

## **Appendix D.3 – Esquimalt Nation**

### **I – Background Information**

Esquimalt Nation (Esquimalt) is a Coast Salish community located on the eastern shore of Esquimalt Harbour in the Greater Victoria Region of British Columbia (BC). Esquimalt asserts that since time immemorial it has used and occupied the lands, waters and resources in its traditional territory for a multitude of purposes, including hunting, fishing, transportation, trade, traditional ceremonies and village sites.

Esquimalt has one reserve (Esquimalt IR) and 306 registered members, 200 of whom live on-reserve and 106 of whom live off-reserve. Approximately 50% of Esquimalt's 44.3 acres of reserve land has been identified for economic development. Reserve development is a balance of residential and commercial. Esquimalt members historically spoke a dialect of the Coast Salish language.

### **II – Preliminary Strength of Claim Assessment**

- Approximately 45 kilometers (km) of the marine shipping route would pass within the southern part of Esquimalt's asserted traditional territory.
- The Province of BC understands Esquimalt to be to be a Douglas Treaty beneficiary. The Province of BC understands that Esquimalt has Douglas Treaty rights to fish as formerly and hunt on unoccupied lands within its historic traditional territory. No distinction is made between the Esquimalt and Songhees peoples in the ethnographic materials and no separate Esquimalt territory is identified by ethnographers, as both are considered Songhees. Ethnohistoric evidence indicates that Songhees territory extended "from Albert Head to Cordova Bay" on Vancouver Island, and included the American San Juan and Henry Islands at the time of the treaties in 1850.<sup>1</sup>
- Canada recognizes the Douglas Treaties and understands that Esquimalt has members who are descendants of one or more signatories to one or more Douglas Treaties. Canada remains committed to working toward a common understanding of the content and scope of the Douglas Treaties with Esquimalt to implement the treaty through agreements with the Crown, and to explore opportunities to honour and recognize the Douglas Treaties.

### **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 Esquimalt's Aboriginal Interests, the Crown is of the view that the legal duty to consult Esquimalt lies at the middle portion of the *Haida* consultation spectrum. Esquimalt was placed on Schedule B of the Section 11 Order

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<sup>1</sup> Te'mexw Treaty Association and Esquimalt Nation. Songhees, Beecher Bay, Esquimalt and Malahat First Nations, Esquimalt Nation: Review of Ethnographic and Historical Sources. Ministry of Justice, Legal Services Branch, Aboriginal Research Division. September 5, 2008. Revised to June 16, 2015; Proposed National Marine Conservation Area Reserve in the Southern Strait of Georgia: Review of Ethnographic and Historical Sources. Prepared by Ministry of Justice, Legal Services Branch, Aboriginal Research Division. December 19, 2012. Revised November 20, 2013.

issued by the Environmental Assessment Office, which afforded Esquimalt opportunities to be consulted at a deeper level.

Esquimalt participated in the National Energy Board (NEB) review process as an intervenor and submitted written evidence and a final written argument, sent additional correspondence to the NEB, and responded to the Crown's Issues Tracking Table Information Request by further elaborating their concerns ([A71202](#)).

Esquimalt was awarded \$24,910 in participant funding (plus travel for one to the hearing) from the NEB. The Major Projects Management Office (MPMO) offered Esquimalt \$8,400 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Esquimalt an additional \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Esquimalt signed contribution agreements with the MPMO in response to both of these offers, for a total of \$14,400 in allocated funding.

Esquimalt signed a letter of support with the proponent on March 10, 2015 ([A68380](#)) and has entered into a Mutual Benefits Agreement (MBA) with the proponent.

Esquimalt participated in meetings with the Crown consultation team on April 21, 2016 and on July 26, 2016.

The Crown provided a first draft of the Consultation and Accommodation Report (Report) to Esquimalt Nation for review and comment on August 17, 2016. The Crown did not receive comments from Esquimalt on the draft Report.

On October 26, 2016, the Crown sent a letter with two attachments to Chief Thomas and the Councillors of Esquimalt in order to respond to questions, outstanding issues, and proposed accommodation measures related to the Project as advanced during both Esquimalt's written final argument to the NEB and as discussed during the July 26, 2016 meeting.

A second draft of this Report was provided to Aboriginal groups for review and comment on November 2, 2016. The Crown has not received comments from Esquimalt.

Esquimalt provided a separate Aboriginal group submission to the Crown on November 15, 2016.

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

The Crown has gained its understanding of Esquimalt's issues and concerns through Esquimalt's involvement in the NEB process, including the responses Esquimalt provided to the Crown on its Information Request (IR) addressed to them, and through other engagement with the Crown, including meetings held in April 2016 and July 2016. In addition, the Crown has considered information regarding the proponent's engagement with Esquimalt, as described in the proponent's Aboriginal Engagement Report (July 2016).

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

- Potential damage to sacred sites and/or resources via increased marine traffic and spill risk;
- Lack of effective cross-examination of proponent within the NEB process;
- An absence of the federal government, despite its legal duty to consult;
- Increased pollution damaging number, quality, and habitat of marine resources, thereby impairing Esquimalt's ability to harvest clams and oysters;
- Potential economic compromise of Esquimalt business interests due to increased marine traffic and possibility of a spill;
- Impacts from increased marine traffic, such as: restricting the times that community members can exercise their harvesting rights; disrupting travelways used by Esquimalt's members; potential for vessel collision; and wakes or grounding of vessels causing damage to sacred sites;
- Potential impacts from spills and/or contaminants, including: inability to exercise harvesting rights; reduced quality and quantity of marine resources; damage to marine habitat and food sources; damage to vessels or equipment used to exercise harvesting rights; contaminated traditional territory, including culturally or spiritually sensitive areas; interruption of traditional ceremonies for spill cleanup; human health impacts; and loss of property value, revenues, or loss of opportunity to develop Esquimalt's lands. These potential impacts illustrate the importance of ensuring an optimal spill response system that protects all parties suffering harm in the event of an environmental disaster;

Esquimalt has provided a letter of support for regulatory approval of the Project, but expressed a desire to see the NEB include a requirement for meaningful engagement by the federal government. Esquimalt also expressed interest in participating in the creation of a regional body including other First Nations, the proponent, and potentially affected parties to address and ensure ongoing environmental and cultural protection from potential marine spills.

### ***Accommodation Proposals***

Esquimalt proposed a series of accommodation proposals to the NEB in its written final argument ([A4X4A2](#)) on January 12, 2016. In summary, Esquimalt supports regulatory approval of the Project on the terms and conditions set out in the MBA. However, in order to better protect the environment and mitigate potential impacts on the environment, Esquimalt Nation's rights and interests and Esquimalt Nation culture, Esquimalt submitted that the following measures should be implemented prior to and as a condition to the Project proceeding:

#### **Spill Prevention**

- Emergency Response Towing Vessels should be stationed at strategic locations along the marine shipping route;

- A resident salvor and personnel as well as salvage equipment should be stationed at strategic locations along the marine shipping route;

### Spill Preparedness and Response

- The federal government should commission independent research on the fate and behavior of diluted bitumen in the marine environment and current best practices for spill response in the event that it does;
- The federal government should provide Esquimalt Nation and other interested parties an opportunity to comment on that research;
- If the research concludes there is a risk that diluted bitumen will sink, the federal government should require Trans Mountain to reassess the risk of an oil spill involving a Project-related tanker, including proposed mitigation measures;
- A spill response base should be established near Victoria, ideally in Esquimalt Harbour and Esquimalt Nation should be further consulted regarding the establishment of that spill response base;
- Equipment should be located in the community and Esquimalt members should be trained for emergency situations;
- The spill response capacity should be increased to an amount considerably greater than 20,000 tonnes (21,277 m<sup>3</sup>) and this response capacity should be available at each of the major spill response bases including Esquimalt Harbour;
- Esquimalt Nation and other interested parties should be consulted regarding that increase and, if required, the federal government should commission independent research to assist in determining the amount it should be increased to;
- Trans Mountain should fund the establishment of a plan, in consultation with Esquimalt and other interested parties, for bringing together and training a shoreline cleanup and wildlife response workforce in the event of an oil spill involving a Project-related tanker; and
- The federal Crown and Trans Mountain should engage in meaningful consultations with Esquimalt and other First Nations with aboriginal or treaty rights in or around the Salish Sea regarding establishment of the Foundation, including the federal government and Trans Mountain's respective financial contributions to the Foundation.

Esquimalt Nation further submits that, regardless whether the Project proceeds, the federal government should implement the following regulatory improvements:

- 1) *Hearing Process*: Amending the environmental assessment process for future projects that may impact Esquimalt's rights and interests in consultation with Esquimalt and other interested parties; and
- 2) *Spill Compensation Regime*: Amending the compensation regime for marine-based oil spills to ensure that the total compensation available reflects the total costs likely to be incurred in the event of a major oil spill and to ensure that damages to Esquimalt's Harvesting Rights are compensable under the regime, in consultation with Esquimalt and other interested parties.

Esquimalt acknowledges that some of the above conditions are beyond the jurisdiction of the NEB; however, submits that, to the extent they are, they should be addressed through federal regulation.

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 Esquimalt 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

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

No specific comments were received on the *NEB Recommendation Report*.

#### **V – Potential Impacts of the Project on Esquimalt'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 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), including by individual members or families.

The discussion in this section focuses on potential impacts of the Project on Esquimalt's Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Esquimalt'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 Esquimalt's Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Esquimalt, Esquimalt's engagement with the proponent, proponent commitments, recommended NEB conditions, as well as relevant conditions proposed by the Province of any Environmental Assessment Certificate issued.

Esquimalt completed a proponent-facilitated traditional marine and resource use (TMRU) study in 2013, which included a map review and community interviews that focused on Crown lands and waters within the asserted territory of Esquimalt crossed by the Marine Regional Study Area (RSA)<sup>2</sup>. In its

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<sup>2</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

Supplemental Technical Report ([A3Z4Z1](#)), the proponent estimated approximate distances and directions from the marine shipping lanes based on information in Esquimalt's report. Additional TMRU information for Esquimalt was presented in *Volume 5B* ([A3S4K3](#)) of the Project application. Traditional marine resource uses identified by Esquimalt include hunting, information on fishing sites, plant gathering, sacred sites, and habitation sites.

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

As identified in the TMRU study, Esquimalt community members historically hunted black ducks, sea lions, humpback whale, and orcas, and harvested gull eggs. Currently, deer and elk are hunted around Shawinigan Lake, Cowichan Lake and Youbou. Eleven hunting sites were identified, of which five are within the Marine RSA (i.e., Sooke Inlet, Discovery Island, Chatham Island, Esquimalt Harbour and Salish Sea). Access to these sites is not restricted by the shipping lanes, with the exception of the Salish Sea hunting site which encompasses portions of the outbound shipping lane. No plant gathering sites were identified by Esquimalt within the Marine RSA. The nearest site is at Goldstream, approximately 25 km north of the Marine RSA, where salmon berries are harvested. Community members used to harvest seaweed, and continue to practice traditional healing using terrestrial plants.

In addition to providing traditional use information, Esquimalt raised specific concerns with potential Project-related impacts on their hunting, trapping and gathering activities including potential for increased pollution damaging number, quality, and habitat of marine resources, and impacts from increased marine traffic, including the restriction of harvesting.

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 directly or indirectly reduce potential Project-related marine shipping impacts on Esquimalt'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 Esquimalt, Esquimalt'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 impact on Esquimalt's hunting, trapping and plant gathering activities.

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indirect influence of other activities could overlap with Project-specific effects and cause cumulative effects on the environmental or socio-economic indicator.

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

As identified in the TMRU study, fish are a main food source for Esquimalt community members, including salmon, halibut, sole, cod, and perch. Clam, crab, sea urchin, abalone, gooey duck and lingcod eggs are also harvested. Twenty-one fishing sites were identified, of which 15 are within the Marine RSA. Access to these sites is not restricted by the shipping lanes, with the exception of the Salish Sea fishing site which encompasses portions of the outbound shipping lane. In *Volume 8B*, Craigflower Creek, Gorge Waterway, and Macaulay Point were also identified as marine resource harvesting and fishing sites within the Marine RSA. The shipping lanes are not crossed to access the sites.

In addition to providing traditional use information, Esquimalt raised specific concerns with potential Project-related impacts on their marine fishing and harvesting activities, including the potential for increased pollution damaging number, quality, and habitat of marine resources, which could impair Esquimalt's ability to harvest clams and oysters.

The general direct and indirect effects of the Project on marine fishing and harvesting activities, along with key mitigation measures, are described in Section 4.3.3 of the main body of this Report. As described in that section, Project-related marine shipping activities are not likely to cause significant adverse environmental effects on marine fish and fish habitat, including SARA-listed species and the proponent would implement several mitigation measures that would directly or indirectly reduce potential Project-related marine shipping impacts on Esquimalt's marine fishing and harvesting activities. These mitigations would include 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). The proponent has also committed to require all tankers to process and empty their bilges prior to arrival and lock the discharge valve of the bilge water while in Canadian waters (commitment 411).

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

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

Historically, boats were the main mode of Esquimalt transportation, allowing access to different islands. No travelways were identified within the Marine RSA during the TMRU study. Several habitation sites (historic and current villages) were identified, none of which are located within the Marine RSA or require crossing shipping lanes to access the sites. Eight sacred areas were identified, including historical burial sites, caves, and rock art sites. One of the historical burial sites, Brothers Islands, is within the Marine RSA and is approximately 5.7 km northwest of the shipping lanes. In *Volume 8B*, the Gorge Rapids were also identified as a sacred site within the Marine RSA. The shipping lanes are not crossed to access this site.

In addition to providing traditional use information, Esquimalt raised specific concerns with potential Project-related impacts on other traditional and cultural practices:

- Potential damage to sacred sites resulting from increased marine traffic;
- Potential economic effects to Esquimalt's business interests resulting from increased marine traffic; and
- Potential impacts from increased marine traffic including the restriction of harvesting times, disruption of travelways used by community members, and damage to sacred sites from vessel wake or vessel grounding.

The general direct and indirect effects of the Project on traditional and cultural practices, along with key mitigation measures, are described in Section 4.3.4 of the main body of this report. 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 Esquimalt during the NEB and Crown consultation processes.

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 Esquimalt'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.

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

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

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

- Potential impacts from spills that reduce the quality and quantity of marine resources and cause damage to marine habitat and food sources;
- Potential impacts from spills and/or contaminants including the restriction of harvesting, reduced quality and quantity of marine resources, damage to marine habitat and food sources, and damage to vessels or gear used to exercise harvesting rights;

- Potential impacts from spills and/or contaminants such as contaminated traditional territory (including culturally or spiritually sensitive areas), interruption of traditional ceremonies resulting from cleanup activities following a potential spill, human health impacts, and loss of property value, revenues, or loss of opportunity to develop Esquimalt's lands;
- Potential damage to sacred sites resulting from spills; and
- Potential economic effects to Esquimalt's business interests resulting from the possibility of a spill.

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 Esquimalt'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 Esquimalt'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>3</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 Esquimalt's Aboriginal Interests would be negligible.

However, given existing use of the marine shipping corridor within areas proximate to the exercise of Esquimalt's Aboriginal Interests and the potential severity of the impacts of a marine spill on the exercise of Esquimalt'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 Esquimalt. 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 MBA with Esquimalt Nation in an attempt to offset potential impacts, should the Project proceed.

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<sup>3</sup> Trans Mountain Final Argument, p. 85 and 207