

**CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY  
REVIEW PANEL HEARING  
ROBERTS BANK TERMINAL 2 PROJECT**

**Closing Remarks of the Pacheedaht First Nation**

**August 26, 2019**

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## I. INTRODUCTION

1. These are the closing remarks of Pacheedaht First Nation (“Pacheedaht”) in the Canadian Environmental Assessment Agency Review Panel hearing in relation to the Roberts Bank Terminal 2 Project proposed by the Vancouver Fraser Port Authority (the “Project”). The purpose of this document is to provide the Review Panel (the “Panel”) with a brief summary of Pacheedaht’s final position on Project impacts on Pacheedaht as well as Pacheedaht’s position regarding potential mitigation and accommodation measures directed at addressing Project impacts on Pacheedaht rights and interests.
2. Pacheedaht is located on the southwest coast of Vancouver Island, in the vicinity of Port Renfrew. Pacheedaht Traditional Territory encompasses approximately 129 kilometres of marine coastline along the Strait of Juan de Fuca.<sup>1</sup> The international shipping lanes transit through the entirety of Pacheedaht’s marine Territory and intersect many important Pacheedaht fishing grounds, including Swiftsure Bank.<sup>2</sup> Pacheedaht people are a marine people and depend upon access to healthy marine resources for their cultural and material survival. If approved, the Project would have significant adverse impacts on Pacheedaht rights, culture and way of life by interfering with the ability of Pacheedaht people to safely use and access Pacheedaht Territory, adversely impacting the retention and transmission of traditional knowledge and culture among Pacheedaht people, and interfering with Pacheedaht governance rights. As a result, Pacheedaht has very serious concerns in relation to the Project.
3. The following remarks include an overview of Pacheedaht Aboriginal rights, including title, that stand to be affected by the Project, a discussion of Project impacts on Pacheedaht Aboriginal rights and a description of the measures that Pacheedaht urges the Panel to recommend in its report in order to avoid or mitigate adverse impacts on Pacheedaht Aboriginal rights.

## II. PROJECT IMPACTS ON PACHEEDAHT FIRST NATION

### A. THE DUTY TO CONSULT AND THE ROLE OF THE REVIEW PANEL

4. When the Crown has knowledge of the potential existence of the Aboriginal right and contemplates conduct that might adversely affect it, the Crown has a duty to consult and, if necessary, accommodate the Aboriginal group asserting the right.<sup>3</sup> Canada has acknowledged that it has a duty to consult Pacheedaht in relation to the Project.<sup>4</sup> Canada has not, however, clearly indicated the process by which it will assess the content of the duty to consult and accommodate Pacheedaht in relation to the Project or whether and how Canada has discharged its duty to consult and accommodate Pacheedaht.

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<sup>1</sup> Document # 1646: Pacheedaht First Nation Written Submission for the Roberts Bank Terminal 2 Public Hearing (“Written Submissions”), para. 2.

<sup>2</sup> Written Submissions, para. 32.

<sup>3</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at paras. 26-38.

<sup>4</sup> Document #407: Letter from the Canadian Environmental Assessment Agency to the Pacheedaht First Nation re: Reassessment of the Preliminary Depth of Consultation for Roberts Bank Terminal 2.

5. Canada has indicated that it intends to rely on the environmental assessment of the Project to collect information regarding Project impacts on Pacheedaht Aboriginal rights.<sup>5</sup> The terms of reference for the Panel require the Panel to accept information regarding the location, extent and exercise of potential Aboriginal rights that may be affected by the Project, adverse impacts on those rights and measures to mitigate and avoid adverse impacts on Aboriginal rights. The terms of reference specifically preclude the Panel from drawing conclusions or making recommendations regarding the validity of Aboriginal rights claims, any infringements of Aboriginal rights, the scope of the Crown's duty to consult or whether the Crown has met its duty to consult.<sup>6</sup> It is unclear who will address these issues, when and by what process. Canada's failure to establish a clear and transparent process to ensure that impacts on Pacheedaht's Aboriginal rights, including title, are properly considered and assessed is troubling.

## **B. PACHEEDAHT ABORIGINAL RIGHTS**

6. Pacheedaht First Nation (meaning "people of the sea foam") is a community of Indigenous people located on the southwest coast of Vancouver Island in the vicinity of Port Renfrew.<sup>7</sup> Pacheedaht is a "band" within the meaning of the *Indian Act* with about 300 members.<sup>8</sup> Pacheedaht people are related by kinship, language and culture to several other First Nations on Vancouver Island, but their closest relations are to the Ditidaht, their neighbours to the northwest, and the Makah across the Strait of Juan de Fuca in Washington State.<sup>9</sup> Pacheedaht Territory encompasses approximately 129 kilometres of marine coastline along the Strait of Juan de Fuca, running from about Sheringham Point to Bonilla Point.<sup>10</sup>
7. In the course of this hearing process, Pacheedaht adduced extensive evidence of the location, extent and exercise of Pacheedaht Aboriginal rights that may be affected by the Project through traditional use and occupancy studies, written submissions and in the oral hearing held at Pacheedaht on June 17, 2019.

### **(a) Pacheedaht Traditional Use and Occupancy Studies**

8. On February 20, 2018, Pacheedaht filed a document titled, "Pacheedaht First Nation Traditional Use and Occupancy Study Report for Port Metro Vancouver Roberts Bank Terminal 2 Project" dated September 23, 2015 (the "2015 TUOS").<sup>11</sup> The 2015 TUOS was prepared to assist the proponent with the preparation of the EIS for the Project. In the cover letter included with the filing, Pacheedaht advised that since the preparation of the

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<sup>5</sup> Document #1325: Letter from the Canadian Environmental Assessment Agency to Pacheedaht First Nation re: Consultation for the Roberts Bank Terminal 2 Project.

<sup>6</sup> Document #1680: Final Amendments to the Review Panel Terms of Reference and Environmental Impact Statement Guidelines: Roberts Bank Terminal 2 Project Review Panel Terms of Reference (Amended April 2019), sections 3.8, 3.9.

<sup>7</sup> Written Submissions, para. 2.

<sup>8</sup> Written Submissions, para. 2.

<sup>9</sup> Document #1150: Pacheedaht First Nation Traditional Use and Occupancy Study Report for Port Metro Vancouver Roberts Bank Terminal 2 Project ("2015 TUOS"), p. 6.

<sup>10</sup> Written Submissions, para. 2; 2015 TUOS p. 6.

<sup>11</sup> 2015 TUOS.

2015 TUOS, Pacheedaht had done additional research, which would be incorporated into an additional report. During the course of the oral hearing held at Pacheedaht on June 17, 2019, Pacheedaht presented to the Panel on Pacheedaht traditional use and occupancy of Pacheedaht Territory and advised that some of the information described in that presentation would be included in a supplemental report. That report, "2019 Update - Pacheedaht First Nation Traditional Use and Occupancy Study Report for Port Metro Vancouver Roberts Bank Terminal 2 Project" (the "2019 TUOS") was completed on July 29, 2019. In a letter filed with the Panel on August 14, 2019, Pacheedaht sought permission to file the 2019 TUOS with the Panel. In a response by email of August 19, 2019, the Panel advised Pacheedaht to submit the 2019 TUOS with Pacheedaht's closing remarks and that the Panel would subsequently determine whether to accept the 2019 TUOS.

9. In accordance with the Panel's instructions, enclosed with these remarks is a complete, confidential and un-redacted copy of the 2019 TUOS as well as a copy of the 2019 TUOS with the confidential maps found at appendix C of that document redacted, for posting on the public registry, should the Panel accept the 2019 TUOS. In accordance with the Panel's email of August 19, 2019, Pacheedaht understands that, if the Panel accepts the 2019 TUOS, the existing confidentiality agreement between Pacheedaht, the Panel and the proponent will apply to the 2019 TUOS. Pacheedaht has provided a copy of the complete, un-redacted 2019 TUOS to the proponent.
10. The 2019 TUOS includes a great deal of new information in relation to Pacheedaht people, their history, culture, rights and interests. In particular, the 2019 TUOS includes:
  - (a) An expanded discussion of traditional Pacheedaht society and culture;
  - (b) New information regarding Pacheedaht territorial rights and governance of the land, waters and resources in Pacheedaht Territory;
  - (c) New information in relation to Pacheedaht traditional harvesting, economic activities and trade of marine resources, with a focus on Swiftsure Bank; and
  - (d) Updated information in relation to Pacheedaht current use of Pacheedaht Territory for traditional purposes, including updated maps showing areas of high-intensity use.
11. It is important that the Panel has access to the information included in the 2019 TUOS in order to allow the Panel to most fully understand the nature of the Pacheedaht rights and interests that stand to be affected by the Project.
  - (b) Overview of Pacheedaht Aboriginal Rights**
12. The following is a summary of those aspects of Pacheedaht Aboriginal rights that stand to be most profoundly affected by the Project.

**(i) Marine Culture**

13. Pacheedaht culture is a marine culture, relying heavily on the resources of the sea for sustenance, trade, and cultural identity. Pacheedaht members currently exercise their aboriginal harvesting rights for a variety of resources throughout their territory. A large portion of the contemporary diet of Pacheedaht people is comprised of traditional foods.<sup>12</sup> The economic and cultural importance of Pacheedaht people's access to traditional foods, and in particular marine resources, cannot be overstated.

**(ii) Swiftsure Bank**

14. One of the most important marine areas in Pacheedaht Territory is Swiftsure Bank, a very productive marine area located at the entrance to the Strait of Juan de Fuca, which Pacheedaht has used and governed for many centuries.<sup>13</sup> Harvesting at Swiftsure Bank and safe, unimpeded access to its waters and pristine marine life are critical to sustain every aspect of the Pacheedaht way of life nutritionally, spiritually and culturally.<sup>14</sup>

**(iii) Sharing Pacheedaht Knowledge and Resources**

15. An essential part of Pacheedaht fishing and harvesting practices is the passing on of traditional knowledge from one generation to another. Fishing is a social event that brings together families and enables Pacheedaht people to connect with each other and exercise governance rights in their Territory. For Pacheedaht, fishing is cultural teaching. Pacheedaht people learn from their elders, who in turn learned from their elders, the knowledge of where, when and how to harvest, and the importance of doing so as a Pacheedaht person. Sharing Pacheedaht resources is a cultural imperative and has been carried out since time beyond memory; it is part of the cultural fabric of Pacheedaht people. Pacheedaht people share seafood both within the community and through trade and barter with other First Nations. The act of sharing seafood reinforces cultural ties within Pacheedaht and among Pacheedaht and its neighbours.<sup>15</sup>

**(iv) Governance and Stewardship**

16. Pacheedaht people are active stewards, managing and restoring lands, waters and resources within their Territory. In accordance with Pacheedaht laws, customs and traditions, Pacheedaht has both the right and the obligation to govern the resources in Pacheedaht Territory. This includes the right to regulate access to resources and the obligation to protect those resources for future generations. Pacheedaht actively exercises its right to regulate access to Swiftsure Bank as it has done for generations through evolving protocols.<sup>16</sup>

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<sup>12</sup> 2015 TUOS, p. 52.

<sup>13</sup> 2015 TUOS pp. 52-53.

<sup>14</sup> Written Submissions, para. 5.

<sup>15</sup> Written Submissions, paras. 8-12.

<sup>16</sup> Written Submissions, paras. 13-16.

17. Much more information regarding all of these aspects of Pacheedaht Aboriginal rights, including detailed information in relation to historical and current traditional practices, can be found in the 2015 TUOS, the 2019 TUOS and Pacheedaht's written submissions.

**C. PROJECT IMPACTS ON PACHEEDAHT ABORIGINAL RIGHTS**

18. Pursuant to the EIS Guidelines for the assessment of the Project, two important functions of the EIS are (1) to describe the potential adverse impacts of the Project on the ability of Aboriginal peoples to exercise their potential or established Aboriginal and Treaty rights and related interests and (2) to describe measures identified to mitigation impacts on Aboriginal and Treaty rights.<sup>17</sup>
19. As discussed below, there are serious problems with the way in which the proponent has assessed Project impacts on Pacheedaht Aboriginal rights and described measures to mitigation those impacts, which collectively operate to undermine the proponent's conclusion that the Project would not have significant adverse effects on Pacheedaht Aboriginal rights.

**(a) Project-Associated Changes in Shipping Traffic and the Mercator Report**

20. Project effects on Pacheedaht Aboriginal rights will result from changes in shipping traffic associated with the Project. In its Marine Shipping Addendum, the proponent estimated that the Project would result in 260 additional vessels transiting the marine shipping area per year, or 520 ship movements per year, when the Project reaches capacity between 2025 and 2030, representing a 9% increase in cargo and container shipping traffic in the Strait of Juan de Fuca by 2030.<sup>18</sup>
21. In November of 2018, the proponent provided the Review Panel with a report commissioned by the proponent and prepared by the consulting firm Mercator International (the "Mercator Report"). The Mercator Report forecasted that by 2035, the Project would result in no additional vessels transiting the marine shipping area but rather an increase in the average size of the vessels in the marine shipping area.<sup>19</sup> It is unclear to Pacheedaht whether and to what extent the effects of the increase in the size of the vessels forecast in the Mercator Report have been assessed but, as explained below, it has been Pacheedaht's experience that larger vessels have adverse impacts on Pacheedaht Aboriginal rights.
22. The Mercator Report is deficient in a number of important respects. The author or authors of the Mercator Report were not made available for questioning during the hearing. In fact, the Mercator Report does not even identify the author or authors of the report or provide any indication of their qualifications or of the expertise of Mercator International, making it impossible to assess the extent to which the author or authors or the report are qualified to

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<sup>17</sup> Document #1680: Updated Environmental Impact Statement Guidelines, Sections 10.2, 11.2.

<sup>18</sup> Document #316: Marine Shipping Addendum ("MSA"), section 4.0.

<sup>19</sup> Document #1362: 2018 Container Vessel Call Forecast Study and Ship Traffic Information Sheet, p. 8 ("Mercator Report").

offer the opinions contained in the Mercator Report. Moreover, the factual basis for the opinions provided in the Mercator Report is unclear: the report contains no footnotes and only a handful of references, which provide little or no indication of the sources of the data that the author or authors relied upon in forming their opinions. As a result, neither the Panel nor any of the participants has any ability to test or validate the opinions offered in the Mercator Report.

23. Putting aside the inability to test the validity of the opinions offered in the Mercator Report, the nature of those opinions suggest that they should be treated with extreme caution. The opinions offered in the report are in the nature of predictions regarding container shipping traffic in the region. These predictions, which extended more than 15 years into the future and align with the interests of the proponent, are made in the context of a global container shipping industry, which, as the report notes, has seen a great deal of change in just the past five years,<sup>20</sup> and which is dependent upon underlying conditions in the global economy that the report barely addresses. Given the volatility in the industry and the inherent instability and unpredictability in the global economy that underlies it, the opinions offered in the Mercator Report must be treated with extreme caution.
24. The Mercator Report is inherently unreliable. In light of the nature of the speculative predictions made in the report combined with the lack of transparency regarding the factual foundation for the report, the identification and qualifications of its authors as well as the failure to make the authors available for questioning, it would be unreasonable for the Panel to rely upon the opinions offered in the Mercator Report. The Review Panel must not give any weight to the opinions supplied in the Mercator Report but rather must assess Project effects in the marine shipping area based on the container shipping traffic forecasted in the Marine Shipping Addendum.

**(b) Pacheedaht Evidence on Project Impacts**

25. In the course of this hearing process, Pacheedaht adduced extensive evidence regarding the location, extent and exercise of Pacheedaht Aboriginal rights that may be affected by the Project through the 2015 TUOS, the 2019 TUOS, Pacheedaht's written submissions and in the course of the oral hearing held at Pacheedaht on June 17, 2019. The following is a brief summary of Pacheedaht's evidence in relation to some of the ways that increased container shipping traffic associated with the Project would adversely impact Pacheedaht Aboriginal rights:

- (a) Increased risks to safety: Large vessel traffic poses a significant safety risk for Pacheedaht fishers. Larger vessels have less ability to slow or change course on short notice and create a larger wake, which creates safety risks for the small craft typically used by Pacheedaht people.<sup>21</sup>

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<sup>20</sup> Mercator Report, p. 11.

<sup>21</sup> Written Submissions, para. 35.

- (b) Increased costs: Increased large vessel traffic increases the costs of fishing for Pacheedaht people by requiring investments in larger fishing boats, more safety equipment and expensive technology such as radar.<sup>22</sup>
  - (c) Interference with the personal and cultural experience of fishing: The physical presence of larger vessels, the safety risks they present and the need to be vigilant to avoid the associated dangers detract from the joy and cultural experience of being on the water and engaging in fishing practices and may lead many Pacheedaht people to choose not to harvest at Swiftsure Bank or in the vicinity of the shipping lanes throughout Pacheedaht Territory.<sup>23</sup>
  - (d) Reduced cultural transmission: Even if Pacheedaht people are willing to take the risks that fishing at Swiftsure Bank entails given increased large vessel traffic, they may be reluctant to take their children and grandchildren, interfering with the transmission of traditional knowledge to future generations, resulting in the loss of culture, traditional knowledge and the connection between Pacheedaht people and their Territory.<sup>24</sup>
  - (e) Impacts on whales: Pacheedaht were a whaling people before non-Indigenous people hunted whales nearly to extinction. Pacheedaht has a deep connection to whales and has a strong desire to see the whaling tradition return for Pacheedaht people, as it has for the Makah Tribe. Pacheedaht is concerned that Project impacts on killer whales and grey whales in Pacheedaht Territory could push whales to a point past recovery such that Pacheedaht will suffer profound cultural impacts.<sup>25</sup>
  - (f) Impacts on Pacheedaht governance rights: The Project would adversely impact Pacheedaht governance rights by materially changing the nature of the vessel traffic in Pacheedaht Territory without Pacheedaht's involvement or consent, and interfering with Pacheedaht's ability to control access to and protect important parts of Pacheedaht Territory. In addition, Pacheedaht people learn their territorial governance rights and responsibilities on the water. As a result, impacts to the ability of Pacheedaht people to travel through their Territory and harvest where they choose would undermine Pacheedaht governance rights by interfering with the ability of Pacheedaht people to transmit knowledge of their governance traditions.<sup>26</sup>
26. More information regarding these impacts on Pacheedaht Aboriginal rights can be found in the 2015 TUOS, the 2019 TUOS, Pacheedaht's written submissions and the transcripts of the oral hearing in Port Renfrew.

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<sup>22</sup> Written Submissions, para. 36.

<sup>23</sup> Written Submissions, para. 37; 2015 TUOS p. 55.

<sup>24</sup> Written Submissions, para. 38.

<sup>25</sup> Written Submissions, paras. 40-42.

<sup>26</sup> Written Submissions, paras. 43-44.

**(c) The Proponent's Assessment of Project Impacts on Pacheedaht Aboriginal Rights**

27. The proponent's assessment of Project impact on Pacheedaht Aboriginal rights is contained in the "Roberts Bank Terminal 2 Environmental Impact Statement - Marine Shipping Supplemental Report" (the "Marine Shipping Addendum").<sup>27</sup> The Marine Shipping Addendum predicts that:
- (a) Project-associated vessel traffic will have negligible (undetectable) effects on current use of the marine shipping area by Indigenous groups with respect to changes in access to preferred locations, availability and quality of resources, and quality of current use experience.
  - (b) Project-associated vessel traffic will have minor effects on current use of the marine shipping area by Indigenous groups by effecting changes in access to preferred current use locations due to shipping traffic and changes in the quality of current use experience.<sup>28</sup>
28. The Marine Shipping Addendum proposes two mitigation measures in relation to Project effects on current use: consultation on the development of a potential communication plan regarding Project-associated shipping traffic, and consultation to identify measures that would reduce the impacts of the international shipping lanes on fishing activity by Indigenous groups.<sup>29</sup> The Marine Shipping Addendum concludes that these mitigation measures will address the residual effects of Project-associated shipping on current use of the marine shipping area by Indigenous groups.<sup>30</sup>
29. The Marine Shipping Addendum applies the analysis of Project effects on current use of the Marine Shipping Area by Indigenous groups to Project effects on Aboriginal rights with the same conclusions.<sup>31</sup>
30. The Marine Shipping Addendum predicts that increased underwater noise from the Project will result in a "very small" residual effect on southern resident killer whale ("SRKW"), which would not by itself be significant but recognizes that there is an existing significant cumulative effect on SRKW.<sup>32</sup> The Marine Shipping Addendum predicts no incremental adverse Project effects on current use of SRKW by Indigenous groups on the basis that the significant cumulative effects on SRKW predate the Project.
31. Pacheedaht strongly disagrees with the conclusions of the Marine Shipping Addendum in relation to Project effects on Pacheedaht Aboriginal rights and impacts on SRKW. As explained below, the effects assessment provided in the Marine Shipping Addendum and the subsequent responses to information requests provided by the proponent contain a

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<sup>27</sup> MSA.

<sup>28</sup> MSA, section 9.5.5, p. 9.5-126.

<sup>29</sup> MSA p. 9.5-145.

<sup>30</sup> MSA p. 9.5-146.

<sup>31</sup> MSA section 9.5-11, p. 9.5-147 ff.

<sup>32</sup> MSA pp. 9.5-133-34.

number of significant errors and omissions that collectively undermine the conclusions in the Marine Shipping Addendum.

**(i) Failure to Assess Effects Specific to Pacheedaht**

32. Pacheedaht provided extensive comments on the insufficiency of the information presented in the Marine Shipping Addendum.<sup>33</sup> After reviewing the responses to information requests dealing with Project effects on Aboriginal rights (and current use), Pacheedaht expressed concerns that this information was not sufficient to adequately assess Project impacts on Pacheedaht Aboriginal rights.<sup>34</sup> In particular, Pacheedaht noted that the responses provided simply reiterated the conclusions stated in the Marine Shipping Addendum, which were not specific to Pacheedaht and did not address a wide range of marine shipping related concerns raised by Pacheedaht, including concerns in relation to inadequate assessment of:
- (a) Impacts from ship wake on fishers and harvesters;
  - (b) Damage to intertidal and shoreline habitat;
  - (c) Economic impacts of the Project, including on commercial fisheries today and future fisheries anticipated through treaty;
  - (d) Ability to safely harvest at Swiftsure Bank and in the vicinity of the shipping lanes throughout Pacheedaht Territory;
  - (e) Damage to or loss of fishing gear, change in fishing practices and locations;
  - (f) Impacts to the intergenerational transfer of knowledge;
  - (g) Cumulative effects on Pacheedaht's marine harvesting, including marine mammals, fishing, and hunting;
  - (h) Loss of access to marine resources; and
  - (i) Health impacts to Pacheedaht from loss of marine resources.<sup>35</sup>
33. Another important omission in the EIS is an assessment of Project impacts on Pacheedaht governance rights. As discussed in the 2019 TUOS, since well before the time of European contact, the ancestors of Pacheedaht people exercised governance over Pacheedaht Territory, controlling access to Pacheedaht marine territory and exercising stewardship obligations over Swiftsure Bank.<sup>36</sup> As highlighted above, the Project would interfere with these rights and with the ability of Pacheedaht to transmit knowledge of their governance traditions. The significance of these impacts has not been assessed.

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<sup>33</sup> Document #672: Pacheedaht comments on the information relating to the environmental assessment of the Roberts Bank Terminal 2 Project.

<sup>34</sup> Document #1452: Pacheedaht comments on the Sufficiency of Information.

<sup>35</sup> Document #1452: Pacheedaht comments on the Sufficiency of Information, pp. 2-3.

<sup>36</sup> 2019 TUOS p. 11-13, 21-28.

34. The Marine Shipping Addendum fails to address the particular effects of the Project on Pacheedaht Aboriginal rights, and instead assesses effects on current use of all Indigenous groups in a generic way that fails to account for the meaningful differences in the distinct geographical, cultural and economic conditions of Pacheedaht. Moreover, the analysis contained in the Marine Shipping Addendum fails to deal with many of the specific concerns raised by Pacheedaht.
35. Pacheedaht and other Indigenous groups are not alone in their criticisms of the way in which the proponent has assessed impacts on Aboriginal rights and current use. The Government of Canada also expressed concerns regarding the proponent's assessment of these Project effects. CEAA noted that the proponent offered no analysis of effects on physical and cultural heritage and that it is unclear how the proponent determined that impacts on Aboriginal rights will be insignificant absent collaboration with Indigenous groups regarding effects thresholds.<sup>37</sup> CEAA also acknowledged gaps between the proponent's conclusions on impacts on Aboriginal rights and Indigenous groups' views and noted that the proponent declined requests to use CEAA's recommended methodology in relation that effects assessment.<sup>38</sup> The Canadian Coast Guard expressed concerns about the lack of follow-up programs for marine shipping, which it linked to predicted effects of marine shipping on current use for traditional purposes.<sup>39</sup> These and other concerns indicate serious deficiencies in the way in which the proponent assessed Project effects on Indigenous groups.

**(ii) Errors in Impact Pathway Assessment**

36. The Marine Shipping Addendum considers two impact pathways in relation to impacts on current use of the marine shipping area by Indigenous groups: (1) displacement of fishing activity caused by large vessel shipping traffic, and (2) interference with fishing activity caused by wake from large vessel shipping traffic.<sup>40</sup>
37. In relation to the second impact pathway, vessel wake, the Marine Shipping Addendum concludes that wake from Project-associated vessels will be indistinguishable from wind-generated waves except in calm conditions, and that, as a result, waves from vessel wake from Project-associated vessel traffic is not expected to be a factor.<sup>41</sup>
38. The wave environment effects assessment in the Marine Shipping Area is fundamentally flawed. This assessment is directed at shoreline impacts of vessel wake and, as a result, the study area is limited to three localized zones where shoreline impacts are expected to be most significant, all of which are located in Segment B of the marine shipping area, well outside of Pacheedaht Territory.<sup>42</sup> The Marine Shipping Addendum nevertheless relies upon the modeling of vessel wake in these three zones to assess the effects of vessel wake on

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<sup>37</sup> Document # 1614: Written Submissions of CEAA on behalf of the Government of Canada, p. 22.

<sup>38</sup> Document # 1614: Written Submissions of CEAA on behalf of the Government of Canada, pp. 41-42.

<sup>39</sup> Document # 1614: Written Submissions of CEAA on behalf of the Government of Canada, pp. 25, 31.

<sup>40</sup> MSA p. 9.5-128.

<sup>41</sup> MSA pp. 9.5-129 to 9.5-130.

<sup>42</sup> MSA Figure 7.2-1.

fishing activities throughout the marine shipping area, notwithstanding that the wake model relied upon predicts that wake size varies with vessel speed, channel depth and distance from the vessel, all of which will be markedly different in other parts of the marine shipping area.<sup>43</sup>

39. The wave environment effects assessment is based on a model that was not verified based on measurements of actual vessel wake.<sup>44</sup> As a result, even the conclusions in relation to the localized shoreline wave activity the model is intended to predict are unreliable. The key prediction offered by that model is that the majority of wake-generated waves reaching the shoreline in the three local zones assessed will be between 10 cm and 12.5 cm in height.<sup>45</sup> Even if that prediction were accurate, however, it does not follow that wave conditions will be the same offshore on Swiftsure Bank, where wake is intercepted closer to the vessel and where shipping traffic tends to travel at higher speeds.<sup>46</sup> On the contrary, the parameters of the model suggest that wake-generated waves in these conditions will be different. By transposing predicted localized shoreline wave conditions to the entire marine shipping area without taking into account local conditions as the model employed requires, the Marine Shipping Addendum fails to provide a reliable assessment of impacts from vessel wake.
40. The evidence from Pacheedaht people who have actually spent time on Swiftsure Bank and experienced waves generated from large vessel wake stands in marked contrast to the predictions in the Marine Shipping Addendum, in particular that ship-wake from Project-associated vessels would be “indistinguishable” from wind-generated waves.<sup>47</sup> This conclusion is fundamentally at odds with the experience of Pacheedaht fishers regarding the danger posed by wake from large vessels.<sup>48</sup> It also fails to account for the fact that Project-related vessels create wake from different directions and at different frequencies than natural waves, making them more difficult to predict and more dangerous for Pacheedaht harvesters.<sup>49</sup> The proposition advanced in the Marine Shipping Addendum that vessel wake would not affect fishing activity by Indigenous groups does not withstand scrutiny and cannot be safely relied upon by the Panel. The video clip of Ditidaht fishers that Pacheedaht showed at the oral hearing in Port Renfrew clearly refutes that proposition.
41. Regarding the second impact pathway, displacement of fishing activity caused by shipping traffic, the Marine Shipping Addendum states that it is difficult to predict to what degree the Project-associated increase in shipping traffic would translate into an increase in interactions with current use activities but that the magnitude of the adverse impact is expected to be less than the magnitude of the increase in cargo and container shipping

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<sup>43</sup> MSA Appendix 7.2-B.

<sup>44</sup> MSA p. 7.2-3.

<sup>45</sup> MSA p. 7.2-13. The basis for this conclusion is unclear.

<sup>46</sup> MSA Table 4-5.

<sup>47</sup> MSA p. 9.4-28.

<sup>48</sup> Document #1972: Hearing Transcript volume 21, June 17, 2019, pp. 94-96, 100, 133-34. To the extent that the proponent has suggested that certain classes of very large vessels create proportionally smaller wake, Pacheedaht has no confidence in such statements, which are not consistent with the experience of Pacheedaht fishers and harvesters.

<sup>49</sup> 2015 TUOS p. 55.

traffic (9% in the Strait of Juan de Fuca) by some unknown factor because current use activities are unlikely to overlap with every Project-associated ship movement. As a result, the Marine Shipping Addendum predicts that, if the effect is measurable, it will be “at most, minor”.<sup>50</sup>

42. Like the assessment of vessel-generated wake, the analytical approach that the Marine Shipping Addendum relies upon to conclude that effects due to displacement by Project-associated shipping will be insignificant is fundamentally flawed. While it may be true that not every new ship movement associated with the Project will interfere with Pacheedaht fishers, it does not follow that the total increase in displacement caused by the Project will be less than the total increase in Project-associated traffic. As the Marine Shipping Addendum recognizes, “Current Use activities occurring in or near the shipping lanes of the [marine shipping area] would be expected to temporarily displace those Current Use activities in much the same way as they are currently displaced in these areas”.<sup>51</sup> In other words, Project-associated shipping traffic will displace Pacheedaht fishers in the same way as existing shipping traffic. As a result, one would expect Project-associated shipping traffic would have no less impact on Pacheedaht use of its marine territory than existing shipping traffic.
43. By way of analogy, if an additional lane of traffic were added to a highway resulting in a 10% increase in traffic, the increase in traffic noise experienced by a person living in a home adjacent to the highway would be expected to be 10%. That the person will not be home at all times during which additional traffic travels the highway would not affect the magnitude of the increase in noise experienced, provided that the additional traffic were expected to occur in the same distribution as the current traffic and not, for example, disproportionately at times when the person is away from home.
44. The only basis on which Project-associated shipping traffic could be expected to displace Pacheedaht fishers at a magnitude that is less than the total increase shipping traffic attributed to the Project would be if Project-associated shipping traffic were less likely to displace Pacheedaht fishers than other shipping traffic, a proposition that is plainly inconsistent with the evidence in the Marine Shipping Addendum. Based on that evidence, the increase in displacement of Pacheedaht fishers attributed to the Project is likely to be equal to the increase in Project-associated shipping traffic. Accordingly, it is incorrect to discount the effect by some unknown factor such that the effect is no considered significant. The forecasting in the Marine Shipping Addendum indicates that the Project will result in 9% increase in cargo and container shipping traffic in the Strait of Juan de Fuca.<sup>52</sup> It follows that the Project can be expected increase displacement of Pacheedaht use of Swiftsure Bank by the same proportion. As discussed below, in the context of the existing interference with Pacheedaht Aboriginal rights, this would be a significant effect.

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<sup>50</sup> MSA p. 9.5-144.

<sup>51</sup> MSA p. 9.5-144.

<sup>52</sup> MSA section 4.0.

**(iii) Failure to Assess Cumulative Impacts**

45. The Marine Shipping Addendum does not assess the cumulative impact of the Project on Pacheedaht Aboriginal rights.<sup>53</sup> This is an important omission as it is the cumulative impact of the Project, i.e. its impact in the context of all of the existing barriers to the exercise of Pacheedaht Aboriginal rights, which will be experienced by Pacheedaht people.
46. Project impacts on Pacheedaht Aboriginal rights must be viewed in context. Large vessel traffic in the vicinity of Swiftsure Bank has already fundamentally changed the way in which Pacheedaht people practice their Aboriginal rights and maintain their culture. It is far more difficult for Pacheedaht people to utilize Swiftsure Bank and areas in proximity to the shipping lanes than it has been in the past because of the dangers posed by tankers, cargo ships and other large vessel traffic transiting the Strait of Juan de Fuca. In particular, since 2005, Pacheedaht people have experienced more pronounced impacts from large vessel traffic in Pacheedaht Territory as a result of Canada's decision, made without consulting Pacheedaht, to move the international shipping lanes northward such that they now intersect with the south-east portion of Swiftsure Bank.<sup>54</sup> A generation ago, Pacheedaht families would travel to Swiftsure Bank on small vessels such as herring skiffs but, due to the volume and nature of marine traffic in the area, it is no longer safe for a family with children to make this trip in a small vessel.<sup>55</sup> This context must be taken into account in the assessment of Project impacts on Pacheedaht Aboriginal rights.
47. Pacheedaht's evidence is that the threshold at which the volume of large vessel traffic at Swiftsure has significant adverse effects on Pacheedaht Aboriginal rights and the economic and cultural values those rights support has already been exceeded.<sup>56</sup> Any additional impacts, even if modest, are therefore significant. Due to the cumulative impact of past and existing interferences with Pacheedaht rights, any further reduction, of any magnitude, in Pacheedaht members' access to fisheries and intertidal resources will result in significant losses to Pacheedaht traditional marine harvesting activities, culture and rights.

**(iv) Inadequate Mitigation Measures**

48. The mitigation measures proposed in the Marine Shipping Addendum and relied upon to address Project effects on Aboriginal rights (and current use) are not described at anywhere near a sufficient level of detail to allow the Panel to determine the degree to which they could offset the adverse effects of marine shipping on Pacheedaht Aboriginal rights. Moreover, as CEAA noted, it is unclear how traditional knowledge or input from Indigenous groups informed the development of mitigation measures designed to address impacts on Aboriginal rights and current use.<sup>57</sup>

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<sup>53</sup> The MSA did not include an assessment of future cumulative effects on current use or Aboriginal rights on the basis of the conclusion that routine marine shipping associated with the Project is not expected to result in any measurable residual effect on current use or aboriginal rights that is likely to interact cumulatively with changes caused by other projects or activities: MSA p. 9.5-146.

<sup>54</sup> 2015 TUOS pp. 53-54.

<sup>55</sup> Written Submissions, para. 33; 2015 TUOS pp. 55-56.

<sup>56</sup> 2015 TUOS p. 45.

<sup>57</sup> Document # 1614: Written Submissions of CEAA on behalf of the Government of Canada, p. 22.

49. The Marine Shipping Addendum proposes two mitigation measures in relation to Project effects on current use:
- (a) Consultation on the development of a potential communication plan that would provide Indigenous groups with real-time information about Project-associated shipping traffic shipping traffic; and
  - (b) Consultation to identify measures that would reduce the impacts of the international shipping lanes on fishing activity by Indigenous groups.<sup>58</sup>
50. The first measure is a commitment to consult Indigenous groups regarding a “potential” plan to provide information to Indigenous groups in relation the movement of Project-associated container traffic (but not any other shipping traffic, an important qualification given the proponent’s position that, according to the Mercator Report, there will be no Project-associated container traffic). The Marine Shipping Addendum is silent as to the scope of such a plan, how it might be implemented and its expected efficacy, at what cost and on what timeline. There is no commitment to implement such a plan but only to consult on it. Without any commitment to actually implement such a plan and without more concrete information in relation to the potential plan, this proposed mitigation measure is meaningless.
51. The second measure is limited to consultation to “identify measures that would reduce the impact of the international shipping lanes” on Indigenous fishing activity. What these measures might be is left unsaid. The proponent has acknowledged that the location and operation of the international shipping lanes are beyond its jurisdiction. In response to questioning, the proponent indicated that it had ruled out requiring container traffic to enter the Strait of Juan de Fuca in convoys, that participation in its voluntary underwater noise reduction program had been very limited, and that the proponent does not anticipate the voluntary lateral displacement trial to be repeated or made permanent due to objections from the US Coast Guard.<sup>59</sup> In the circumstances, a commitment by the proponent to consult with Indigenous groups regarding measures that would reduce impacts of the international shipping lanes without any detail as to what that consultation might look like, what measures might be available or how the proponent might be able to advance such measures is meaningless.
52. The proponent’s failure to provide for meaningful mitigation measures in relation to impacts on Aboriginal rights is important as the Marine Shipping Addendum relies upon these proposed measures to purportedly address residual impacts on current use and Aboriginal rights. The mitigation measures articulated in the Marine Shipping Addendum cannot be relied upon to mitigate Project impacts on Pacheedaht Aboriginal rights.

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<sup>58</sup> MSA p. 9.5-145.

<sup>59</sup> Document #1821: Hearing Transcript volume 12, May 28, 2019, pp. 2991-92, 2997-98, 3010-11.

**(d) Impacts on SRKW**

53. Pacheedaht disagrees with the proponent's conclusion that incremental impacts on SRKW are insignificant. Fisheries and Oceans Canada was critical of the proponent's assessment of impacts on SRKW. In particular, Fisheries and Oceans Canada concluded that:
- (a) Underwater noise from marine shipping associated with the Project will contribute to cumulative effects on SRKW;
  - (b) The proponent's conclusions that SRKW ability to forage in critical habitat will not be adversely affected by the Project and that no population-level effects will occur have a high level of uncertainty and low confidence because of limitations in the modelling; and
  - (c) There is a medium to high risk of collisions with SRKW and humpback whales in the Swiftsure Bank area.<sup>60</sup>

Pacheedaht agrees with these comments of Fisheries and Oceans Canada regarding Project impacts on SRKW.

54. Pacheedaht also disagrees with the proponent's conclusion that Project effects on SRKW will not significantly impact Pacheedaht Aboriginal rights. As noted above, whales are an integral part of Pacheedaht culture and Pacheedaht is concerned that Project effects on killer whales and grey whales in Pacheedaht Territory may push whales to a point past recovery resulting in profound adverse effects on Pacheedaht culture and Aboriginal rights.<sup>61</sup> As a result, significant adverse impacts on SRKW will have significant adverse effects on Pacheedaht Aboriginal rights.
55. Cumulative impacts on SRKW health has opened up a new pathway for adverse effects on Pacheedaht Aboriginal rights. As discussed below, in response to concerns regarding SRKW viability, Canada has proposed management measures for SRKW critical habitat including salmon or finfish closures.<sup>62</sup> Such measures tend to have a disproportionate adverse effect on Pacheedaht people whose traditional fishing grounds overlap with SRKW critical habitat.

**(e) Summary**

56. The extent to which the Project will have adverse effects on Pacheedaht Aboriginal rights depends in large part upon the extent to which the Project results in changes to container shipping traffic in the Strait of Juan de Fuca. The Marine Shipping Addendum predicted that, when it reaches capacity, the Project will result in an additional 520 vessel movements per year and assessed Project effects on that basis. The proponent subsequently filed the Mercator Report, which predicted that the Project would lead to an increase in the size of the vessels transiting the marine shipping area but not their number. For the reasons explained above, the Mercator Report is inherently unreliable and the Panel must assess

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<sup>60</sup> Document #1742: Fisheries and Oceans Canada Oral Presentation on Marine Mammals and Underwater Noise.

<sup>61</sup> Written Submissions, paras. 40-42.

<sup>62</sup> Written Submissions, para. 60, Annex 9, 10.

Project effects based upon the shipping traffic predictions made in the Marine Shipping Addendum, which are the basis for the effects assessment provided by the proponent.

57. There are a number of fundamental flaws in the way in which the Marine Shipping Addendum assesses Project impacts on Pacheedaht Aboriginal rights:
- (a) Despite Pacheedaht having provided a great deal of evidence in relation to its Aboriginal rights, existing impacts on those rights and the nature of anticipated impacts resulting from changes in container shipping traffic in the Strait of Juan de Fuca, the Marine Shipping Addendum assesses Project impacts on Pacheedaht in a generic fashion and, in doing so, overlooks critical impact pathways such as impacts on governance rights.
  - (b) The generic assessment of impacts on Aboriginal rights and current use offered in the Marine Shipping Addendum identifies two potential impact pathways, vessel wake and displacement, but understates impacts from both pathways due to serious methodological errors, completely undermining the conclusion that the Project is unlikely to have significant adverse effects on Pacheedaht Aboriginal rights.
  - (c) In order to address any residual Project impacts on Aboriginal rights, the Marine Shipping Addendum proposes two mitigation measures. Both measures, however, are so patently inadequate and underdeveloped as to offer no real potential mitigating effect.
  - (d) Despite the emphasis on cumulative impacts in Pacheedaht's evidence and despite the importance of understanding cumulative impacts in order to understand the true effect of the Project on Indigenous peoples, the proponent failed to undertake a cumulative effects assessment in the Marine Shipping Addendum.
  - (e) The proponent's assessment that the Project is unlikely to have significant incremental adverse effects on SRKW is flawed due to material methodological errors. These errors also affect the conclusion that impacts on SRKW will not have significant adverse effects on Pacheedaht Aboriginal rights.
58. The Marine Shipping Addendum cannot be relied upon to accurately assess Project impacts on Pacheedaht Aboriginal rights. In order to get the clearest possible picture of Project impacts on Pacheedaht Aboriginal rights, the information presented in the Marine Shipping Addendum must be read critically and in conjunction with Pacheedaht's evidence in relation to its particular traditional practices, the Aboriginal rights and culture those practices support, and the cumulative impact of two hundred years of infringement of Pacheedaht Aboriginal rights in myriad ways. Examined in that way, the evidence leads to the inescapable conclusion that the Project is likely to have significant adverse effects on Pacheedaht Aboriginal rights.

**D. PROPOSED MITIGATION MEASURES**

59. In light of the serious gaps and flaws in the proponent's assessment of Project impacts on Pacheedaht Aboriginal rights and the evidence that the Project is likely to have significant adverse effects on Pacheedaht Aboriginal rights, the Panel should recommend against approving the Project.
60. If the Project is to proceed, the design and implementation of meaningful mitigation measures will be critical to avoid, minimize and manage adverse impacts on Pacheedaht Aboriginal rights. Below is a description of the measures that Pacheedaht urges the Panel to recommend in its report in order to mitigate and avoid impacts adverse impacts on Pacheedaht Aboriginal rights.
61. Many of the mitigation measures needed to address Project impacts on Pacheedhat Aboriginal rights are beyond the jurisdiction of the proponent and depend upon action by the federal government. If the federal government is not prepared to adopt and implement appropriate mitigation measures, the government should not approve the Project.

(a) **Consent-based and collaborative Nation-to-Nation decision-making as required by *UNDRIP***

Condition/Recommendation

In implementing all conditions and recommendations in relation to the Project, Canada shall engage in consent-based and collaborative, bilateral, Nation-to-Nation decision-making with Indigenous groups.

Rationale

The Project offers real opportunities to advance reconciliation, including by engaging in consent-based processes as required under the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which Canada has committed to implementing.

Major infrastructure projects such as the Project represent an important opportunity to engage in consent-based and collaborative Nation-to-Nation decision-making as required by UNDRIP. In order to take advantage of these opportunities, Canada must exercise its jurisdiction and employ its resources to protect Indigenous rights and interests, engage in consent-based processes and work collaboratively with Indigenous groups on designing and implementing mitigation measures in relation to the Project. Such partnerships at the Nation-to-Nation level are required in order for Canada to act consistently with UNDRIP as well as its commitments in the Principles respecting the Government of Canada's relationship with Indigenous peoples, including Principle 8 which requires partnership with Indigenous groups in relation to resource development.

(b) **Special routing measures at Swiftsure Bank**

Condition/Recommendation

Canada must work directly with Pacheedaht, in conjunction with the Ditidaht First Nation, on any decisions to put special routing in place, including a Deviation Point, changes to the traffic separation scheme or realignment of the shipping lanes, for shipping through the Strait of Juan de Fuca, including at Swiftsure Bank. Part of this effort may include Canada undertaking an updated marine traffic risk assessment for the Strait of Juan de Fuca in collaboration with Pacheedaht and Ditidaht.

In working with Pacheedaht in relation to this Condition/Recommendation, Canada must take into account impacts to Pacheedaht's rights and title at Swiftsure Bank.

Canada must also take steps to cooperate and collaborate with the United States on transboundary issues relating to the location of the shipping lanes, including potential voluntary and legislative processes to amend the traffic separation scheme. This engagement process should include the Makah Tribal Council and Office Marine Affairs.

Canada must support Pacheedaht's efforts to acquire standing to participate in the proceedings of International Maritime Organization.

Rationale

Mitigation measures need to consider Indigenous groups' ability to exercise their fishing and harvesting rights safely in Canadian waterways. Pacheedaht has provided evidence about interference with its fishing activities created by the current location of the shipping lanes and supports the implementation of special routing to avoid Swiftsure Bank. Pacheedaht has been requesting a realignment of the shipping lanes in the Strait of Juan de Fuca for many years, including in the context of the review of the Project. Pacheedaht must be an active partner in the decision-making process in relation to whether a Deviation Point or any other changes to the shipping lanes are implemented, including ship behaviour and speed, and must be fully engaged from the very beginning of the process.

Any changes to the location of the shipping lanes needs to address not just impacts to species at risk, but also Pacheedaht's rights and title at Swiftsure Bank and elsewhere in Pacheedaht's marine Territory.

(c) **Marine Emergency Response Centre at Pacheedaht**

Condition/Recommendation

Canada must oversee the establishment of a marine emergency response centre at Port Renfrew in Pacheedaht Territory, to be collaboratively managed by Pacheedaht and the Canadian Coast Guard, using the Makah/US Coast Guard example described in Pacheedaht's Written Submissions as a guide.<sup>63</sup>

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<sup>63</sup> Written Submissions, para. 48, Annex 3.

The emergency response centre must be staffed by fully trained Pacheedaht members and adequate funding needs to be provided to Pacheedaht to ensure they have the capacity to adequately train emergency response workers and respond to emergencies. In establishing the emergency response centre, Fisheries and Oceans Canada must work with Pacheedaht on identifying the necessary infrastructure and resources to ensure the centre provides adequate emergency response capacity. Canada must also work with Pacheedaht on the necessary transboundary coordination. The marine emergency response centre is to be more than an investment in facility and its staff; it is to be an integral part of a long-term effort toward collaborative management of marine safety in Pacheedaht Territory.

#### Rationale

Buoy J at the mouth of the Strait of Juan de Fuca has been identified as a high risk area for a marine incident within the Strait of Juan de Fuca.<sup>64</sup> Currently, there is no Canadian Coast Guard presence in the Port Renfrew area, and there is inadequate capacity to properly respond to a marine emergency.<sup>65</sup> A marine emergency response centre is needed at Port Renfrew in order to ensure timely emergency response to a spill or accident in Pacheedaht's marine Territory. Given Pacheedaht's extensive knowledge of its marine environment and the stewardship role it plays in its marine waters, Pacheedaht members are best placed to respond to a marine emergency in their Territory.

It is critical that collaborative management with Pacheedaht occurs in Pacheedaht Territory. One model that can be looked to in order to devise an approach in Pacheedaht's Territory is the Makah Indian Tribe's relationship and collaborative management processes with the US Coast Guard and other response organizations in Washington State, including in Neah Bay across from Pacheedaht Territory.<sup>66</sup>

#### (d) **Strait of Juan de Fuca Integrated Response Planning**

##### Condition/Recommendation

Pacheedaht understands that integrated response planning for the Strait of Juan de Fuca is underway. Pacheedaht must be fully engaged in this planning effort on a Nation-to-Nation basis, as with all response planning within Pacheedaht's marine Territory.

##### Rationale

Same as above.

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<sup>64</sup> Written Submissions, para. 45.

<sup>65</sup> Written Submissions, para. 45.

<sup>66</sup> Written Submissions, para. 48, Annex 3.

(e) **Indigenous Coast Guard Auxiliary**

Condition/Recommendation

Canada must provide Pacheedaht with further information about the Indigenous Coast Guard Auxiliary, including how its roles and responsibilities relate to other emergency response initiatives within the Strait of Juan de Fuca such as the Canadian Coast Guard, the Western Canada Marine Response Corporation, and transboundary emergency response initiatives.

Rationale

Same as above.

(f) **Protection of Aboriginal rights**

Condition/Recommendation

Before taking any steps in the management of critical SRKW habitat, Canada must be required to identify how Pacheedaht's Aboriginal rights will be protected in the implementation of any management tools that are used.

Rationale

The Project, and other proposed projects, will adversely affect SRKW and SRKW habitat. Canada has announced that it will take steps to mitigate effects to SRKW and SRKW habitat but, in doing so, Canada must not add to adverse effects to Pacheedaht Aboriginal rights by restricting Pacheedaht fishing opportunities.

Pacheedaht is aware that the proposed management measures for SRKW critical habitat include salmon fishing or finfish closures.<sup>67</sup> Pacheedaht's Aboriginal rights need to be respected in any measures that are implemented in relation to the protection of the SRKW. As a whaling people of the west coast, whales are very important to Pacheedaht and have special spiritual significance.<sup>68</sup> Pacheedaht whalers had to go through special ceremonies and rituals to prepare for whaling; the cultural identity of Pacheedaht people is built on these practices.<sup>69</sup> Pacheedaht supports conditions that will help mitigate Project impacts to whales, however, care must be taken to ensure any mitigation measures that are imposed will not unnecessarily result in further adverse impacts to Pacheedaht Aboriginal rights. Pacheedaht cannot bear the brunt of conservation measures.

Furthermore, Pacheedaht's rights and jurisdiction must be respected in any areas managed by Parks Canada, and collaborative management arrangements need to be developed between Parks Canada and Pacheedaht, as noted below.

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<sup>67</sup> Written Submissions, para. 60, Annex 9, 10.

<sup>68</sup> Written Submissions, para. 40.

<sup>69</sup> Written Submissions, para. 41.

(g) **Protected Areas for SRKW**

Condition/Recommendation

Canada must work with Pacheedaht to collaboratively manage critical SRKW habitat, and any marine conservation areas or sanctuaries that are developed, within Pacheedaht's Territory.

Rationale

If Canada establishes an *Oceans Act* Marine Protected Area, consent-based processes need to be followed given that the entirety of Pacheedaht's marine Territory is SRKW critical habitat. As a result, Pacheedaht needs to be fully involved in decision-making around what protective measures are implemented, and where.

Pacheedaht needs to be part of the decision-making process in relation to the establishment of any protected areas in Pacheedaht Territory. Any protected areas established within Pacheedaht Territory need to be collaboratively managed with Pacheedaht. Canada has already committed to undertake collaborative management of protected areas, so this commitment needs to be recognized in the Project conditions/recommendations.

(h) **Oceans Protection Plan**

Condition/Recommendation

Canada must address the funding and resources deficits to support and facilitate the participation of Indigenous groups in the Oceans Protection Plan ("OPP") initiatives.

Given the number of different initiatives being undertaken by Canada in relation to the OPP and marine issues generally, Canada should fund Indigenous Program Coordination Officers for coastal First Nations to assist Indigenous groups in accessing information about initiatives, opportunities for participation, and participant funding in relation to the OPP and other marine initiatives. Canada must also work with Indigenous groups to provide clarity in terms of the relationship between these broader initiatives and the Project conditions that the proponent and Canada will be required to meet.

Rationale

Pacheedaht and other Indigenous groups require capacity in order to effectively participate and partner in OPP initiatives.

(i) **Indigenous and Multi-Stakeholder Working Group for SRKW**

Condition/Recommendation

Canada must facilitate Pacheedaht's participation in this working group, including by providing the funding necessary to participate. This is in addition to direct Nation-to-Nation engagement on issues relating to the protection of SRKW in Pacheedaht Territory.

Rationale

Given the potential impacts to Pacheedaht's Rights and Title from the potential measures being contemplated in relation to the protection of SRKW, Pacheedaht needs to be actively involved in this Working Group.

(j) **SRKW Working Groups**

Condition/Recommendation

Canada must facilitate Pacheedaht participation, including by providing sufficient participant funding, in all existing and any additional federal working groups established to address issues relating to SRKW.

Rationale

Pacheedaht is currently participating in the SRKW Working Groups relating to prey availability, sanctuaries, and small vessels. However, Pacheedaht has yet to be engaged in the working groups relating to large vessels and contaminants.

In general, Pacheedaht's experience with the SRKW Working Groups has been characterized by insufficient participant funding, a general lack of coordination between the various working groups and other related initiatives, insufficient time and resources being devoted to the mandates of the working groups, and inadequate information being shared with the Nations.

Notwithstanding the importance of enabling Pacheedaht's meaning participation in SRKW working groups as described above, the most important dialogue for Pacheedaht in relation to SRKW is consultation with Fisheries and Oceans Canada on a nation-to-nation basis. Pacheedaht is committed to continuing to work directly with Canada on SRKW issues as they relate to Pacheedaht Territory.

**E. CONCLUSION**

62. Pacheedaht culture and way of life are inextricably linked to the sea. Pacheedaht relies upon its marine territory and, in particular, Swiftsure Bank, for its cultural and economic survival. Pacheedaht takes its obligations to govern and protect its marine territory very seriously. These obligations are based in traditional practices that pre-date European contact and support Aboriginal rights, including Aboriginal title, in Pacheedaht Territory.

63. Since the time of European contact, Pacheedaht Territory has been transformed. Despite the changes, Pacheedaht people continue to rely on Pacheedaht Territory and continue to work to protect it. This is the lens through which Pacheedaht views the Project and this hearing process. Through its participation in this process, Pacheedaht strives to assert its rights to Pacheedaht Territory and protect the culture and way of life that territory supports.
64. In the course of this process, Pacheedaht has produced a great deal of evidence, including two lengthy traditional use studies that document Pacheedaht traditional practices, both historical and current, the culture they support, and the threats they face from the Project. Pacheedaht has also engaged with the proponent and the evidence it has provided, including the EIS, the Marine Shipping Addendum and the Mercator Report.
65. The evidence indicates that the Project will have significant adverse effects on Pacheedaht Aboriginal rights. The Project appears likely to increase the volume and size of container shipping vessels in the Strait of Juan to Fuca. These vessels, which reach 400 metres in length and traverse Swiftsure Bank on their way to and from Vancouver, present a very real and concrete threat to Pacheedaht people in their daily lives. Due to the cumulative impact of centuries of infringement of Pacheedaht Aboriginal rights, not least the existing level of large vessel traffic at Swiftsure Bank, even a modest increase in the size or number of vessels transiting Pacheedaht territory represents a significant adverse effect on Pacheedaht Aboriginal rights.
66. Due to the risks that the Project presents and the context in which Pacheedaht people find it increasingly difficult and dangerous to continue to practice their way of life, Pacheedaht has very serious concerns regarding the Project. The mitigation measures proposed to-date, which are not responsive to Pacheedaht's concerns, are woefully inadequate. In the circumstances, before the Project can be considered for approval, there must be deep consultation with Pacheedaht leading to the development of meaningful accommodation measures to avoid Project impacts to the extent possible and, where avoidance is not possible, mitigate or manage impacts. Pacheedaht has proposed some such measures but there is much more work to do in this regard. Pacheedaht is determined to see that effort through in order to protect its Territory and way of life for future generations.