

Appendix D.9 - Malahat Nation

I – Background Information

Malahat Nation (Malahat) is located about half way between Duncan and Victoria, British Columbia (BC) on the east coast of Vancouver Island. Malahat asserts that they traditionally used Saanich Inlet, the adjacent Gulf Islands and surrounding waters to conduct fishing and other activities. Malahat has a registered population of 330 members (126 are living on their Reserve, 54 are living on other Reserves, and 151 are living off Reserve) and two reserves: Malahat Reserve no.11 (239 hectares [ha]) and Goldstream Reserve no.13 (8.9 ha). Malahat members historically spoke the Coast Salish language.

As a Coast Salish group, Malahat traditionally followed a seasonal round centered on hunting, fishing, and harvesting a variety of shellfish and plant resources; manufacturing houses, canoes, and a variety of weapons, nets, traps, and containers; and, utilizing preserving techniques of drying and smoking. Fish was undoubtedly the most important resource. Land mammals were hunted and were important to the economy in the Salish Sea and a wide variety of fruits, roots, berries and other vegetable foods were gathered.

Malahat is a member of the Te'mexw Treaty Association (TTA) along with the Nanoose First Nation, Scia'new (Beecher Bay) First Nation and Songhees First Nation. The TTA is currently in Stage 5 of the BC Treaty process (i.e. Final Agreement), having signed an agreement-in-principle in April 2015.

II - Preliminary Strength of Claim Assessment

- The marine shipping route would transect approximately 15 kilometres (km) along the east side of Malahat's asserted traditional territory;
- Malahat may include descendants of the South Saanich Tribe or the North Saanich Tribe, signatories of the Douglas Treaty signed February 7, 1852, and February 11, 1852, respectively. Malahat may also include descendants from Cowichan people from Somenos and Quamichan. It is not clear to the Province whether Malahat is or claims to be a Douglas Treaty beneficiary;
- Canada recognizes the Douglas Treaties and understands that Malahat 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 Malahat, to implement the treaty through agreements with the Crown, and to explore opportunities to honour and recognize the Douglas Treaties;
- The Crown recognizes that Malahat asserts Aboriginal Interests, defined as asserted or established aboriginal or treaty rights, in the Project area and seeks information to inform this understanding through consultation with Malahat¹.

¹During the meeting with the Crown consultation team on September 15, 2016, Malahat informed the Crown that Malahat sources crab as their primary catch currently, which is captured off Tsawwassen Terminal (Roberts Bank). Consequently, the Crown has requested additional information from Malahat about an expanded boundary that is

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 Malahat's Aboriginal Interests, the Crown is of the view that the legal duty to consult Malahat lies at the middle portion of the *Haida* consultation spectrum. Malahat was placed on Schedule B of the Section 11 order issued by the BC Environmental Assessment Office (EAO), which affords Malahat opportunities to be consulted at a deeper level.

Malahat applied to participate in the National Energy Board (NEB) review process as a commenter, but did not submit a letter of comment to the Board. Malahat did not participate in the NEB hearing process, and did not submit an application for funding to the NEB.

The Major Projects Management Office (MPMO) offered Malahat \$5,995 in participant funding for consultations following the close of the NEB hearing record. MPMO offered Malahat an additional \$6,000 to support their participation in consultations following the release of the *NEB Recommendation Report*. Malahat signed contribution agreements with the MPMO in response to both of these offers, for a total of \$11,995 in allocated funding. On July 26, 2016 Malahat was issued \$5,000 in capacity funding from EAO to participate in consultation with the Crown.

Malahat representatives met with the Crown consultation team on April 22, 2016, following the close of the NEB hearing record, as well as on September 15, 2016.

On July 17, 2014, Malahat signed a letter of support with the proponent. As part of the Mutual Benefit Agreement, the proponent will support the community with Aboriginal employment and training opportunities.

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

IV - Summary of Key Malahat Issues and Concerns Raised

The Crown has gained its understanding of Malahat's issues and concerns through the community's involvement with the Crown consultation process. In addition, the Crown has considered information regarding the proponent's engagement with Malahat, as described in the proponent's Aboriginal Engagement Report (July 2016). This section offers a summary of the key issues raised by Malahat, 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

broader than captured by the Statement of Intent (Province's consultative areas database) in order to consider it in the assessment. The Crown has yet to receive a response from Malahat.

consideration of these issues and includes the Crown's views and conclusions. The Crown's understanding of Malahat's key Project-related issues and concerns are summarized below:

Cultural and Socio-economic Impacts

- Cumulative environmental effects causing negative socio-economic impacts;
- Potential cultural and social impacts of the Project, including impacts to Malahat's ability to transfer knowledge within their community;
- Potential impacts of a spill on Malahat's way of life; and
- Concerns that the Project will bring an increased risk from oil tankers without providing direct financial benefit to their community.

Environmental Impacts

- Potential environmental impacts of the Project on Malahat's asserted traditional territory, including the potential risk to fisheries, mammals, marine environment and migratory birds (e.g. sound, disruption, ecosystem health).

Impacts from Increased Marine Shipping Vessels

- Potential for increased marine shipping to interfere with fishing vessels, potentially affecting marine habitat and wildlife in the Salish Sea; and
- Potential cumulative impacts of marine traffic in the Juan de Fuca Strait, as well as the cumulative impacts of other projects (e.g. LNG projects, Roberts Bank Terminal 2) in Malahat's asserted traditional territory.

Impacts on Aboriginal Interests

- Malahat asserts Aboriginal title in their claim area, including title to lands, waters, foreshores and other submerged lands within the boundary of the claim area; and
- Potential for the Project's construction and operations, and impacts which would result from a potential spill, to infringe on Malahat's Aboriginal Interests, including restricting ability of Malahat community members to access Malahat's asserted traditional territory.

NEB Process

- Concern that an assessment of the maximum use threshold for marine shipping along the coast was not completed;
- Malahat desires inclusion in decision making processes, and believes that such inclusion should be entrenched in processes; and
- Malahat noted that projects are long-term with opportunities for on-going consultation and monitoring and that resources are needed to help Aboriginal groups to participate in the opportunities provided (follow-up programs etc.).

Accidents and Malfunctions

- Potential impacts of a spill on marine habitat and wildlife;

- Potential spills/accidents negatively impacting sustainability, availability, and access to natural resources;
- Concern that although there is a planned increase in shipping activity, there may not be an associated increase in marine emergency response capacity and Coast Guard presence in areas that will have increased marine traffic;
- Malahat emphasized that the community is very concerned by the “what if’s” that come along with such a project; and
- Malahat lacks the capacity to respond to accidents and spills, however, they desire to develop the necessary capacity to respond and be involved; and
- Request for an Aboriginal spill response team.

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.

Malahat’s Response to the NEB Recommendation Report

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

V - Potential Impacts of the Project on Malahat’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 Malahat’s Aboriginal Interests. These potential impacts are characterized by considering how the Project could affect several factors important to Malahat’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 Malahat’s Aboriginal Interests considers information available to the Crown from the NEB process, consultation with Malahat, Malahat’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.

Malahat completed a third-party *Traditional Marine Resource Use* (TMRU) study in 2014. The focus of the study was on Crown lands and waters within Malahat's asserted traditional territory crossed by the Marine Regional Study Area (RSA)². Traditional resource uses identified by Malahat include hunting deer and bear, gathering plants, information on fishing sites, sacred sites, habitation sites, gathering areas for community members and trails and travelways. In its Supplemental Technical Report ([A4F5D2](#)), the proponent estimated approximate distances and directions from the pipeline corridor based on information in Malahat's report. Additional information for Malahat was presented in Volume 5B ([A3S4K3](#)) of the Project application.

Impacts on Hunting, Trapping, and Gathering

As summarized in their TMRU, community members continue to harvest a variety of marine and terrestrial wildlife species such as seal, sea lions, harbour porpoise, deer, bear, pheasants, grouse, ducks, geese, coons, and loons. Throughout their asserted traditional territory, Malahat gather blueberries, salmon berries, thimble berries, strawberries, raspberries, cucumber, hops, cauliflower, kelp and seaweed for many purposes including food, fuel and materials.

During the TMRU study, Malahat identified 27 hunting sites, of which 23 are located within the Marine RSA. Locations were not provided for many additional hunting sites. The shipping lanes are crossed to access three hunting sites: Orcas Island and Inlet, and Sucia Island. Malahat identified 15 plant gathering sites, of which 11 are located in the Marine RSA. Specific locations were not provided for all plant gathering sites. Malahat members cross shipping lanes to access five plant gathering sites: Orcas Island, Puyallup, Lummi, and two sites in Miners Channel.

In addition to providing traditional use information, Malahat raised specific concerns with potential Project-related impacts on their hunting and gathering activities, including concerns related to the potential environmental impacts of the Project in their territory, and the potential risk to mammals and migratory birds (e.g. sound, disruption, ecosystem health).

The general direct and indirect effects of the Project on hunting, trapping, and gathering plants, 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 Malahat'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

² 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.

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 Malahat, Malahat'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-related marine shipping activities are expected to result in negligible-to-minor impacts on Malahat's hunting and trapping activities and a minor impact on Malahat's plant gathering activities.

Impacts on Marine Fishing and Harvesting

Malahat's TMRU identified that salmon is the most important species for subsistence; additional fish and marine species harvested included cod and cod roe, flounder, halibut, herring and herring eggs, ling, mud shark, octopus, perch, prawns, red snapper, sea bass, smelt, sole, steelhead, trout, barnacles, clam, cockles, crab, cucumbers, geoduck, mussels, oysters, rock stickers, and sea urchin. Although no longer harvested, Malahat consider whales an indicator species of marine ecosystem health. Viewing whales is also a cultural activity practiced by Malahat community members.

Malahat identified 89 fishing sites during the TMRU study, of which 74 are located within the Marine RSA. Locations were not provided for many additional fishing sites and therefore it is unknown if other sites are located in the Marine RSA. Malahat members must cross shipping lanes to access six fishing sites: Orcas Island, Fraser River, North Orcas Island, Patos Island, and two sites on the Fraser River and Orcas Island, respectively.

In addition to providing traditional use information, Malahat raised specific concerns with potential Project-related impacts on their marine fishing and harvesting activities, including concerns related to the potential environmental impacts of the Project in their territory, the potential risk to fisheries, mammals, and the marine environment (e.g. sound, disruption, ecosystem health), as well as increased marine shipping interfering with fishing vessels, and potentially affecting marine habitat and wildlife in the Salish Sea.

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. Project-related marine vessels are expected to cause temporary disruptions to Malahat'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. 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 Malahat 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 Malahat'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 reduce potential effects associated with Malahat'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 Malahat, Malahat'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-related marine shipping activities are expected to result in negligible-to-minor impacts on Malahat'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. Malahat's TMRU study notes that historically, travel routes on the west coast and into the interior were important for sustaining trade and social relationships with other First Nations. Traveling to other communities remains important for Malahat to continue the relationships among Salish communities. Community gatherings are considered integral to sustain Malahat cultural continuity and the transmission of Salish culture. A number of permanent and temporary habitation sites (e.g., camps and villages) are also located on the islands in the Salish Sea straits region. Sacred areas such as ceremonial sites, spiritual sites and burial sites were identified by Malahat during the TMRU study.

Two travelways and one trail were identified by Malahat during the TMRU study; however, locations were only provided for one trail and one travelway in the Marine RSA. The shipping lanes are not crossed to access the trail from Mayne Island to Galiano Island; however the travelway to Orcas Island crosses the shipping lanes. During the TMRU study, Malahat identified 26 gathering places, of which 22 are within the Marine RSA. The shipping lanes are crossed to access 10 gathering places: Anacortes, Coupeville, Neah Bay, Yakama, San Juan Island, and at three locations on the Fraser River and two locations on Orcas Island. Malahat identified eight sacred areas during the TMRU study, of which seven are located within the Marine RSA. The shipping lanes are crossed to access one sacred site at Orcas Island. Due to confidentiality, locations were not provided for additional gathering places (including habitation sites) and sacred areas identified within the Marine RSA. During the desktop study and literature review conducted for the Project, a burial site at Mill Bay Marina was identified within the Marine RSA; however shipping lanes are not crossed to access the site.

In addition to providing traditional use information, Malahat raised specific concerns with potential Project-related impacts on their other traditional and cultural practices, including concerns with cultural and social impacts of the Project, their ability to transfer knowledge within their community and participate in other cultural activities such as viewing whales.

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. The conditions in the NEB 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 appreciates that there will be temporary interruptions to Malahat's traditional and cultural practices, or that their participation traditional activities is curtailed 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.

Malahat identified cultural use of or concerns regarding Southern resident killer whales during the NEB and Crown consultation processes. 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.

In consideration of the information available to the Crown from the NEB process, consultation with Malahat, Malahat'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-related marine shipping activities are expected to result in moderate impacts on Malahat's other traditional and cultural practices.

Impacts Associated with Accidental Tanker Spills

Malahat expressed concerns regarding the impact of a potential oil spill on their Aboriginal Interests, including concerns about the impact of a potential spill on their way of life, concerns about impact of a potential spill on marine habitat and wildlife, and concerns that potential spills/accidents will negatively impact sustainability, availability, and access to natural 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 Malahat'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 Malahat'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 spill³.

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 Malahat's Aboriginal Interests would be up to moderate.

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

³ Trans Mountain Final Argument, p. 85 and 207