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Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
* 11404 Moorage Way * La Conner, Washington 98257 *

November 23, 2020

Impact Assessment Agency of Canada
Suite 210A – 757, West Hastings Street
Vancouver, BC V6C 3M2

Via Electronic Mail:

IAAC.Deltaport.AEIC@canada.ca

Re: GCT Deltaport Expansion – Berth 4
Comment on Summary of Issues

Dear Impact Assessment Agency of Canada:

Thank you for the opportunity to comment on the scope of review for the Delta Port Expansion -- Berth 4 proposal.¹ I am writing to request that you make me and the Swinomish Indian Tribal Community a part of the record in this proceeding and provide us direct notification of future opportunities for participation and comment. We also request that you develop a protocol with us for government-to-government consultation. The Swinomish Indian Tribal Community is recognized as a sovereign government under U.S. law.

When we took an initial look at the applicant's initial project description materials, we noted right away that the conclusions about potential impacts to indigenous people appear to omit any mention of the adverse effects on US treaty tribes that arise due to the planned use of shipping lanes on the U.S.-side of the border by project shippers. The Swinomish Indian Tribal Community depends heavily on those areas for subsistence, cultural and spiritual Life Ways. See <https://iaac-aeic.gc.ca/050/documents/p81010/136127E.pdf> at Page 68.

Under international law and Canadian law, we urge you to analyze direct and indirect project impacts to our treaty fishing on the U.S. side of our shared border. The purpose of this letter is to underscore the substantial nature of those impacts and the legal requirement to consider them, with a request that you continue to allow us opportunities for consultation and presentation of evidence. In light of Canadian statutory requirements, we request an opportunity to develop protocols with you for consultation with my office.

¹ Invitation reviewed at: <https://iaac-aeic.gc.ca/050/evaluations/proj/81010?culture=en-CA>, viewed November 20, 2020.

1. The Swinomish Indian Tribal Community: a Coast Salish Indigenous Fishing Community and Sovereign Government.

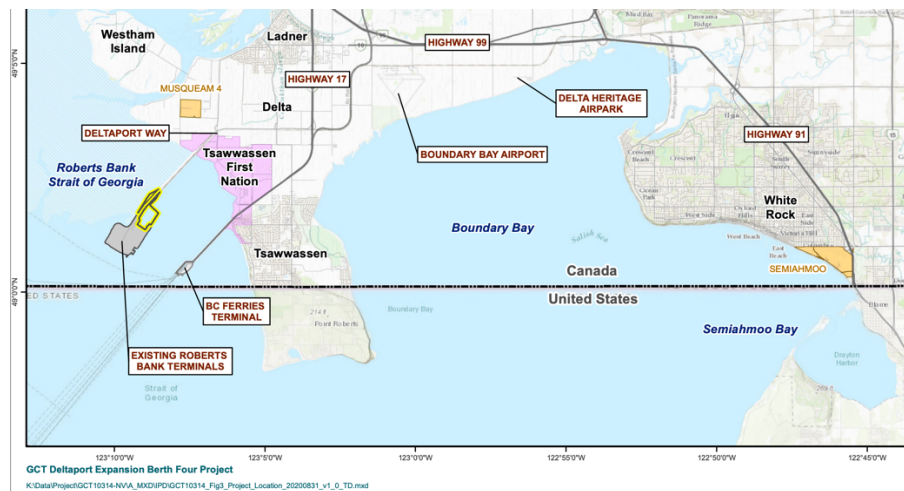
The Swinomish Indian Tribal Community has the second largest tribal fishing fleet in the U.S. Salish Sea. Our tribal members are direct descendents of the Coast Salish peoples who lived in the area of our reservation near La Conner, Washington for millennia. Archeologists have found artifacts thousands of years old at the edge of our reservation. Our people had lived here for millenia by the time that westerners began settling in the area in the mid-1800's.

In 1855, in negotiations with the U.S. Government, our Swinomish ancestors ceded their lands, agreed to a reservation, but also reserved our traditional fishing rights in the Salish Sea. Swinomish is a successor in interest to tribes who signed the Treaty of Point Elliott, 12 Stat. 927 (1855) with the United States Government. As such, Swinomish is a U.S. Tribe that currently holds a right under that treaty to fish and gather shellfish throughout its "usual and accustomed grounds and stations," or "U&As" for short. The Swinomish U&A has been adjudicated and extends north all the way to the Canadian Border. In signing the Treaty, Swinomish and other tribes never relinquished their status as sovereigns and U.S. courts continue to recognize the independent governmental function of federally recognized U.S. treaty tribes.

Swinomish tribal members are Coast Salish peoples that know no borders between Canada and the U.S. For millennia, our people have exchanged family ties, goods and indigenous technology throughout the entire Salish Sea, spanning what is today British Columbia and Washington State inland waters. Those kinship, spiritual and economic ties continue today and the leadership of bands and tribes on both sides of the modern border meet throughout the year for canoe gatherings, political gatherings, and cultural events as they did prior to western arrival. Swinomish and other U.S. treaty tribes participate actively in co-management of the fishery resource with Canada, the U.S. government, the province of B.C. and with Washington State. See Declaration of Lorraine Loomis, attached.

2. Project Background.

The Roberts Bank/Delta Port shipping complex is located in the homeland of the Tsawwassen First Nation and our Coast Salish peoples, in the delta of the Fraser River, British Columbia. The port currently serves private ship export enterprises that transport coal, containers and other materials to and from international ports. The Roberts Bank port is located less than a mile from the international border with the United States, as shown in Figure 3 of the applicant's project description:



Delta Port 4 Initial Project Description (Sept. 2020), Figure 3 (Proposed Delta 4 Project outlined in yellow at Roberts Bank Terminal).

One of the primary shipping operators at Roberts Bank is Global Container Terminals (“GTC”). They are now the applicant for expansion of Roberts Bank to allow a fourth container terminal. As reported in GTC’s *Initial Project Description*, Berth 4 would substantially increase the export capacity of the Delta Port export facility:

While DP4 will result in an increase in capacity of 2 million TEU per annum at GCT Deltaport, there will only be a small increase in the number of vessels calling. This is due to the expected increase in the size of vessels GCT Deltaport is currently able to handle vessels up to the size of Ultra Large Container Vessel (ULCV) but current vessels calling are predominantly Post-Panamax. It is expected by 2035, the mix of shipping service vessels is projected to be 75% Post Panamax size and 25% ULCV size.

Id. at 19. We note the applicant’s characterization of project impacts as only “a small increase in the number of vessels calling.” We write to explain why this increase is not “small.” It involves an increased capacity to send the largest cargo container ships in the world through our treaty-reserved fishing grounds.

In Figure 6, the applicant makes a preliminary estimate that, at buildout, the new project will add a maximum of 52 ports of call to Roberts Bank per year. Each port of call involves two transits, one arriving and one departing. Thus, the applicant’s estimate translates into an increase in Salish Sea vessel traffic of 104 transits per year. However, the applicant acknowledges that Delta Port 4 will increase the Port’s ability to utilize Ultra Large Container Vessels, and thus, the increase in cargo handling will be significant. *Id.*

The increase of 104 transits per year of these Ultra Large Container Vessels will be significant for U.S. treaty tribe fishermen and other ships in the United States. The size of these

ships is truly astronomical, from the perspective of a fisherman on the water trying to set nets or crab pots and to retrieve them prior to an encounter with one of these vessels, which are four football fields long, and described and shown as follows:

Container ship size categories

Name	Capacity (TEU) ^[19]	Length	Beam	Draft	Example
Ultra Large Container Vessel (ULCV)	14,501 and higher	1,200 ft (366 m) and longer	160.7 ft (49 m) and wider	49.9 ft (15.2 m) and deeper	With a length of 400 m, a width of 59 m, draft of 14.5 m, and a capacity of 18,270 TEU, ships of the Maersk Triple E class are able to transit the Suez canal. ^[27] (photo: <i>MV Mærsk Mc-Kinney Møller</i>)



Source: https://en.wikipedia.org/wiki/Container_ship#Size_categories, accessed on November 20, 2020.

Our tribal fishing fleet consists primarily of smaller-sized vessels that are not even as large as the tugs that service these Ultra Large Container Vessels (ULCV). For a sense of scale, the following photograph compares the size of these tugs with a ULCV.



MSC Gülsün arriving in Germany. Its owner says that larger container ships help to lower exporters' carbon footprint
MOHSSEN ASSANIMOGHADDAM/ALAMY

Source: <https://www.thetimes.co.uk/article/worlds-biggest-container-ship-msc-guelsuen-makes-waves-on-first-european-visit-3z7sfdlbq>, accessed on Nov. 20, 2020. For sense of scale, humans

can be seen on the bridge at upper right, and in the far-right portal of the stern, to the right of the following tug boat.

We do not regard an increase of 104 transits of these giant vessels within our fishing grounds as a “small increase.” In the event the Vessel Traffic Scheme is modified to shift the shipping lanes into the U.S.-side of the corridor in the Strait of Juan de Fuca and Haro Strait to the border (discussed below), our tribal fishermen will potentially be asked to endure the total impact of Delta 4 ships arriving and departing from Roberts Bank. Due to the size and frequency of proposed shipping, we intend to devote resources to working with you and the Canadian Government to better understand the impacts of this proposal on our Coast Salish Life Ways, within the United States.

3. Canadian Law Requires an Analysis of Impacts to the Swinomish and other U.S. Tribes.

It is our understanding that, under Canadian federal law, a comprehensive review of impacts to U.S. treaty fishing tribes would be required for the GTC Delta 4 proposal. Based on the prior work of the Environmental Assessment Agency for the concurrent Roberts Bank 2 proposal, we conclude that the Environmental Assessment Act of 2012 requires the following scope of analysis for the GTC Delta 4 proposal:

The Panel is required to consider all environmental effects defined in its Terms of Reference and under subsection 5(1) and 5(2) of CEAA 2012, and to determine whether the designated Project is likely to cause significant adverse environmental effects, taking into account the implementation of mitigation measures. The term “environmental effects” refers to environmental effects in areas of federal jurisdiction as described in section 5 of CEAA 2012:

- Effects on fish and fish habitat, shellfish and their habitat, crustaceans and their habitat, marine animals and their habitat, marine plants, and migratory birds;
- Effects on federal lands;
- Effects that cross provincial or international boundaries;
- Effects of any changes to the environment that affect Aboriginal peoples, such as their use of lands and resources for traditional purposes and physical and cultural heritage; and
- Changes to the environment that might result from federal decisions as well as any associated effects on health, socio-economic conditions, matters of historical, archaeological, paleontological or architectural interest, or other matters of physical or cultural heritage.

Federal Review Panel Report for the Roberts Bank Terminal 2 Project (March 27, 2020) at 4-5.²

The third bullet point in your outline of legal requirements, above, is of particular relevance to our review of this proposal. The *Initial Project Description*, in our view, significantly omits impacts that cross the international boundary in its description of the scope of environmental review.

4. The Nature of Impacts to the Swinomish and Other U.S. Treaty Fishing Tribes.

For ease of reference, we attach here and incorporate by reference in its entirety our letter to you dated February 8, 2019 (represented by Earth Justice) and its Exhibit 1, the *Declaration of Lorraine Loomis*, the Chair of our Swinomish Fish Commission. Please refer to these for a detailed account of the impacts of port expansion proposals at Roberts Bank on our Coast Salish Life Ways and Swinomish treaty fishing rights.

As described in detail in those materials, the GTC Delta 4 project will have significant direct impacts on the Swinomish tribe and other U.S. indigenous people. Some of those impacts will occur in Canadian waters, as our salmon and freshwater rely on the Fraser River system, including its delta at Roberts Bank. Other impacts will occur in U.S. waters. Every shipping project in B.C. utilizes U.S. waters for transit, in order to participate in the Vessel Traffic Management system operated by the U.S. and Canadian Coast Guards. Every B.C. port project therefore increases vessel traffic within our traditional and treaty-reserved fishing areas outside the Canadian border.³

As you know, the Swinomish tribe has fishing rights that extend to the border between Canada and the United States. The Delta Port Berth 4 proposal is located within approximately one mile (1.6 KM) of our U&A within the U.S. Our tribal members fish that border area routinely for salmon, crab, halibut and other species. Large vessel traffic and support tugs and crew vessels accessing Canadian and U.S. ports occupy shipping lanes within our U&A and block access to a portion of those U&As every single day. Our tribal fishermen are directly and adversely affected through deprivation of access to their U&A, the action of large waves on their vessels, loss of gear, and a shortening of time available for use of limited-duration fish openings, the duration of which are set under state and tribal regulations.

² As acknowledged by the applicant, the land and seabed underlying the proposed development is owned by the federal government and/or the Vancouver Fraser Port Authority, a federal agency, thus triggering the need for federal permits and approvals. See, *GTC Initial Project Description* (Sept. 2020) at 15 (Section 4.1, Table 10).

³ As mentioned, the use of U.S. waters for Canadian port shipping will be exacerbated if Canada succeeds in its proposal to shift more of the vessel shipping lanes onto the U.S. side of the boarder, as currently proposed and under study by Transport Canada.

Sworn declarations from Swinomish tribal members and leadership are on file with the Canadian government demonstrating just how that vessel traffic interferes with the exercise of Swinomish treaty fishing rights (see Swinomish testimony before the National Energy Board/Kinder Morgan and the IAAC/Roberts Bank2). We appreciate the fact that your agency reviewed our evidence and recognized it in detail in your report for Roberts Bank 2. We urge you to do the same here, with the addition of the cumulative impacts analysis you identified as critical to environmental review of Canadian shipping.

5. The Project Review Must Include the Context of Cumulative Ship Increases.

Our concerns with the proposed increase in very large vessel trips through our fishing grounds cannot be divorced from our concern about the overall proliferation of Canadian vessels planned and/or approved by the Canadian federal government. In addition to the increased very large vessel traffic directly tied to this proposal, the applicant estimates that shipping trade at Roberts Bank for other berths will also increase substantially over the next ten years. The applicant's analysis does not appear to include a cumulative impact assessment considering the combined impact of this project with other possible or probable shipping projects in South British Columbia. We urge you to require cumulative effects analysis.

The cumulative effect of multiple singular proposals is of great concern to us and all who seek to protect the future viability of the Salish Sea biome. Over the past eight years, a number of proposals have been advanced, with some obtaining final approval, including the following.

Project	Export Product	Expected Vessel Transit Increase per Year	Use of U.S. Waterways?
Trans Mountain Pipeline Expansion	Crude Oil	695 Tanker Transits	Yes
Roberts Bank 2	Containers	520 Cargo Ship Transits	Yes
Westpac/Tilbury	Liquid Natural Gas (LNG)	244	Yes
Wood Fiber	LNG	96	Yes

In order to weigh the true impacts of the additional 104 large vessel transits of GTC's proposed Delta Port 4, the vessel transit increase must be reviewed in context, with the additional cumulative impacts of other proposals and existing baseline⁴ ship traffic taken into account. For example, if GTC Delta Port 4, Trans Mountain Pipeline Expansion and Roberts Bank 2 were to

⁴ The baseline level of ship traffic is monitored annually by the Washington State Department of Ecology in its annual Vessel Entries and Transits report. For their 2019 report, see <https://fortress.wa.gov/ecy/publications/documents/2008004.pdf>.

be approved, the cumulative future increase in large vessel trips annually would place 1,319 additional vessel trips without our Usual & Accustomed treaty-reserved fishing area. That equates to four additional ships per day. An accurate environmental assessment must take into account whether the environment, and the people living in it, can withstand the total impact, taken together, beyond the narrow and distorted focus of a single piece.

6. Request for Postponement of Project Planning Until Completion of Other Studies.

Based on the specifics of the Delta Port 4 project, we urge the panel not to issue any reports, recommendations or approvals on the scope of environmental review until ongoing studies, including a cumulative impact study, have been completed. This postponement is necessary to ensure that a holistic picture emerges capable of supporting an accurate analysis of marine impacts to our Life Ways.

The impacts of the Delta Port 4 proposal can only be understood when the following studies-in-process are completed and evaluated in terms of cumulative impacts to our Coast Salish Life Ways:

- Transport Canada Traffic Separation Scheme Feasibility Study;
- Transport Canada Ocean Protections Plan Cumulative Effects of Marine Shipping Study of the South Coast of B.C.
- Roberts Bank 2 Request for Additional Information by the Minister of the Environment and Climate Change.

Significantly, the Canadian government is now studying a government proposal by Transport Canada to shift the vessel traffic lanes to the U.S. side, in order to mitigate the impacts of increased shipping traffic in British Columbia. See, Transport Canada Traffic Separation Scheme Feasibility Study.⁵ That proposal indicates an inability of the Canadian government to mitigate the impacts of its increasing shipping port approvals within Canadian waters. Shifting those impacts to the U.S. side may address one problem – habitat for the Southern Resident Killer Whale, but simply shifts that burden to another problem – interference with U.S. Treaty Tribe fishing rights.

Further, it is our understanding that Transport Canada is at only the beginning stages of a new cumulative impacts study for the South Coast of B.C. that should be completed prior to any review or approvals of the Delta Port 4 proposal. This South Coast study is being conducted by the agency's Oceans Protection Plan and may incorporate fishing data from U.S. treaty fishing

⁵ Contact: Nicole Mathews, Project Lead, Oceans Protection Plan, Transport Canada; Tel: (604) 787-9427; Email: nicole.mathewstc.Qc.co.

tribes and an analysis of impacts to U.S. Coast Salish indigenous people. The Delta Port 4 analysis should not be completed until this data and study are completed, in order to ensure a holistic picture of how Delta Port 4 will contribute to the demise of our people.

Finally, the analysis should not be completed until all of the information is submitted in response to the request by the Minister of the Environment and Climate Change related to the concurrent Roberts Bank 2 proposal, as follows:

Regarding Effects to Indigenous Peoples:

Provide any additional information from ongoing consultation led by the VFPA with Indigenous groups, or consultation that has occurred since the Panel hearings concluded, on the effects to current use of lands and resources for traditional purposes and human health identified in the Review Panel Report. Specifically:

- **Are there additional details regarding the extent of current use of Indigenous groups who traverse the shipping lanes to practice traditional activities?**
- **How would health effects documented in Section 21 of the Panel Report affect vulnerable sub-groups of each Indigenous group?**
- **For Indigenous groups that have indicated they harvest crab for the purpose of consumption, how will Project effects, including loss of abundance and loss of access, affect food security?**
- **For nearby residents, including members of Tsawwassen First Nation, how may the contributions of the Project's additional stress and annoyance affect individuals?**

Present any new information, if available, specific to each Indigenous group. The information shall, where appropriate, consider socio-economic and gender differences within individual communities.

Letter from Minister of the Environment and Climate Change to Vancouver Fraser Port Authority re Roberts Bank 2 (August 24, 2020).

Our request for holistic analysis of impacts is consistent with your recommendation in the Roberts Bank 2 report, in which you articulated the need for a cumulative impacts assessment, internationally throughout the Salish Sea, in order to truly understand the impacts to indigenous peoples and the natural resources upon which we depend for our cultural, spiritual and economic survival as Coast Salish people.

7. **Request for Consultation and Notification.**

As a sovereign government, the Swinomish Indian Tribal Community requests notification from you in the future concerning this project – GTC Deltaport - Berth 4 -- and any

other new proposals under your review in the future that affect marine shipping in U.S. waters. (As far as I am aware, we did not receive notification from you for this GTC Berth 4 comment period). We also request that you develop a protocol with us for direct government-to-government consultation, under international law and Subsection 5(1) and 5(2) of the CEAA 2012.

We appreciate your review of this letter and our concerns as a neighboring sovereign government. Please contact James Jannetta in the Swinomish Office of Tribal Attorney at (360) 466-1021, or via email at jjannetta@swinomish.nsn.us, to arrange consultation and for all future notifications related to GTC Deltaport – Berth 4 and similar future proposals. Thank you for your consideration.

Sincerely,

<original signed by>

Steve Edwards

Chairman

Swinomish Indian Tribal Community

cc: James Jannetta
Tom Ehrlichman
Wendy Otto