

**Hearing Order OH-001-2014
File No. OF-Fac-Oil-T260-2013-03 02**

**IN THE MATTER OF
TRANS MOUNTAIN PIPELINE ULC
TRANS MOUNTAIN EXPANSION PROJECT**

**FINAL WRITTEN ARGUMENT:
INTERVENORS SWINOMISH INDIAN TRIBAL COMMUNITY, TULALIP TRIBES,
SUQUAMISH TRIBE, AND LUMMI NATION (“U.S. TRIBES”)**

January 12, 2016

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We, as Indian people, Coast Salish People, we believe that we are the voice for Mother Nature. Mother Nature cannot tell us what's going wrong. She can give us indications, but she can't speak the same way that we do. We have to be that voice. We have to recognize that.

When we talk about this pipeline that's coming across, crossing many rivers, wetland areas, much of it seeping, draining down into the Salish Sea, we talk about the shipping impact, the ships that will be coming and going through our waters. We are on the U.S. side.

As Tulalip people, we have no treaty with Canada, but yet we partake in the Pacific Fisheries Management Council. We partake in management of the Fraser River and the harvest as tribes. We take an active role understanding the run sizes, harvest rates and how we're going to share this resource. So even though there is no treaty connection, there is a connection. We do have impacts.

We come across this man-made border and the potential impacts that eventually will happen -- we believe wholeheartedly will happen; it's just a matter of when -- will know no boundaries. They will know no borders, and they will travel -- those impacts will travel freely through the Coast Salish Sea.

Oral Testimony of Glen Gobin, ¶¶ 4731-34 (23 October 2014)

INTRODUCTION

The Swinomish, Tulalip, Suquamish, and Lummi Indian Tribes (the “U.S. Tribes”) oppose the application of Kinder Morgan to build an additional pipeline along the current TransMountain pipeline route. Such an expansion of oil transportation from the tar sands area of Alberta to the Westridge Terminal would result in nearly a seven-fold increase in dangerous oil tanker traffic, or 37 additional oil tankers and barges per month, transporting crude oil through the Salish Sea and directly through the U.S. treaty-protected fishing areas that are the lifeblood of these sovereign nations. As oil transport increases, so does the risk of an accident and oil spill, which would impact a far greater area than the shipping channels alone. The U.S. Tribes submit that these impacts and potential risks are too great to be countenanced by the Canadian government; that the impacts to the U.S. tribal interests have not been adequately explored or considered by Kinder Morgan; that Kinder Morgan’s environmental analysis lacks sufficient

rigor to form the basis of a decision to grant the pipeline application; and that approval of the pipeline would violate international law duties above and beyond violations of Canadian law.

Under the *Canadian Environmental Assessment Act 2012*, the Panel should find that the TransMountain project would have significant effects on the Salish Sea marine environment and coastal communities and that these effects cannot be justified. The Panel should also find that the TransMountain project is not in the public interest under the *National Energy Board Act*. The U.S. Tribes urge the NEB panel to recommend rejection of the Kinder Morgan TransMountain pipeline application.

ARGUMENT

I. THE U.S. TRIBES HAVE TREATY-RESERVED RIGHTS AND CULTURAL HERITAGE IN THE SALISH SEA THAT ARE PUT AT RISK BY THE TRANSMOUNTAIN PROJECT.

The four U.S. Tribes that have joined together in opposition to the TransMountain Pipeline are each separate sovereign nations with tribal governments and authorities, reservation lands, and treaty-protected fishing, hunting, and gathering rights. In the United States, the Tribes regularly participate in proceedings similar to this one affecting their resources. Tribal fisheries managers interact and negotiate with other tribes, the state of Washington, the United States government, and international organizations about management of various fisheries, including the Pacific Salmon Commission, an international body that oversees harvest of Fraser River salmon in the U.S. and Canada.¹

¹ Exhibit C336-7-5 - Written Evidence, Appendix C, part 1, Declaration of Lorraine Loomis (May 27, 2015) (A4L7G5), 2-3, ¶¶4-8; Exhibit C336-7-7 - Written Evidence, Appendix D, Declaration of Robert Purser, Jr., (May 27, 2015) (A4L7G7), ¶6 (Commissioner, Northwest Indian Fish Commission and representative of the Suquamish Tribe on the U.S.-Canada Pacific Salmon Commission Fraser River Panel).

The U.S. Tribes rely on land and resources in the Salish Sea and along its shorelines for traditional, commercial, economic, and cultural purposes. Since time immemorial, the Tribes have lived, fished, hunted, and gathered in this area. Salmon and shellfish play a central role in the Tribes' subsistence, economy, culture, spiritual life, and day-to-day existence. These treaty-reserved resources and the ability to continue traditional activities require a healthy ecosystem in the Salish Sea on both sides of the U.S.-Canada border. The Tribes are part of the Coast Salish people, whose political, social, and economic linkages spanned the international border long before that border existed.

A. U.S. Tribes Are Sovereign Nations That Retain Treaty Protected Fishing Areas In The Salish Sea.

Although they are separate, distinct nations, the U.S. Tribes share a common legal history. In a series of treaties with the U.S. government in 1854 and 1855, the Indian tribes of what is now Puget Sound and the Washington State coast ceded their aboriginal lands to the United States and retained or reserved certain lands, sovereignty, as well as hunting, fishing, and gathering rights in their usual and accustomed places. A treaty in the United States is not a grant of rights to Indians but a grant of rights from them, and those rights not specifically granted are reserved to the Indians.² The treaties here are collectively known as the Stevens Treaties, after the U.S. negotiator and Washington Territorial Governor Isaac Stevens.³

With increased European settlement of the area, conflicts arose over tribal fishing. As early as the 1800s, the United States, on behalf of U.S. tribes, filed lawsuits against non-Indians who were preventing Indian fishermen from accessing traditional fishing grounds. Several cases reached the U.S. Supreme Court, which found that “[t]he right to resort to the fishing places in

² *United States v. Winans*, 198 U.S. 371, 380-81 (1905).

³ Exhibit C336-7-5 - Written Evidence, Appendix C, part 1, Declaration of Lorraine Loomis (May 27, 2015) (A4L7G5), ¶¶10-11.

controversy was a part of larger rights possessed by the Indians, upon the existence of which there was not a shadow of impediment, and *which were not much less necessary to the existence of the Indians that the atmosphere they breathed.*”⁴ (Emphasis added.)

Still, the treaty-reserved fishing rights of the tribal nations were routinely ignored and violated for over 100 years. In 1968, 14 members of the Yakama Tribe in Washington sued the Oregon State Fish Commission seeking a decree defining and clarifying their treaty fishing rights and the extent of the state’s ability to regulate Indian fishing.⁵ Holding the Indians maintained the right to fish without unreasonable interference, the district court judge found that treating tribal members like all other U.S. citizens (the state’s argument) was wrong. “Such a reading would not seem unreasonable if all history, anthropology, biology, prior case law and the intention of the parties to the treaty were to be ignored.”⁶ In 1974, a U.S. federal court decision commonly known as the Boldt decision (after the judge who decided the case) also interpreted and applied the Stevens Treaties.⁷ These cases laid down the basic framework for treatment of the tribal treaty fishery; this framework has been applied ever since. Under that framework, the federal courts retain jurisdiction over future disputes over the scope of the treaty right, including most recently a dispute over Washington State’s duties to protect salmon habitat as reserved by the treaties.⁸

⁴ *Winans*, 198 U.S. at 381.

⁵ *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969), *aff’d*, 529 F.2d 570 570 (9th Cir. 1976).

⁶ *Sohappy*, 302 F. Supp. at 905.

⁷ *U.S. v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

⁸ *See U.S. v. Washington*, 2007 WL 2437166, (W.D. Wash. 2006) - No. 9213, Subproceeding 01-1 (“The Court hereby declares that the right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon the State to refrain from building or operating culverts...that hinder fish passage and thereby diminish the number of fish...”).

Under U.S. law, treaties take precedence over conflicting state laws by reason of the Supremacy Clause of U.S. Constitution. Art. VI, Sect. 2.⁹ Treaty reserved fishing at usual and accustomed places is a protected property right, protected by the Fifth Amendment to the U.S. Constitution.¹⁰ These usual and accustomed fishing places are also protected by the National Environmental Policy Act, 42 U.S.C. §4321 *et seq.*, the major U.S. federal environmental review and analysis statute, as they involve important historical and cultural aspects of Native American heritage.¹¹

As explained by Ms. Lorraine Loomis, Swinomish fisheries manager and direct descendant of two of the chiefs who signed the Stevens Treaty of Point Elliott, the individual tribes' treaty-protected fishing rights are based on a defined geographical area (which may overlap with other tribes), a mandate for conservation, an allocation of 50% of the harvestable fish, tribal self-regulation, and co-management of the fisheries with the state of Washington.¹² The Swinomish marine fishing areas extend from the Canadian border south to a few miles beyond the southern tip of Whidbey Island, bordering the Kinder Morgan shipping route from the U.S./Canada border until ships have passed well to the west of Victoria, B.C.¹³ Similarly, Tulalip tribal fishers regularly fish from Seattle to the Canadian border; “[t]he San Juan Island waters adjacent to the shipping lanes and the Canadian border are a particularly important area

⁹ *Worcester v. Georgia*, 31 U.S. 515 (1832).

¹⁰ *See, e.g., Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 411 (1968); *Muckleshoot v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988).

¹¹ *See No Oilport! v. Carter*, 520 F. Supp. 334, 354 (W.D. Wash. 1981).

¹² Exhibit C336-7-5 - Written Evidence, Appendix C, part 1, Declaration of Lorraine Loomis (May 27, 2015) (A4L7G5), ¶12.

¹³ *Id.* at ¶13.

for the harvest of sockeye salmon.”¹⁴ Suquamish tribal fisherman also fish throughout the Salish Sea. Robert Purser, Jr., Suquamish Tribe Director of the Fisheries Department, descendant of seven treaty chiefs, and former Suquamish Tribal Council member, declared “[b]ecause there are no large rivers in Suquamish’s territory, the Suquamish Tribe is one of the few Coastal Salish Tribes who historically and currently covered a vast territory—by fishing all areas within Puget Sound and well documented to the Frasier River in Canada.”¹⁵

B. U.S. Tribal Commercial Fishing Practices Are Economically Significant.

The U.S. Tribes have significant economic interests in maintaining the environmental health of the Salish Sea. The U.S. Tribes submitted oral testimony and written evidence of their substantial interest in protecting the economic welfare of individual tribal members and the economic interests of tribal enterprises. The Oral Testimony from Swinomish Chairman Brian Cladoosby stated that “[the Swinomish] are the second-largest fishing fleet in the Puget Sound” and that they export \$6 million USD to \$10 million USD of salmon caviar alone.¹⁶ Lummi fisherman Dana Wilson testified that the Lummi is probably the biggest Native fishing fleet in Puget Sound.¹⁷ Fishing activities are substantial cornerstones of tribes’ economies. Data from the Tulalip Tribe indicates that in 2014 fishing activity amounted to a value of approximately

¹⁴ Exhibit C336-7-8 - Written Evidence, Appendix E, Declaration of Jason Gobin (May 27, 2015) (A4L7G8), ¶7.

¹⁵ Exhibit C336-7-7 - Written Evidence, Appendix D, Declaration of Robert Purser, Jr., (May 27, 2015) (A4L7G7), ¶4.

¹⁶ Hearing Order OH-001-2014, Vol. 10 - Oral Testimony of Chairman Brian Cladoosby (October 22, 2014) (A63743), ¶¶ 4356, 4415.

¹⁷ Hearing Order OH-001-2014, Vol. 10 - Oral Testimony of Dana Wilson (October 22, 2014) (A63743), ¶ 4851.

\$5.6 million USD.¹⁸ The Swinomish Tribe generated \$3.6 million USD of revenue from the Affected Area alone.¹⁹

Approximately “20% of the Swinomish membership, one in five of every Swinomish man, woman, and child,” engages in some form of commercial fishing.²⁰ The Swinomish harvest—salmon (sockeye, pink, coho, chinook), steelhead, crab, shrimp, halibut, clams, oysters, sea cucumber, sea urchin, and geoduck—are marketed widely, including in Canada.²¹ Swinomish fishing “is particularly heavy in the areas Strait of Juan de Fuca East and Haro Strait/Boundary Pass, areas directly affected by shipping traffic from Canada traveling to the ocean through the Strait of Juan de Fuca.”²² “Swinomish engages in a considerable part of its fishing activity and gains a considerable part of its harvest from the Affected Area.²³ In 2013 Swinomish fishers harvested almost 3 million pounds of fish from the Affected Area. [...] That is 9,000 pounds per fisher or 1.5 tons per tribal member. The major portion of the harvest was salmon, which accounted for over half the harvest by weight. Crab accounted for about 15% of the total.”²⁴

¹⁸ Exhibit C336-7-8 - Written Evidence, Appendix E, Declaration of Jason Gobin (May 27, 2015) (A4L7G8), ¶ 4.

¹⁹ Exhibit C336-7-5 - Written Evidence, Appendix C, part 1, Declaration of Lorraine Loomis (May 27, 2015) (A4L7G5), ¶ 24.

²⁰ *Id.* at ¶15.

²¹ *Id.* at ¶¶16-17.

²² *Id.* at ¶18.

²³ See map attached as Exhibit A to Ms. Loomis’ declaration, showing the northern and western portions of Swinomish usual and accustomed fishing areas that are likely to be directly affected by TransMountain pipeline expansion vessel traffic, including associated anchoring and bunkering. Exhibit C336-7-5 - Written Evidence, Appendix C, part 1, Declaration of Lorraine Loomis (May 27, 2015) (A4L7G5), ¶13.

²⁴ *Id.* at 5, ¶23, see also ¶24 (half of the revenue from all Swinomish fishing comes from fishing in the Affected Area); ¶25 (Swinomish Fish Company processing plant uses fish from tribal, non-tribal, and Canadian sources).

For the Tulalip Tribes, commercial fishing is also central to their economy:

Tribal fishers are engaged in the harvest of all commercially valuable species, including salmon, Dungeness crab, geoduck and spot prawns. Over the last five years the tribe harvested commercially 5,234,429 pounds of salmon, 2,699,740 pounds of Dungeness crab, and 845,828 pounds of geoduck clams—species that currently make up the bulk of the commercial catch. However, the Tribes have also harvested many other species (for example, clams, sea cucumber, shrimp, halibut, dogfish, lingcod, skates, black cod, and flounders) in the commercial fisheries in different proportions in different years. These fisheries are ever changing over time depending on stock conditions and markets.²⁵

Similarly, the Suquamish Tribe “relies on salmon as a food staple. Suquamish tribal fishers harvest all species throughout its [treaty-protected fishing areas], including but not limited to steelhead, cod, flounder, perch, trout, herring, rock cod, Ling cod, black cod, sturgeon, skate, dogfish. The Tribe harvests shellfish, including but not limited to crabs, clams, cockles, mussels, barnacles, geoduck, oysters, scallops, shrimp, red and green sea urchins, sea cucumbers. Historically tribal fishers also harvested dahl porpoise, seals and sea lions, octopus, china slippers, marine and freshwater birds (ducks), and other marine mammals. These resources are harvested for subsistence, ceremonial, and commercial purposes.”²⁶ Mr. Purser explains the importance of fishing in and adjacent to the international fishing lanes:

A large portion of the fishery occurs in the area affected by the international shipping lane from Canada through the Strait of Juan de Fuca. The gillnet fishery occurs within the shipping lanes using 1800 foot long nets. When the nets are loaded with fish, it can take on average 10 hours and up to 20 hours to pull in the drift net and retrieve fish, depending on the circumstances. During that time, fishing boats drift in and out of the shipping lane while the web of the fishing net is still in the water. You cannot maneuver the net with any speed due to the volume of the loaded net. Fishing occurs at all hours of the day and night. The

²⁵ Exhibit C336-7-8 - Written Evidence, Appendix E, Declaration of Jason Gobin (May 27, 2015) (A4L7G8), ¶4. *See also id.* ¶¶5-6 (“a significant number of tribal members and their families derive some portion of their income from fishing activities...Each permit we issue means employment and income not just for that fisher and their families, but also for others who work with them.”).

²⁶ Exhibit C336-7-7 - Written Evidence, Appendix D, Declaration of Robert Purser, Jr., (May 27, 2015) (A4L7G7), ¶9.

number of sets performed by a fisher depends on volume of fish intercepted. In other words, it could be that one set meets the fleet's target or it may require a number of sets by each fisher.

When there is a tribal fishery in the area, like the affected area from the Kinder Morgan Pipeline, that includes shipping traffic, in addition to the Suquamish Tribe, there are at least six other tribes who have overlapping [treaty protected fishing areas]. Large bodies of water are used by all tribal fishers to catch migrating salmon and to avoid drifting into shorelines or other obstacles like buoys.

Existing inbound and outbound shipping traffic (non-tribal) already causes interference with tribal fishing activities. The types of interferences with shipping traffic and tribal fishers occur when ship traffic pass through the Tribe's fishing grounds and damage tribal gill nets. This causes net damage and/or net loss and loss of fish, along with creating serious safety and health hazards on the water. I have first-hand experience of this increase in shipping traffic and its interference with tribal fishing fleet in the Tribe's [fishing areas]. These interferences cause economic hardship to tribal fishers due to loss of gear and loss of fish. This further impacts the Tribe's ability to carry on its time immemorial ceremonial, subsistence, and commercial practices.²⁷

C. Tribal Fishing Is A Cultural, Ceremonial, and Subsistence Right.

Salmon are the cultural beginning for the U.S. Tribes. As Tulalip Tribal member Patti Gobin testified, "I want to tell you that, long before I was human, I was King Salmon. That's where I come from. That's my grandfather. That's who I am."²⁸ "The economic impact of tribal treaty commercial fishing is very important to the tribes, including Swinomish, but it is not the only value of the fishery nor, in the end, is it the most important one."²⁹ Subsistence and ceremonial values are associated with U.S. tribal fishing rights; the tribes' members thrive as a community around the sharing of fish.

²⁷ *Id.* at ¶¶13-15.

²⁸ Hearing Order OH-001-2014, Vol. 10 - Oral Testimony of Patti Gobin (October 22, 2014) (A63743), ¶ 4657.

²⁹ Exhibit C336-7-5 - Written Evidence, Appendix C, part 1, Declaration of Lorraine Loomis (May 27, 2015) (A4L7G5), ¶27.

Feasting on the bounty of sea and river, and particularly on salmon, is a central feature of almost every Swinomish ceremony or gathering, as is true throughout the whole Coast Salish culture. Some of the ceremonies mark important events for an individual or family—birth, death, naming, marriage, and the like. They also feature prominently as the core of community events, such as the Coast Salish Gatherings, the Canoe Journey, and the First Salmon Ceremony. For example, at the first Salmon Ceremony recently held at Swinomish on May 14, the whole community, staff and invited guests feasted on salmon, clams, mussels, shrimp, crab, and other fruits of the sea. The ceremonies are an integral part of our culture, and the ceremonial food is essential to the ceremonies.³⁰

The U.S. Tribes share this core expression of their tribal identity.

[I]t is not possible to overstate the central cultural importance of these activities. Although the economic benefits of fishing to the Tribe are very significant, it is critical to understand that their value is more than monetary—the loss of these resources cannot be mitigated through money or any other means. Fishing represents the continuation of our culture and way of life since time immemorial. While the rules and structures of fishing have changed in modern times, fishing is an integral part of our culture. For thousands of years, our people have lived on the marine waters of the Salish Sea harvesting salmon, many other fish species and shellfish. Fishing constituted our economic base prior to European contact, through both trade and sustenance, and continues to this day.³¹

Tribal members eat significantly greater amounts of fish and shellfish as part of their daily diets than the general population.³² Indeed, tribal members often would like to eat more fish and shellfish, but are unable to do so for various reasons, including lack of access, fear of pollution, and confirmed pollution.³³ “It’s devastating to think that our people will no longer

³⁰ *Id.* at ¶32.

³¹ Exhibit C336-7-8 - Written Evidence, Appendix E, Declaration of Jason Gobin (May 27, 2015) (A4L7G8), ¶8.

³² Exhibit C336-7-5 - Written Evidence, Appendix C, part 1, Declaration of Lorraine Loomis (May 27, 2015) (A4L7G5), 4, ¶30; *see also* Exhibit C, *Swinomish Seafood Diet Survey 2004–2006*. Exhibit C336-7-5 - Written Evidence, Appendix C, part 1, Exhibit C, *Swinomish Seafood Diet Survey 2004-2006* (May 27, 2015) (A4L7G5), 21.

³³ *Id.*; *see also* Exhibit C336-7-8 - Written Evidence, Appendix E, Declaration of Jason Gobin (May 27, 2015) (A4L7G8), ¶4 (“A 2013 study by the United States Environmental Protection Agency documented fish consumption rates of Tulalip Tribal members that was 5 times higher than the average fish consumption rate of the general population in the United States.”).

have the foods that nourish our spirit and our bodies. They're that important to us.”³⁴ The subsistence and dietary relationship between the people and the treaty fishing harvest is a strong strand of the tribal culture.

“The act of fishing, the circulation of harvest within the community, the dietary reliance upon the harvest, and the importance of salmon and other species to the Swinomish culture and spiritual life, give treaty fishing rights a value that far transcends the economic value as a commodity. The treaty fishing right was meant to preserve our culture and way of life revolving around fishing and the fish harvest. As a fisheries manager, I am mindful of the need to preserve the fishery in order to preserve our identity as a tribe.”³⁵

II. THE ENVIRONMENTAL ASSESSMENT IS INCOMPLETE.

The NEB Panel cannot recommend approval of the project because the environmental assessment of the project is incomplete within the meaning of the *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, s 52 at s 19 (“CEAA”), and these deficiencies cannot be corrected by future studies, mitigation measures, or conditions.

Pursuant to section 52(3) of the *National Energy Board Act*, RSC 1985, c N-7, s 52(3) (“NEB Act”), the NEB Panel’s report under the NEB Act must also set out the Panel’s environmental assessment of the project under the CEAA. The NEB Panel cannot recommend approval of the project under the CEAA because TransMountain has not complied with the provisions of the Act in filing a complete environmental assessment because it failed to fully describe the environmental effects of its proposal, particularly “outside Canada,” CEAA, s.5(1)(b)(iii), and “with respect to aboriginal peoples” in Canada. CEAA, s.5(1)(c).

³⁴ Hearing Order OH-001-2014, Vol. 11 - Oral Testimony of Inez Bill (October 23, 2014) (A63792), ¶ 4782.

³⁵ Exhibit C336-7-5 - Written Evidence, Appendix C, part 1, Declaration of Lorraine Loomis (May 27, 2015) (A4L7G5), ¶33.

A. TransMountain Failed To Consult With And Consider U.S. Tribal Interests.

First and foremost, TransMountain did not consult with the U.S. Tribes.³⁶ In response to Tribal Information Requests, TransMountain listed some large meetings, such as the Oil Sands Product Forum, where TransMountain presented information and there were various tribal members in attendance, but with the exception of several meetings with the Makah Tribe, there was no outreach to the four U.S. Tribes about the project and its specific impacts.³⁷ TransMountain confirmed that none of its limited outreach was tailored specifically for U.S. interests.³⁸

In fact, TransMountain failed to consider impacts to U.S. Tribes and U.S. tribal treaty-protected fishing rights at all; at most, TransMountain “learned of, and considered, concerns” by attending at a few large conferences.³⁹ TransMountain admits that it did not complete a Traditional Marine Use Study for the U.S. Tribes nor consider impacts on the U.S. Tribes because they are not Canadians.⁴⁰ Indeed, in answer to the question how it could be determined that the project effects on U.S. fisheries were not significant when no assessment of U.S. effects

³⁶ Exhibit C336-7-7 - Written Evidence, Appendix D, Declaration of Robert Purser, Jr., (May 27, 2015) (A4L7G7), ¶19.

³⁷ Exhibit B159 – TM Response to Information Requests from U.S. Tribes (June 18, 2014) (A3Y3S6), ¶1.1(d); *See also* Exhibit B18-26 - Application, Volume 8a, 4.2.10 (December 17, 2013) (A3S4Y0), 8A-188 (only Canadian First Nations consulted with respect to Traditional Marine Resource Use).

³⁸ Exhibit B159 – TM Response to Information Requests from U.S. Tribes (June 18, 2014) (A3Y3S6), ¶1.1(f).

³⁹ Exhibit B159 – TM Response to Information Requests from U.S. Tribes (June 18, 2014) (A3Y3S6), ¶1.2.01(a). TransMountain’s assertion of “inclusive and responsive” aboriginal engagement, *see* B444-2 - Trans Mountain Revised Final Argument (clean) (A4W6L8), 85, obviously does not include the U.S. Tribes.

⁴⁰ Exhibit B159 – TM Response to Information Requests from U.S. Tribes (June 18, 2014) (A3Y3S6), ¶1.2.01(b).

had been undertaken,⁴¹ TransMountain simply responded that it didn't need to evaluate impacts on tribal peoples outside of Canada.⁴²

B. TransMountain Failed To Assess Impacts To U.S. Tribal Fishing Interests.

Stating that the U.S. Tribes don't meet the definition of Aboriginal peoples with which it must consult is a vastly different position than that found in TransMountain's application, which first deems U.S. tribal impacts "similar" to Canadian First Nation interests⁴³ and then finds all such interests "not significant."⁴⁴ Finding the impacts similar and insignificant ignores the reality that that all of the increased ship traffic will pass through U.S. waters. It also fails to grapple with the differences between the United States and Canadian fishing fleets. U.S. fisheries in Puget Sound may be more substantial, with more vessels, greater employment and higher economic value, than British Columbia fisheries.⁴⁵ Indeed, the George Washington University Vessel Traffic Risk Analysis, done for the U.S. waters of Puget Sound, found fishing vessels to be the most numerous category, and much higher than that estimated for Canadian waters.⁴⁶ Moreover, evidence in the record acknowledges gaps in the data and research for the

⁴¹ Exhibit B18-29 – TM Application, Volume 8A, section 4.3.10.3 (December 17, 2013) (A3S4Y3). 8A-356, 8A-357.

⁴² Exhibit B159 – TM Response to Information Requests from U.S. Tribes (June 18, 2014) (A3Y3S6), ¶1.2.01(c).

⁴³ Exhibit B18-26 – TM Application, Volume 8A, section 4.2.10.4 (December 17, 2013) (A3S4Y0) 8A-202, 8A-203.

⁴⁴ Exhibit B18-29 – TM Application, Volume 8A, section 4.3.10.3 (December 17, 2013) (A3S4Y3). The U.S. Tribes join the First Nation intervenors in objecting to the characterization of the Aboriginal impacts as insignificant. TransMountain itself recognizes the risks that increase vessel movement poses to Aboriginal uses (section 4.3.10) and commercial fishing (section 4.3.10.6.1).

⁴⁵ Exhibit C336-7-2 – Written Evidence, Appendix A (May 27, 2015) (A4L7G2), §2.2.2.

⁴⁶ Exhibit C376-11-1 - exhibits1-27_Part3 (A4Q2D4), 136.

B.C. fisheries themselves.⁴⁷ TransMountain has confirmed that it plans no additional studies on fisheries impacts in the U.S.⁴⁸

When asked why its Marine Traffic Survey did not include smaller vessels, which make up the majority of the U.S. tribal fishing fleets,⁴⁹ TransMountain responded that accidents between an oil tanker and a small fishing boat were unlikely to damage the tanker: “while the potential exists of a navigation conflict between a project tanker and a small fishing vessel or recreational craft, the potential for damage to the tanker as a result of such an incident is minimal at best and will not lead to any damage to the cargo hull of a double hull tanker.”⁵⁰ Of course, the damage to the small fishing boat would be catastrophic, and could lead to loss of life, but apparently is unworthy of mention.

A study conducted by Glosten Associates to look at impacts to Lummi tribal fishing from a proposed coal export terminal (“Glosten Study”) estimated that by 2019 the risk of collision between commercial vessels and Lummi fishermen alone would increase by 16.7% if a coal export terminal was constructed in Washington State. It further estimated that even without that facility, the collision risk would rise by 5.9% as a result of general economic and waterway

⁴⁷ Exhibit B20-9 – TM Application, Vol. 8C, TERMPOL, section 3.3 - Fishery Resources Survey (December 17, 2013) (A3S4S2), 17-18; and Exhibit B18-29 – TM Application, Vol. 8A, Table 4.3.10.3 (December 17, 2013) (A3S4Y3), 8A-358.

⁴⁸ Exhibit B159 – TM Response to Information Requests from U.S. Tribes (June 18, 2014) (A3Y3S6), ¶1.2.02.

⁴⁹ Exhibit C336-7-5 - Written Evidence, Appendix C, part 1, Declaration of Lorraine Loomis (May 27, 2015) (A4L7G5), ¶19; Exhibit C336-7-2 – Written Evidence, Appendix A (May 27, 2015) (A4L7G2).

⁵⁰ Exhibit B159 – TM Response to Information Requests from U.S. Tribes (June 18, 2014) (A3Y3S6), ¶1.2.03.

changes.⁵¹ Without undertaking a similar analysis, TransMountain's position that risks of collision are insignificant is unsupported and most likely quite wrong.

As explained by Lummi fisherman Mr. Dana Wilson, "I spend half my time watching for ships, half my time fishing and the other half of my time on talking to Victoria Traffic trying to get boats around my nets, around my gear. ... it gets pretty overwhelming having a 200-tonne ship bearing down on you. You don't know which end of your net to run to. You don't know who to – or you don't know whether to let go and run or sit there and keep talking on the radio and make sure that they make it around you."⁵²

The TransMountain application (Volume 8A, Tables 4.3.10.3 and 4.3.11.2) identifies potential effects on fisheries, even after mitigation, including disruption of subsistence and commercial fishing activities, alteration of existing marine vessel movement patterns, damage to marine vessels, injury, damage or loss of gear, disruption of traditional marine user activities, and loss or reduced economic opportunity for commercial marine users.⁵³ Given that the analysis fails to consider vessels smaller than 150 tons, it is likely that TransMountain "misses almost entirely any impacts on Treaty fishing."⁵⁴ Additional studies must be conducted to clarify these impacts, particularly on U.S. tribal fisheries.

Moreover, the assessment of Canadian aboriginal interests is qualitative and uses the terms low/medium/high probability to judge measure significance. In the report commissioned by the U.S. Tribes by Marico Marine Risk Consultants, Marico identified multiple flaws with this approach, including availability of other methodologies that have been recently used in this

⁵¹ Exhibit C336-7-2 – Written Evidence, Appendix A (May 27, 2015) (A4L7G2), §2.5.

⁵² Hearing Order OH-001-2014, Vol. 11 – Oral Testimony of Dana Wilson (October 23, 2014) (A63792), ¶¶4855, 4857.

⁵³ Exhibit C336-7-2 – Written Evidence, Appendix A (May 27, 2015) (A4L7G2), §2.2.4.

⁵⁴ Exhibit C336-7-2 – Written Evidence, Appendix A (May 27, 2015) (A4L7G2), §2.2.4.

same region, lack of stakeholder involvement, and, again, failure to involve U.S. tribes in the analysis.⁵⁵ Indeed, “where hazard magnitudes are catastrophic or probabilities are almost certain, the assessment does not have the flexibility to differentiate from other less significant impacts.”⁵⁶

Table 4.3.10.3 of the TransMountain application concerns Traditional Marine Resource Use Identified to Date by Participating Aboriginal Communities Within or in Proximity to the Marine RSA. Many entries indicate that fishing area proximity to, and crossing of, shipping lanes is unknown. The declarations from the U.S. Tribes present solid evidence of fishing area proximity to the shipping lanes.⁵⁷ “And you say, ‘Well, they can stay in the traffic lanes, in the shipping lanes.’ When you’re out fishing and you’re harvesting out in the deep water, the fish don’t know traffic lanes. They don’t know the borders, they sure as heck don’t know the traffic lanes. They don’t know where they shouldn’t be. And so fishermen have to harvest where the fish are, and oftentimes it will be in traffic lanes.”⁵⁸ Yet because TransMountain refused to discuss issues and impacts with the U.S. Tribes, that information simply failed to appear in any analysis.

Increases in vessel traffic in and near fishing areas often result in damage to, and loss of, fishing gear. This is especially true in areas like the area where oil tankers and barges will travel, where static gear such as crab traps, shrimp traps, and salmon gillnets is very common. The

⁵⁵ *Id.* at §2.2.5.

⁵⁶ *Id.*

⁵⁷ Exhibit C336-7-8 - Written Evidence, Appendix E, Declaration of Jason Gobin (May 27, 2015) (A4L7G8), ¶7; Exhibit C336-7-5 - Written Evidence, Appendix C, part 1, Declaration of Lorraine Loomis (May 27, 2015) (A4L7G5), ¶¶13-18.

⁵⁸ Hearing Order OH-001-2014, Vol. 11 – Oral Testimony of Glen Gobin (October 23, 2014) (A63792), ¶4736.

Glosten Study suggests that each fisherman loses between 40 and 50 crab pots each year.⁵⁹

Increased vessel traffic will increase this economic damage.

At the same time, lost gear can damage valuable resources. Derelict gear in Puget Sound has been known to kill marine mammals as well as other species such as three species of rockfish protected under the Endangered Species Act (Good, et al., 2010;⁶⁰ NMFS 2014a, -b, -c⁶¹). U.S. authorities have invested over \$7 million in removing lost fishing gear during the past 13 years (Northwest Straits Marine Conservation Initiative, 2014). TransMountain did not provide a list of mitigation measures to address the potential for increased loss of fishing gear and resultant damage to marine resources arising from the project, instead noting that “[t]anker owners carry appropriate levels of insurance that can address damages such as the loss of fishing gear.”⁶² Insurance alone cannot mitigate the issue of derelict gear. “Gear loss is of particular concern, because it harms the fisher directly and deprives the fisher of present and future fishing. Gear loss due to vessel traffic occurs throughout the fishery. The worst places, however, include locations near the shipping lanes in Haro Strait and the high traffic vessel anchoring and bunkering areas in the vicinity of Vendovi Island, areas that will be affected by traffic increase

⁵⁹ Exhibit C336-7-2 – Written Evidence, Appendix A (May 27, 2015) (A4L7G2), § 2.6.

⁶⁰ Good, T., J. June, M. Etnier, G. Broadhurst, 2009. Derelict fishing nets in Puget Sound and the Northwest Straits: Patterns and threats to marine fauna. *Marine Pollution Bulletin* 60 (2010) 39–50.

⁶¹ NMFS. 2014a. NOAA Fisheries, Office of Protected Resources. Canary Rockfish (*Sebastes pinniger*). Last updated 2/14/2014. <http://www.nmfs.noaa.gov/pr/species/fish/canaryrockfish.htm>.
NMFS. 2014b. NOAA Fisheries, Office of Protected Resources. Yelloweye Rockfish (*Sebastes ruberrimus*). Last updated 2/14/2014. <http://www.nmfs.noaa.gov/pr/species/fish/yelloweyerockfish.htm>.
NMFS. 2014c. NOAA Fisheries, Office of Protected Resources. Bocaccio (*Sebastes paucispinis*). Last updated 2/14/2012. <http://www.nmfs.noaa.gov/pr/species/fish/bocaccio.htm>.

⁶² Exhibit B159 – TM Response to Information Requests from U.S. Tribes (June 18, 2014) (A3Y3S6), ¶1.2.06.

due to the pipeline expansion.”⁶³ As Mr. Purser explained, “[e]xisting inbound and outbound shipping traffic (non-tribal) already causes interference with tribal fishing activities. The types of interferences with shipping traffic and tribal fishers occur when ship traffic pass through the Tribe’s fishing grounds and damage tribal gill nets. This causes net damage and/or net loss and loss of fish, along with creating serious safety and health hazards on the water. I have first-hand experience of this increase in shipping traffic and its interference with tribal fishing fleet in the Tribe’s U&A. These interferences cause economic hardship to tribal fishers due to loss of gear and loss of fish. This further impacts the Tribe’s ability to carry on its time immemorial ceremonial, subsistence, and commercial practices.”⁶⁴

The evidence of fishing disruption is not solely anecdotal.

Estimates of fishing disruption were made as part of the Glostén Associates (2014) report on Gateway Pacific Terminal Vessel Traffic. The analysis examined the area and frequency which Lummi fishermen used and the frequency and area obstructed by vessel transits, thereby quantifying the fishing opportunity loss. The results suggest that by 2019, the Lummi fishermen alone would experience a disruption of 2.79% in Juan de Fuca East, increased to 5.1% if Gateway Pacific Terminal were constructed (Glostén, 2014). We note that there are several limitations in directly applying the approach employed by Gateway Pacific Terminal analysis to Kinder Morgan, including the focus on one tribe and the examination of the route Gateway Pacific Terminal vessels would take. Given these differences, the Glostén 2014 figures are significant underestimations. If extrapolated across all of the Treaty Tribes, the impacts would be significant. Whilst the numbers and traffic involved in Kinder Morgan are different, the impacts would be of a similar order of magnitude.⁶⁵

⁶³ Exhibit C336-7-5 - Written Evidence, Appendix C, part 1, Declaration of Lorraine Loomis (May 27, 2015) (A4L7G5), ¶37.

⁶⁴ Exhibit C336-7-7 - Written Evidence, Appendix D, Declaration of Robert Purser, Jr., (May 27, 2015) (A4L7G7), ¶15.

⁶⁵ Exhibit C336-7-2 – Written Evidence, Appendix A (May 27, 2015) (A4L7G2), §2.3.

C. TransMountain Failed To Adequately Access Oil Spill Risk To U.S. Tribes.

Not only will increased vessel traffic likely reduce fisherman outings and harvests, but the risks of accidents and oil spills that disrupt and destroy marine life will increase. Whether large or small, oil spills are a primary concern of the U.S. Tribes, a concern not adequately addressed by TransMountain. Chairman Forsman concisely summarized U.S. Tribes' concerns and how they are affected by project approval:

I think that we are really concerned about the risk – the increased risk that more oil on a daily basis being put on the Salish Sea increases the risk of oil spills. The more traffic there is, the more oil there is, the more opportunity there is for a catastrophic spill, whether it be done during loading or if it be due to collisions or breakdowns or all those things that can happen on the water. As we've learned on our canoe journey, we've – safety first, and we've had some close calls here and there just in our canoes, just let alone in a big giant taker. So we're very concerned about that. We're very concerned about the increased traffic and its impact on our harvesters and their ability to harvest fish or crab or other species on the water. And we're also very concerned about the catastrophic impacts that an oil spill could have on the ecosystem of the Salish Sea.⁶⁶

The risk of a catastrophic oil spill in Puget Sound is high, and the disastrous impacts such a spill would have on tribal fishing cannot be overstated. A recent Vessel Traffic Risk Assessment study by George Washington University estimated an across the board increase of 67% in the potential for oil spills as a result of several new developments.⁶⁷ The analysis indicates that the **TransMountain project alone would result in a 38% increase in potential oil loss in US waters of the Salish Sea.**

Major oil spills cause significant damage to the ecosystems in which they occur. Even 25 years after the Exxon Valdez spill, a recent study has estimated that only 13 of the 28 monitored

⁶⁶ Hearing Order OH-001-2014, Vol. 10 - Oral Testimony of Chairman Leonard Forsman (October 22, 2014) (A63743), ¶¶ 4598-99.

⁶⁷ Exhibit C376-11-1 – Written Evidence from WSDOE. exhibits1-27_Part3 (May 27, 2015) (A4Q2D4), 136.

resources have recovered or have “very likely” recovered, and neither commercial fishing, recreation, tourism, nor subsistence fishing has fully recovered to pre-Exxon levels.⁶⁸

Oil spills can also result from fueling of vessels, known as bunkering. Bunkering will need to occur more frequently to meet the increase in vessels numbers caused by this project, and includes oil tankers themselves plus associated towing and piloting vessels. While bunkering spills generally have a lower magnitude of environmental risk than navigation incidents, they occur more frequently and may be a significant hazard which has not been assessed at all.⁶⁹

Marico’s analysis also raises grave doubts over TransMountain’s refined risk analysis following the TERMPOL review. After minimal changes in underlying assumptions, the initial risk analysis was changed from an oil spill from TransMountain vessels once in 46 years to once in 90 years.⁷⁰ “While this improvement seems significant, there are reasons to doubt its veracity,”⁷¹ including reliance on “enhanced situational awareness” data that pre-dates modern navigation technologies now in place. “It would be unlikely that the navigational risks associated with this project can be reduced by half beyond global best practice.”⁷²

TransMountain also seems to rely on the fact that large commercial vessels already use shipping lanes to travel between the Pacific Ocean and Canadian ports, stating that the increased marine vessel traffic will not cause a “capacity” problem.⁷³ It may be that Port Metro Vancouver

⁶⁸ Exhibit C336-7-2 – Written Evidence, Appendix A (May 27, 2015) (A4L7G2), §2.4.1.

⁶⁹ *Id.* at §2.4.1. Marico’s review also pointed to several limitations in the risk analysis, including uncertainty about the behavior of spilled dilbit in open ocean waters and the exclusion of smaller tribal fishing vessels from the analysis. *Id.* at § 2.4.2.

⁷⁰ *Id.* at §2.4.3.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Exhibit B444-2 - Trans Mountain Revised Final Argument (clean) (December 15, 2015) (A4W6L8), 68 (“oil cargo spill risk in the region will remain similar to and comparable with

has the physical capacity to handle a 14% monthly increase in vessel traffic, but that is irrelevant to the issue of risks posed by this increase or impacts from the increase.

III. THE TRANSMOUNTAIN PROPOSAL WILL CAUSE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS.

The *NEB Act* empowers this Panel to recommend issuance of a certificate for a pipeline only upon a finding that doing so is consistent with the “present and future public convenience.” *NEB Act*, s.52(1)(a). Such a recommendation can only be made upon full consideration of all relevant factors, including the “public interest” that would be affected. *Id.* s.52(2)(e). Similarly, pursuant to s.52(4) of the *CEAA*, the NEB must determine if the significant adverse environmental effects that a project is likely to cause are “justified” in the circumstances. In making that determination, the NEB Panel must consider the purposes of the *CEAA*, which are

- 4(1)(a) to protect the components of the environment that are within the legislative authority of Parliament from significant adverse environmental effects caused by a designated project;
- (b) to ensure that designated projects that require the exercise of a power or performance of a duty or function by a federal authority under any Act of Parliament other than this Act to be carried out, are considered in a careful and precautionary manner to avoid significant adverse environmental effects;
- (c) to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessments;
- (d) to promote communication and cooperation with aboriginal peoples with respect to environmental assessments;
- (e) to ensure that opportunities are provided for meaningful public participation during an environmental assessment;
- (f) to ensure that an environmental assessment is completed in a timely manner.

CEAA, s.4(1)(a)-(f).

current conditions.”). *See also* Trans Mountain Pipeline ULC response to evidence presented by Swinomish, Tulalip, Suquamish, and Lummi Indian Nations (Nov. 18, 2014) at 4.

For the reasons discussed in this brief, the NEB should recommend denial of a certificate for this project. The proposed pipeline expansion is not consistent with the public convenience, it will cause extensive harm to the public interest, and it will result in significant adverse environmental effects that cannot be “justified” in the circumstances. The support for this conclusion is extensive, and included in many of the filings of other environmental, governmental, and First Nation opponents of the project. The U.S. Tribes will not repeat all of that evidence here, but offer the following to highlight the significant adverse public and environmental impacts of this proposal that are in the record. While the record is replete with evidence of all manners of different adverse public and environmental impacts, the U.S. Tribes will focus on those impacts that affect their primary interests in maintaining their culturally and commercially significant fishing and shellfishing that would be harmed, and potentially irreversibly destroyed, by this project.

As this Panel understands, a critical concern of the U.S. Tribes and many other intervenors is the risk of a significant oil spill that threatens to wipe out resources of immeasurable cultural and economic significance. TransMountain seeks to downplay the risks of such an event, but the record reveals that concern is fully warranted.⁷⁴ Such a catastrophic spill could occur via a pipeline rupture on the Fraser River, which is a major source of salmon on which the U.S. Tribes rely.⁷⁵ Alternatively, it could occur in a marine environment through a tanker incident. Such events have occurred in the past. One study put the risk of a catastrophic sized spill at 3.1% in the next 25 years, but the risk of a still-significant size spill (average of

⁷⁴ See, e.g., Exhibit C77-27-1 - City of Vancouver Written Evidence (May 27, 2015) (A4L7V8), section 6; Exhibit C77-27-4 – City of Vancouver Written Evidence, App. 3 - Report of Jeffery Short (May 27, 2015) (A4L7W1) (discussing fate of oil spills in Fraser and Burrard Inlet).

⁷⁵ Exhibit C291-1-3 – Written Evidence of Raincoast Conservation Foundation, Attachment B, Potential Effects on Fraser River Salmon from an Oil Spill by the Trans Mountain Expansion Project (May 27, 2015) (A4L9F4).

over 17,000 gallons) at 85%.⁷⁶ Evidence submitted by the City of Vancouver estimated a substantial likelihood of a spill at the Westridge Terminal or in Burrard Inlet over the project's lifetime, with environmental, human health, and financial impacts.⁷⁷

Many studies show oil spills—which will not respect the formality of the international border—moving into areas regularly fished by U.S. Tribes.⁷⁸ Even if the physical oil remains in Canadian waters, it would unquestionably affect the entire Salish ecology and resources like salmon that move back and forth across the border and which are relied on by tribal people in both nations.⁷⁹

As discussed in many of the authorities above, an oil spill would have extensive and catastrophic ecological consequences, ultimately affecting the Tribes' cultural and economic fishing and shell fishing resources.⁸⁰ For example, oil spills would have disastrous impacts on forage fish that form the base of the ecological food chain salmon rely on in order to survive in the Salish Sea. "Because Pacific herring and other forage fishes represent a crucial conduit of energy and nutrients from lower trophic levels to upper level predators, such as salmon, marine birds, and mammals, it needs to be highlighted that existing threats to Pacific herring and other

⁷⁶ Exhibit C135-8-2 – Written Evidence of Friends of the Earth, Appendix A, 2010 VTRA (May 27, 2015) (A4L9W5), 4.

⁷⁷ Exhibit C77-28-1 – Written Evidence of the City of Vancouver (May 27, 2015) (A70261).

⁷⁸ See Exhibits C69-44-4, Written Evidence of the City of Burnaby, Oil Spill Trajectory Modeling Report in Burrard Inlet (May 27, 2015) (A4L8F8); C135-8-2 - Written Evidence of Friends of the Earth, Appendix A, 2010 VTRA (May 27, 2015) (A4L9W5), 4 (maps); C356-7-3 - Written Evidence of Tsawwassen First Nation (May 27, 2015) (A4L7T2), 16.

⁷⁹ Exhibit C376-8-1 – Written Evidence of Washington Department of Ecology (May 27, 2015) (A4Q1X6), 4 (describing oil spill in Washington state that oiled 300 miles of British Columbia shorelines).

⁸⁰ See also Exhibit C312-8-3 – Written Evidence of Shxw'ōwhámel First Nation - Impacts of a Freshwater or Marine Spill on Aquatic Resources (May 27, 2015) (A4Q1A1), 38 ("A pipeline [or marine] spill into the Fraser River or its tributaries could cause large scale injury to fisheries in the region.").

forage fish potentially impact other components of marine ecosystems in the Marine RSA... Because certain contaminants biomagnify up the foodweb, any increased contamination of Pacific herring could potentially influence the contamination load of upper level predators.”⁸¹

Many documents also reveal the significant shortcomings of the response capability to respond to catastrophic spills in British Columbia. An extensive study on this topic (known as the NUKA report), founds significant gaps in response capabilities when response timing was critical to reducing the adverse impacts of a spill.⁸² Another critical study, which unfavorably compared BC’s preparedness to that of the western United States, reported that virtually every person interviewed for the study “reported either limited preparedness or complete non-preparedness in the event of a marine oil spill.”⁸³ These concerns were explicitly echoed by the Washington state agency responsible for oil spill response on the U.S. side of the border: “Ecology is concerned that Canadian and provincial prevention, preparedness and response standards are less stringent than U.S. and Washington state standards, and will not adequately protect shared waters from the increased risks associated with TM’s project.”⁸⁴ These shortcomings were displayed in real time very recently when a spill in Vancouver from the *MV Marathassa* revealed significant gaps in the collective ability of federal and provincial governments to respond quickly to a spill.⁸⁵

⁸¹ Exhibit C-24-12-2, Written Evidence of BC Nature and Nature Canada, Dr. Caroline Fox (May 27, 2015) (A4L8K8).

⁸² Exhibit C77-55-8 –City of Vancouver, Revised NUKA Report, Part 7 (December 2, 2015) (A4W1Q0), s.5.

⁸³ Exhibit C138-2-2, Evidence of Georgia Strait Alliance, Assessment of Marine Oil Spill Response (May 27, 2015) (A4Q1K1), ii.

⁸⁴ Exhibit C376-8-1, Written Evidence of Washington Department of Ecology (May 27, 2015) (A4Q1X6), 4.

⁸⁵ Exhibit C77-27-1 – Written Evidence of the City of Vancouver (May 27, 2015) (A4L7V9), 36.

An additional concern is how little is understood about a spill of tar sands diluted bitumen. Dilbit presents unique toxicity issues for aquatic life and fish.⁸⁶ Another study found that dilbit is “more persistent and more toxic to salmonid species” than conventional crude oil, further observing that the relative paucity of information counseled in favor of greater caution, not less.⁸⁷ The rapidly evolving science in this area underscores this lack of understanding. For example, the National Academy of Sciences report, *Spills of Diluted Bitumen from Pipelines: A Comparative Study of Environmental Fate, Effects, and Response* (Dec. 8, 2015), that Living Oceans Society and several other intervenors moved to admit as late evidence,⁸⁸ was only released a few weeks ago. While the Board refused to admit the study as evidence due to prejudice to TransMountain,⁸⁹ it is highly instructive that fundamental research into our understanding of how this oil interacts with the environment is still being carried out. Extraordinary caution should be exercised when making a decision that comes with this degree of scientific uncertainty.

The commercial impacts of a spill are potentially greater than the ecological ones. As Dr. Short (and several other experts) testified, “the mere credible threat of contamination should a large-scale spill occur could have serious adverse consequences for these fisheries stemming from impaired marketability of products suspected of tainting, even when tainting is

⁸⁶ See, e.g., Exhibit C72-5-2 – Written Evidence of City of New Westminster (May 27, 2015) (A4Q0L5), 7-10; Report of Jeffery Short, *supra*, at 74 (“Submerged diluted bitumen that is naturally dispersed in the upper water column presents a contamination hazard to commercially important fish, especially salmon.”).

⁸⁷ Exhibit C319-27-6 – Written Evidence of the Squamish Nation – Potential Effects of Diluted Bitumen Spills on Salmon Species (May 27, 2015) (A4L7E7), 17.

⁸⁸ Exhibit C214-31-2 – Living Oceans Society, Notice of Motion to file late evidence (December 9, 2015) (A4W3Y9).

⁸⁹ Exhibit A241-1 - Ruling No. 105 Living Oceans Society and Raincoast Conservation Foundation - Notice of Motion to file late evidence (December 17, 2015) (A4X0Z7).

undetectable.”⁹⁰ In other words, even if ecological effects were difficult to discern or minimal, the commercial effects of a dilbit spill could be devastating because the commercial market for fished species in the area would collapse.

Catastrophic spills aren't the only mechanism by which oil is introduced into the marine environment. Smaller spills from loading, minor incidents, and/or refueling are commonplace and can be assumed likely.⁹¹ Cumulatively, they present significant risks in their own right. The record reveals a consistent history of spills in the past, with no reason to think this project would be any different.⁹²

Finally, there is extensive evidence in the record that the increase in shipping traffic associated with this proposal adds to an already barely tolerable level of interference with fishing activities. Much of this evidence was presented by the U.S. Tribes themselves—Lummi fisherman Dana Wilson spoke extensively of the gauntlet he faced from oil tankers simply trying to make a living fishing, and the loss of gear faced by US Tribal fishers due to extensive marine traffic.⁹³ These concerns were echoed in the evidence submissions of other First Nations

⁹⁰ Report of Jeffery Short, *supra*, at 74.

⁹¹ See, e.g., Exhibit C-24-12-2, BC Nature and Nature Canada—Written Evidence of Dr. Caroline Fox (May 27, 2015) (A4L8K8) (“Smaller, more frequently occurring chronic oil spills, also commonly referred to as chronic oil discharges, chronic oil pollution or ‘small oily discharges’ (using a <1000 L definition) contribute more oil to marine environments than the larger, often “catastrophic” oil spills.”), 25.

⁹² See Exhibit C77-27-1 – Written Evidence of the City of Vancouver (May 27, 2015) (A4L7V9), 21 (average of 1.5 spills annually from existing TransMountain pipeline historically); C135-8-1 Friends of the Earth Written Evidence (A4L9W4), 4 (discussing history of small spills in Salish Sea).

⁹³ Hearing Order OH-001-2014, Vol. 11 - Oral Testimony of Dana Wilson (October 23, 2014) (A63792), ¶4681 (“And I've watched these ships come around there on a daily basis, especially one that's trying to overturn another, you know, pass another one. They don't stay in the shipping lane. I watch them. They don't—they've got schedules they've got to keep. They overpass each other. You know. If one is slower than the other, the other one is not going to slow down. He's going to pass it. And you've got three ships there all at once. They've got—

concerned. For example, the Squamish Nation submitted a report that found that Kinder Morgan’s filings to be “unreliable” and “deficient” in light of its failure to adequately consider impacts on traditional fishers.⁹⁴

The evidence in the record shows that the TransMountain project would cause significant environmental and social harm to the Salish Sea and the coastal communities on both sides of the border. Because TransMountain failed to adequately analyze this harm and because these impacts cannot be justified by project proponents, the proposed pipeline expansion is not in the public interest.

IV. THE NEB PANEL FAILED TO CONSULT WITH U.S. FEDERAL AGENCIES WITH “POWERS, DUTIES OR FUNCTIONS” RELATED TO THE ASSESSMENT OF ENVIRONMENTAL EFFECTS OF THE PROJECT AS REQUIRED UNDER SECTION 18 OF THE *CEAA*.

On December 16, 2013, TransMountain formally submitted its application to this Board for the TransMountain Expansion project. On December 20, 2013, a notice was placed on the Canadian Environmental Assessment Registry pertaining to this project. The notice identified NEB’s duty under s. 18 of the *CEA Act, 2012* to consult and cooperate with jurisdictions that have “powers, duties or functions” related to the assessment of environmental effects of the project. The notice invited jurisdictions which believed that they met the criteria of the *CEAA 2012* to contact the NEB, via email, by January 31, 2014.

Although the U.S. Tribes are intervenors in this proceeding, they were not made aware of the existence of this notice until June 4, 2014, when it was referred to in a letter to the Board filed by the Matsqui First Nation. Counsel for the Tribes located the notice with the assistance of

one has to go way out of the shipping lane and that's where you've got to stay—you know, you've got to really keep a sharp eye and a sharp ear and try to fish at the same time.”).

⁹⁴ Exhibit C319-26-4 – Squamish Nation, Potential Adverse Effects of Shipping on Squamish Interests (May 26, 2015) (A4L5R7).

an NEB process advisor that day. There appears to be no link from the NEB project website to the Environmental Assessment Agency registry, or any other notice on the NEB project website pertaining to the *CEA Act, 2012* s. 18 request to jurisdictions.

The U.S. Tribes are unaware of any U.S. jurisdiction, many of which have powers, duties, and functions related to the environmental assessment of this project, that has responded to the *CEA Act, 2012* notice. In the Tribes' discussions with such agencies, agency staff have professed to be unaware of either the *CEA Act, 2012* s. 18 duties or the environmental assessment of this project being conducted by this Board. While the United States Environmental Protection Agency ("EPA") has become a commenter to this proceeding,⁹⁵ in first seeking an extension of time to intervene (denied by the Board), EPA explained that it had only become aware of the existence of this proceeding and was unable to coordinate a formal approval request in the one day available.

A. The NEB Failed To Initiate Consultation With Appropriate U.S. Agencies.

A key concern of the U.S. Tribes in this matter is the adverse impact to culturally and economically important resources, within United States territory, as a result of the movement of oil tankers through shared U.S.-Canadian waters. These adverse transboundary impacts to the U.S. Tribes (and U.S. citizens in general) appear to be undisputed but are not described in any detail in Kinder Morgan's application materials, highlighting the importance of assessing those impacts in the pending environmental assessment.

The Board failed to initiate consultation with U.S. government jurisdictions with planning, oversight, and responsibilities for the protection of natural resources and the safety of vessel movement. These agencies also have an obligation to fulfill their trust responsibility to

⁹⁵ US Environmental Protection Agency Region 10 – Letter of Comment (August 18, 2015) (A4S5D5).

protect the treaty-reserved rights of each Indian tribe to the fullest extent possible that will be adversely impacted by the project. These agencies include, but are not limited to, the U.S. Environmental Protection Agency, the National Marine Fisheries Service, the U.S. Coast Guard, and the U.S. Department of State, which have legal authorities, responsibilities, and relevant expertise in the areas of marine safety, oil spill response, and natural resource protection in the United States that are threatened by this project:

a. United States Environmental Protection Agency (“EPA”): The EPA is the lead U.S. government authority for the protection of human health and the environment from pollution. Under the Oil Pollution Act of 1990 (“OPA”), 33 U.S.C. § 2701-62, the EPA oversees a comprehensive national, regional, and local planning process for the prevention of and response to marine oil spills. It also oversees the protection of water quality from ballast discharges of marine vessels, another critical issue of concern to the U.S. Tribes, pursuant to its federal Clean Water Act authorities, 33 U.S.C. § 1251-1387. Region 10 of the EPA, based in Seattle, Washington, has extensive expertise on oil spill planning, risk management, and response in the Puget Sound area. EPA recently funded a multi-year study of vessel traffic impacts from proposed projects in the Salish Sea region, including the TransMountain pipeline expansion.

b. National Marine Fisheries Service (“NMFS”): NMFS is an agency within the U.S. Department of Commerce. Under the federal Endangered Species Act, 16 U.S.C. § 1531-44, NMFS oversees the protection of federally listed threatened and endangered species, reviews federal actions to ensure consistency with such protection, and plans for their recovery. Species of particular concern include Puget Sound chinook salmon—a threatened species on which the U.S. Tribes historically have relied for cultural and economic purposes—and Southern resident orcas, which even TransMountain’s application materials reveal will be harmed by the marine

traffic generated by this project. NMFS also oversees the protection of marine mammals under the 1972 Marine Mammal Protection Act, 16 U.S.C. § 1361-1423h, and the management of Pacific ocean fisheries, including salmon fisheries, under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801-44. NMFS's management, oversight, and planning responsibilities are implicated by this project.

c. United States Coast Guard: The U.S. Coast Guard, a branch of the U.S. military organized under the U.S. Department of Homeland Security, has numerous authorities overseeing the protection of property, safety and the environment in U.S. marine waterways. Under the Ports and Waterways Act, 33 U.S.C. § 1221, the Coast Guard is charged with promoting navigation, vessel safety, and protection of the marine environment. In particular, the Coast Guard operates a vessel traffic and separation program in Puget Sound to minimize the risk of incidents involving large vessels. The Coast Guard also regulates anchoring and bunkering of large vessels in U.S. waters.

d. United States Department of State: The Department of State is the executive department responsible under the U.S. Constitution and Title 22 of the U.S. Code for the international relations of the United States government. The Department of State also has responsibilities under bilateral and multilateral treaties affecting natural resources in shared waters, including treaties to which Canada and/or the United States have signed pertaining to transboundary environmental impacts and management of shared resources.

Other legal duties apply to all U.S. agencies and entities of government.⁹⁶ For example, the U.S. government is under a mandatory legal duty to protect tribal treaty fishing rights secured

⁹⁶ For example, Magnuson Amendment of 1977, 33 U.S.C. § 476, reflects the United States commitment to the protection of Puget Sound from crude oil-carrying vessels by prohibiting

by treaties under which the tribes ceded title to ancestral lands. This right entails protection of the fisheries resources available to the tribes and prevention of physical interference with the exercise of rights. The failure of the federal government to prevent the continued loss of treaty-reserved resources like salmon from ongoing loss and degradation of habitat in Puget Sound is an issue of critical importance and high-level discussion at this time, as is the physical impingements upon the exercise of rights due to vessel traffic. The U.S. Tribes expect that the agencies listed above will act to protect their treaty-reserved rights via their participation in the environmental assessment process. However, they can only do so if the NEB offers to consult and cooperate, which required more than posting a notice on a website.

B. The NEB Must Consult And Cooperate With All Jurisdictions With “Powers, Duties, And Functions” Related To The Environmental Impacts Of The Proposed Project.

The NEB’s duty to inform and cooperate with these entities arises under both statutory and international law. With respect to the former, the NEB is under an explicit legal duty to “consult and cooperate” with other jurisdictions that have “powers, duties, and functions” in relation to the Board’s environmental assessment of this project. *See* s. 18, *CEA Act, 2012*. The definition of “jurisdiction” includes the government of a foreign state or subdivision thereof, or “any institution” of such government. *Id.* s. 2(1).

The United States agencies listed above have “powers, duties, and functions” related to the protection of United States resources and trust duties, and meet the definition of “jurisdiction” in the *CEA Act, 2012*. Moreover, these agencies have extensive scientific and technical expertise with respect to the resources, activities and impacts at issue in this

federal agencies from taking actions that could result in an increase of crude oil tanker traffic in Puget Sound.

proceeding. Accordingly, s. 18 of the *CEA Act, 2012* required the Board to “offer to consult” them such agencies, and cooperate with them in your review of this project.

The NEB Panel violated this duty, and none of the U.S. agencies identified above were aware of either this proceeding or the *CEA Act, 2012*’s s. 18 duties. A notice placed on a Canadian registry, without any effort at affirmative outreach, does not constitute an “offer to consult” foreign jurisdictions under s. 18 of *the CEA Act, 2012*.

In reviewing the correspondence between the NEB and the Tsleil-Waututh Nation, it appears that the NEB interprets s. 18 of the *CEA Act, 2012* as applying only to jurisdictions which are undergoing their own, independent environmental assessment of the proposed action. However, the duty to consult and cooperate contained in s. 18 of the *CEA Act, 2012* is not limited to jurisdictions that are already preparing their own independent assessment, nor would implying such a limit make any sense. The statute is framed broadly so that any jurisdiction, including foreign jurisdictions, that have “powers, duties, or functions in relation to an assessment” of the impacts of proposed projects must be invited to cooperate. The U.S. federal agencies have power, duties and functions relating to the Board’s assessment of transboundary environmental harm, even if they are not independently conducting their own. For example, as noted above, EPA completed an evaluation of vessel traffic risks in the Salish Sea from several proposed projects, including the TransMountain pipeline.⁹⁷

One of the explicit purposes of the statute is to ensure that projects that are carried out “outside Canada” (or, by implication, projects that have impacts outside Canada) are considered in a “careful and precautionary manner to avoid significant adverse environmental effects.” *CEA*

⁹⁷ U.S. Environmental Protection Agency, Letter of Comment (August 18, 2015) (A4S5D5), 3 (referring to 2014 Vessel Traffic and Risk Assessment Study authored by Glosten Associates). The U.S. Tribes submitted the Glosten Report as written evidence, *see* Exhibit C336-7-3 – Written Evidence, Appendix B, parts 1 and 2 (May 27, 2015) (A4L7G3), (A4L7G3).

Act, 2012, s. 4(g). The *CEA Act, 2012* expressly defines “environmental effects” to include those changes that may be caused to the environment “outside Canada.” *Id.* s. 5(1)(b)(iii). The U.S. agencies listed above have significant expertise on how to assess, analyze, and avoid environmental harm in U.S. waters resulting from either increased vessel traffic in or adjacent U.S. waters, or oil spills that could devastate U.S. natural resources, and the NEB Panel violated its statutory mandate to carefully assess extraterritorial impacts of its decision in this matter by not consulting and cooperating with U.S. agencies with appropriate expertise and authority.

C. The *CEAA* Consultation Requirement Reflects Recognized International Law Duties.

The s. 18 *CEA Act, 2012* duty mirrors long-standing customary and treaty-based international law duties.⁹⁸ Cooperation and consultation with U.S. agencies is required to fulfill Canada’s well-established customary international law responsibility to prevent transboundary harm to other jurisdictions, including the duty to take reasonable steps to ensure that it is fully informed about all potential environmental impacts of its actions, including transboundary impacts.⁹⁹

Canada’s duties to avoid transboundary environmental damage, and to engage foreign jurisdictions that could be harmed by Canada’s decisions, are also enshrined in treaties. For example, the Convention on Environmental Impact Assessment in a Transboundary Context, commonly known as the Espoo Convention, imposes a duty to conduct environmental assessments where, as here, a project has the potential to cause a “significant adverse

⁹⁸ See Argument, Section VI below for a more detailed discussion of international law and its application to this decision.

⁹⁹ See Neil Craik, *Transboundary Environmental Assessment in Canada: International and Constitutional Dimensions*, 21 J. Env. L. & Prac. 107 (2010).

transboundary impact.”¹⁰⁰ Several provisions of the Espoo Convention are applicable here, and legitimate questions exist as to whether Canada is in compliance. For example:

- For projects likely to cause a significant adverse transboundary impact, Canada is obligated to notify any other state “as early as possible and no later than when informing its own public about that proposed activity.” Article 3(1). The U.S. Tribes are unaware that any such notification has ever taken place.
- Canada is obligated to provide an “opportunity for the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures” and shall ensure that such opportunity is “equivalent to that provided to the public” in Canada. Article 2(6). The duty to provide public opportunities to participate in the environmental assessment is not limited to only contracting parties to the convention. (The United States has signed but not yet ratified the convention.) Again, it appears that no such opportunity was given.
- Activities triggering these duties include “large diameter oil and gas pipelines” and ports which permit the passage of vessels of over 1,350 tonnes. App. I (8,9). The TransMountain pipeline project meets both of these criteria.

Similarly, the North American Agreement on Environmental Cooperation recognizes the right of transboundary public participation.¹⁰¹ In that agreement, Canada and the U.S. affirmed their responsibility to ensure that activities within one state do not damage the environment of another state, and emphasized the “importance of public participation in conserving, protecting and enhancing the environment.” The agreement creates a cabinet-level multilateral council between the three nations and directs it to, among other things, develop recommendations for assessing transboundary environmental impacts. Article 10(7). While such recommendations remain in draft form, the U.S. Tribes are unaware of any effort by NEB to review and comply with these draft recommendations.

¹⁰⁰ Available at http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo_Convention_authentic_ENG.pdf (last visited January 11, 2016).

¹⁰¹ Available at http://www.cec.org/Page.asp?PageID=1115&AA_SiteLanguageID=1 (last visited Jan. 8, 2016).

Because the NEB failed to consult with United States federal agencies with “powers, duties or functions” related to the assessment of environmental effects of the project as required by s.18 of the *CEAA*, the NEB cannot proceed with approval.

V. APPROVAL OF THE PROJECT SHOULD NOT UNDERMINE U.S. LAW ON WILDLIFE PROTECTION.

The NEB Panel should interpret and take actions under the *NEB Act* and the *CEA Act, 2012* in a manner that is consistent with and does not frustrate U.S. government and U.S. Tribal efforts to sustain and recover salmon and whale populations in the Salish Sea. Endangered and threatened transboundary species will not survive and recover absent efforts on both sides of the border to ensure they are protected, including from acoustic harms. Three key reasons support the need to interpret and apply Canadian law in a manner which does not undermine U.S. efforts under the Endangered Species Act (“ESA”).

First, the ESA is fundamentally aimed at the same objectives as the Canadian Species at Risk Act (“SARA”). The ESA and SARA have the same overarching legislative purpose—in essence, they aim to conserve endangered and threatened species. *Compare SARA, s. 6 with ESA, § 2 (16 U.S.C. § 1531)*. These shared legislative purposes should lead to consistent conservation outcomes.

Second, beyond their purposes alone, the ESA and SARA employ similar statutory schemes. It would be baffling if, under statutes with similar schemes, activities causing harm to wildlife (for example, acoustic harms to Southern Resident Killer Whales) could be authorized under one legal regime but effectively precluded by the other regime, when both schemes are intended to ensure the recovery of the same whales. The following statutory elements are found in and mandated by both the ESA and SARA schemes:

- listing species as either endangered or threatened following scientific assessment;¹⁰²
- mandatory prohibitions against harms to listed species;¹⁰³
- recovery planning that involves the identification of threats to listed species and designation of their critical habitat, leading to legal protections for that critical habitat;¹⁰⁴ and
- permitting mechanisms to review and, where permissible, to authorize impacts on listed species and their critical habitat.¹⁰⁵

Third, the U.S. Tribes believe that it is relevant to consider the consequences of the NEB’s decision on U.S. efforts under the ESA, the Marine Mammal Protection Act, and other U.S. laws to conserve salmon and whale populations. Furthermore, Canada’s own SARA recovery strategies recognize that Canadian recovery efforts alone will be insufficient to recover these whales and acknowledge the need for transboundary cooperation. Despite this, the NEB Panel did not seek to consult or cooperate with U.S. federal fish and wildlife agencies during its approval process.

For example, approval of the project will undermine the U.S. Government’s strong interest in protecting and recovering imperiled orca whales in the Salish Sea.¹⁰⁶ The U.S. Tribes have a strong cultural connection to orcas.¹⁰⁷ Even TransMountain concedes that the project will have significant and unmitigatable impacts on orcas, describing them as “negative, long-term,

¹⁰² Section 4 of the ESA (16 U.S.C. § 1533); sections 14-31 of SARA.

¹⁰³ Section 9 of the ESA (16 U.S.C. § 1538), sections 32-36, 58, 60-61 of SARA.

¹⁰⁴ Section 4 of the ESA (16 U.S.C. § 1533), sections 37-72 of SARA.

¹⁰⁵ Section 7-10 of the ESA, sections 73-79 of SARA.

¹⁰⁶ Orcas are listed as an endangered species under U.S. Federal law; a recovery plan was finalized in 2008. Exhibit C356-2-11 – Tsawassen First Nation IR Round 1, NOAA Office of Protected Resources – Killer Whale (May 12, 2014) (A3W8G8).

¹⁰⁷ See Hearing Order OH-001-2014, Vol. 11 – Oral Testimony of Glen Gobin (October 23, 2014) (A63792), ¶4753 (“the orca is the emblem of our tribe”); *id.* ¶¶ 4754-55 (discussing role of orcas in Tulalip oral tradition).

high magnitude, high probability and significant.”¹⁰⁸ The record strongly supports this finding: harm to orcas will occur even without significant oil spills due to the significant acoustic disturbance resulting from increased tanker traffic.¹⁰⁹ And, of course, a serious accident involving spilled oil would gravely set back the protections for—and could even trigger the extinction of—an iconic species for both nations.¹¹⁰

Given the similarities in purpose and in scheme between the ESA and SARA, the consequences of the NEB’s actions on the shared waters of the Salish Sea, salmon, and whales, and the practical need for cooperation and collaboration for the recovery of these species, the U.S. Tribes contend that the NEB Panel must not approve projects that would threaten these species or their habitats. Before any project approvals, the NEB Panel should consider U.S. information and interests in consultation with U.S. federal agencies, including gathering information relevant to cumulative impacts and mitigation.

¹⁰⁸ Exhibit B18-29 – TransMountain Application, Vol. 8A (December 17, 2013) (A3S4Y3), p. A8-320; *see also* B444-2 - Trans Mountain Revised Final Argument (clean) (December 15, 2015) (A4W6L8), 72, lines 1255-58 (“the potential effect of sensory disturbance on southern resident killer whale based on the existing status of that species” is an exception to TransMountain’s assertion of no significant adverse environmental effects). TransMountain’s shrugs off its admission that “underwater noise effects may be significant” by stating (1) the marine system already exists; (2) the shipping lanes are well-established; and (3) a great deal of international trade occurs already. None of these excuses addresses TransMountain’s noise impact; as mitigation, TransMountain rejected any alteration of shipping lanes or reduction of vessel speeds. TransMountain Revised Final Written Argument, *id.* at 65-68.

¹⁰⁹ *See, e.g.*, C291-1-5 - Raincoast Conservation Foundation, Exhibit D - Potential Acoustic Impacts of Vessel Traffic from the Trans Mountain Expansion Project on Southern Resident Killer Whales (May 27, 2015) (A4L9G0) (“Sound is as important to whales as vision is to humans.”).

¹¹⁰ Exhibit C291-1-4 - Raincoast Conservation Foundation, Exhibit C Orca Recovery Strategy (May 27, 2015) (A4I9F9).

VI. NEB PANEL SHOULD CONSIDER OBLIGATIONS UNDER INTERNATIONAL LAW BEFORE PROJECT APPROVAL.

The proposed TransMountain Pipeline Project is an international issue that will have long lasting, and potentially catastrophic, consequences that will undermine the U.S. Tribes' ability to survive. Approval of the project, especially given TransMountain's and the NEB's failure to consult and coordinate with U.S. tribal and federal interests, will harm the U.S. Tribes' internationally recognized rights to culture and subsistence. Although the project is physically located in Canada, U.S. Tribes have express and unique interests in opposing the project that are tied to whole of the Salish Sea, spanning the international border and waters in both the United States and Canada. Through treaties between the tribes and the United States government, the U.S. Tribes are designated as co-managers with the state of Washington of fisheries resources within the state, including the affected area of the project. In this capacity the U.S. Tribes have more than an express interest in protecting marine life; they have a legal duty.

Project approval will destroy tribal resources and practices central to their ability to protect their culture and ensure it continues to future generations. It will also interfere with U.S. Tribes' welfare and means of subsistence. These cultural concerns are unique and cannot be mitigated or adequately compensated in the event of any environmental harm resulting from project approval. The U.S. Tribes' involvement as intervenors reflects their express interests in protecting the Salish Sea. Regardless of whether the harm originates in Canada or the United States, U.S. Tribes will be impacted by it.

The NEB Panel must consider the effects of approving this project on aboriginal peoples both in Canada and in the United States. First, the U.S. Tribes are uniquely and intimately tied to the international impacts of the project; any effect on the Salish Sea will damage U.S. Tribes' commercial and cultural resources. Second, since project approval will cause harm and risk

outside the borders of Canada, principles of international law apply. International law requires states to prevent serious transboundary environmental harm, one of the main concerns of U.S. Tribes, as their culture and economies center on environmental health, wildlife, and renewable resources of the Salish Sea. Third, Indigenous international law recognizes the importance of land, culture, and resources as essential to the survival and self-determination of Indigenous peoples, both of which are threatened throughout all stages of the TransMountain Pipeline Project.

A. U.S. Tribes Are Uniquely Tied To The International Impacts Of Project Approval Through Harms To Their Culture and Internationally Shared Marine Resources.

The NEB Panel must consider the transboundary connections and concerns of the U.S. Tribes before project approval. Although the Swinomish, Tulalip, Suquamish, and Lummi Tribes are currently located within the United States, their cultural practices and traditional economies connect them to all tribes in the Salish Sea, including those currently residing in British Columbia. “In times long ago our people always got together in the winter months. It was nothing new 10 years ago when we started. We have always been getting together in the customs of our people.”¹¹¹ “We [the Suquamish] went as far north as the Fraser River to get enough salmon to provide for ourselves.”¹¹² “Our Elders told us that we travelled far and wide with the canoes up and down the Coast Salish Sea, well into Canada...”¹¹³ There are intimate family ties between U.S. Tribes and aboriginal First Nations on the Salish Sea. Tulalip Tribal Councilwoman Deborah Parker orally testified that her children are also part of the Tsleil-

¹¹¹ Hearing Order OH-001-2014, Vol. 10 - Oral Testimony of Ray Harris (October 22, 2014) (A63743), ¶ 4470.

¹¹² Hearing Order OH-001-2014, Vol. 10 - Oral Testimony of Chairman Leonard Forsman (October 22, 2014) (A63743), ¶ 4519.

¹¹³ Hearing Order OH-001-2014, Vol. 10 - Oral Testimony of Glen Gobin (October 22, 2014) (A63743), ¶ 4757.

Waututh and Squamish Nations in British Columbia.¹¹⁴ These cultural and social connections existed long before the border between the United States and Canada.

Indeed, the U.S. and Canada recognized the inherent complexities of establishing a new international border when they signed the Treaty of Amity, Commerce, and Navigation between the United States and Great Britain (“the Jay Treaty”), in 1794. Article III of the Jay Treaty, relating to the right of “Indians” to cross the border, remains a Treaty in Force with the United States State Department¹¹⁵ and has been codified in the United States Code.¹¹⁶ The Jay Treaty openly acknowledged that tribes had transboundary rights and could pass freely between the borders.

The United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) also acknowledges that transboundary issues exist for indigenous populations and provides that indigenous peoples have the right to maintain social, cultural, spiritual, political, and economic contacts with both their own tribal members, as well as other indigenous peoples, across borders.¹¹⁷ In a special report from the United Nations Special Rapporteur on the rights of indigenous peoples,¹¹⁸ Canada was specifically advised to address issues affecting tribal nations

¹¹⁴ Hearing Order OH-001-2014, Vol. 11 - Oral Testimony of Deborah Parker (October 23, 2014) (A63792), ¶¶ 4801-2.

¹¹⁵ Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 31, 2013, United States Department of State, *available at* <http://www.state.gov/documents/organization/218912.pdf>, p. 38 (last visited January 7, 2016).

¹¹⁶ 8 U.S.C. § 1359.

¹¹⁷ United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”), Article 36(1), *available at* http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (last accessed January 7, 2016).

¹¹⁸ The position of UN Special Rapporteur on the Rights of Indigenous Peoples is mandated by the UN Commission on Human Rights to promote good practices between indigenous peoples and states, gather information from governments and indigenous peoples regarding alleged violations on the rights of indigenous peoples, make recommendations to prevent or remedy violations of rights of indigenous peoples, and work with other organizations, including the UN

spanning the border between the United States and Canada.¹¹⁹ This special attention given to Canada, as well as the specific attention given to transboundary rights for Indigenous peoples, demonstrates the international concern that Canada has not sufficiently respected that right.

Much like the indigenous peoples of the Salish Sea, the cultural way of life and the marine resources on which it depends have no regard for the international border. Any effect on the Salish Sea will ultimately impact U.S. Tribes. All oil tanker traffic must necessarily travel through United States waters and the increased traffic and increased risk of oil spills will undoubtedly affect tribal fisheries.¹²⁰ As tribal leader Ray Harris testified, “the Salish leaderships tasked us, a few of us, to say, ‘Find a way to do this. Let the governments know that there is an environmental issue here that the border doesn’t recognize.’ Pollution doesn’t know there’s a border.”¹²¹ “We come across this man-made border and the potential impacts that eventually will happen—we believe wholeheartedly will happen; it’s just a matter of when—those impacts will travel freely through the Coast Salish Sea.”¹²² “The international border provides no protection from the risk of oil spill and devastation to the Tribe’s fishing grounds and treaty reserved resources.”¹²³

Permanent Forum on Indigenous Issues to further the rights of indigenous peoples. UN HRC Res. 15/14, U.N. Doc. A/HRC/RES/15/14 (Jun 10, 2010), *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/166/70/PDF/G1016670.pdf?OpenElement> (last visited January 7, 2015).

¹¹⁹ Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, U.N. Doc. A/HRC/27/52/Add.2 (July 4, 2014), ¶ 50.

¹²⁰ Exhibit C-336-7-2 - Written Evidence, Appx A, section 2.2.2 (May 27, 2015) (A4L7G2), 3.

¹²¹ Hearing Order OH-001-2014, Vol. 10 - Oral Testimony of Ray Harris (October 22, 2014) (A63743), ¶ 4470.

¹²² Hearing Order OH-001-2014, Vol. 11 - Oral Testimony of Glen Gobin (October 23, 2014) (A63792), ¶ 4734.

¹²³ Exhibit C336-7-7 - Written Evidence, Appendix D, Declaration of Robert Purser, Jr. (May 27, 2015) (A4L7G7), 3, ¶ 20.

The U.S. Tribes ask the NEB Panel to recognize the unique international relationship that U.S. Tribes and other First Nations have to the Salish Sea and that any damage to the Salish Sea the U.S. Tribes (indeed all Coastal Salish peoples) will be subject to the consequences.

B. International Environmental Norms And Principles Impose Obligations On Canada To Avoid Transboundary Environmental Harm.

Independent of the special consideration for the rich cultural history and interconnectedness of the Coast Salish peoples, other elements of international law apply for effects felt across international borders. Customary international law requires Canada to prevent its territory from being used in a manner that causes harm outside of its jurisdiction. This obligation to avoid transboundary environmental harm is one of the most fundamental and widely recognized customary international law norms.

1. *Canada has an obligation to avoid transboundary harm.*

The duty to avoid transboundary harm obliges Canada to prevent its territory from being used in a manner that causes harm outside of its jurisdiction. This obligation is one of the most fundamental and widely recognized customary international law norms.¹²⁴ For over half a century, this principle has been recognized by international tribunals as limiting the way in which States may use their territory. In the 1938 *Trail Smelter Arbitration* between the United States and Canada, the U.S.–Canada International Joint Commission held that “under principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the

¹²⁴ See David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy* 472-75 (4th ed. 2010).

injury is established by clear and convincing evidence.”¹²⁵ In the *Corfu Channel Case*, the International Court of Justice recognized the principle even more broadly as “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”¹²⁶ More recently, in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice noted that “[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”¹²⁷

Customary international law has also been affirmed in international agreements and conferences. For example, numerous widely accepted treaties and declarations over the past several decades, including the 1972 Declaration of the United Nations Conference on the Human Environment (“Stockholm Declaration”), the 1992 Rio Declaration on Environment and Development (“Rio Declaration”), and the United Nations Framework Convention on Climate Change (“UNFCCC”) acknowledge that sovereignty over natural resources is conditioned on the responsibility of States “to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”¹²⁸ Canada agreed to such language in those and several other international treaties,

¹²⁵ *Trail Smelter Arbitration* (U.S. v. Can.) (1941), 3 R.I.A.A. 1938, 1965 (1949).

¹²⁶ *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9).

¹²⁷ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, 241-42.

¹²⁸ Declaration of the United Nations Conference on the Human Environment, G.A. Res. 2997, princ. 21, U.N. GAOR, 27th Sess., U.N. Doc. A/ Conf.48/14/Rev/1, 11 I.L.M. 1416 (June 16, 1972) (“Stockholm Declaration”); Rio Declaration on Environment and Development, U.N. ESCOR, princ. 2, U.N. Doc. A/CONF.151/26 (Vol. I) (1992) (“Rio Declaration”). The Heavy Metals Protocol to the Convention on Long-Range Transboundary Air Pollution, which Canada has ratified, echoes the Rio Declaration’s agreement that States must prevent transboundary

including the 1993 North American Agreement on Environmental Cooperation (the environmental side agreement to NAFTA), as well as the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (also known as the London Convention).¹²⁹

There is also international law specific to marine species, which requires states to protect the habitats of depleted, threatened, or endangered marine species. Canada has ratified the United Nations Convention on the Law of the Sea (“UNCLOS”), which provides that “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as to not cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.”¹³⁰ Article 194(5) emphasizes that this obligation includes a commitment to take measures “necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species.” UNCLOS further supports the proposition that the NEB

harm. Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals, pmbl., June 24, 1998, U.N. Doc. E/ECE/EB.AIR/66/1999, U.N. Sales No. E.99.II.E.21 (1999) (“LRTAP Protocol on Heavy Metals”). U.N. Framework Convention on Climate Change, pmbl., May 9, 1992, 31 I.L.M. 849 (“Framework Convention”) (ratified by Canada on Dec. 4, 1992).

¹²⁹ North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., pmbl., Sept. 8, 1993, 32 I.L.M. 1480 (entered into force Jan. 1, 1994) (“[r]eaffirming...[States’] responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”); International Maritime Organization, Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, pmbl., Dec. 29, 1972, 1046 U.N.T.S. 120 (ratified by Canada on Nov. 13, 1975) (“Recognizing that States have ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”).

¹³⁰ U.N. Convention on the Law of the Sea, art. 194, 1833 U.N.T.S. 3, reprinted at 21 I.L.M. 1261 (entered into force Nov. 16, 1994).

Panel must consider prevention of harm to transboundary endangered and threatened marine species and their habitats before project approval.

The effects TransMountain Pipeline Project will cross the international boundary with the increased number of vessel traffic that must pass through U.S. waters to access the Westridge Marine Terminal.¹³¹ In addition, the environmental harm caused by a potential spill will reach outside Canada's jurisdiction and negatively affect the U.S. Tribes. In approving the project, the NEB Panel will violate Canada's international responsibility to prevent activities within its jurisdiction from damaging the environment outside its borders.

2. *Canada has an obligation to apply the precautionary principle.*

The precautionary principle obliges Canada to act cautiously in the face of scientific uncertainty. The Rio Declaration provides the most widely accepted articulation of this well-established principle of international law: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. When there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."¹³² Canada reiterated its acceptance of the precautionary principle by incorporating it into the purpose of the *Canadian Environmental Protection Act, 1999*: "the Government of Canada is committed to implementing the precautionary principle"¹³³ and affirming it in

¹³¹ Exhibit B18-19 - TransMountain Application, Vol. 8A, Figure 1.3.1. (December 17, 2013) (A3S4X3), 8A-35.

¹³² Rio Declaration, *supra* note 128, princ. 15.

¹³³ Canadian Environmental Protection Act, 1999 SC, ch. 33 (Can.), pmb. Although it is not as strong a commitment as the precautionary principle embraced in Canadian domestic law, Canada's ratification of multilateral environmental agreements endorsing the precautionary approach also echoes Canada's support for taking precautionary steps in the face of serious environmental threats. *See, e.g.*, Framework Convention, *supra* note 128, art. 3.3 ("The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate

Canadian caselaw.¹³⁴ Moreover, among the Government’s duties in administering the Act is to “exercise its powers in a manner that protects the environment and human health, [and] applies the precautionary principle.”¹³⁵

The precautionary principle is especially important for the consideration of threatened and endangered salmon and whale species with populations that share United States and Canadian marine waters. Both Canada and the United States have federal legislation protecting endangered species. As discussed previously in Section 5, both Canada and the U.S. have statutory schemes protecting rare, endangered, and threatened species, such as the endangered Southern Resident Killer Whales. The United States ESA protects the same killer whale population and several populations of Pacific salmon. It is worth emphasizing that all five whale species threatened by project activities have a poor conservation status. They are listed, under SARA, as endangered or threatened. By definition, an endangered species faces “imminent extirpation or extinction.” Not only does extinction constitute a serious harm, but extinction is irreparable and its possibility imminent. The United States National Marine Fisheries Service has referred to the Southern Resident Killer Whale population as so dire, that it considers “the loss of a single individual, or the decrease in reproductive capacity of a single individual, is

change and mitigate its adverse effects”; “lack of full scientific certainty should not be used as a reason for postponing [cost-effective] measures” in the face of “threats of serious or irreversible damage”); LRTAP Protocol on Heavy Metals, *supra* note 128, pmb1, ¶¶ 2-3; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, arts. 5-6, Annex II, Aug. 4, 1995, 2167 U.N.T.S. 88 (ratified by Canada on Aug. 3, 1999).

¹³⁴ See *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, [2001] 2 SCR 241.

¹³⁵ Canadian Environmental Protection Act, *supra* note 133, ¶2(1)(a).

likely to reduce appreciably the likelihood of survival and recovery of the [distinct population segment].”¹³⁶

NEB Panel approval of the project—despite the threat of serious or irreversible damage posed by oil spills and increased vessel traffic—would demonstrate a failure to abide by the precautionary principle. The NEB Panel should consider the effects that project approval will have on endangered and threatened species, and in a manner consistent with SARA and the precautionary principle in international law, so as to ensure the protection and conservation of these fish and whale species. There can be no doubt, on the record, of the potentially serious harms threatened to transboundary marine species by approval of this project.

3. *Project approval would be inconsistent with the international law duty to prevent transboundary environmental harm.*

The U.S. Tribes submit that the NEB Panel, if it approves activities that will unquestionably harm species listed as endangered under both United States and Canadian law, will fail to abide by both the precautionary principle and the duty to avoid transboundary harm. The risk to endangered marine species is eminent. The TransMountain Application revealed that the affected marine area covers the entire critical habitat for Southern Resident Killer Whales.¹³⁷ A map included in the Application reveals Southern Resident Killer Whale sightings to include the entire affected area throughout the Strait of Georgia, the Haro Strait, the Strait of Juan de

¹³⁶ Endangered Species Act Section 7(a)(2) Consultation Biological Opinion: Effects on the Pacific Coast Salmon Plan on the Southern Resident Killer Whale (*Orcinus orca*) Distinct Population Segment, National Marine Fisheries Service, Northwest Region, (May 5, 2009), 56, available at <https://pcts.nmfs.noaa.gov/pcts-web/dispatcher/trackable/NWR-2009-2298?overrideUserGroup>, (last visited January 7, 2016).

¹³⁷ Exhibit B18-25 - TransMountain Application, Volume 8A, Table 4.2.7.1 (December 17, 2013) (A3S4X9), 8A-150.

Fuca, and into United States' and international waters.¹³⁸ The whales pass freely through Canadian and United States waters, and the U.S. Tribes request the NEB Panel to consider the threat that project approval will have on this vulnerable population. Failure to do so will be inconsistent with Canada's obligations under UNCLOS Article 194(5) and customary international law.

Approval of the project also poses a great risk to the transboundary environment of the Salish Sea. With the increase in marine traffic, there is also an increased risk of an oil spill. Marico's independent analysis of the TransMountain Application revealed a higher risk of an oil spill than originally indicated – "The analysis indicates that the Kinder Morgan development alone would result in a 38% increase in potential oil loss in U.S. waters of the Salish Sea."¹³⁹ Similar projections and concerns are echoed by Canadian First Nations. A study commissioned by the Tsleil-Waututh First Nation projected upwards of "a 79-87% likelihood of an oil spill at the Westridge Marine Terminal or in the Burrard Inlet over fifty years," with larger spills having 37% likelihood over 50 years and a "worst-case" spill having 29% likelihood over 50 years.¹⁴⁰ project approval in light of the increased risk for an oil spill will be directly contrary to the international norms to apply the precautionary principle and the duty to not cause transboundary harm.

¹³⁸ Exhibit B18-25 - TransMountain Application, Volume 8A, Figure 4.2-23 (December 17, 2013) (A3S4X9), 8A-157.

¹³⁹ Exhibit C336-7-2 - U.S. Tribe Written Evidence, Appendix A, section 2.4.1 (May 27, 2015) (A4L7G2), 7.

¹⁴⁰ Exhibit C358-13-13 - Tsleil-Waututh First Nations, Written Evidence, vol. 4 (May 26, 2015) (A4L6A4), 781.

C. International Law Protects The Land And Resources Of Indigenous Peoples.

The NEB Panel should respect the U.S. Tribes' right to self-determination as defined by international law, which includes the right to pursue economic, cultural, and social development. For U.S. Tribes, this also includes protection of their environment as their cultural well-being and subsistence are based on the health of the Salish Sea. Both the Inter-American Commission on Human Rights and international law generally protect the special ties that many indigenous people have to their environment.¹⁴¹ This protection has become a norm of customary international law.¹⁴² In addition, the Draft American Declaration of the Rights of Indigenous Peoples, Article XVIII(1), on which the negotiating parties have reached consensus, explicitly guarantees indigenous peoples the right to environmental protection: "Indigenous peoples have the right to live in harmony with nature and to a healthy, safe, and sustainable environment, essential conditions for the full enjoyment of the right to life, to their spirituality, world view and to collective well-being."¹⁴³ The development of the TransMountain Pipeline without consent of the U.S. Tribes would violate internationally protected rights to enjoy and transmit culture to

¹⁴¹ See, e.g., *Case of Yanomami Indians v. Brazil*, Case 7615, Inter-Am. C.H.R., OEA/Ser.L/V/II.66, doc. 10 rev. 1, ¶ 7 (1985) ("*Yanomami*") ("[I]nternational law in its present state ... recognizes the right of ethnic groups to special protection ... for all those characteristics necessary for the preservation of their cultural identity.").

¹⁴² See *Case of Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, ¶¶ 97, 124 (2002) ("*Dann*"), ¶ 125 (citing Inter-Am. C.H.R., *The Human Rights Situation of the Indigenous People in the Americas*, OEA/Ser.L/V/II.108, Doc. 62 (2000), at 21-25); see also *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Inter-Am. C.H.R. Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1, ¶ 87 (2004) ("*Belize Maya*"), ¶ 95 (citing same).

¹⁴³ Permanent Council of the OAS, Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples (Outcomes of the Thirteenth Meetings of Negotiations in the Quest for Points of Consensus), OEA/Ser.K/XVI/GT/DADIN/doc.334/08 rev. 6, art. XVIII(1), (Jan. 20, 2011) ("*OAS, Draft Declaration on the Rights of Indigenous Peoples (2011)*").

future generations and affect the economic subsistence of tribes on resources from the Salish Sea.

1. Project approval will interfere with U.S. Tribes' internationally recognized right to culture.

The human right to culture is recognised in many international instruments, and is an “integral part of human rights and, like other rights, [is] universal, indivisible and interdependent.”¹⁴⁴ These instruments include the Universal Declaration on Human Rights (which protects the right “freely to participate in the cultural life of the community”),¹⁴⁵ the International Covenant on Civil and Political Rights (“ICCPR”) (which provides that members of minority groups “shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, and to use their own language”),¹⁴⁶ and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) (which provides that “States Parties ... recognize the right of everyone [t]o take part in cultural life”).¹⁴⁷ Canada is a party to both covenants and is a signatory to the declaration.¹⁴⁸

¹⁴⁴ UN Committee on Economic, Social and Cultural Rights (“ESCR Committee”), Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) – General Comment No. 21 (“General Comment 21”), UN Doc. E/C.12/GC/21 (December 21, 2009), ¶ 1, *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f21&Lang%20=en (last visited January 7, 2016).

¹⁴⁵ Universal Declaration on Human Rights, Article 27(1) (proclaimed December 10, 1948), *available at* <http://www.un.org/en/universal-declaration-human-rights/index.html> (last visited January 7, 2015).

¹⁴⁶ International Covenant on Civil and Political Rights (“ICCPR”), Article 27(1), (entered into force March 23, 1966) *available at* <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (last visited January 7, 2016).

¹⁴⁷ International Covenant on Economic, Social and Cultural Rights (“ICESCR”), Article 15(1)(a), (entered into force January 3, 1976) *available at* <http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> (last visited January 7, 2016).

Other major human rights instruments, including the American Declaration of the Rights and Duties of Man,¹⁴⁹ the Charter of the Organization of American States,¹⁵⁰ the American Convention on Human Rights,¹⁵¹ protect cultural rights.

For many indigenous peoples, including the U.S. Tribes, the right to enjoy culture is linked to the natural environment of their traditional lands:

[C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting.... The protection of these rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.¹⁵²

¹⁴⁸ UN Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en; Yearbook of the United Nations: 1948-49, 535, available at <http://www2.ohchr.org/english/issues/education/training/docs/UNYearbook.pdf> (last visited Aug 27, 2015).

¹⁴⁹ American Organization of American States, American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003) (“American Declaration”), art. XIII. (“Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.”).

¹⁵⁰ Charter of the Organization of American States, arts. 2(f), 3(m), 30, 48, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 rev. 9 (Jan. 2003) (Member States are “individually and jointly bound to preserve and enrich the cultural heritage of the American peoples”).

¹⁵¹ Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (“American Convention”), art. 16 (“Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.”).

¹⁵² UN Human Rights Committee, Office of the High Commissioner for Human Rights, General Comment No. 23: The Rights of Minorities (Art. 27), CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994) (“OHCHR, Gen. Comment No. 23”), ¶¶ 7 and 9.

Interference with indigenous lands implicates the right to culture, because the use and enjoyment of traditional lands are integral components of the physical and cultural survival of indigenous peoples. The ESCR Committee has noted that:

Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity.¹⁵³

The United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”), which Canada endorsed in 2010, also specifically assures the cultural rights of indigenous peoples and links those rights to the natural environment and to future generations:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.¹⁵⁴

UNDRIP also provides that indigenous peoples have the rights:

- not to be subjected to destruction of our culture;¹⁵⁵
- to practice and revitalize our cultural traditions and customs, which includes maintaining, protecting and developing our culture;¹⁵⁶
- to practice and develop our spiritual and religious traditions, customs and ceremonies, and to maintain and access in privacy our religious and cultural sites;¹⁵⁷
- to revitalize, use, develop and transmit to future generations our histories, languages, oral traditions and philosophies;¹⁵⁸ and
- to maintain and develop our traditional knowledge, and cultural heritage and expressions, and the manifestations of our cultures, including oral traditions.¹⁵⁹

¹⁵³ ESCR Committee, *General Comment 21*, *supra* note 144, ¶ 36.

¹⁵⁴ UNDRIP, *supra* note 117, Article 25.

¹⁵⁵ *Id.*, Article 8.

¹⁵⁶ *Id.*, Article 11.

¹⁵⁷ *Id.*, Article 12.

¹⁵⁸ *Id.*, Article 13.

¹⁵⁹ *Id.*, Article 31.

Other international human rights bodies have recognized the special relationship that indigenous peoples have with their land and its connection to their right to culture.¹⁶⁰ For instance, the U.N. Human Rights Committee acknowledged the importance of natural resources to the right to the benefits of culture in *Bernard Ominayak and the Lubicon Lake Band v. Canada*. In that case, which the Commission cited with approval in the *Belize Maya* decision,¹⁶¹ the petitioners alleged that the government of the province of Alberta had deprived the Band of their means of subsistence and their right to self-determination by selling oil and gas concessions on their lands.¹⁶² The Human Rights Committee characterized the claim as being based on the right to enjoy culture under Article 27 of the ICCPR.¹⁶³ It found that oil and gas exploitation, in conjunction with historic inequities, threatened the way of life and culture of the Band and that Canada had thus violated Article 27.¹⁶⁴

¹⁶⁰ See, e.g., *Centre for Minority Rights Development v. Kenya*, Case 276/2003, Afr. Comm'n on Human and Peoples' Rights, ¶ 156 (2009) (citing extensively the Inter-American Court's jurisprudence in *Awasi Tingni*, *Moiwana*, and *Saramaka* in observing that indigenous peoples' "culture, religion, and traditional way of life are intimately intertwined with their ancestral lands [] and the surrounding area" and that "without access to their ancestral land, [they] are unable to fully exercise their cultural and religious rights, and feel disconnected from their land and ancestors.").

¹⁶¹ *Belize Maya*, *supra* note 142, ¶ 141.

¹⁶² U.N. Human Rights Committee, *Bernard Ominayak and the Lubicon Lake Band v. Canada*, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (Mar. 26, 1990) ("*Lubicon Lake Band*").

¹⁶³ *Id.*; see also U.N. Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, ¶ 9.5, U.N. Doc. CCPR/C/70/D/547/1993 (Nov. 16, 2000) (noting that, according to general comment to Article 27, "especially in the case of indigenous peoples, the enjoyment of the right to one's own culture may require positive legal measures of protection by a State party and measures to ensure the effective participation of members of minority communities in decisions which affect them").

¹⁶⁴ *Lubicon Lake Band*, *supra* note 162, ¶ 33.

The threat to tribal culture is necessarily implicated in the TransMountain Pipeline project through a number of factors: the increase in potential for oil spills that will cause catastrophic damage to the Salish Sea and the marine species that the U.S. Tribes depend on for cultural and economic subsistence; the inevitable increase in vessel traffic that poses a safety risk to tribal fishermen and can reduce tribal fisheries;¹⁶⁵ and the overall increase in traffic and environmental degradation has a negative effect on tribal cultural practices.

The U.S. Tribes testimony, as discussed above, revolves around the importance of salmon to the cultural survival of the U.S. Tribes. Salmon is also the center of the tribes' cultural evolution. "Fishing represents the continuation of our culture and way of life since time immemorial. While the rules and structures of fishing have changed in modern times, fishing is an integral part of our culture. For thousands of years, our people have lived on the marine waters of the Salish Sea harvesting salmon, many other fish species and shellfish."¹⁶⁶ Salmon continues to be a part of the cultural fabric—"And salmon provides []—not only a food, but also what we might call medicine or our cultural strength to our people."¹⁶⁷ The integration of salmon to the cultural lives of U.S. Tribes cannot be overstated.

¹⁶⁵ Exhibit C336-7-2 - Written evidence, Appendix A, (May 27, 2015) (A4L7G2), - section 1.1 ("The application, if approved, will see an increase from 5 tankers a month to 34 Aframax tankers a month exporting a cargo of diluted bitumen."), section 2.2.4, ("TransMountain Response to U.S. Tribes IR No. 1' 1.2.03 states that 'while the potential exists of a navigation conflict between a project tanker and a small fishing vessel or recreational craft, the potential for damage to the tanker as a result of such an incident is minimal.' Whilst this assertion is indeed correct, the consequences of said incident would be catastrophic for the small vessel with a credible possibility of loss of life.").

¹⁶⁶ Exhibit C336-7-8 - Written Evidence, Appendix E, Declaration of Jason Gobin (May 27, 2015) (A4L7G8), ¶ 8.

¹⁶⁷ Hearing Order OH-001-2014, Vol. 10 - Oral Testimony of Chairman Leonard Forsman, (October 22, 2014) (A63743), ¶ 4523.

The right to culture and the central importance of the health of the Salish Sea to the U.S. Tribes' culture cannot be mitigated nor economically compensated. As U.S. tribal members have testified:

- “The Kinder Morgan Pipeline project creates unacceptable risk that cannot be mitigated.”¹⁶⁸
- “The act of fishing, the circulation of harvest within the community, the dietary reliance upon the harvest, and the importance of salmon and other species to the Swinomish culture and spiritual life, give treaty fishing rights a value that far transcends the economic value as a commodity.”¹⁶⁹
- “While this declaration provides information about economic value of fishing resources to the Tribe, it is not possible to overstate the central cultural importance of these activities. Although the economic benefits of fishing to the Tribe are very significant, it is critical to understand that their value is more than monetary – the loss of these resources cannot be mitigated through money or any other means.”¹⁷⁰

Prior to project approval, the NEB Panel must carefully consider the potentially devastating effect the TransMountain project will have on cultural resources, an impact which is not compensable through monetary relief.

2. *Project approval will harm U.S. Tribes' internationally recognized right to subsistence.*

U.S. Tribes and Indigenous peoples' right to their own means of subsistence is well-established under international law. Canada has a duty not to degrade the environment of the Salish Sea such that it violates U.S. Tribes' right to their own means of subsistence.

¹⁶⁸ Exhibit C336-7-7 - Written Evidence, Appendix D, Declaration of Robert Purser, Jr. (May 27, 2015) (A4L7G7), ¶ 21.

¹⁶⁹ Exhibit C336-7-5 - Written Evidence, Appendix C, part 1, Declaration of Lorraine Loomis (May 27, 2015) (A4L7G5), ¶ 33.

¹⁷⁰ Exhibit C336-7-8 - Written Evidence, Appendix E, Declaration of Jason Gobin (May 27, 2015) (AL7G8), ¶ 8.

For people who depend on natural resources for their livelihood, the right to their own means of subsistence is inherent in, and a necessary component of, the American Declaration's rights to property, health, life, and culture. The ICESCR and ICCPR both provide that all peoples "may freely dispose of their natural wealth and resources," but that "[i]n no case may a people be deprived of its own means of subsistence."¹⁷¹ The UNDRIP provides the same assurance to indigenous peoples, for whom this right is particularly vital, adding that indigenous peoples have the right "to be secure in the enjoyment of their own means of subsistence and development."¹⁷² The UNDRIP provides further recognition of cultural autonomy of Indigenous peoples through security "in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities."¹⁷³

In addition, the U.N. Committee on Economic and Social Rights in 2009 recognized in General Comment No. 21 that "[i]ndigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity."¹⁷⁴ Ultimately, the Inter-American Commission on Human Rights has recognized that indigenous peoples' "special relationship [to their territories] is fundamental...for the[ir] material

¹⁷¹ ICESCR, *supra* note 147, art. 1(2); ICCPR, *supra* note 146, art. 1(2).

¹⁷² UNDRIP, *supra* note 117, art. 20.

¹⁷³ *Id.*, Article 20.

¹⁷⁴ General Comment No. 21, *supra* note 144, Right of everyone to take part in cultural life, (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), ¶ 36, E/C.12/GC/21 (Nov. 20, 2009) (citing International Labour Organisation, Convention concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989 ("ILO, Conv. No. 169"), arts. 13-16. *See also* UNDRIP, *supra* note 117, arts. 20 and 33. The Committee added that "States parties must take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources."

subsistence.”¹⁷⁵ Indeed, in the context of indigenous peoples, the right to one’s own means of subsistence has become a recognized principle of international human rights law.

By failing to sufficiently protect the Salish Sea, Canada will deprive the U.S. Tribes of the right to their own means of subsistence, in violation of international law.¹⁷⁶ The U.S. Tribes depend on the Salish Sea for their subsistence economy and traditional activities, including hunting, fishing, and gathering are “important factors in the maintenance of their cultures and in their economic self-reliance and development.”¹⁷⁷

U.S. Tribes’ right to subsistence will be jeopardized by project approval through the increase of vessel traffic and the increased risk of an oil spill. Impacts to U.S. Tribes’ subsistence rights are implicated on the tribal community level and the individual tribal member level. Ultimately, the increase in vessel traffic will expose individual tribal members to increased safety risks, will reduce the ability to harvest fishery and other resources, will endanger individual tribal members’ lifeways by interfering with consumption rates, and will interfere with economic subsistence. The tribal community as a whole is made up of a sum of its individual members and ultimately the project approval will diminish tribal economies of the U.S. Tribes. A catastrophic oil spill combined with increased vessel traffic tied to the project will severely cripple or decimate tribal communities and individual tribal members’ ability to

¹⁷⁵ Inter-Am. C.H.R. *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II, doc. 56/09 ¶ 394 (Dec. 30, 2009), ¶ 56 (citing *Dann*, *supra* note 142, ¶ 128 (noting connection between subsistence and the right to property, stating that the American Convention’s right to property “refers ... [to] its capacity for providing the resources which sustain life”)).

¹⁷⁶ See ICCPR, *supra* note 146, art. 1(2); ICESCR, *supra* note 147, art. 1(2); UNDRIP, *supra* note 117, art. 20.

¹⁷⁷ See UNDRIP, *supra* note 117, art. 23.1.

harvest and consume treaty-reserved resources for subsistence purposes for decades that in turn, will also severely cripple U.S. Tribes' economies and tribal life ways.

The U.S. Tribes also have a substantial interest in protecting the economic welfare of individual tribal members through fishing activities. Suquamish Chairman Leonard Forsman orally testified that most tribal members are “crabbers or salmon fisherman or both” and that maintaining the “clean water, good habitat, robust fisheries are good economics as well and provide a lot of jobs.”¹⁷⁸ Although tribal communities vary in size, the written evidence further elucidates the importance and large presence of fishing in individual tribal member's lives.

Inherent in the individual interest in fishing activities is also the individual interest in safety in pursuing those activities. Increased vessel traffic will impede U.S. Tribes' right to subsistence through impacts on their means of travel and harvesting, which in turn affects U.S. Tribes' access to land and natural resources. Because travel is an essential component of U.S. Tribes' subsistence harvest, the deprivation of safe and reliable means of travel also deprives U.S. Tribes, and their individual members, of their means of subsistence. Oral testimony of Chairman Cladoosby told the story of a fisherman whose net was caught by a tanker.¹⁷⁹

Chairman Forsman also spoke of a near miss with a tanker while canoeing from Port Angeles to Songhees.¹⁸⁰ Dana Wilson testified “sometimes I'm afraid for my life, and other people.”¹⁸¹

Vessel traffic is already impeding U.S. Tribes' individual rights to harvest fish. Project approval

¹⁷⁸ Hearing Order OH-001-2014, Vol. 10 - Oral Testimony of Chairman Leonard Forsman (October 22, 2014) (A63743), ¶¶ 4534, 4605.

¹⁷⁹ Hearing Order OH-001-2014, Vol. 10 - Oral Testimony, Chairman Brian Cladoosby (October 22, 2014) (A63743) ¶¶ 4419-21.

¹⁸⁰ Hearing Order OH-001-2014, Vol. 10 - Oral Testimony, Chairman Leonard Forsman (October 22, 2014) (A63743), ¶ 4577.

¹⁸¹ Hearing Order OH-001-2014, Vol. 11 - Oral Testimony, Dana Wilson (October 23, 2014) (A63792), ¶ 4861.

will inevitably worsen the scenario by increasing the amount of vessel traffic, consequently depriving U.S. Tribes from using the natural resources they need for subsistence.

The right to subsistence is strongly implicated by tribal consumption of fishing harvests. In addition to ceremonial usage, tribal members consume resources from the Salish Sea for subsistence. Both written evidence and oral testimony indicate that tribal member consumption of fish is higher than average consumption in the general population. “A 2013 study by the United States Environmental Protection Agency documented fish consumption rates of Tulalip Tribal members that was 5 times higher than the average fish consumption rate of the general population in the United States.”¹⁸² “The survey showed that the Swinomish people eat significantly more fish and shellfish—over twice as much than does the general population. In addition, it revealed that tribal members would like to eat even more, but are unable to do so for various reasons...Swinomish would not be Swinomish without this marine diet.”¹⁸³ Suquamish tribal fish consumption is approximately 800 grams a day.¹⁸⁴ Any reduction in the tribal fish harvest, either due to an increase in vessel traffic or to environmental contamination, necessarily infringes on the subsistence diet of members of the U.S. Tribes.

The U.S. Tribes’ right to their own means of subsistence is protected under international law. Project approval will increase the impacts felt by U.S. Tribes on both the individual and tribal level. In addition, these impacts will be felt throughout all stages of the project and cannot be mitigated since project approval will necessarily result in increased vessel traffic. Project

¹⁸² Exhibit C336-7-8 - Written Evidence, Appendix E, Declaration of Jason Gobin (May 27, 2015) (A4L7G8), 1, ¶ 4.

¹⁸³ Exhibit C336-7-5 - Written Evidence, Appendix C, part 1, Declaration of Lorraine Loomis (May 27, 2015) (A4L7G5), 7, ¶ 30.

¹⁸⁴ Hearing Order OH-001-2014, Vol. 10 - Oral Testimony of Chairman Leonard Forsman (October 22, 2014) (A63743), ¶ 4541.

approval will threaten the U.S. Tribes' subsistence way of life, including their traditional hunting and fishing activities, and will diminish U.S. Tribes' right to their own means of subsistence.

3. *Failure to consider the concerns of U.S. Tribes will violate their internationally protected rights.*

If the TransMountain Expansion Project is approved, Canada will allow domestic polluters under its jurisdiction to impose the environmental costs of their pollution on the indigenous peoples of the North, both within and outside Canadian borders. Canada has a duty not to degrade or allow the degradation of the Salish Sea to an extent that infringes upon the U.S. Tribes' human right to enjoy the benefits of their culture or their means of subsistence. Although the U.S. Tribes are physically located in the United States, they are a concerned indigenous group and international party that will bear much of the risk and receive none of the benefit from project approval.

The NEB Panel should consider the impacts that approval of the TransMountain Pipeline Project will have on the U.S. Tribes' internationally recognized rights to culture and subsistence. The U.S. Tribes have extensively testified to the importance of the Salish Sea to the past, present, and future of their cultural survival. The Salish Sea is also an important base of their economic subsistence. Any effect on their right to culture or economic subsistence infringes on their internationally recognized human rights under the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the United Nations Declaration on the Rights of Indigenous Peoples.

VII. THE DRAFT CONDITIONS FAIL TO MITIGATE THE HARM TO THE U.S. TRIBES.

The U.S. Tribes believe that project should not be approved as it is counter to the public interest. The draft conditions, required by s 52(1)(b) of the *NEB Act*, do not change the U.S.

Tribe's position. If the project is approved, the draft conditions proposed by the NEB on August 12, 2015, as amended on December 11, 2015, will not prevent or mitigate the harms that the project will have on individual tribal members or the U.S. Tribes' traditional, cultural, and subsistence resources in the Salish Sea.

First, echoing the Tribe's substantive arguments above, the draft conditions specifically fail to include U.S. Tribes' interests. To the extent that the draft conditions may have an effect on mitigation measures or have an ability to protect marine resources, they only do so north of the Canadian border.

Although a number of the draft conditions include considerations for potentially affected Aboriginal groups in Canada, including requirements that TransMountain report on to the NEB on Aboriginal concerns and steps they have or have not taken to address those issues,¹⁸⁵ TransMountain has made it clear that its responsibility ends at the Canadian border, even though effects of project will be felt without regard to that line on the map.¹⁸⁶ Indeed, TransMountain seeks to limit its responsibilities even within Canada; in its comments on the draft condition for Ongoing Implementation of Marine-Related Shipping Commitments, TransMountain proposed to notify the NEB of non-compliance that it knew about on the rationale that "TransMountain does not own or operate tankers and might not have control over all tanker related activities, especially after the vessel has departed from Westridge Marine Terminal. Accordingly, TransMountain requests that the scope of this condition be limited to non-compliances that are

¹⁸⁵ Exhibit A199-3 – NEB Procedural Direction No. 17, Draft Conditions for Comment (August 12, 2015) (A4S1G2), Condition No. 84, 34-5.

¹⁸⁶ Exhibit B159-1 – TM Response to U.S. Tribes IR No. 1 (June 18, 2014) (A3Y3S6), 10.

known to TransMountain.”¹⁸⁷ By this rationale, TransMountain would bear little, if any reporting responsibility for marine compliance.

Without explicit consideration of the interests of U.S. Tribes, the draft conditions will not mitigate the effects of project approval on the U.S. Tribes. If the NEB approves this project, which it should not, it NEB should revise the draft conditions to explicitly require consultation with the U.S. Tribes and consideration of project effects throughout the entire Salish Sea. The U.S. Environmental Protection Agency also requested modifications to draft Condition No. 85 “to require coordination with interested Pacific Northwest and Alaska tribal governments and entities to ensure tribal concerns are identified and addressed to the extent practicable, and that traditional knowledge is incorporated into project design, construction, and operations.”¹⁸⁸ U.S. Tribes also request that draft Conditions Nos. 17, 64, 84, 85, 98, 100, 128, and 139 similarly require consultation with U.S. Tribes that will be impacted by the project. In addition, draft Condition No. 78, which requires reporting of updates under SARA, should be amended to include species listed under the ESA that are present in the Affected Area. Such measures would begin to hold TransMountain accountable to the purpose of the *CEAA*.

Second, the majority of the draft conditions addressing environmental protection contain no substantive requirements that TransMountain must meet or adhere to in order to actually mitigate the effects of the project: at most, the draft conditions are a plan to make a plan. Draft Condition No. 63 requires TransMountain to submit an Environmental Protection Plan for the Westridge Marine Terminal, however, the Condition only requires TransMountain to compile procedures, mitigation measures, and monitoring commitments, but does not impose an

¹⁸⁷ Exhibit B417-5 – TM Reply Evidence, Appendix 1A, Analysis of Draft Conditions, Comment on Condition No. 137, (August 20, 2015) (A4S7F2), 1A-34.

¹⁸⁸ U.S. EPA, Letter of Comment (August 18, 2015) (A4S5D5), 5.

affirmative duty on TransMountain to mitigate environmental effects.¹⁸⁹ If TransMountain is unwilling to consider the impacts to U.S. Tribes, as discussed and evidenced in their failure to consult and their deliberate omission to analyze impacts to U.S. waters, it is unlikely that they will include U.S. Tribes' interests in any plan submitted according to the draft Conditions. Unknown future measures and further future studies do not lessen the risks faced by the U.S. Tribes and Canadian First Nations immediately upon project commencement.

CONCLUSION

For the reasons discussed above, in traditional oral testimony, and in written submitted evidence, the U.S. Tribes ask the NEB to recommend denial of the Kinder Morgan TransMountain pipeline permit.

Respectfully submitted this 12th day of January, 2016.



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¹⁸⁹ Exhibit A199-3 – Draft Conditions for Comment (August 12, 2015) (A4S1G2), 28.