



February 11, 2022

Impact Assessment Agency of Canada  
160 Elgin Street, 22nd Floor  
Ottawa, ON K1A 0H3  
CANADA

*Submitted via online portal:* Reference Number 80054

Re: Swinomish Indian Tribal Community, Suquamish Tribe, and Tulalip Tribes  
("U.S. Tribes") Comments on Roberts Bank Terminal 2 Potential Environmental  
Assessment Conditions and Additional Information

Greetings:

The Swinomish Indian Tribal Community, Suquamish Tribe, and Tulalip Tribes ("U.S. Tribes") have actively participated in the Canadian Environmental Assessment Agency's environmental assessment of the proposed Roberts Bank Terminal 2 Project since 2018. The U.S. Tribes submit these comments in response to the Agency's December 15, 2021 invitation to comment on (1) additional information provided by the Vancouver Fraser Port Authority following an information request sent by the Minister of Environment and Climate Change in August 2020, and (2) potential environmental assessment conditions for the Project. The U.S. Tribes call on the Port Authority, the Agency, and the Minister to halt the Project at least until the Port Authority has consulted with all Coast Salish Tribes and conducted a proper and complete assessment of the Project's impacts on both sides of the border.

As explained below and in comments previously submitted by the U.S. Tribes, the information needed to fully and fairly review the Project remains incomplete as the Port Authority continues to neglect the presence and concerns of the U.S. Tribes as they relate to the Project. While the U.S. Tribes were encouraged to see the Port Authority's increased efforts at consultation with their First Nation relatives, the U.S. Tribes are disappointed by the Port

Authority's failure to consult with all Indigenous groups impacted by the Project. *See* Draft Potential Conditions 1.22-1.24 (definition of "Indigenous groups" excludes U.S. Tribes).

After reviewing the Port Authority's latest responses to information requests, as well as the draft potential conditions, the U.S. Tribes continue to believe that the Project will cause significant harms and risks to their ability to preserve their time immemorial life ways—including protecting and continuing to harvest fishery resources for commercial, subsistence, and ceremonial uses; protecting and continuing cultural and spiritual customs, and preserving and protecting ecological resources in the Salish Sea for future generations. The U.S. Tribes are committed to protecting the Salish Sea and are deeply concerned about Project impacts on salmon and Southern Resident Killer Whale relatives. Moreover, the Port Authority's failure to fully assess cumulative impacts of past, present, and future marine vessel shipping projects, and failure to assess transboundary harms associated with the Project, violates international law obligations. The U.S. Tribes have submitted evidence to highlight their concerns during the various comment periods for this proposed Project, but this one-sided effort is a far cry from proper consultation and farther still from Free, Prior and Informed Consent under international law.<sup>1</sup>

I. THE U.S. TRIBES HAVE TREATY-RESERVED RIGHTS AND CULTURAL HERITAGE IN THE SALISH SEA THAT ARE PUT AT RISK BY THE ROBERTS BANK TERMINAL 2 PROJECT.

The three U.S. Tribes are part of the Coast Salish people, whose political, social, and economic linkages spanned the international border with Canada long before that border existed.

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<sup>1</sup> *See* United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), *available at* [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) (last accessed January 21, 2022).

Like many of their Coast Salish relatives in Canada, the U.S. Tribes have lived, fished, hunted, and gathered in the Project area since time immemorial. The U.S. Tribes continue to rely on land and resources in the Salish Sea and along its shorelines for subsistence, commercial, economic, and cultural and ceremonial purposes. The Tribes are signatories to treaties with the United States and the language of these treaties reserves natural and cultural resources to continue traditional tribal activities and tribal ways of life in perpetuity that demand a healthy ecosystem in the Salish Sea on both sides of the U.S.-Canada border.

A. The Port Authority Should Consult with the U.S. Tribes on Impacts to Commercial and Subsistence Fishing Practices.

The U.S. Tribes each have adjudicated usual and accustomed fishing areas arising under the treaties that expand throughout the Salish Sea, including extending to the Fraser River of Canada, that will be directly impacted by this Project. Since time immemorial, salmon are essential for the U.S. Tribes' culture and life ways where the Tribes' members thrive as a community around the sharing of fish associated with subsistence, commercial, and cultural/ceremonial values arising from U.S. tribal fishing rights. The subsistence and dietary relationship between the people and the treaty fishing harvest and consumption is a strong strand of their tribal culture. Due to the overall decline of natural resources in the Salish Sea stemming from lack of habitat and the existence of and fear of pollution, Tribal members are unable to harvest resources in amounts that were available even a decade ago. These cultural and subsistence resources are further imperiled by the Roberts Bank Terminal 2 Project. The Port Authority should consult with the U.S. Tribes to understand the breadth of these impacts and discuss methods to offset any and all impacts.

Additionally, the U.S. Tribes have significant economic interests in maintaining the environmental health of the Salish Sea and their access to usual and accustomed fishing areas, all of which are threatened by the Roberts Bank Terminal 2 Project and associated vessel traffic. The U.S. Tribes have a right to fish in the international shipping lanes, and they often exercise that right despite the dangers created by ever-increasing vessel traffic transiting the Salish Sea. The environmental assessment fails to consider the economic impacts the Project will have on these resources.

B. The Port Authority Should Consult with the U.S. Tribes on Impacts to Southern Resident Killer Whales, Which Are Inextricably Linked with the U.S. Tribes' Cultural Identity.

The U.S. Tribes are also concerned about how the increase in vessel traffic associated with the Project will adversely impact Southern Resident Killer Whales (“Southern Residents,” “orca,” or “blackfish”). The Southern Residents are an iconic species at the heart of the U.S. Tribes’ spiritual and cultural identities and are integral to the culture and spiritual practices of the Tribes who have shared these waters with the Southern Residents since time immemorial. The relationship the U.S. Tribes have with the Southern Residents is inextricably linked with their Tribal identity, and the U.S. Tribes have long acknowledged the relationship between a healthy Salish Sea and the Southern Resident population.

The U.S. Tribes understand that the Port Authority will employ some mitigation measures during construction of the Project, and that certain vessels may be required to participate in some Enhancing Cetacean Habitat and Observation (ECHO) Program initiatives. *See* IR2020-3. While these are encouraging steps, the U.S. Tribes fear that these measures are insufficient as the Southern Resident population teeters on the brink of extinction, with only 73

members remaining (not including Tokitae, a Southern Resident who lives in captivity).<sup>2</sup> As described in prior comments, the U.S. Tribes have embarked on numerous efforts to aid in the survival and recovery of their blackfish relatives. Given these efforts, the U.S. Tribes were dismayed by the Port Authority's failure to consult—especially when the Port Authority purports to have integrated Indigenous knowledge into its development of the Project.

## II. THE PORT AUTHORITY MUST ADDRESS CUMULATIVE IMPACTS OF BASELINE AND PROPOSED PROJECTS.

The failure to consult with U.S. Tribes and consider impacts to U.S. waters also highlights a significant omission: the failure to adequately consider the cumulative impacts the Project will have on the Salish Sea. In prior comments, the U.S. Tribes demonstrated how their tribal histories and lineages know no international border—neither do the salmon, and neither do the Southern Residents, nor will the harms associated with the proposed Roberts Bank Terminal 2. The consequences of the proposed terminal on the shared waters of the Salish Sea, salmon, and whales must be considered along with cumulative impacts from other, similar projects that will increase marine vessel traffic and noise in the Salish Sea.

There are several projects proposed on both sides of the border that will have impacts on the Salish Sea that should be considered cumulatively. In addition to Roberts Bank Terminal 2, of particular concern to the U.S. Tribes is the Trans Mountain Pipeline Expansion, which would

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<sup>2</sup> In addition to risks from noise and ship strikes, orcas are also particularly vulnerable to oil spills (whether from cargo or fuel) because they travel in pods and an entire family group can be lost due to one spill. See NOAA Fisheries, *Recovery Plan for Southern Resident Killer Whales (Orcinus orca)* (Jan. 17, 2008), at II-73, II-116, <https://www.fisheries.noaa.gov/resource/document/recovery-plan-southern-resident-killer-whales-orcinus-orca>.

result in the construction of three additional berths at the nearby Westridge Marine Terminal, and 34 additional oil-loaded tankers per month.

The U.S. Tribes already feel the effects of increased tanker traffic, even without the Project in operation. In a recent proceeding before the National Energy Board, the U.S. Tribes extensively testified that the Salish Sea was experiencing the detrimental effects of seemingly “small” impacts, such as small oil spills and increased vessel traffic.<sup>3</sup> The cumulative impacts increased bunkering of shipping vessels,<sup>4</sup> noise impacts to marine mammals, and concerns about safety from Tribal members exercising their Treaty-reserved rights in the Salish Sea must also be considered.<sup>5</sup>

The U.S. Tribes’ concern about safety have not been addressed in other Canadian environmental assessments for projects that will increase vessel traffic in transboundary waters, and these concerns were also ignored as part of this process. Indeed, in the Trans Mountain Reconsideration process, the National Energy Board implicitly admitted that there is insufficient information for review of projects such as this with respect to cumulative impacts. Without a

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<sup>3</sup> See Reference Number 1459 in this docket, Exhibit 9: Declaration of Nigel Lawrence (Dec. 4, 2018) at ¶ 16 (the Salish Sea and Southern Residents are experiencing “death by a thousand cuts”), <https://iaac-aeic.gc.ca/050/documents/p80054/126783E.pdf>.

<sup>4</sup> *Id.*, Exhibit 4: Declaration of Brian Cladoosby (Dec. 4, 2018) at ¶¶9-10 (bunkering has increased in the Salish Sea and oil spills associated with bunkering are among the leading causes of oil spills in the area).

<sup>5</sup> See *id.*, Declaration of Nigel Lawrence (Dec. 4, 2018) at ¶ 15 (“Traveling in a human powered dugout canoe, we see several oil tankers and other large commercial vessels and it gets very difficult to stay out of their way while we cross major bodies of water like the Strait of Juan de Fuca and the Georgia Strait. We are always afraid that even if they do see us, they’d think we were seagulls on a log of driftwood.”); Declaration of Brian Cladoosby (Dec. 4, 2018) at ¶ 4 (“We experience a substantial amount of lost gear and danger in areas outside the shipping lanes and separation zones.”).

cumulative impacts review of past, present, and future projects on both sides of the border, there is insufficient information to proceed with this Project.

The U.S. Tribes are aware that a marine shipping analysis is underway, led by Transport Canada, but this ongoing analysis is not a reason to ignore cumulative impacts in the environmental review for this Project. The Port Authority made no effort to document or analyze the existing baseline impacts to U.S. tribal fishing interests, let alone analyze the combined impacts of other planned projects to those interests. This Project, in addition to other proposed projects on the Salish Sea, will only exacerbate these effects. The increase in vessel traffic through the Salish Sea associated with the Project will not occur in a vacuum, and the Port Authority's assertions that vessel traffic will increase regardless does not diminish the need for a proper cumulative impacts analysis.<sup>6</sup> The U.S. Tribes fear that every proposed project in the area will likewise eschew responsibility, and that increased vessel traffic in the U.S. will continue to be ignored and associated impacts will remain unmitigated. This is but one issue that could be addressed through consultation.

### III. THE HARM ARISING FROM THE PROJECT TO THE U.S. TRIBES' WAY OF LIFE CANNOT BE MITIGATED.

The U.S. Tribes' loss of access to fishing areas and the loss of subsistence and cultural resources, including their relationship with the Southern Residents, cannot be mitigated. The environmental assessment fails to address the core of the U.S. Tribes' concerns, which is that loss of fishing and loss of the Southern Residents is also a direct loss of their tribal ways of life.

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<sup>6</sup> The Port Authority estimates that between 208 and 260 container vessels will call at the Project each year once the Project is fully operational but denies that its added capacity will increase vessel traffic. IR2020-3.

Swinomish Tribal Fisheries Manager Tandy Wilbur noted that looking at the impacts of the Project are not enough: “That would be so not only heartbreaking, devastating, detrimental, catastrophic, whatever term it is you want to use, to the Native culture, the people on the Salish Sea, up and down the coast. We – it’s really hard for me to have to try to express the value, the traditions, the spiritual, the meaning of loss. I don't think there's anyone that could probably put it into words what that would mean. That's our way of life, the Native people.”<sup>7</sup> While the U.S. Tribes appreciate that the Port Authority has proposed a smaller Project footprint (IR2020-2.1), additional offsetting (IR2020-1.1), and a possible breach of the terminal or causeway (IR2020-2.2), there is no mitigation measure that can address the U.S. Tribes’ fundamental and existential concern.

The Port Authority has repeatedly stated that it would consult with Indigenous people throughout its process, yet it expressly excluded the U.S. Coast Salish Tribes. In its latest responses to the Minister’s requests for information, the Port Authority stated that it considered traditional Indigenous knowledge when developing the Project, yet the Port Authority continues to ignore the voices of the Suquamish, Swinomish, and Tulalip Tribes who have known these waters, and the salmon and the orca that live in them, since time immemorial. The U.S. Tribes call on the Port Authority, the Agency, and the Minister to halt the Project at least until the Port Authority has consulted with all Coast Salish Tribes and conducted a proper and complete assessment of the Project’s impacts on both sides of the border.

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<sup>7</sup> Reference Number 1459 in this docket, Exhibit 8: NEB Hearing Order MH-052-2018 (Trans Mountain Pipeline Reconsideration), Vol. 6 (Nov. 28, 2018) at ¶¶2801-2802, <https://iaac-aeic.gc.ca/050/documents/p80054/126783E.pdf>.



#### IV. THE ENVIRONMENTAL ASSESSMENT FAILS TO ASSESS OBLIGATIONS UNDER INTERNATIONAL LAW.

Because Project approval will cause harm and risk outside the borders of Canada, principles of international law apply. International law requires governments 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. 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 by Roberts Bank Terminal 2. Failure to consult and coordinate with the U.S. Tribes in order to prevent foreseeable harms violates the U.S. Tribes' (1) right to enjoy the benefits of their own culture; (2) right to their own means of subsistence as a component of their rights to culture, health, and property; (3) right to preservation of health; and (4) right to use and enjoy the lands they have traditionally used and occupied. Moreover, the U.S. Tribes have not given free, prior, and informed consent with respect to their internationally recognized rights to culture and subsistence.

The U.S. Tribes ask the Agency and the Minister to respect and apply international norms and principles, consistent with both Canada and British Columbia's adoption of laws meant to implement the UN Declaration on the Rights of Indigenous Peoples.<sup>8</sup> International law creates a duty for the Agency and the Minister to recognize the unique international relationship that both

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<sup>8</sup> An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples, S.C. 2021, C 15 (Can.); Declaration on the Rights of Indigenous Peoples Act, S.B.C. 2019, 41 (Can. B.C.).

the U.S. Tribes and First Nations have to the Salish Sea and recognize that harm to the Salish Sea harms the U.S. Tribes and all Coastal Salish peoples.

A. U.S. Tribes Are Uniquely Tied to the Transboundary Impacts of the Project Through Harms to Their Culture and Internationally Shared Marine Resources.

The United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) 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.<sup>9</sup> As such, the transboundary connections and concerns of the U.S. Tribes must be considered in the environmental assessment for the proposed Project. Although the Swinomish, Suquamish, and Tulalip Tribes are currently located within the United States, the natural resources upon which they depend, their cultural practices, and their traditional economies are interwoven with First Nations and natural and cultural resources of the Canadian portion of the Salish Sea. These cultural and social connections existed long before the border between the United States and Canada.

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 vessel traffic must necessarily travel through United States waters and the increased traffic and increased risk of oil spills will undoubtedly affect tribal fisheries. Treaty reserved fishing by U.S. Coast Salish Tribes includes substantial reliance on the Fraser River Sockeye run, and U.S. tribal leaders participate actively

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<sup>9</sup> UNDRIP, *supra* note 1, Article 36(1).

in the U.S.-Canadian Pacific Commission, including the Fraser Panel. The sockeye swim through both U.S. and Canadian waters of the Salish Sea. Moreover, the Fraser River contributes the majority of fresh water flowing into Puget Sound, on the U.S. side of the border. Despite these established international relationships, the Port Authority has not assessed—or even asked about—Project impacts and harms to the U.S. Tribes.

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.<sup>10</sup> The effects of the proposed Project will undoubtedly cross the international boundary with the increased number of vessel traffic that must pass through U.S. waters to access Roberts Bank Terminal 2 and return to the Pacific Ocean.<sup>11</sup> In addition, the environmental harm caused by a potential spill will reach outside Canada’s jurisdiction and negatively affect the U.S. Tribes. Canada has an international responsibility to prevent activities within its jurisdiction from damaging the environment outside its borders.

B. International Law Protects the Land and Resources of Indigenous Peoples.

The Agency 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

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<sup>10</sup> See David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy* 472-75 (4th ed. 2010).

<sup>11</sup> See Roberts Bank Terminal 2 Project Addendum to the Environmental Impact Statement, Marine Shipping Supplemental Report—Executive Summary (Oct. 2015) at pgs. 5-7.

on Human Rights and international law generally protect the special ties that many indigenous people have to their environment.<sup>12</sup> The construction of the proposed Roberts Bank Terminal 2 without consent of the U.S. Tribes would violate internationally protected rights to enjoy and transmit culture to future generations and affect the economic subsistence of tribes on resources from the Salish Sea.

UNDRIP 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.<sup>13</sup>

The threat to tribal culture is necessarily implicated in the Roberts Bank Terminal 2 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 fishery access and harvest; and the overall increase in traffic and environmental degradation has a negative effect on tribal cultural practices.

U.S. Tribes and Indigenous peoples' right to their own means of subsistence is also 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. The

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<sup>12</sup> 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.”).

<sup>13</sup> UNDRIP, *supra* note 1, Article 25.

UNDRIP provides that Indigenous peoples have the right “to be secure in the enjoyment of their own means of subsistence and development,”<sup>14</sup> and 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.”<sup>15</sup>

Since the Salish Sea flows in and out of the international border, and its marine mammals, shellfish, and anadromous fish migrate across that border, Canadian decisions must consider their effects across the border. 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.<sup>16</sup> 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.”<sup>17</sup>

In addition to ceremonial usage, tribal members consume resources from the Salish Sea for subsistence and the 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. Written evidence submitted in this docket indicates that tribal member consumption of fish is higher than average consumption in the general population. Any

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<sup>14</sup> *Id.*, Article 20.

<sup>15</sup> *Id.*

<sup>16</sup> *See id.*

<sup>17</sup> *See id.*, Article 23.1.

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.

Moreover, the increase in vessel traffic will expose individual tribal members to increased safety risks, will reduce their access to their treaty-reserved fishing areas, will threaten the longevity of the natural resources upon which they depend, will endanger individual tribal members' lifeways by interfering with consumption rates, and will interfere with economic subsistence. 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 of their means of subsistence. As noted above and in prior comments, vessel traffic is already impeding U.S. Tribes' rights to harvest fish.

Finally, an oil spill combined with increased vessel traffic tied to the Project would decimate tribal communities and individual tribal members' ability to harvest and consume treaty-reserved resources for subsistence purposes for decades that in turn, will also devastate U.S. Tribes' economies and tribal life ways.

The U.S. Tribes' rights to culture and their own means of subsistence are 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.

C. Failure to Consider the Concerns of U.S. Tribes Will Violate the U.S. Tribes' Internationally Protected Rights.

The Agency and the Port Authority must consider the impacts that Roberts Bank Terminal 2 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.

If the Roberts Bank Terminal 2 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 Salish Sea, 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.

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Roberts Bank Terminal 2 will cause significant harms and risks to the U.S. Tribes—including harms from increased vessel traffic through Treaty-reserved and protected fishing areas, marine pollution and noise impacts on salmon and endangered Southern Resident Killer Whales, and cumulative impacts of past, present, and future marine vessel shipping projects—the failure to consult with or even consider the U.S. Tribes renders the information insufficient.

February 11, 2022

Page 16

Likewise, the Port Authority's failure to include the U.S. Tribes in the consultation efforts outlined in the potential environmental assessment conditions renders the conditions inadequate.

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