

## Appendix D.6 – Lake Cowichan First Nation

### I - Background Information

Lake Cowichan First Nation (Lake Cowichan) is a Coast Salish community located about 30 kilometers (km) inland from Duncan, British Columbia (BC) on the east coast of Vancouver Island. Lake Cowichan asserts that it traditionally used the interior of Vancouver Island and that they would travel to the coast and surrounding waters to conduct fishing and other activities. Lake Cowichan also asserts that it uses marine resources on the west coast of Vancouver Island along the Strait of Juan de Fuca.

Lake Cowichan has one reserve (Cowichan Lake IR) with a registered population of 20 as of July 2016 with 14 members living on-reserve and 6 members living off-reserve.

Lake Cowichan is a party to the Hul'qumi'num Nation protective *Writ of Summons*, which was filed in the BC Supreme Court in December, 2003, asserting Aboriginal title to a territory identified in the *writ*. Lake Cowichan is party to the Hul'qumi'num Treaty Group *Statement of Intent*. The Hul'qumi'num (pronounced "Hul-ka-MEE-num") Treaty Group includes: Stz'uminus (Chemainus) First Nation, Lake Cowichan, Halalt First Nation, Penelakut Tribe, Cowichan Tribes and Lyackson First Nation.

The Hul'qumi'num Treaty Group is currently in Stage 4 of the BC Treaty process (i.e., developing an Agreement-in-Principle).

Lake Cowichan signed a letter of support with the proponent on August 5, 2015.

### II - Preliminary Strength of Claim Assessment

- The right of way (RoW) transects the asserted traditional territory of the Hul'qumi'num, between the Westridge terminal and Surrey, and again between Chilliwack and Hope (approximately 72 km of new RoW). The following Project facilities are located within the asserted traditional territory of the Hul'qumi'num: Hope Station, Wahleach Station, Port Kells Station, Burnaby Terminal, and Westridge Marine Terminal. The marine shipping route would pass through approximately 265 km of Hul'qumi'num Treaty Group's traditional territory.
- The Crown's preliminary assessment of Lake Cowichan's Aboriginal rights in areas proximal to the marine shipping corridor of the Project, which transits the Strait of Georgia, is assessed as having a *prima facie* claim of Aboriginal rights ranging from weak to strong as follows. Areas of strong claims are areas within what ethnohistoric sources generally describe as pre-contact traditional territory of the Lake Cowichan and where there is information of their historic use as part of their traditional seasonal round, including areas in the Strait of Georgia proximal to, and within the southern reaches of, the southern arm of the Fraser River and portions of the southern Gulf islands that lie to the west of Galiano Island and above Active Pass. Areas of weak claims include areas proximal to the Strait of Georgia north of Gabriola passage and north and south of the South arm of the Fraser River, the Strait of Georgia south of Active Pass, and areas

within Haro and Juan de Fuca Straits, which were not considered within the pre-contact traditional territory of the Lake Cowichan and/or Cowichan people.<sup>1</sup>

- The Crown's preliminary assessment of the Lake Cowichan's *prima facie* claim of Aboriginal title to upland areas proximal to the marine shipping corridor of the Project ranges from weak to moderate with the higher end of the range (i.e., moderate) pertaining to exclusive areas of known Lake Cowichan habitation and use. The Crown does not have clarity regarding how Hul'qumi'num Treaty Group members are asserting Aboriginal title in certain areas where there is limited indication that any of the Hul'qumi'num Treaty Group member First Nations could have excluded each other at 1846. For example, upland areas proximal to the marine shipping corridor, including by the southern arm of the Fraser River, the Crown would assess the *prima facie* claim of Aboriginal title of the Lake Cowichan as ranging from weak to moderate, with the stronger (i.e., moderate) claims located in proximity to uplands in the vicinity of the large village site of Tl'ektines. The Crown also does not have clarity regarding how Hul'qumi'num Treaty Group members are asserting Aboriginal title in the southern Gulf Islands that lie to the west of Galiano Island and above Active Pass and to the west of Valdes and Gabriola; in these areas, the Crown would assess the *prima facie* claim of Aboriginal title of the Lake Cowichan to upland areas as ranging from weak to weak-to-moderate as there is some indication of habitation and resource gathering sites utilized by Cowichan people likely at 1846. The following areas are generally described by ethnohistoric sources as outside the traditional territory of the Cowichan people without evidence of their occupation or use, such that there is no support for a *prima facie* claim of Aboriginal title to upland areas: proximal to the Strait of Georgia north of Gabriola passage and north of the South arm of the Fraser River, the Strait of Georgia south of Active Pass and south of the south arm of the Fraser River, and within Haro and Juan de Fuca Straits.<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 Lake Cowichan's Aboriginal Interests, the Crown is of the view that the legal duty to consult Lake Cowichan lies at the middle portion of the *Haida* consultation spectrum. Lake Cowichan was placed on Schedule B of the section 11 order issued by the BC Environmental Assessment Office (EAO), which afforded Lake Cowichan opportunities to be consulted at a deeper level.

Lake Cowichan participated in the National Energy Board (NEB) review process as an intervenor. The Crown understands that Lake Cowichan did not provide any oral traditional evidence or written evidence about their rights and interests, and did not respond to the Crown's Issues Tracking Table Information Request.

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<sup>1</sup> The Hul'qumi'num Treaty Group: Review of Ethnographic, Historical and Archaeological Resources: Cowichan, Lake Cowichan, Halalt, Chemainus, Lyackson, Penelakut and Hwlitsum First Nations. Prepared by Aboriginal Research Division, Legal Services Branch, Ministry of Attorney General. September 8, 2009; and Lake Cowichan First Nation: A Preliminary Review of Ethnographic, Historical and Archaeological Resources. Prepared by Aboriginal Research Division, Legal Services Branch, Ministry of Attorney General. January 27, 2009.

<sup>2</sup> Ibid

On April 28, 2015 Lake Cowichan filed a Letter of Support for the Project with the NEB.

Lake Cowichan and Lyackson First Nation met jointly with the Crown on April 20, 2016 to discuss the Project. Lake Cowichan also met with the Crown on September 27, 2016.

The NEB awarded Lake Cowichan \$36,920, including travel for two to the oral traditional evidence hearing, during the review process. The Major Projects Management Office (MPMO) offered Lake Cowichan \$12,000 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Lake Cowichan an additional \$14,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Lake Cowichan signed contribution agreements with the MPMO in response to both of these offers, for a total of \$25,000 in allocated funding. EAO offered \$5,000 in capacity funding to Lake Cowichan to assist with the consultation process.

The Crown provided a first draft of the Consultation and Accommodation Report (Report) to Lake Cowichan for review and comment on August 17, 2016. The Crown did not receive comments from Lake Cowichan on the draft Report. A second draft of this Report was provided to Aboriginal groups for review and comment on November 3, 2016. The Crown has not received comments from Lake Cowichan.

#### **IV - Summary of Key Lake Cowichan Issues and Concerns Raised**

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

The Crown has considered information regarding the proponent's engagement with Lake Cowichan, as described in the proponent's Aboriginal Engagement Report (July 2016), in addition to information gathered during Crown consultation.

Lake Cowichan asserts rights and interests as straddling the east and west sides of Vancouver Island. Lake Cowichan assert that community members historically travelled, traded, harvested, and had strong direct relations over to the Lower Mainland (including Burrard Inlet) and the west coast of Vancouver Island. They described fishing activities that would take place across the Salish Sea in the vicinity of the lower Fraser and Point Roberts. Lake Cowichan expressed concern about increased marine traffic and the potential for an accident or malfunction involving the Project pipeline, and noted that these real and potential Project impacts could impact their traditional and commercial fishery activities, pose safety risks to smaller marine vessels, and impact water quality.

Lake Cowichan signaled their support for the Project, and agreed it is satisfied with the mitigation measures provided by the proponent on April 28, 2015. However, Lake Cowichan expressed that they have remaining concerns with the broader impacts of climate change.

### ***Accommodation Proposals***

Although Lake Cowichan has not indicated specific accommodation proposals relating to the Project, Lake Cowichan noted their commitment to revitalizing their culture and reinvigorating traditional fishing activities. Lake Cowichan suggested a study be conducted of climate change impacts on Lake Cowichan, including the effects on traditional sites, and, a study of traditional foods.

Section 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 Lake Cowichan 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.

### ***Lake Cowichan's Response to NEB Recommendation Report***

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

## **V - Potential Impacts of the Project on Lake Cowichan'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 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.

It is the Crown's understanding that Lake Cowichan declined to participate in a traditional use study for the Project. As a result, the Crown has limited information on the traditional use sites and resources that could be impacted by the Project. Lake Cowichan identified concerns during the Crown consultation process, which the Crown has taken into consideration in its assessment of potential impacts on Lake Cowichan's Aboriginal Interests.

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

During the NEB process and Crown consultation process, Lake Cowichan raised concern about the potential effects of climate change on their ecosystem and the impact of the Project on their ability to gather traditional foods. The Crown is not aware of hunting, trapping or plant gathering sites that overlap with the Project area, including the pipeline right-of-way (ROW), the Westridge Marine Terminal (WMT), or the marine shipping route.

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. As described in the *NEB Recommendation Report*, Project-related activities are likely to result in low to moderate magnitude effects on soil and soil productivity, rare plants and lichens and vegetation communities of concern, old growth forests, wetlands, and terrestrial wildlife and wildlife habitat (including species at risk), marine mammals, and marine birds.

Project-related construction and routine maintenance is expected to cause short-term, temporary disruptions to Lake Cowichan's hunting, trapping, and plant gathering activities in the Project area. The Crown appreciates that this short-term disruption could temporarily alter the behaviour of community members' hunting, trapping or plant gathering activities during construction, and that reduced participation in traditional activities, while not expected to occur from temporary access disruptions within the footprint of the Project, could have spiritual and cultural impacts on community members.

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 is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignments Sheets and environmental tables within the immediate vicinity of the RoW will be clearly marked before the start of clearing. Mitigation measures to reduce effects on habitat, limit barriers to movement, avoid attraction to wildlife to the work site, minimize sensory disturbance and protect site specific habitat features are outlined in the Project Environmental Protection Plan (EPP) and the vegetation and wildlife management plans. The proponent would implement a range of mitigation measures that would reduce potential effects associated with Lake Cowichan'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.

The proponent is committed to implementing weed management (as outlined in the Weed and Vegetation Management Plan) to reduce the potential for weed infestation following construction, and utilizing an Integrated Vegetation Management approach intended to reduce the use of herbicides and promote healthy ecosystems. The proponent will consult with Aboriginal groups regarding problem vegetation management and methods of treatment. Measures outlined in the proponent's Reclamation Management Plan are intended to stabilize and revegetate affected lands to achieve land productivity along the construction ROW and footprint, equivalent to the adjacent land use. The proponent has also committed to ongoing engagement with Aboriginal groups that are interested in providing traditional knowledge related to the location and construction of the Project

NEB Condition 81 would require the proponent to develop a WMT-specific EPP, including mitigation and monitoring plans, to be finalized in consultation with DFO and potentially affected Aboriginal groups. The proponent would also be required to conduct a post-construction monitoring program for marine mammals from the expansion of the WMT. The proponent has committed to various mitigation

measures to reduce effects of construction and operation of the WMT on marine birds, further the proponent has committed to compile information regarding mortality and collision events and to include that information in post-construction monitoring reports.

In consideration of the information available to the Crown from the NEB process, consultation with Lake Cowichan, Lake Cowichan's engagement with the proponent, the proponent's proposed mitigation measures and the recommended NEB conditions, as well as relevant proposed conditions of any Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operations and Project-related marine shipping are expected to result in a negligible impact on Lake Cowichan's hunting, trapping and plant gathering activities.

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

Lake Cowichan raised concerns that an increase in marine traffic as a result of Project-related marine shipping could impact Lake Cowichan's marine fishing and harvesting activities. Lake Cowichan also expressed concern about an accident or malfunction resulting in a spill into the Fraser or the marine environment.

As described in the *NEB Recommendation Report*, Project-related construction and operation could result in low to moderate magnitude effects on freshwater fish and fish habitat and surface water. Moderate effects to fish and fish habitat would be localized to individual watercourse crossings where any potential serious harm would be compensated by offset measures. NEB conditions, if the Project is approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Sections 4.3.2 of this Report). A number of recommended NEB conditions require the proponent to file reports that will monitor Project-related impacts to fish, fish habitat and riparian habitats. The proponent has committed to time watercourse crossing construction activities to occur within the least risk biological windows in an attempt to avoid causing serious harm to fish, has committed to working with Aboriginal groups to identify the most appropriate means of offsetting serious harm to marine fish and fish habitat, and has proposed the implementation of channel and bank reclamation measures at each watercourse crossing to help maintain the productive capacity of water bodies that provide fish habitat.

The potential 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 are expected to cause temporary disruptions to Lake Cowichan's marine fishing and harvesting activities. The Crown understands that community members could be discouraged from travelling to marine fishing and harvesting sites that require these members to cross shipping lanes. 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 reduce potential effects associated with Lake Cowichan's marine fishing and harvesting activities, including plans to implement, monitor and comply with marine shipping-related commitments in cooperation with affected Aboriginal groups. 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 Lake Cowichan 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 Lake Cowichan's cultural activities and sharing of marine food with the community.

In consideration of the information available to the Crown from the NEB process, consultation with Lake Cowichan, Lake Cowichan'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 Environmental Assessment Certificate issued by the Province, Project construction and routine maintenance during operation and Project-related marine shipping are expected to result in negligible-to-minor impacts on Lake Cowichan's marine fishing and harvesting activities.

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

During consultation with the Crown, Lake Cowichan described plans to revitalize the traditional culture and educate the youth in the community about the culture. Lake Cowichan is working on increasing capacity for members to participate in fishing in their traditional territory including in the Salish Sea and the Fraser.

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 Lake Cowichan's traditional and cultural practices, and there could be reduced access to traditional and cultural sites during Project operational activities, including Project-related marine shipping. 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.

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 Lake Cowichan during the NEB and Crown consultation processes.

In consideration of the information available to the Crown from the NEB process, consultation with Lake Cowichan, Lake Cowichan'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 Environmental Assessment Certificate issued by the Province, Project construction and routine

maintenance during operation and Project-related marine shipping are expected to result in negligible-to-minor impacts on Lake Cowichan's other traditional and cultural practices.

### ***Impacts on Aboriginal Title***

The proponent has entered into a Mutual Benefits Agreement<sup>3</sup> with Lake Cowichan in an attempt to offset potential impacts, should the Project proceed.

The Crown provides a description of the potential impacts of the Project on Aboriginal title in Section 4.3.5 of this Report, which includes a discussion of the numerous mitigation measures that avoid or minimize potential impacts associated with Project-related activities on asserted Aboriginal title claims. Some of these mitigations include NEB Conditions that would either directly or indirectly avoid/reduce Project impacts associated with the degree of disturbance to terrestrial, marine and aquatic environments, ongoing engagement with Aboriginal groups that has the potential to reduce impacts on the ability of Aboriginal groups to manage and make decisions over the area impacted by the Project, as well as NEB Conditions that could provide Aboriginal groups with direct and/or indirect economic benefits if the Project is approved.

Given the potential impacts of the Project on Aboriginal title and various measures to address those impacts, as described in Section 4.3.5, it is the Crown's opinion that the Project is expected to have negligible impacts on Lake Cowichan's asserted Aboriginal title to the proposed Project area.

### ***Impacts Associated with Accidental Pipeline, Terminal, and Tanker Spills***

Lake Cowichan expressed concerns regarding the impact of a potential oil spill on their Aboriginal Interests.

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a 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. In consideration of this information and analysis, as well as information available to the Crown on Lake Cowichan'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 on Lake Cowichan'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>

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<sup>3</sup> The Crown notes that Lake Cowichan executed a Mutual Benefits Agreement with the proponent. Although these agreements are confidential, the Crown understands they may contain provisions for financial, environmental and training benefits that could further reduce or accommodate impacts to Aboriginal title claims if the Project proceeds.

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

## **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 pipeline and marine safety regimes would only partially address these ongoing burdens and risks. Under the typical conditions for construction and operations of the pipeline and WMT, as well as for marine vessel use of the area between the WMT and the 12 nautical mile limit (J-buoy) through the Salish Sea and Strait of Juan de Fuca, the Crown expects impacts of the Project on the exercise of Lake Cowichan's Aboriginal Interests would be up to negligible-to- minor.

The Crown is supportive of consultation requirements provided by the NEB and EAO in the various conditions, which would support Lake Cowichan's ongoing involvement and participation in the proponent's detailed Project planning, including the development of site-specific measures or pipeline routing to further avoid or mitigate adverse impacts on Aboriginal Interests, as well as the involvement of Lake Cowichan in emergency response planning activities. The federal Crown is considering incremental measures that would further accommodate the potential adverse impacts of the Project on Lake Cowichan, as discussed in Sections 4 and 5 of the main body of this Report.

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