



Pacheedaht First Nation

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Submitted online

Impact Assessment Agency of Canada
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To whom it may concern:

**Re: Roberts Bank Terminal 2 Project (the Project)
Pacheedaht First Nation Comments on Additional Information Provided by the Vancouver Fraser Port Authority (Reference number 80054)**

On behalf of the Pacheedaht First Nation (Pacheedaht), I am writing to provide Pacheedaht's comments on the additional information provided by the Vancouver Fraser Port Authority (the Proponent) in response to the Minister's Information Request IR2020-3 relating to mitigation measures for Southern Resident Killer Whales (SRKW) from the Project.

Pacheedaht has very serious concerns with the Proponent's response, both in terms of the new report by Mercator International, and also in terms of the sufficiency of the mitigation being proposed for marine shipping from the Project. These issues are addressed in turn below.

1. Mercator International Report

At the outset, Pacheedaht is deeply concerned to see the Proponent once again stating that the Project will not result in any new vessels transiting the marine shipping area. The Proponent states throughout their response to IR2020-3 that the Project will have no influence on the number of vessels calling at the Port of Vancouver. They say there will instead be a spatial redistribution of those vessels' berthing locations. As support for these statements, the Proponent cites a 2021 report prepared by Mercator International (the 2021 Mercator Report).

This is not the first time the Proponent has relied on Mercator International's predictions that the Project will not result in any new vessels. In the Environmental Impact Statement for the Project (the EIS), the Proponent stated that the Project would result in an additional 260 container ships transiting the marine shipping area on an annual basis, or an additional 1.5 vessel movements per day. Subsequently, in November of 2018, they provided the Review Panel tasked with reviewing the Project with a report which forecasted that the Project would result in no additional vessels transiting the marine shipping area. That report was prepared by Mercator International (the 2018 Mercator Report). At the time, the Proponent asked the Review Panel to rely on the 2018 Mercator Report for vessel forecasting for the Project.

The question of whether to use the vessel forecasting in the EIS or in the 2018 Mercator Report was thoroughly canvassed by the Review Panel. Pacheedaht participate actively in these discussions and our concerns with the



reliability of the 2018 Mercator Report were summarized as follows in our concluding remarks to the Review Panel in August of 2019:

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 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, 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.¹

After thoroughly canvassing the issue, the Review Panel ultimately agreed that the EIS should be relied on for vessel forecasting for the Project:

The Panel finds that the forecast in the EIS and the MSA provide a realistic and conservative assessment of the effects of marine shipping associated with the Project.²

In choosing not to rely on the predictions in the 2018 Mercator Report, the Review Panel said the following:

The Panel used the forecast from the EIS and the MSA (Marine Shipping Addendum) as opposed to the Mercator Report 2018 for two reasons: First, the results of the InterVISTAS report confirms that the OSC (Ocean Shipping Consultants) 2016 base case is appropriate, and second, there are realistic indications of the changing pace in the marine transportation sector. The Proponent mentioned that five years in marine shipping was a long time. GCT (Global Container Terminals Canada) also commented on the rapid change that ocean carriers and the container shipping industry had to go through over the past five years.

Further, the OSC warned that the current interest in very large ships will probably decline because filling such large ships takes time, which would be a disservice to customers who always expect or need their products to reach destinations quickly. The OSC emphasized that unless vessel speed is reduced to ten knots, operations would not be cost effective because of fuel costs. Although very large ships exist for trade between Europe and Asia, it remains speculative as to when and where these large vessels will operate in the Pacific.

Based on its decision to use 1.5 ship movements per day, the Panel notes that the number of movements associated with the Project provided in Table 5-1 for 2035 would be 520 instead of 468. The Panel notes that numbers provided by the Proponent in that table illustrate a trend towards increased traffic for all sectors in the marine shipping area.

¹ CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY, REVIEW PANEL HEARING, ROBERTS BANK TERMINAL 2 PROJECT, Closing Remarks of the Pacheedaht First Nation, August 26, 2019 (Reference Number 2048).

² Federal Review Panel Report for the Roberts Bank Terminal 2 Project at page 34.



The Panel acknowledges the trends towards increased traffic in the marine shipping area, which was a concern expressed by several participants.³

The Review Panel therefore assessed Project impacts on the basis of the information contained in the EIS, i.e. that the Project would result in 260 additional container ships transiting the marine shipping area on an annual basis, or 1.5 vessel movements per day.

As Canada will be aware, some of the Review Panel's key findings in relation to Project impacts on Pacheedaht from the vessel traffic were as follows:

- The Review Panel recognized that Swiftsure Bank is the primary harvesting area used by Pacheedaht and considered that “Pacheedaht adequately demonstrated that they harvest extensively in the shipping lanes at Swiftsure Bank and travel across the shipping lanes to access other harvesting locations and to visit relatives at Neah Bay”. The Review Panel acknowledged that shipping traffic “poses challenges” for Pacheedaht’s ability to safely harvest at Swiftsure Bank, practice cultural activities, and transfer Indigenous traditional knowledge.
- The Review Panel accepted that Pacheedaht’s safety concerns are preventing Pacheedaht members from bringing children and elders out to Swiftsure Bank and that this is “disrupting the intergenerational transfer of knowledge”. The Review Panel disagreed with the Proponent that the safety risk is only perceived. The Review Panel concluded that Project-associated shipping “poses a real risk to the safety of Pacheedaht members affecting both access and quality of experience.”
- The Review Panel concluded that the Project would have a **significant adverse cumulative effect** on Pacheedaht current use practices, particularly access to and quality of experience of fishing at Swiftsure Bank. Pacheedaht and Ditidaht were the only two Indigenous groups that the Review Panel concluded would suffer significant adverse effects on their current use practices in the marine shipping area as a result of the Project.
- The Review Panel acknowledged that Pacheedaht’s “traditional activities are not currently practiced in the preferred manner because of existing marine shipping, which has been exacerbated by the shifting of the shipping lanes.” The Review Panel stressed that “immediate changes are needed to reduce interactions between commercial vessels and smaller fishing vessels and to improve communication to mitigate cumulative effects.”
- The Review Panel concluded that, in the absence of “effective and mandatory mitigation measures”, the Project would cause **significant adverse effects** on SRKW due to its effects on underwater noise, Chinook salmon prey availability and potential ship strikes. The Panel also concluded that the cumulative effects of the Project and marine shipping associated with the Project on SRKW would be **significant**.
- The Review Panel acknowledged that killer whales are so connected to Indigenous cultural practices that effects on SRKW populations would affect cultural heritage values. The Review Panel concluded that marine shipping associated with the Project would result in significant adverse cumulative effects on cultural heritage for Pacheedaht and other Indigenous groups that use the marine shipping area for cultural practices.

³ Federal Review Panel Report for the Roberts Bank Terminal 2 Project at page 34.



- The Review Panel concluded that spill events associated with the Project could result in residual adverse environmental effects, which could be significant for vulnerable species such as SRKW, current use practices, cultural heritage and health of Indigenous groups. The Panel made a number of recommendations aimed at mitigating risk from spills and accidents in the marine shipping area.

We provide this background in order to help explain our perspective that when the Minister asked the Proponent to provide information about how to further avoid and mitigate impacts to SRKW from the Project in IR2020-3, we were incredibly surprised and disheartened to see the Proponent once again taking the position that the Project will not result in additional vessels, as we have been down this road before.

For the reasons set out below, Pacheedaht has serious concerns with the Minister relying on the 2021 Mercator Report at this point in any decision in relation to the Project.

(a) Unreasonable for the Minister to rely on the 2021 Mercator Report

In our view, it would not be reasonable for the Minister to rely on the vessel forecasting found in the 2021 Mercator Report to make any decisions in relation to the Project. Pacheedaht is aware that in IR2020-3, the Minister asked the Proponent to “confirm the projections for container vessel traffic associated with the Project”. The Proponent’s response was to provide what they call an “update” to information which was not accepted by the Review Panel.

It would be unreasonable for the Minister to rely on this update. We are not aware of any grounds that would justify departing from the Review Panel’s conclusion that the vessel forecast in the EIS and the MSA provide a realistic and conservative assessment of the anticipated levels of marine shipping associated with the Project. Nor are we aware of any grounds that would justify relying on the 2021 Mercator Report when essentially the same vessel forecasting was rejected by the Review Panel.

Review Panels are an extremely rigorous form of environmental assessment. Their role is to gather and to carefully test information about a proposed project and to provide evidence-based recommendations to decision-makers. Review Panels are comprised of independent and impartial experts who in order to be appointed, must have knowledge or experience relative to the anticipated environmental effects of a project.

In this case, the Review Panel was mandated to consider the marine shipping associated with the Project and provide a report setting out their rationale, conclusions, and recommendations in relation to Project impacts, including any mitigation measures and follow up programs. The Review Panel’s process included 24 days of public hearings and resulted in the preparation of a 627-page final report. The conclusions and recommendations set out in the Review Panel’s report have formed the basis for the Crown consultation processes that have followed, as well as the engagement between the Proponent and Indigenous groups such as Pacheedaht.

In our view, the Review Panel’s findings about vessel forecasting must be what guides the Minister’s decision in relation to the Project. The Review Panel had the opportunity to consider this complex issue thoroughly and was able to test the evidence before them. As set out above, they came to the conclusion that the vessel forecasting prepared by Mercator International should not be relied upon.

Pacheedaht understands there is uncertainty associated with the prediction of shipping industry activities up to twenty-five years in the future. The Review Panel considered this fact. This is why their conclusion was ultimately conservative in nature. In our view the Minister must take a similar approach in order to ensure that the significant impacts identified for both SRKW and Pacheedaht from the Project have a hope of being addressed, especially considering the existing level of cumulative impacts in the marine shipping area.



It is deeply discouraging to feel we are back at the starting point with the Proponent once again trying to distance themselves from their own EIS and taking the position that the Project will not result in any new vessel traffic. While the Proponent refers to the 2018 Mercator Report in their response to IR2020-3, we do not see any reference to the fact that it was ultimately not relied on by the Review Panel. We are concerned that by commissioning and seeking to rely on an update to Mercator International's initial report, the Proponent is trying to distance themselves from the Review Panel's significance findings. While we understand that the Proponent was asked by the Minister to confirm the projections for container vessel traffic associated with the Project, we cannot agree that returning to Mercator International's predictions after they were rejected by the Review Panel is a sufficiently conservative approach to this incredibly important issue.

As Canada is aware, Pacheedaht's marine territory, including our hereditary fishing grounds at Swiftsure Bank, is transected by the international shipping lanes. This means that each additional vessel that transits through the Juan de Fuca Strait passes through our Territory, adding to the cumulative effects already impacting our rights and title and the species we rely on. Even since the Proponent provided their response to IR2020-3, we have found it incredibly difficult to have a meaningful conversation about how to avoid or mitigate potential impacts in the marine environment from the Project because of the suggestion once again that the Project will not result in any new vessels. In order for these important conversations to be able to continue, we implore Canada to make a clear statement that the vessel forecasting in the 2021 Mercator Report will not be relied upon for any decision-making in relation to the Project.

(b) If the Minister relies on the 2021 Mercator Report, it must be tested

If the Minister does consider relying on the 2021 Mercator Report in any decision-making in relation to the Project, procedural fairness requires that an opportunity be provided to test its conclusions.

In our view, the 2021 Mercator Report has all of the same reliability concerns that Pacheedaht raised with the Review Panel about the 2018 Mercator Report, including unknown authorship, unknown qualifications of the authors, unknown level of expertise of Mercator International, and reliance on unknown sources.

As the Review Panel no longer exists, it cannot provide its views on the 2021 Mercator Report. If the Minister is considering relying on the 2021 Mercator Report, an alternate process must be provided to test its conclusions, including an opportunity to question its authors and review the sources being relied upon. In our view, it would not be reasonable to rely on the conclusions of the 2021 Mercator Report otherwise.

2. Inefficient mitigation for the marine shipping portion of the Project

Apart from Pacheedaht's concerns with the 2021 Mercator Report, we also have very serious concerns with the sufficiency of the mitigation measures the Proponent has identified for the marine shipping of the Project. In this respect we say that the Proponent has not meaningfully responded to IR2020-3.

In their final report, the Review Panel concluded that, in the absence of "effective and mandatory mitigation measures", the Project would cause significant adverse effects on SRKW due to its effects on underwater noise, Chinook salmon prey availability, and potential vessel strikes. The Review Panel also concluded that the cumulative effects of the Project and marine shipping associated with the Project on SRKW would be significant. Mitigation measures for the Project need to be designed based on these conclusions.

The Review Panel also acknowledged that killer whales are so connected to Indigenous cultural practices that effects on SRKW populations would affect cultural heritage values. The Review Panel concluded that marine shipping associated with the Project would result in significant adverse cumulative effects on cultural heritage for Pacheedaht and other Indigenous groups that use the marine shipping area for cultural practices.



In IR2020-3, the Proponent was asked to provide additional mitigation measures to address the impacts to SRKW from the Project. Specifically they were asked to provide an avoidance and mitigation plan for underwater noise for marine shipping that would address impacts to SRKW and to describe potential measures to reduce the risk of vessel strikes.

In their response at Table IR2020-3-7, the Proponent identified four commitments and mitigation measures which apply to the marine shipping associated with the Project. These are set out below in the Proponent's words:

1. **[Regional/Federal Initiatives]** Participate in regional initiatives (project commitment #55 and marine shipping commitment #3) and support relevant federal authorities with initiatives aimed at effective management and recovery of SRKW.
2. **[ECHO Program]** Continue to manage the ECHO Program and its initiatives and sign on to an additional five years of the Species at Risk Act (SARA) Section 11 Conservation Agreement to Support the Recovery of the SRKW, if other parties agree, to reduce acoustic and physical disturbances to SRKW by large commercial vessels in Pacific Canadian waters, in particular those vessels that call at the Port of Vancouver, or otherwise operate in SRKW critical habitat.
3. **[ECHO Program]** Impose terms on the terminal operator, requiring that RBT2-bound container vessels to participate in the ECHO Program (or equivalent).
4. **[Marine Shipping Follow up Program]** Implement a marine shipping follow up program element – if container vessel projections and their associated underwater noise exceed predictions, with the project, then we would seek to apply additional measures to reduce underwater noise, which could include expanded vessel slowdowns.

The table in which these measures are listed is entitled “Previous project commitments and additional proposed mitigation measures”.⁴ Pacheedaht's concern is that contrary to the Minister's request, in identifying the above, the Proponent has not identified any new mitigation for marine shipping. The commitments and mitigation measures listed are either: (a) not new; or (b) simply a plan to do something later. We set out these concerns below.

a. Regional/Federal Initiatives

The first measures the Proponent identifies as mitigation for the marine shipping component of the Project is their participation in various regional and federal initiatives. In their response to IR2020-3, the Proponent states that the additional measures they have identified to address impacts to SRKW are “beyond what was considered by the review panel”.⁵ However, this commitment is not new. Both project commitment #55 and marine shipping commitment #3 were before the Review Panel during their review, as was the commitment to participate in relevant federal initiatives. As such this part of the Proponent's response is not responsive to the Minister's request.

In addition, in our view this commitment is too generic to offer the kind of immediate and concrete action needed to sufficiently protect SRKW and their critical habitat. The outcomes of these initiatives remain entirely unknown, making it impossible to assess the extent to which they will be successful in addressing impacts to SRKW.

⁴ Response to IR2020-3 at page 37.

⁵ Response to IR2020-3 at page 3.



b. ECHO Program

Measures 2 and 3 above are a commitment by the Proponent to continue to manage its own program, the Enhancing Cetacean Habitat and Observation (ECHO) Program. As with the regional and federal initiatives discussed above, the ECHO Program was also considered by the Review Panel and so does not represent a new commitment. The same is true for the Section 11 Conservation Agreement with the Government of Canada referenced by the Proponent's in this section.

Pacheedaht acknowledges the important work being carried out through the ECHO Program to further the understanding of underwater noise from marine traffic, including through the vessel slowdown trials that were considered by the Review Panel. However, in our view, the ECHO Program is necessarily limited in its effectiveness given that it is restricted to providing recommendations and relying on voluntary compliance from the shipping industry. In the words of the Review Panel, SRKW need “effective and mandatory mitigation measures”, and we cannot see how the ECHO Program is equipped to provide the latter.⁶

Another concern that Pacheedaht has with the ECHO Program is that it is not currently equipped to deal with the transboundary nature of the threats facing SRKW. Just as SRKW and their critical habitat cross the international border, so must the work being carried out to protect them. Pacheedaht is of the strong view that a transboundary approach is needed. A helpful model for such an approach is the Resident Killer Whale Recovery Team (Recovery Team) that helped in developing the 2008 Recovery Strategy for Northern and Southern Resident Killer Whales. Importantly, the Recovery Team included team members from research centres and government departments in Washington State. In Pacheedaht's view, a step that could be taken to strengthen the effectiveness of the ECHO Program and other initiatives would be to work collaboratively with partners in the United States, including the Makah Tribe at Neah Bay. The International Maritime Organization also (IMO) provides a possible venue for this transboundary work, as well as an opportunity for creating mandatory standards for vessels transiting the Juan de Fuca Strait. Pacheedaht is currently in the process of trying to partner with Canada in this important work. In our view working with the IMO to impose standards and maximum speeds on vessels associated with the Project as they transit the Juan de Fuca Strait represents a promising opportunity for reducing underwater noise, vessel emissions, and strike risks to marine mammals.

c. Marine Shipping Follow Up Program

The final measure identified by the Proponent to mitigate impacts from the marine shipping component of the Project is a marine shipping follow-up program, which they say will be implemented “if container vessel projections and their associated underwater noise exceed predictions”.⁷ In our view this does not represent an additional commitment or mitigation measure as requested by the Minister. This is only a commitment to take action some time in the future, and only if required to do so.

As stated at length above, Pacheedaht has serious concerns with the vessel forecasting being relied on by the Proponent. We are worried that the Proponent is trying to discount the findings of the Review Panel by seeking to rely on new information, albeit from the same source that was rejected during the Review Panel hearings. The Review Panel found significant impacts to SRKW from the marine shipping associated with the Project and yet the Proponent does not appear to have provided any new commitments or mitigation measures for the marine shipping associated with the Project, except for this commitment to do something later - if required.

There are currently only seventy-four SRKW left. When it comes to protecting SRKW, the time for action is now. We know from the recent work completed by Dr. Sheila Thornton that SRKW are experiencing significant disruption to their foraging activities as a result of underwater noise, including at Swiftsure Bank. In order to

⁶ Federal Review Panel Report for the Roberts Bank Terminal 2 Project at page 592

⁷ Response to IR2020-3 at page 38.



ensure their survival, the Project and its impacts need to be considered in the most careful and precautionary manner possible, which we do not believe is reflected in the Proponent's response to IR2020-3. Canada has an obligation under the *Species at Risk Act* to take a precautionary approach to any threats to species at risk. In our view, it is not sufficiently precautionary to allow the Proponent to "wait and see", especially considering the strong findings made by the Review Panel in terms of how SRKW and also Pacheedaht will be impacted by the Project.

Effective Mitigation is Needed Now

Pacheedaht wishes to speak with Canada about identifying additional mitigation measures to reduce underwater noise that will be implemented immediately. In our view, this could include measures identified by the Proponent in their follow up program, but these measures would need to be put in place in advance should the Project be allowed. In particular, Pacheedaht is of the view that mandatory vessel slow downs for vessels associated with the Project are required immediately, especially given the presence of increasingly large vessels in the shipping lanes.

Conclusion

All of the concerns raised by Pacheedaht in this letter have been raised directly with the Proponent, both in a letter and also at a meeting. In their response to IR2020-3, the Proponent states that the input of Indigenous groups is "reflected in the response".⁸ The Proponent also states that the 2021 Mercator Report was completed in response to "feedback received from Indigenous groups and government agencies".⁹

It may be the case that the response reflects the views and input from other Indigenous groups, but not Pacheedaht's. Despite raising concerns both with the 2021 Mercator Report and with the sufficiency of the mitigation being proposed for SRKW, as far as we are aware no changes have been made to the response to IR2020-3 based on our input and we have received no feedback in response to our concerns. To suggest that the 2021 Mercator Report was provided in response to feedback from Indigenous groups, when Pacheedaht has been objecting to the Proponent about its use, is in our view disingenuous at best.

Given the nature of the concerns set out in this letter, Pacheedaht would like to meet with Canada to discuss. Please contact me to make arrangements for a meeting.

Yours truly,

⁸ Response to IR2020-3 at page 3.

⁹ Response to IR2020-3 at page 2.



PACHEEDAHT FIRST NATION

A handwritten signature in black ink, appearing to read "Kristine Gatzke".

Kristine Gatzke

Referrals Coordinator

cc: Chief and Council