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March 14, 2022

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

**Attention: Impact Assessment Agency of Canada**

**Re: Roberts Bank Terminal 2 Project**  
**Reference Number: 80054**

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We represent Tsartlip First Nation (“Tsartlip”) regarding the Roberts Bank Terminal 2 Project (“the Project”). We write to you respecting the letter dated August 24, 2020 from the Minister of Environment and Climate Change requesting further information from the Vancouver Fraser Port Authority (“VFPA”), VFPA’s subsequent response materials dated September 24, 2021, and the Impact Assessment Agency’s (“the Agency’s”) draft Potential Conditions under the *Canadian Environmental Assessment Act, 2012* dated December 15, 2021 (“the Conditions”).

### **Overview**

The entire Roberts Bank Terminal 2 Project is located within the traditional territory of the W̱SÁNEĆ people, which includes Tsartlip. Tsartlip members hold constitutionally protected rights to fish and hunt throughout Tsartlip’s territory, including Tsartlip’s extensive marine traditional territories. Tsartlip members already face significant, compounding barriers to both the access to and the availability of marine resources required to exercise these constitutionally protected Treaty rights.

As you know, the Federal Review Panel Report for the Project concluded that, despite mitigation measures, numerous significant adverse residual and cumulative effects were likely to fish and fish habitat including juvenile salmon, SRKWs, wetland function, terrestrial vegetation, biofilm and migratory birds, human health and quality of life, Indigenous peoples and cultural heritage, Dungeness crab, and greenhouse gas (“GHG”) emissions.

These effects, particularly to fish and fish habitat, SRKWs and human health, and the Project as a whole, would further impair the ability of Tsartlip members to practice their constitutionally protected Treaty and Aboriginal rights in and around the Project area. Tsartlip would be impacted both by the construction and direct activities of the Project, as well as the effects of increased vessel traffic in Tsartlip's marine waters and the cumulative environmental effects of the already extensive development, shipping, and marine activities. These effects would constitute an unjustified interference with the meaningful exercise of Tsartlip members' section 35 rights.

We wish to make it clear for the Agency and the record that Tsartlip has no benefits agreement in place with VFPA. Regardless, for the following reasons, Tsartlip is firmly opposed to the approval of the Roberts Bank Terminal 2 Project and strongly believes that the economic justification for the Project does not outweigh the numerous, significant adverse environmental and cumulative effects of the Project on nearly every aspect of the local and regional environment and community.

### **Impacts on Tsartlip**

The Project would have direct and indirect impacts on Tsartlip marine territories and Aboriginal and treaty rights. VFPA has not adequately addressed the cumulative impacts of the proposed Project, particularly the impacts of marine shipping, on Tsartlip First Nation and its members, and the proposed Conditions are not adequate to address these concerns. VFPA has largely ignored the direct impacts of the Project on WSÁNEĆ peoples, including Tsartlip, despite all of Tsartlip's preferred fishing locations being located within the Marine Shipping Area and the Project itself being located in Tsartlip traditional territory at the site of Tsartlip's most important fishery. VFPA has not carried out adequate or additional consultation with Tsartlip despite the Project and all related activities occurring in Tsartlip's core traditional marine territories.

### *Tsartlip and the broader WSÁNEĆ Nation*

The WSÁNEĆ have the sacred obligation to steward WSÁNEĆ territories since time immemorial, and have unique knowledge and perspective developed over millennia. Tsartlip is one of the four WSÁNEĆ Nations in whose waters the entire Project is located. Additionally, nearly all WSÁNEĆ marine fishing locations, including the preferred fishing locations, are located within the Marine Shipping Area for the Project. Despite Tsartlip reserves not being located on the mainland or adjacent to the Project, Canada should acknowledge that Tsartlip is one of the Nations most affected by the Project, its operations, and any related increase in marine vessel activities.

The lands and waters surrounding the Project remain important for the contemporary land and resource use of Tsartlip members and their exercise of constitutionally protected Treaty rights to

fish and hunt. W̱SÁNEĆ families – which include Tsartlip families - have always travelled across what are now contemporary shipping lanes from Vancouver Island to the mainland, at Point Roberts and the Fraser River, where they frequented salmon fishing sites alongside other Salish-speaking peoples.

Tsartlip members' relationship to the marine environment continues to be a driving force in social and cultural life, lying at the heart of what it means to be W̱SÁNEĆ. W̱SÁNEĆ identity and marine harvesting practices are entirely interwoven, and traditional marine harvesting activities completely organized the W̱SÁNEĆ seasonal round and way of life. W̱SÁNEĆ peoples are known as the “saltwater people,” as they do not have major freshwater rivers in their traditional lands and instead took to the sea for their survival, culture, and way of life.

In particular, Tsartlip identity is intrinsically tied to the salmon and steelhead that frequent the waters of the Strait of Georgia and the Fraser River; salmon especially have cultural and spiritual significance, and are respected as relatives to the W̱SÁNEĆ peoples. The W̱SÁNEĆ seasonal round and territory is defined by the pursuit of salmon and steelhead between Vancouver Island and the mainland as they migrate to the Fraser River.

W̱SÁNEĆ peoples maintained reef-net and other fishing sites throughout these marine areas along the migration route of salmon and steelhead, including the largest and most important village and reef-net fishing site at Point Roberts that was traditionally used between May and October every year. The village and fishing site at Point Roberts, known as SMOKEĆ in the SENĆOŦEN language, is specifically noted in historical documents as belonging to the W̱SÁNEĆ peoples from Vancouver Island, and is particularly associated with Tsartlip families. SMOKEĆ was preferred because it was useable for longer periods of each day, was the largest reef-net location in the area and was a place where W̱SÁNEĆ peoples gathered to cooperate among different households and communities. Tsartlip members continue to practice reef net fishing at preferred sites throughout their marine territory, as the practice has become re-established in the community in recent years. As such, the Project will have a negative impact on Tsartlip members ability to practice their right to this important fishing activity.

Historically, W̱SÁNEĆ peoples were one unified cultural group of interconnected families and households spread across separate winter village sites, and traditional uses of marine and terrestrial harvesting sites were not divided among the lines of the modern W̱SÁNEĆ communities. Each of the modern W̱SÁNEĆ communities, including Tsartlip, descended from one of the winter village sites that were continuously occupied in the mid-19<sup>th</sup> century when James Douglas came to what is now called Vancouver Island. W̱SÁNEĆ peoples traditionally spent three to six months of the

year in these winter villages, and the other six to nine months out on the water. Family ties to established harvesting sites were, and remain, very strong.

### *The Douglas Treaty*

In 1852, James Douglas entered the North Saanich Treaty with the WSÁNEĆ ancestors of Tsartlip. Among other things, the Treaty promised that the WSÁNEĆ would retain their right to hunt and fish throughout their traditional territories “as formerly.” Tsartlip’s understanding of this promise is that their way of life was not to be disturbed; that they would be able to take food and travel as they had always done, which must include the ability to access traditional fishing and harvesting locations throughout the entire marine territory. Tsartlip fisheries have not been protected as promised.

Nevertheless, Tsartlip members’ relationship to the marine environment remains a driving force behind social and cultural life, resource-sharing and systems of reciprocity at the heart of WSÁNEĆ culture, and are central to food security. In fact, the use of traditional sites that are located within the Project study area, or exposed to the Project study area, is increasing among Tsartlip harvesters as they face increasing barriers preventing access to other established harvesting sites in their traditional territory.

### *Cumulative Impacts*

Tsartlip members face a declining availability of marine resources due to the cumulative impacts of settler overfishing, climate change, pollution, and declining fish habitat particularly for Pacific salmon species. Tsartlip’s Traditional Use Study, submitted earlier within this Impact Assessment, show that intensive marine vessel traffic and commercial fishing in the region are also contributing to these cumulative effects. Tsartlip members also face increasing barriers to accessing marine resources as they are prevented from accessing increasing numbers of locations within their traditional territories due to developments, ferry terminals, privately-owned properties, and other vessel traffic.

The cumulative effects and compounding barriers to access have already diminished Tsartlip’s ability to harvest marine resource and undertake cultural activities, particularly in areas close to Tsartlip reserves, creating health problems that are directly related to the decreasing availability of traditional marine food sources. These barriers on Tsartlip members’ ability to harvest already constitute a violation of their freedom to exercise their rights to hunt and fish as formerly protected by the Douglas Treaty.

In *Yahey v British Columbia*, 2021 BCSC 1287 (“*Yahey*”), the BC Supreme Court recognized that the cumulative effects of interferences with treaty rights could constitute a breach of a treaty, even if each individual development in the area would be “justified” on its own merits and impacts. This decision means that the Crown, and therefore Crown agencies, must consider the cumulative effects of development on the meaningful exercise of treaty-protected rights in decision-making processes. Crown powers to infringe such rights must be exercised in ways upholding the promises and protections of the Treaty in issue, and must consider the cumulative effects of such decisions.

All of Tsartlip’s marine territory is already significantly impacted by intensive marine traffic of all types, from sport-fishing to commercial fishing, ferry operations and container traffic. The Roberts Bank Terminal 2 Project proposes to add 2.4 million twenty-foot equivalent units (“TEUs”) of container capacity annually, resulting in approximately 526 vessel transits per year. VFPA estimates that container traffic on the west coast is forecast to grow to 6 million TEUs by 2025, and to 7 million TEUs by 2030 – double the current container capacity already traversing Tsartlip traditional marine territories.

In all scenarios, northbound shipping traffic will travel through Tsartlip fishing areas, and southbound traffic will travel through some of Tsartlip’s most important and most frequented fishing, marine gathering and habitation areas. Southbound traffic will also travel by many of Tsartlip’s hunting, harvesting and cultural sites, endangering coastal heritage sites that are entirely or partially exposed.

It is Tsartlip’s position that what remains of access to and availability of preferred marine resources in their waters must be protected. Tsartlip members already struggle to sustain their physical and community social health as a result of diminishing access to traditional resources and activities. In light of the increasing barriers Tsartlip members already face in meaningfully exercising their Treaty rights to fish and hunt, a further, significant interference like the one posed by the Project would be unjustified.

## **Impacts to Fish and Fish Habitat**

VFPA has provided information about mitigation measures and enhanced offsetting plans in response to the Minister's Information Request that address the direct impacts of the Project to fish and fish habitat at the terminal and causeway.

VFPA relies predominantly on offsetting plans to counterbalance, rather than avoid or reduce, the adverse effects of the Project. VFPA has proposed only three new mitigation measures in response to the Minister's request for information: minor changes to the light management plan, an approximate reduction in the Project's direct size, and a potential fish passage breach in either the causeway or the terminal. The fish passage in the causeway is the preferred approach of the Minister and Indigenous groups but the proponent suggests it is not economically feasible. We do not believe the latter option – through the terminal – is effective mitigation.

VFPA acknowledges that despite all of the proposed potential mitigation measures, the adverse effects on fish and fish habitat might be reduced but not avoided. Tsartlip is not confident that the offsetting measures are sufficient, certain, or timely enough to counterbalance the significant adverse effects posed by the Project even after mitigation measures and after uncertainty and time delays are accounted for.

First, VFPA proposes to use rock reef offsetting as a key part of its onsite offsetting plan. However, VFPA acknowledges based on information shared by Indigenous groups that the use of rock reef may in fact be harmful to native fish species by providing habitat for invasive species and predatory reef fish. Nevertheless, VFPA has retained rock reef offsetting as part of its proposal and is “considering” alternative design options. This means that there is considerable uncertainty that VFPA's proposed onsite offsetting plan will ultimately be protective of native fish and fish habitat, and may in fact be detrimental. The Project should not be approved while such uncertainties exist and there remains a risk that native fish species will be further threatened.

Second, VFPA has already constructed five habitat banks in the area that have been established and functioning variously from the 1990s and the last decade. It is not clear from VFPA's IR2020-1.1, s. 7.1 how long these habitat banks require to implement and to become productive. VFPA intends to rely upon “credits” it has obtained through the construction of these habitat banks in accordance with Department of Fisheries and Oceans Canada (“DFO”) policies that allow for the withdrawal of credits to offset the death of fish or harmful alteration, disruption or destruction of fish habitat associated with their activities as part of the “additional 50+ ha of conventional

offsetting” being advanced. Effectively, VFPA now seeks to rely on its existing credits to require fewer offsetting measures from the Project.

The habitat bank sites are already considered to be established and functioning, providing benefits to fisheries and wildlife in the region. Despite these projects, crucial fish populations in the region are in decline and fish habitat continues to be eroded. While VFPA’s approach aligns with existing DFO policies, it does not reflect a new beneficial program to offset the anticipated significant adverse effects of the Project. Rather, relying on these credits would mean that some of the adverse effects of the Project will not be addressed at all by new offsetting programs. At minimum, new offsetting programs should ensure that fish and fish habitat already in decline or at risk are not further harmed by development in the region.

Third, the implementation of offsetting measures after construction begins creates a considerable risk that any offsetting measures may come too late to address the significant adverse effects of the Project on fish and fish habitat, putting the survival and recovery of fish and fish habitat further at risk. Threats to the survival and recovery of Pacific salmon species at risk further threaten the Southern Resident Killer Whale (“SRKW”) population that is already intensely vulnerable to further declines in the availability of prey and their ability to forage effectively. VFPA acknowledges that these projects, which would be implemented during construction and therefore finished only once the adverse effects are already taking place, are relatively uncertain regarding the effectiveness of the measures or the time required for new offsetting measures to become functioning (see IR2020-1.1, p. 32).

The adverse effects of construction would be both immediate and ongoing, placing fish habitat, fish including Pacific salmon, and other species at risk in an even more precarious position than they are currently. Offsetting plans require time to implement, take effect, and obtain and analyze data to ensure that they are having the anticipated positive effects. If the offsets are not initiated or implemented until construction has already begun, the offsets are competing with the adverse effects of construction itself, and affected species and ecosystems will face those adverse effects before offset measures have the opportunity to become effective. In effect, things will get worse and as such may never get better. These sensitive and already at-risk species and ecosystems cannot afford that risk.

VFPA’s current approach assumes the success of mitigation measures and offsetting plans. Even more concerning is the prospect that the proposed offsetting measures would not counterbalance the Project’s significant adverse effects to fish and fish habitat, particularly given the time required to implement the measures while fish and fish habitat are already at risk. If data from follow-up

programs shows that despite the mitigation and offsetting measures proposed, fish and fish habitat experience further declines, there will be a considerable delay in developing new mitigation and offsetting measures.

This “wait and see” approach is the principal flaw of adaptive management; follow-up and monitoring programs naturally require time delays to collect data, evaluate data, consult experts, investigate and decide upon new mitigation measures, implement those measures, wait for more data to see if those measures are successful, and re-start the cycle. While adaptive management has benefits, the amount of time required to go through these phases is inappropriate in the context of species already at risk and facing the cumulative adverse effects of developments and activities already present in the area, climate change, and pollution.

VFPA has asserted that even accounting for temporal lags and discounting for uncertainty, the proposed mitigation and offsetting will result in a significant net gain in fish and fish habitat productivity of 1,773 t/year. However, this does not address the decrease in productivity that is likely to be seen in the first several years of Project construction before offsetting measures are implemented and shown to be effective.

Most importantly, VFPA’s approach even accounting for temporal lag assumes that fish and fish habitat can withstand the significant adverse impacts of the Project within the first several years of construction before offset plans are constructed and effective, when in fact fish and fish habitat in the area are struggling in the face of the cumulative effects they already face. VFPA therefore also fails to consider the impacts such a decline, even temporarily, may have on the endangered SRKWs.

Additionally, VFPA has included their DFO credit withdrawal within the 86 ha of proposed offsetting that will “account for uncertainty and temporal lag.” As stated above, the withdrawal credits from habitat banks do not constitute new programs creating additional ecosystem resiliency; the habitat banks are already implemented in the environment, and the environment is nonetheless facing mounting and cumulative challenges with key species in decline. Therefore, including withdrawal credits within the offsetting program is not in accordance with a responsible and precautionary approach to accounting for and mitigating adverse effects.

VFPA has also included a causeway breach to avoid salmon migration disruption in determining what adverse effects from the Project are outstanding. However, it has not been decided whether a terminal breach or a causeway breach, or both, will be included in the Project design, and it has not yet been determined whether a causeway breach is even feasible. The Minister has included

draft Conditions 7.1 and 7.2 requiring that the feasibility of a causeway breach be investigated and that, if feasible, VFPA shall install and maintain a fish passage. However, this does not address the contingency of finding that a fish passage is not feasible, and would allow Project approval before the feasibility of a fish passage is assessed and decided upon.

Further, the requirement that future mitigations that may be needed be “technically and economically feasible” creates the risk that any necessary mitigation measures will not be implemented once the Project is built and there are fewer opportunities to create and implement design changes, or if mitigation measures would have a significant economic impact by requiring terminal closures to implement and construct new mitigation or offsetting features. The potential for leaving such effects unmitigated in the context of species at risk could be disastrous given the declining conditions of several fish species, the cumulative effects such species already face, and their importance to other species at risk such as SRKWs. Simply put, Chinook salmon and other species at risk cannot afford to “wait and see” if there will be unanticipated adverse effects and if those can be mitigated in a way that is “technically and economically feasible.”

Finally, VFPA has left many uncertainties outstanding in the proposed offsetting plans. For example, VFPA is still evaluating opportunities to incorporate additional habitat enhancement features, such as the removal of accumulated logs in the proposed Westham Island Canoe Pass Tidal Marsh Project. The removal of accumulated logs is described as important to increasing the fisheries productivity of the existing intertidal marsh habitat, yet the VFPA has not actually committed to the removal of these accumulations. Without the removal of the accumulations which cause vegetation smothering, soil compaction, clog tidal channels and create a risk of chemical leaching, it is unlikely this offset program can be as beneficial as described. Therefore, the removal of the accumulation should be an integral and required part of VFPA’s offsetting plan.

Additionally, many of the proposed offsets are located on Provincial Crown land and agreements to provide land tenure or access have not been finalized. Therefore, it is not clear whether VFPA will in fact have the tenure or access required to implement several of the proposed offsets, such as the Westham Island Canoe Pass Tidal Marsh Project and the South Arm Jetty Tidal Marsh

Project. Similarly, the Finn Slough Enhancement Project has not yet received the approval of the City of Richmond which considers the area important to potential future municipal flood defenses in the same area. Therefore, whether the preliminary designs will be approved and able to provide the proposed benefits is uncertain.

Marine harvesting, especially fishing, is central to Tsartlip identity and way of life. Salmon in particular carry spiritual and cultural significance and are considered WSÁNEĆ relatives. It is acknowledged that the Project, accounting for mitigation measures, will cause significant adverse effects to fish and fish habitat that are already facing the cumulative effects of development, marine shipping, and the impacts of climate change. It is also known that these adverse effects would impact Pacific salmon species, such as Chinook and chum salmon, that are critical to the survival and recovery of the endangered SRKW population. Despite VFPA's proposed offsetting plans and mitigation measures, there are many risks and uncertainties outstanding regarding those measures, whether they will come to pass, and whether they will have the proposed benefits to fish and fish habitat, particularly species at risk like Chinook salmon.

Tsartlip members hold Treaty rights to fish as formerly throughout Tsartlip's marine territory. The entire Roberts Bank Terminal 2 Project is located within Tsartlip marine waters, including important fishing stations immediately surrounding and north of the Project. Tsartlip members face increasing barriers to exercising their constitutional right to fish, which affects their physical and social wellbeing and further threatening food security in Tsartlip communities. Approving this Project in the face of the risks and uncertainties it poses to fish and fish habitat would further threaten Tsartlip members' ability to exercise their right to fish.

### **Impacts to Southern Resident Killer Whales ("SRKWs")**

The potential impacts of this Project on SRKWs are of great concern to Tsartlip, as orcas are spiritually and culturally important to Tsartlip, featuring prominently in WSÁNEĆ oral history, cosmology, and spiritual connections. Further, as part of their spiritual significance, WSÁNEĆ peoples traditionally harvested marine mammals, including orcas. Tsartlip has no confidence that the information provided by VFPA regarding the Project's potential impacts on SRKWs has adequately mitigated the likely harms from Project construction and operation, marine shipping, or cumulative effects.

Overall, the VFPA has not adequately taken into account the cumulative environmental effects facing SRKWs and their already incredibly precarious position. SRKWs are already listed as endangered species at risk of extinction under the *Species at Risk Act*, SC 2002, c 29, and are struggling with the cumulative impacts of development, noise pollution from marine activities including shipping, environmental pollution, and declining prey availability, particularly of Chinook salmon. There are fewer than 100 SRKWs remaining.

Further, both the draft Conditions and the further information provided by VFPA rely on proposed additional conditions and mitigation measures that are inadequate to protect the critically-endangered SRKW because they are uncertain in terms of effectiveness, feasibility and third-party compliance. Nonetheless, many of the Project's adverse effects on SRKWs stem from marine shipping, largely outside of VFPA's authority.

### *Impacts of Construction*

VFPA has explicitly acknowledged that many construction activities cannot be planned to entirely avoid SRKW peak-use periods, instead relying on its proposed mitigation measures. VFPA has undertaken to avoid noisy construction during the SRKW peak-use period, avoiding impact pile driving for all but four piles, enhanced measures to detect SRKWs, and stop-work procedures to shut down or modify in-water construction should SRKWs enter the exclusion zone; these commitments are also reflected in draft Conditions 8.1 and 8.2. In Tsartlip's submission, these mitigation measures are unlikely to substantially avoid adverse impacts to the already threatened SRKWs. Further, VFPA has failed to address the cumulative effects already faced by SRKWs, and fails to acknowledge that the SRKW population cannot withstand even the smallest of impacts additional to those already faced.

First, the reliance on exclusion zones as small as one kilometre and past SRKW movement patterns are not reliable methods for avoiding impacts on SRKWs. While VFPA can set exclusion zones based on Project activities, the SRKWs' speed at a given sighting cannot be predicted in advance. At an average speed of 1.6 metres per second, it takes orcas only 10 minutes to travel one kilometre at a leisurely pace; they can travel at a speed of over 50 kilometres per hour for short bursts such as when pursuing prey.<sup>1</sup> This means that despite implementing exclusion zones as small as one kilometre and two kilometres on average, it is entirely likely that SRKWs could enter the exclusion zone much faster than a detection and stop-work order can be communicated and effectively followed. Additionally, as the SRKWs face declining prey availability and cumulative interferences with their foraging abilities, the predictability of their appearances has abruptly evaporated leaving much more sporadic appearances.<sup>2</sup> Therefore, relying on the SRKW's former seasonal habitual use patterns to avoid noisy construction in those timeframes may not be effective to avoid impacting their foraging activities.

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<sup>1</sup> Williams and Noren, "Swimming speed, respiration rate, and estimated cost of transport in adult killer whales" (2008), Society for Marine Mammalogy, DOI: <10.1111/j.1748-7962.2008.00255.x>

<sup>2</sup> Jones, *Southern Resident Orcas – long absences punctuated by sporadic appearances* (July 2020), online: Centre for Whale Research <<https://www.whaleresearch.com/post/longabsences>>

Second, VFPA has not committed to a mitigation method for the acoustic impacts of the Project construction on SRKW. Both DFO and the Impact Assessment Review Panel acknowledged that there is outstanding uncertainty regarding the anticipated effectiveness of sound mitigation measures. VFPA has undertaken to “evaluate the potential effectiveness of sound-reducing technology.” Critically, VFPA acknowledges that several of the existing technologies available that would potentially dampen the acoustic impacts of construction are not yet commercially available or are unproven to meet the Project’s requirements. Many more were reviewed and considered unfeasible or impractical. Ultimately, VFPA will leave the selection of sound-dampening technologies to the contractor, creating the risk that appropriate and effective sound dampening technologies are not implemented, or are determined to be technically or economically unfeasible with the goal of minimizing costs and delays.

VFPA has indicated that the potential lost foraging time during construction is “only” estimated to be 1.2 – 7.6 foraging hours per year per SRKW during the six years of construction, and 1.8 foraging hours per year per SRKW as a result of Project operation. While this may seem a small individual impact, those lost foraging hours are in addition to the foraging challenges SRKWs already face as a result of other preexisting developments, marine shipping, other vessel traffic and existing noise pollution. This population is already at the brink of extinction, largely due to declining prey availability and ability to forage successfully, and cannot withstand further impacts to their foraging abilities.

### *Impacts of Operation & Marine Shipping*

VFPA has also proposed additional mitigation measures to reduce the risk of physical and acoustic disturbances to SRKWs from Project operations and Project-related marine vessel traffic that are incorporated in draft Conditions 8.3 through 8.7, namely: (i) delaying the departure and unberthing of container vessels during daylight hours when SRKWs are present, (ii) evaluating the potential effectiveness of technologies to reduce noise associated with tug activities and implementing them once feasible, (iii) providing shore power for container vessels, (iv) requiring incoming container vessels to participate in the *Enhancing Cetacean Habitat and Observation* Program (“the ECHO Program”), (v) managing the ECHO Program and agreeing to an additional five years of the SRKW Conservation Agreement, if other parties agree, and (vi) distributing pamphlets to marine pilots working within the Port of Vancouver. VFPA has determined that delaying nighttime berthing would have a limited benefit because of the infrequency of SRKW transits at Roberts Bank at night, while a passive acoustic monitoring system would come with a high cost.

VFPA estimates that container traffic on the west coast is forecast to grow to 6 million TEUs by 2025, and to 7 million TEUs by 2030 – double the current container capacity already traversing Tsartlip marine territory. Yet VFPA asserts that the overall marine shipping and sound exposure levels for SRKWs at the Port of Vancouver including the Terminal would remain the same with or without the Project, or in the “less likely alternative,” container vessels by 2045 could reach 156 additional vessel calls per years. VFPA forecasts that the Project will not result in an increase of actual marine shipping traffic, relying on the assumption that an industry trend toward increasing container size will mean a proportionate decrease in small container vessel traffic rather than an increase in vessel traffic overall, and that a reduction in capacity will result in a return to smaller, rather than fewer, vessels. This approach also assumes that the size of the vessel has no impact on the likelihood or consequences of acoustic or physical disturbances to SRKWs, including vessel strikes.

VFPA has relied on many other assumptions in evaluating the positive benefits of the proposed mitigation measures. For instance, VFPA assumes that tugs with quiet vessel notations will be available, and considered economically feasible, for future operations despite the increasing vessel sizes VFPA predicts. VFPA also assumes a 95% compliance rate with the ECHO Program despite only an 80% voluntary uptake in 2020, and acknowledges that there are safety reasons causing container vessels not to participate. VFPA assumes education measures such as distribution of pamphlets through the ECHO Program will result in reduced interactions between vessels and SRKWs. VFPA also assumes that as vessels age, they will be replaced with vessels that cause less acoustic disturbance beginning in 2045. This does not align with the prediction that container vessel sizes will continue to increase, that tugs will need to increase in power to match, and assumes that SKRWs can withstand Project-related acoustic disturbance until that time.

Further, the VFPA places heavy reliance on the assumed success of requiring vessels calling at the Terminal to participate in the ECHO Program in mitigating the impacts of Project-related marine shipping on SRKWs. At the same time, VFPA acknowledges that they lack the authority to regulate vessel traffic or enforce slow-downs outside the Port of Vancouver waters, instead needing to rely on third-parties such as government agencies and the marine transportation industry itself to implement threat reduction initiatives.

It is clear to Tsartlip that many of these proposed mitigation measures remain uncertain in effectiveness, feasibility, and third-party agreement or compliance. Further, many of the adverse effects of the Project stem from marine shipping, which is largely outside of VFPA’s control or authority. These measures do not counterbalance the already precarious position of the SRKWs and their current vulnerability to any additional impacts to their survival and recovery. VFPA states that limiting terminal capacity at the Project is not a viable method of reducing or avoiding adverse

effects on SRKWs and can have “harmful economic consequences.” Instead, VFPA relies on these inadequate and uncertain mitigation measures.

VFPA and the Minister propose an adaptive monitoring program for vessel strikes and the increased underwater noise SRKWs would face during construction, operation, and as a result of Project-related marine shipping. Tsartlip’s comments regarding the risks posed by inherent temporal lags in the adaptive monitoring process stand, and are all the more concerning given that SRKWs presently face a significant risk of extinction. Evaluating the effectiveness of these small mitigation measures after the impacts have begun is extremely concerning to Tsartlip. A single vessel strike causing the death of even a single member of the SRKW population would be disastrous in light of their already dwindling numbers. This would be especially true if the victim were a female orca in her reproductive years or in a matriarchal role within her matriline.

Failing to entirely mitigate any increased risk to or impact on the incredibly vulnerable SRKW population with fewer than 100 members, regardless of their “technical and economic feasibility,” is preparing for their eventual extinction. As noted, the SRKWs are an endangered species in severe decline and facing many cumulative, challenging conditions preventing their survival and recovery. The Agency must ensure this Project does not impede SRKW recovery or speed up their extinction.

### **Impacts on Human Health**

The Panel made a number of significant determinations with regard to human health that are of concern to Tsartlip, but declined to make conclusions in other areas due to a lack of information from the Proponent or differences in methodology.

The Panel found that the Project, during all phases, would result in a significant residual adverse effect on human health due to chronic exposure to an increasing annual average of nitrogen dioxide pollution. The Panel also concluded that the operation of the Project would result in a significant cumulative effect on human health due to exposure to nitrogen dioxide.

Health Canada submitted that it was concerned that Indigenous harvesters would be exposed to these respiratory irritants and pollutants while exercising traditional use practices. While these findings were not made for the Marine Shipping Area, Tsartlip harvesters continue to conduct harvesting practices in the area of the Project. Tsartlip is concerned that the human health assessment failed to take into consideration an adequate Indigenous health baseline, and believes its members are particularly vulnerable to respiratory ailments that could be worsened by exposure to airborne pollutants. The Panel reached similar conclusions with regard to noise.

Tsartlip is disappointed that the Panel failed to reach definitive conclusions on the subjects of food security, stress and annoyance, and health inequity. Tsartlip submits that these issues are key aspects of the proposed Project's possible impacts on Tsartlip members' rights, and economic, social, mental, and physical well-being.

### **Draft Potential Conditions**

The draft Conditions rely heavily on follow-up programs and adaptive management, as well as offsetting and salvage plans, to address the numerous residual and cumulative environmental effects that the Panel found would be caused by the Project to all aspects of the local and regional environment and community. Tsartlip's concerns regarding the inadequacy and timelags of adaptive management and offsetting or salvage plans in this sensitive context apply equally to the proposed follow-up and monitoring plans for the Project's effects on other areas such as human health, GHG emissions, terrestrial vegetation, wetlands, Dungeness crab, biofilm and avifauna such as barn owls and great blue heron.

In addition to the draft Conditions discussed throughout the submissions above, Tsartlip notes the following concerns with the Conditions.

#### *Project Changes*

Condition 2.10.7 requires VFPA to provide "reasonable justification" if it determines that the implementation of a condition is not technically or economically feasible, for any conditions dependent in whole or in part on feasibility. This Condition should more explicitly require VFPA to provide their detailed analysis and applicable data in support of that finding.

Condition 2.16 allows changes to the Project, requiring the Proponent to provide a description of proposed changes, potential environmental effects, modified or additional mitigation measures and follow-up requirements, and an explanation of how the environmental effects may differ from those identified during the environmental assessment. Condition 2.17 states that VFPA shall submit any additional information required by the Agency, which "may include the results of consultation with Indigenous groups and relevant authorities" on the proposed changes, environmental effects, modified mitigation measures and follow-up requirements.

Changes to the Project should undergo a thorough assessment process to ensure that potential environmental effects resulting from the change are anticipated and mitigated if needed. Changes

should also be assessed for their impact on Indigenous rights and interests that may be different from those initially assessed.

Additionally, consultation with affected Indigenous nations should be required for any changes to the Project that create additional or different environmental effects, or require additional or modified mitigation measures or follow-up requirements. Impacts on Indigenous rights and interests can only be anticipated by consulting with Indigenous nations, and Indigenous nations have unique knowledge about the environment and potential effects developed over millennia. For example, mitigation measures for this Project were adjusted during the initial assessment in response to feedback from Indigenous nations that Dungeness crab could be harmed by the original proposed mitigation measures, highlighting the importance of involving Indigenous peoples in the assessment process. No less should be required for changes to the Project.

### *Greenhouse Gas Emissions*

Section 3 of the draft Conditions sets out conditions related to air quality and GHG emissions. While Condition 3.1 requires VFPA to provide electrical power connections to container vessels to reduce the use of diesel-powered engines, the Conditions otherwise do little to mitigate the Panel's finding that the Project would contribute to additional GHGs in the area even after mitigation measures, resulting in a significant adverse cumulative effect (Report of the Review Panel, Vancouver Fraser Port Authority Roberts Bank Terminal 2 Project, section 7.1.3).

The Panel acknowledged that the proposed mitigation measures would be much more effective if mandatory rather than voluntary, recommended contractually requiring the infrastructure developer and project operator to reduce GHGs aligned with the BC Ministry of Environment and Climate Change Strategy and Metro Vancouver GHG reduction strategies. Yet, this recommendation is not incorporated in the draft Conditions. Instead, Condition 3.4.2 requires VFPA to provide incentives to third-party contractors to use zero-emission equipment or provide a rationale if they deem the use of zero-emission equipment not technically or economically feasible. It is Tsartlip's view that VFPA should be required to mandate, rather than merely incentivize, the use of GHG-reducing methods and technologies.

### *Access & Cultural Heritage*

Conditions 12.1 provides that VFPA shall provide access to closure areas for Indigenous crab harvesting, and Condition 12.4 requires a follow-up program to monitor changes to environmental

components important for the traditional use of lands and resources by Indigenous nations. Similarly, section 14 of the Conditions seeks to ensure that physical and cultural heritage materials are protected from construction impacts and inventoried, while Conditions 14.8 and 14.9 require VFPA to develop nation-specific measures and follow-up programs for Tsawwassen, Musqueam and Tsleil-Waututh nations to address the effects of the Project on their cultural heritage.

Tsartlip, as one of the Indigenous nations directly affected by the Project, should be included in the draft Conditions related to access and nation-specific measures. As noted above, SMOKEĆ – now known as Point Roberts – was historically associated particularly with Tsartlip and was Tsartlip’s most important fishery. It remains a focal point for Tsartlip traditional harvesting activities including revitalized reef-net fishing. Therefore, the draft conditions that seek to protect cultural heritage must acknowledge Tsartlip’s connection to the Project site and ensure that any Tsartlip cultural materials that are exposed by the Project are protected and inventoried for Tsartlip.

Additionally, crab harvesting is not the only traditional activity for which Tsartlip requires access. As access to important fishing sites throughout Tsartlip’s traditional territory has become increasingly difficult due to the impacts of other, pre-existing developments, excessive vessel traffic and operations such as BC Ferries, Tsartlip’s traditional marine territories across the Strait of Georgia have become increasingly important for maintaining Tsartlip’s exercise of the treaty-protected right to fish as formerly. Tsartlip access to this important site must be protected beyond what the draft Conditions currently provide.

### *Indigenous Advisory Committee*

Section 17 of the draft Conditions requires the VFPA to establish and Indigenous Advisory Committee to support dialogue and issue resolution between VFPA and Indigenous groups, yet Condition 17.1 does not explicitly require the Proponent to provide funding to participating Indigenous nations. VFPA should be explicitly required to fairly compensate Indigenous nations for providing their time, work and expertise.

### **Potential Accommodations**

Tsartlip remains firmly opposed to the approval of the Roberts Bank Terminal 2 Project and the numerous, significant adverse and cumulative effects it will cause. Nevertheless, if the Project is approved, Tsartlip expects that measures to accommodate Tsartlip Aboriginal and treaty rights will be taken and would like to provide examples of measures that may accommodate those rights.

Tsartlip is particularly interested in programs that will directly address the Project's impacts on Douglas treaty rights and Tsartlip practices, such as knowledge-transmission projects, capital investments in fisheries infrastructure, reef net environmental monitoring, and measures to improve access to Tsartlip fishing and other harvesting sites throughout Tsartlip's traditional territories, including at Point Roberts. This could include priority access to important fishing locations during the Tsartlip fishing season.

Potential accommodation measures to address impacts to fish and fish habitat could include restoration work for fish habitat in salmon-bearing waterways, salmon hatcheries and stocking work, funding for programs like the Goldstream Hatchery project, or funding for clam garden restoration and seeding.

Although Tsartlip does not endorse this Project, economic benefits from the Project if approved should be shared with Tsartlip. This could include a procurement framework for fueling vessels, royalties for ships passing through Tsartlip's traditional marine territories, safe harbour fees, or the establishment of a trust fund for Tsartlip. Additionally, economic benefits must also flow directly to Tsartlip members through employment and training opportunities and contracts to Tsartlip members' businesses.

Finally, there are legislative and planning measures that could be taken to accommodate impacts to the rights of Tsartlip and other Indigenous nations. For example, a Marine Protected Area – first proposed in 2012 – could finally be implemented to protect SRKWs in the Salish Sea. A marine use plan co-developed by the federal and provincial governments and local Indigenous nations could be developed along the lines of the Marine Plan Partnership for the North Pacific Coast. In making these suggestions, Tsartlip echoes requests for accommodations that have been made before and that remain unimplemented.

## **Conclusion**

For the above reasons, Tsartlip remains opposed to the approval of the Roberts Bank Terminal 2 Project which is located entirely within Tsartlip marine water. Despite the mitigation measures and offsetting plans proposed by VFPA, it remains far too likely that the Project will have significant adverse effects on fish and fish habitat, particularly Pacific salmon species and Southern Resident Killer Whales. Both salmon and orcas hold sacred places in WSÁNEĆ culture, and the loss of each orca is felt deeply.

Additionally, the Project would increase the barriers to access of Tsartlip members seeking to exercise their constitutionally protected rights and who already face cumulative impacts

threatening that ability, including the declining availability of marine resources and an overabundance of marine vessel traffic in Tsartlip's marine waters. Further impacts to Tsartlip members' ability to exercise the right to fish would constitute an unjustified infringement of the protection afforded by the Douglas Treaty.

HÍSKWE, SI,ÁM,

A handwritten signature in black ink, appearing to be 'Don Tom', written in a cursive style.

Don Tom, Chief of Tsartlip First Nation