key concerns identified in this letter include:

### Consultation Process

Ditidaht expressed that they would like to have clear expectations regarding the consultation process including: a specific plan for how impacts to Ditidaht's Aboriginal rights will be assessed; adequate time to review the consultation report; and an understanding of how the Project will be considered in terms of overall marine shipping activities in Ditidaht's traditional territory.

### Information Gaps Related to Marine Shipping Activities

Ditidaht described gaps in information that they believe should be considered by regulators in their decision-making: the disruption of fishing activities at Swiftsure Bank due to community members' avoidance of large vessels navigating shipping lanes; ships navigating outside designated shipping lanes; inability of pilots and captains to safely navigate extreme weather conditions; and the removal of navigational aids (e.g. lighthouses and whistle buoys) within Ditidaht's territory.

### Improved Infrastructure

Ditidaht raised concerns regarding emergency and spill response preparedness, as well as the infrastructure and capacity within Ditidaht's community required to respond to accidents and malfunctions in a manner that mitigates the Project's potential adverse effects.

### Spill Risk

While Ditidaht expressed that they do not object to the Project, they identified the disproportionate amount of risk that they believe their community will assume in the event of an accident or spill, if the Project is approved.

### ***Ditidaht's Response to NEB Recommendation Report***

Ditidaht's response to the *NEB Recommendation Report* is outlined in the September 16, 2016 letter sent to the Crown by JFK Law Corporation on behalf of Ditidaht. The letter notes that Ditidaht disagrees with the NEB's view that the adverse effects of the marine shipping aspect of the Project on Ditidaht traditional use and occupancy activities are short-term and of a low magnitude. Consequently, Ditidaht remains concerned that the NEB improperly discounted the ongoing adverse impacts to Ditidaht from the risk of spills and the disproportionate severity of spill impacts on Ditidaht's rights, title, and way of life. In Ditidaht's view, the NEB's conclusions underestimate the Project-related adverse impacts to Ditidaht's interests because the NEB:

- Overlooked flaws in Trans Mountain's methodology, as identified by Ditidaht;
- Does not appreciate local marine conditions within Ditidaht's territory and how this affects the ability to gather adequate baseline information regarding marine resources and conditions;
- Does not adequately appreciate the Aboriginal perspective on Project effects;
- Overly relied on vague commitments respecting emergency preparedness and shipping risks without considering Indigenous knowledge, infrastructure, and training gaps in Ditidaht's community, and local environmental conditions;
- Does not properly consider impacts to Ditidaht's Aboriginal rights and title, including title to water;
- Overlooked Ditidaht's requests for revisions to certain marine-related conditions; and
- Does not address the disproportionate risk and burden placed on Ditidaht in the event of a spill.

According to Ditidaht, the NEB also neglected to ensure that there is a regulatory requirement that relevant Aboriginal groups be consulted by the Crown and the proponent in the development and implementation of the marine plans and programs that are conditions on the Project. Thus, Ditidaht requests that the conditions pertaining to marine shipping and spill response be revised to require such consultation with relevant Aboriginal groups. A detailed commentary on the NEB Report can be read in Appendix 2 of the September 16, 2016 letter.

Ditidaht noted two strengths of the *NEB Recommendation Report*:

- The acknowledgement that traditional marine activities in and around Swiftsure Bank are very important to Aboriginal communities; and
- The acknowledgement that the NEB does not have the ability to impose specific mitigation conditions to address Project-related marine shipping effects.

From the perspective of Ditidaht, it is not enough for the Crown to rely on current shipping practices, ad hoc training workshops, and general commitments by the proponent and Western Canada Marine Response Corporation (WCMRC) in order to address Ditidaht's outstanding concerns.

### ***Accommodation Proposals***

Ditidaht's proposed mitigation measures for Crown consideration are outlined in letters dated June 6, 2016 and September 16, 2016. The measures proposed by Ditidaht include:

- Emergency response planning and capacity development for Ditidaht’s marine territory, developed with Canada and WCMRC, including:
  - A fully equipped marine response station in Nitinat;
  - A commitment to train Ditidaht members in marine response measures; and
  - Funding to establish and maintain a response plan.
- Consultation with Ditidaht in regards to emergency response planning;
- The installation of a WCMRC response base at Nitinat that will incorporate local Indigenous Knowledge as Ditidaht members possess unique knowledge regarding the Nitinat Narrows and Nitinat Lake;
- Support for Ditidaht’s local response capacity by committing to properly equip, train, and fund Ditidaht members as first responders in the event of a marine accident or spill;
- Road infrastructure improvements to enable first responders to access the coast by road;
- A requirement that a rescue tug be stationed in the Juan de Fuca Strait;
- Extend the escort tug zone beyond Race Rocks to Swiftsure Bank, while ensuring that all escort tugs meet minimum requirements for severe weather in the Juan de Fuca Strait;
- Changes to shipping lanes to require that tankers exit the Juan de Fuca Strait to the south to avoid Swiftsure Bank;
- Shipping restrictions on tankers travelling through Ditidaht territory during extreme weather events, defined with regard to Ditidaht Indigenous Knowledge;
- The provision of education and equipment in Nitinat for Ditidaht members to have access to the navigation monitoring systems used by the Marine Communication and Traffic Services (MCTS);
- A commitment to expand MCTS services in order to accommodate the increase in tanker traffic from the Project;
- Continued engagement on marine shipping;
- Amendment of NEB Conditions 90, 91, 131, 132, 133, 134, 136, 144, and 146 to require that all plans/programs be developed through and require early consultation with Aboriginal communities, incorporate Indigenous Knowledge, and demonstrably mitigate Aboriginal concerns;
- A commitment to develop and fund job training programs for Ditidaht members to obtain senior level marine positions; and
- Ongoing consultation regarding marine traffic issues in Ditidaht’s marine territory for any of the foregoing measures where the Crown cannot provide a clear, binding commitment prior to mid-November.

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 Ditidaht 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.

## **V – Potential Impacts of the Project on Ditidaht’s Aboriginal Interests**

A discussion of the Crown’s assessment approach and understanding of the potential impacts of the Project on Aboriginal Interests are provided in Sections 2.4.3 and 4.3 of this Report, respectively. The Crown recognizes that areas within the asserted or established traditional territory of each Aboriginal group 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 Ditidaht’s Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Ditidaht’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 Ditidaht’s Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Ditidaht, Ditidaht’s engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant conditions of any Environmental Assessment Certificate (EAC) issued by the Province.

Ditidaht completed a traditional marine resource use (TMRU) study in 2015 titled *Ditidaht First Nation Traditional Marine Use and Occupancy Study* ([A4L5D4](#), [A4L5D5](#) and [A4L5D6](#)). The focus of the study was on Crown lands and waters within the asserted territory of Ditidaht crossed by the Marine Regional Study Area (RSA).<sup>3</sup> Traditional land and marine uses identified by Ditidaht include hunting aquatic birds, coastal mammals and marine mammals; gathering plants; information on fishing sites, sacred sites, habitation sites, and gathering areas for community members; and trails and travelways. In its Supplemental Technical Reports ([A4S7I8](#), [A4F5D2](#), [A4A0W1](#), [A3S4K3](#)), the proponent estimated approximate distances and directions from the marine shipping lanes based on information in Ditidaht’s report.

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

Historically, Ditidaht community members hunted both terrestrial and marine mammals, and trapping was an important traditional activity. Currently, community members hunt aquatic birds (i.e., mallard

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<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.

duck, surf scoter, common merganser, bufflehead duck, common goldeneye), coastal mammals (i.e., coastal deer, Roosevelt elk), and marine mammals (i.e., harbour seal). Western red cedar, sitka spruce, basketry grasses, American dune grass, salal, Pacific cinquefoil/silverweed, wild clover, stinging nettle, salmonberry, and huckleberry are currently harvested by community members.

Ditidaht identified 91 hunting sites and 48 plant gathering sites in the Marine RSA, concentrated at four locations: Bonilla Point, Pachena Point, Nitinat Lake, and Nitinat River. The shipping lanes do not need to be crossed to access these sites, with the exception of Swiftsure Bank which is located in the shipping lanes. During the TMRU study, Ditidaht First Nation identified 11 trapping sites within the Marine RSA; however the sites are confidential and it is not known where the sites are located in relation to the shipping lanes and if shipping lanes need to be crossed to access these sites. Ditidaht identified 48 plant gathering sites in the Marine RSA during the TMRU study. The plant gathering sites are concentrated at four locations: Bonilla Point, Pachena Point, Nitinat Lake, and Nitinat River. The shipping lanes do not need to be crossed to access these sites, and the nearest site is 8.7 km north of the shipping lanes.

In addition to providing traditional use information, Ditidaht raised specific concerns with potential Project impacts relating to their Aboriginal right to hunt, trap, and gather plants, specifically the potential for increased marine traffic to compromise Ditidaht's ability to hunt in its traditional territory.

The general direct and indirect effects of the Project on hunting, trapping, and gathering, along with key mitigation measures, are described in Sections 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 (Sections 4.3.1 of this Report). The proponent would implement a range of mitigation measures that would reduce potential effects associated with Ditidaht'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 Ditidaht, Ditidaht'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 Ditidaht's hunting, trapping and plant gathering activities.

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

Ditidaht community members consider seafood gathering, fishing, and fish and fish habitat in the ocean and inland critical for food, cultural, and economic aspects of their society. Historically, Ditidaht community members fished species such as northern abalone, sea cucumber. Currently they fish species such as butter clam, horse clam, California mussel, blue mussel, gooseneck barnacle, acorn barnacle, black kate chiton, limpets, whelks, urchins (i.e., giant red sea urchin, purple sea urchin), red rock crab, Dungeness crab, prawn, pacific octopus, pile worm, salmon (i.e., sockeye salmon, coho salmon, pink



salmon, chum salmon, chinook salmon) steelhead, coastal cutthroat trout, herring, ling cod, yellow eye rockfish, surf smelt, night smelt, and halibut. Whaling has been central to Ditidaht, and species hunted include humpback, grey whales and northern right whales.

During the TMRU study, Ditidaht identified 242 fishing sites in the Marine RSA concentrated at five locations: Bonilla Point, Pachena Point, Nitinat Lake, Nitinat River and Swiftsure Bank. The shipping lanes need to be crossed to access Swiftsure Bank. The Crown understands that Swiftsure Bank is a rich fishing and harvesting area with particular cultural significance where Ditidaht share offshore fishing and harvesting rights with the Pacheedaht, and the Makah Nation. 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.

Ditidaht raised specific concerns with potential Project impacts relating to their Aboriginal right to fish and harvest marine resources:

- Declines of fish stocks due to increases in pollution and marine traffic associated with the Project;
- Potential for increased marine traffic to compromise the ability of Ditidaht community members to fish in their traditional territory, particularly at Swiftsure Bank; and
- Poor weather conditions that increase the likelihood of collisions between tankers and Ditidaht fishing vessels.

The general 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. 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 Ditidaht 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. Reduced harvests, while not expected to occur from temporary access restrictions, could impact Ditidaht's cultural activities and sharing of marine food with the community.

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 Ditidaht'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).

In consideration of the information available to the Crown from the NEB process, consultation with Ditidaht, Ditidaht'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 Ditidaht's marine fishing and harvesting activities.

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

Other traditional and cultural practices sites include trails and travelways, habitation sites, gathering places, and sacred areas. Historically, transportation routes were established and maintained throughout Ditidaht's asserted traditional territory. The use of trails and travelways was also important for participation in spiritual and ceremonial activities and to gather, hunt and fish. Trails and travelways continue to be used by community members. Historically, nine Ditidaht villages were located on the coast of Vancouver Island from Bonilla Point to Pachena Point. Although more permanent habitation sites were moved inland to Nitinat Lake, community members continue to use sites identified during the TMRU study along the coast in its asserted traditional territory. Sacred areas include sacred/ceremonial, burial, rock art panel and legendary being sites, as well as areas used for ritual bathing in preparation of ceremonies and other activities.

During the TMRU study, 58 trails and travelways, and two anchorage sites were identified by Ditidaht within the Marine RSA. The majority of the travelways and anchorage sites locations are confidential, and it not known where the sites are located in relation to the shipping lanes and if shipping lanes are crossed to access these sites. Shipping lanes are crossed to access the Swiftsure Bank travelway. Ditidaht identified a total of 146 gathering places and 68 sacred areas within the Marine RSA concentrated at Bonilla Point, Pachena Point, Nitinat Lake, and Nitinat River. The shipping lanes are not crossed to access the gathering places or sacred areas, of which the nearest is approximately 8.7 km north of the shipping lanes.

Ditidaht raised specific concerns with potential Project impacts relating to the use of marine travelways, specifically an increase in the likelihood of collisions between tankers and Ditidaht fishing vessels.

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 Ditidaht'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 in providing traditional knowledge related to the location and construction of the Project. Marine mammals are of importance to many Coast Salish Aboriginal groups, and killer whales specially hold strong spiritual and cultural importance for many Aboriginal groups. The NEB concluded that effects on the endangered southern resident killer whale and Aboriginal cultural use of Southern Resident Killer Whale from Project-related shipping activities would be significant. The Crown is not aware of any specific cultural use of or concerns regarding killer whales raised by Ditidaht during the NEB and Crown consultation processes.

In consideration of the information available to the Crown from the NEB process, consultation with Ditidaht, Ditidaht'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 negligible-to-minor impacts on Ditidaht's other traditional and cultural practices.

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

Ditidaht expressed concerns regarding the impact of a potential oil spill on their Aboriginal Interests, including the effects on:

- Economic development interests and commercial harvesting rights;
- The environment, as well as Ditidaht culture, identity, and rights, including stewardship of Ditidaht's traditional lands and waters; and
- Shoreline heritage resources.

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 Ditidaht'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 Ditidaht'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>4</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 Ditidaht First Nation's Aboriginal Interests would be up to minor.

However, given existing use of the marine shipping corridor within areas proximate to the exercise of Ditidaht First Nation's Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of Ditidaht 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 Ditidaht First Nation. Transport Canada has offered to meet with Ditidaht to discuss the issues

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<sup>4</sup> Trans Mountain Final Argument, p. 85 and 207

surrounding the location of the shipping lanes near Swiftsure Bank. Please see Sections 4 and 5 of the main body of this Report for a discussion of proposed accommodation measures.

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