

January 7, 2022

Sent via E-mail to deltaport@iaac-aeic.gc.ca

GCT Deltaport Expansion – Berth Four Project
Impact Assessment Agency of Canada
160 Elgin St, 22nd Floor
Ottawa, ON K1A 0H3

To the Impact Assessment Agency:

Re: Comments on draft Joint Guidelines and draft Joint Assessment Plan for GCT Deltaport Expansion - Berth Four Project

We write on behalf of the David Suzuki Foundation, Georgia Strait Alliance, Raincoast Conservation Foundation, and Wilderness Committee to provide their comments on the Draft Joint Guidelines and Draft Joint Assessment Plan for the GCT Deltaport Expansion - Berth Four Project (“DP4”).

Timing of impact assessment

Our clients participated in the Agency’s review of the Roberts Bank Terminal 2 Project (“T2”), also proposed for the Fraser River estuary, and currently awaiting ministerial and Cabinet decisions concerning its approval. The initial project description for DP4 characterizes it as an alternative to T2.

Given that two projects – DP4 and T2 – are proposed for this area, and given that GCT presents DP4 as an alternative to T2, our clients’ opinion is that it would be appropriate to pause further progress towards a decision on T2. To proceed with an assessment of DP4 when T2 might be approved in the interim risks wasting the Agency’s, the proponent’s, and participants’ time and resources.

Our clients note that the timeline for the Minister’s decision on T2 is currently suspended under s. 48 of the *Canadian Environmental Assessment Act, 2012* (“CEAA 2012”) due to the Minister requiring further information from its proponent under s. 47(2) of CEAA 2012. If needed, the Minister can also extend the time limit for his decision for up to three months under s. 54(3) in order to “take into account circumstances that are specific to the project” – in this case, the fact that DP4 has been proposed as an alternative.

Comments on Draft Joint Guidelines

Issues of interest

Our clients are concerned with impacts in the Fraser River Delta and Salish Sea that include underwater noise, marine water quality, marine fish and fish habitat, marine mammals, species at risk, and climate change.

Our clients are particularly concerned with 1) the impacts of DP4 on Fraser River salmon populations and their habitat, and 2) the impacts of DP4 and related marine shipping on the federally protected endangered Southern Resident Killer Whales (the “Southern Residents”) and their legally protected critical habitat, which includes a quiet ocean environment, clean marine waters, and abundance and availability of salmon prey.

The impact assessment for DP4 should address, at minimum, the same issues that the assessment of T2 did. This includes impacts on salmon that depend on the Fraser River estuary, which in the case of DP4 would be affected by changes to eel grass beds and fish habitat in the intertidal, inter-causeway area, and changes to fish movement around the causeway. This also includes the impacts of marine shipping on the *Species at Risk Act* listed endangered Southern Resident Killer Whales. Additionally, the impacts of short sea shipping on the marine environment, including noise impacts in Southern Resident Killer Whale critical habitat, must be examined.

The assessment should also better address areas that were overlooked or under-scrutinized in the T2 assessment. T2 is currently subject to post-assessment information requests from the Minister, who is seeking further information on topics that were not adequately addressed by that project’s proponent in the environmental assessment; in this case, the proponent should be required to address all issues in a satisfactory manner during the impact assessment. In particular, to avoid similar shortcomings, the proponent must provide thorough information concerning plans for mitigation and offsetting of impacts on fish habitat that speaks to the feasibility and effectiveness of those measures, rather than stating that the effects can be mitigated and that the details will be worked out at some later time.

Furthermore, the review panel assessing T2 found that it would impact juvenile chum and Chinook salmon and have “significant” adverse effects on Chinook due to a combination of disruption caused by its footprint, which would restrict access to productive salmon habitat in the inter-causeway area, and acoustic and light impacts during construction and operations.¹ One can expect that DP4 would have some similar, or similarly disruptive, effects in this important salmon habitat. Given the impacts of construction and operations in the Fraser River estuary on salmon, and the importance of those salmon to First Nations not only in the immediate area but along the Fraser River, there should be consultation with a broader range of First Nations than there was with respect to T2.

Geographic extent of marine shipping incidental to the project

¹ Review Panel, Roberts Bank Terminal 2 Protect, “Federal Review Panel Report for the Roberts Bank Terminal 2 Project” (27 March 2020), online at <https://iaac-aeic.gc.ca/050/documents/p80054/134506E.pdf>, at 187.

Our clients' position is that the impact assessment should assess the effects of marine shipping to the outer boundary of Canada's exclusive economic zone (the "EEZ"), rather than restrict the assessment to the 12 mile nautical limit of the territorial sea of Canada (the "Territorial Sea"). This would be consistent with the *Impact Assessment Act*, SC 2019, c 28, s 1 (the "IAA"); consistent with the *Species at Risk Act*, SC 2002, c 29 ("SARA"); and consistent with Canada's jurisdiction. Any other interpretation would be unreasonable.

It is uncontroversial that marine shipping must be assessed as part of DP4, as it is "incidental" to DP4. Section 2 of the *Impact Assessment Act*, SC 2019, c 28, s 1 (the "IAA") defines a "designated project" to include "any physical activity that is incidental to" the designated project.

Our clients' position is that marine shipping not only within the Territorial Sea but to the outer boundary of the EEZ is "incidental" to the Project and therefore captured by this definition. Marine shipping continuing beyond the Territorial Sea into the EEZ is still incidental to the DP4, because the causal connection between DP4 and marine shipping is the same in the EEZ as it is in the Territorial Sea. Shipping up to the outer boundary of the EEZ is therefore squarely within the IAA definition of the "designated project". There is no basis for excluding marine shipping within the EEZ.

Furthermore, marine shipping within the EEZ may have effects within federal jurisdiction, including effects on fisheries and species at risk. Evidence concerning these potential effects should be included in the impact assessment.

The IAA requires impact assessments to consider effects within federal jurisdiction, and it defines "effects within federal jurisdiction" as follows in s. 2:

effects within federal jurisdiction means, with respect to a physical activity or a designated project,

- (a) a change to the following components of the environment that are within the legislative authority of Parliament:
 - (i) *fish* and *fish habitat*, as defined in subsection 2(1) of the [Fisheries Act](#),
 - (ii) *aquatic species*, as defined in subsection 2(1) of the [Species at Risk Act](#),
 - (iii) *migratory birds*, as defined in subsection 2(1) of the [Migratory Birds Convention Act, 1994](#), and
 - (iv) any other component of the environment that is set out in Schedule 3;
- (b) a change to the environment that would occur
 - (i) on federal lands,
 - (ii) in a province other than the one where the physical activity or the designated project is being carried out, or
 - (iii) outside Canada; [...]

“Federal lands”, as defined in s. 2 of the IAA, include both the Territorial Sea and the EEZ.

This further indicates that marine shipping within the EEZ should be part of the designated project and its effects should be addressed in the impact assessment.

Including the impacts of marine shipping within the EEZ is also consistent with the purposes of the IAA, set out in s. 6(1), which include:

(b) to protect the components of the environment, and the health, social and economic conditions that are within the legislative authority of Parliament from adverse effects caused by a designated project; and

(d) to ensure that designated projects that require the exercise of a power or performance of a duty or function by a federal authority under any Act of Parliament other than this Act to be carried out, are considered in a careful and precautionary manner to avoid adverse effects within federal jurisdiction and adverse direct or incidental effects.

Finally, with respect to the IAA, the Federal Court of Appeal has held that responsible authorities conducting impact assessments must address a project’s effects on all components of the environment that are within the legislative authority of Parliament in order for the impact assessment to be consistent with the purposes of the IAA’s predecessor, the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 (“CEAA 2012”).² CEAA 2012’s purposes (a) and (b) are nearly identical to the IAA’s (b) and (d) above.

Including marine shipping within the EEZ would also be consistent with SARA. The purposes of SARA include “to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity”.³

To further this purpose in the context of impact assessment, s. 79(2) of SARA imposes additional obligations for impact assessments being conducted under the IAA when the “designated project” is likely to affect SARA-listed species or their critical habitat. The scope of the “designated project” that is subject to an environmental assessment determines what subject matter the additional requirements under s. 79(2) of SARA apply to. The purposes of SARA, therefore, also require the “designated project” to be defined in a way that does not arbitrarily exclude activities that are part of the “designated project”. In this case, it should include shipping within the EEZ.

Ships travelling into the EEZ by any route will pass through habitat for multiple SARA-listed species.⁴

² *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at para 402.

³ *Species at Risk Act*, SC 2002, c 29, s. 6.

⁴ See, for example, a Fisheries and Oceans Canada map showing the geographical extent of habitat for SARA-listed marine species: <https://gisp.dfo-mpo.gc.ca/apps/NASAR/widgets/SARQuery/reports/PacificOceanEN.pdf>.

For example, the Southern Resident Killer Whales' ("SRKW") critical habitat which has been identified and legally protected under SARA includes habitat in the EEZ.⁵ The SRKW Recovery Strategy identifies activities that may destroy critical habitat, which include acoustic and physical disturbance from vessel operations and spills of oil (including fuel) or other toxic materials from vessels, both of which are effects or potential effects of marine shipping; s. 58 of SARA prohibits destruction of critical habitat. DP4 therefore has the potential to affect, and even to destroy, critical habitat, in violation of a federal statute, within the EEZ. These potential effects need to be examined as part of the impact assessment.

Many other SARA-listed species have habitat in or use the EEZ, including the following⁶:

- a) the Recovery Strategy for the Offshore Killer Whale states that "Offshore Killer Whales seem to predominantly inhabit continental shelf-edge waters along the British Columbia coast"⁷;
- b) the Black-footed Albatross "visit[s] Canada's Pacific EEZ to forage during the breeding and post-breeding season", and they are "abundant over the outer continental shelf, particularly at the shelf break"⁸;
- c) the Action Plan for Blue, Fin, Sei and North Pacific Right Whales states that "Blue, Fin, Sei and North Pacific Right Whale habitat in Canadian Pacific Waters includes the continental shelf break, slope and oceanic areas beyond the shelf break"⁹;
- d) the Recovery Strategy for the North Pacific Humpback Whale identifies critical habitat extending well beyond the Territorial Sea off of Southwest Vancouver Island¹⁰;
- e) the Bluntnose Sixgill Shark is "often found over the outer continental and insular shelves as well as upper slopes associated with areas of upwelling and high biological productivity", and the Tope Shark is "often found well offshore but not oceanic" and its

⁵ Fisheries and Oceans Canada. 2018. Recovery Strategy for the Northern and Southern Resident Killer Whales (*Orcinus orca*) in Canada. Species at Risk Act Recovery Strategy Series, Fisheries & Oceans Canada, Ottawa, x + 84 pp, online at https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/Rs-ResidentKillerWhale-v00-2018dec-Eng.pdf.

⁶ See: BC Marine Conservation Analysis, "Human Use – Maritime Zones", online: https://bcmca.ca/datafiles/individualfiles/bcmca_hu_maritimezones_atlas.pdf; Fisheries and Oceans Canada, Canadian Hydrographic Service, "Defining Canada's Maritime Zones", online: http://publications.gc.ca/collections/collection_2012/mpo-dfo/Fs23-571-2011-eng.pdf.

⁷ Fisheries and Oceans Canada, Recovery Strategy for the Offshore Killer Whale (*Orcinus orca*) in Canada (2018) at iv, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/Rs%2D0kw%2Dv00%2D2018Nov%2DEng%2Epdf.

⁸ Environment and Climate Change Canada, Management Plan for the Black-footed Albatross (*Phoebastria nigripes*) in Canada (2017) at 6, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/mp%5Fblack%5Ffooted%5Falbatross%5Fe%5Ffinal%2Epdf.

⁹ Fisheries and Oceans Canada, Action Plan for Blue, Fin, Sei and North Pacific Right Whales (*Balaenoptera musculus*, *B. physalus*, *B. borealis*, and *Eubalaena japonica*) in Canadian Pacific Waters (2017) at 1, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/Ap%2DBlueFinSeiNprWhales%2Dv00%2D2017Feb20%2DEng%2Epdf.

¹⁰ Fisheries and Oceans Canada, Recovery Strategy for the North Pacific Humpback Whale (*Megaptera novaeangliae*) in Canada (2013) at 34, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/rs%5Frb%5Fpac%5Fnord%5Fhbv%5F1013%5Fe%2Epdf.

habitat is “temperate continental shelf waters ranging from close inshore [...] to offshore waters up to 471 m depth”¹¹;

- f) the Longspine Thornyhead, Rougheye Rockfish, and Blackspotted Rockfish occur along the continental slope¹²;
- g) the distribution of the Yelloweye Rockfish Pacific Ocean outside waters population extends beyond the Territorial Sea, and includes the whole of the BC offshore waters¹³;
- h) habitat is uncertain for the Basking Shark, but historically Basking Sharks were abundant off the coast of BC and they may be found in waters outside the Territorial Sea¹⁴;
- i) it is uncertain how far offshore the range of the West Coast Transient Killer Whale population extends¹⁵;
- j) Marbled Murrelets are found in coastal waters off BC, with newly identified critical habitat within the Territorial Sea, and, while there is a paucity of data, their at-sea range may extend beyond the Territorial Sea¹⁶;
- k) recorded sightings of Leatherback Sea Turtles in Pacific Canadian waters include have occurred in the EEZ¹⁷; and
- l) while the offshore distribution of Steller Sea Lions is not well defined, they can range over 200 km from shore in winter.¹⁸

¹¹ Fisheries and Oceans Canada, Management Plan for the Bluntnose Sixgill Shark (*Hexanchus griseus*) and Tope Shark (*Galeorhinus galeus*) in Canada (2012) at 9, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/Mp%2DGrisetMilandreBluntnoseTope%2Dv02%2D2012Apr%2DEng%2Epdf.

¹² Fisheries and Oceans Canada, Management Plan for the Rougheye/Blackspotted Rockfish Complex (*Sebastes aleutianus*) and Longspine Thornyhead (*Sebastes altivelis*) in Canada (2012) at 10-14, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/mp%5Fsebastes%5Fsebastolobe%5Frockfish%5Fthornyhead%5F0412%5Feng%2Epdf.

¹³ COSEWIC, COSEWIC assessment and status report on the Yelloweye Rockfish *Sebastes ruberrimus*, Pacific Ocean inside waters population and Pacific Ocean outside waters population, in Canada (2008) at 16-22, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/cosewic/sr%5Fyelloweye%5Frockfish%5F0809%5Feng%2Epdf; Fisheries and Oceans Canada, Management Plan for the Yelloweye Rockfish (*Sebastes ruberrimus*) in Canada (2021) at 4-5, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/Mp-YelloweyeRockfishSebasteYeuxJaunes-v00-2021Jan-Eng.pdf.

¹⁴ Fisheries and Oceans Canada, Recovery Strategy for the Basking Shark (*Cetorhinus maximus*) in Canadian Pacific Waters (July 2011) at 9-11, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/rs%5Fbasking%5Fshark%5Fpacific%5F0711%5Feng%2Epdf.

¹⁵ COSEWIC, COSEWIC assessment and update status report on the Killer Whale *Orcinus orca*, Southern Resident population, Northern Resident population, West Coast transient population, Offshore population and Northwest Atlantic / Eastern Arctic population, in Canada (2008) at 13, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/cosewic/sr%5Fkiller%5Fwhale%5F0809%5Feng%2Epdf.

¹⁶ Environment and Climate Change Canada, Amended Recovery Strategy for the Marbled Murrelet (*Brachyramphus marmoratus*) in Canada [Proposed] (2021) at 2-5, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/amended_rs_marbled_murrelet_e_proposed.pdf.

¹⁷ Pacific Leatherback Recovery Team, Recovery Strategy for Leatherback Turtles (*Dermochelys coriacea*) in Pacific Canadian Waters (2006) at 7, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/rs_Leatherback_turtle_Pacific_population_0207_e.pdf.

¹⁸ Fisheries and Oceans Canada, Management Plan for the Steller Sea Lion (*Eumetopias jubatus*) in Canada [Final] (2010) at 5, online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/mp_steller_sea_lion_012011_final-eng1.pdf.

Additionally, protection of the environment within the EEZ is within the authority of Parliament, and Canada can regulate aspects of vessel activity for environmental purposes, within the bounds of international law concerning freedom of navigation.

The territorial sea and EEZ are defined in United Nations Convention on the Law of the Sea (“UNCLOS”) and the *Oceans Act*.¹⁹ Under UNCLOS and the *Oceans Act*, Canada has sovereign rights for conserving and managing living natural resources within the EEZ, and it has jurisdiction over “the protection and preservation of the marine environment” within the EEZ.²⁰ Under UNCLOS, Canada has the jurisdiction to regulate ship related activities of Canadian vessels in any waters, including the EEZ, and Canadian law already clearly regulates shipping-related activities of foreign vessels in the EEZ under the provisions of many statutes, including the *Canadian Environmental Protection Act*²¹, *Migratory Birds Convention Act*²², and the *Shipping Act, 2001*²³.

Finally, while the impact assessment of T2 was limited to an assessment of the impacts of marine shipping within the Territorial Sea, the Agency and the panel that will review DP4 are not bound by approaches taken in past impact assessments. Rather, including marine shipping in the EEZ would represent ongoing improvement in impact assessments over time.

Addressing cumulative effects

Our clients further note that a regional impact assessment of marine shipping impacts on the west coast would be appropriate given the number of projects proposed for the area, its environmental significance, and the extensive impacts that this area already experiences from commercial and other human activities.

A regional assessment would assist in addressing the cumulative effects of marine shipping. This issue continues to come up in reviews of major projects with marine shipping aspects, such as T2 and the Trans Mountain Expansion Project. The review panel assessing T2 noted that “underwater noise levels in the Salish Sea area already high, and are too noisy for SRKW”, and that enhanced measures are needed to address this issue.²⁴

Regardless of whether a regional assessment is conducted, the impact assessment of DP4 must address the contribution of this project to the existing untenable levels of ocean noise in the Salish Sea and the cumulative impacts of DP4 along with the many other existing and planned projects.

¹⁹ *United Nations Convention on the Law of the Sea*, 1982, 1833 UNTS 3 art 3(entered into force 1994, ratified by Canada 7 November 2003) [UNCLOS], articles 3, 57. *Oceans Act*, SC 1996, c 31 [*Oceans Act*], ss 5, 13.

²⁰ UNCLOS, article 56, para 1(a), (b)(iii). *Oceans Act*, s 14(a)-(b).

²¹ *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33. See for example Division 3 s. 122(2) definition of “sea”.

²² *Migratory Birds Convention Act*, SC 1994, c 22. See for example s 2.1.

²³ *Canada Shipping Act, 2001*, SC 2001, c 26. See for example s 166.

²⁴ Review Panel, Roberts Bank Terminal 2 Protect, “Federal Review Panel Report for the Roberts Bank Terminal 2 Project” (27 March 2020), online at <https://iaac-aeic.gc.ca/050/documents/p80054/134506E.pdf>, at 118.

Comments on Draft Joint Assessment Plan

Our clients are supportive of the general commitment in this document to using participation methods that include public comment periods and hearings by the review panel.

All public comment periods should be of an appropriate length that reflects the complexity of the relevant documents.

Hearings should include the opportunity to file written evidence, to test the proponent's evidence through both written and oral questioning, and to make oral arguments and address any questions the Review Panel may have. If the proponent files late evidence, the participants must be given additional time to respond and to question.

With respect to communication methods, our clients wish to receive email updates to the distribution list.

Sincerely,

<Original signed by>

<Original signed by>

Margot Venton
Barrister & Solicitor

Dyna Tuytel
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- c. David Suzuki Foundation, Georgia Strait Alliance, Raincoast Conservation Foundation, and Wilderness Committee

Hon. Steven Guilbeault, Minister of Environment, via email to ec.ministre-minister.ec@canada.ca