

# MEMO

**Date:** January 7, 2022

**From:** Mike McLellan, Vice President, Project Development, GCT Global Container Terminals Inc.

**To:** Tracy Utting, Agency Review Manager, Review Panels Division, Impact Assessment Agency of Canada  
Brendan Mather, Project Assessment Director, BC Environmental Assessment Office

**Subject:** **Deltaport Expansion Berth Four Project – Marine Shipping To 12 Nautical Miles**

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# 1 OVERVIEW

This memo provides further information on marine shipping as it relates to the proposed Deltaport Expansion Berth Four Project (DP4 or the Project) as requested by the Impact Assessment Agency of Canada (IAAC) and the British Columbia Environmental Assessment Office (EAO), to inform the scope of the Project assessment.

GCT Canada Limited Partnership (GCT) is proposing to use the 12 nautical miles (nm) territorial sea limit boundary when assessing the geographic extent of marine shipping incidental to the project. However, GCT distinguishes between the effects of the Project from the extent of the Project itself. GCT's objective is to work with Indigenous nations to assess the effects of the Project on their treaty or traditional territory, irrespective of whether such territory is beyond 12 nm.

The Draft Joint Guidelines state that:

*“The Agency and the EAO have yet to determine the geographic extent of marine shipping incidental to the project, short sea shipping, and vessel movements associated with the Tsawwassen First Nation marina. In establishing the geographic extent for these physical activities, the Agency and EAO will consider comments received during the comment period, as well as comments received to date. To date, participants have indicated that the geographic extent of marine shipping incidental to the project should extend beyond the 12 nautical mile limit of Canada's territorial sea, such as to the 200 nautical mile limit of the Exclusive Economic Zone, and should also include Southern Resident Killer Whale critical habitat. The geographic extent of the assessment for these three physical activities will be outlined in the final Joint Guidelines. Once defined, the geographic extent of these three physical activities will be referred to as “the marine shipping area”.”*

Container ships travelling to the Project follow the routing for deep sea vessels travelling to Vancouver as defined by the international shipping lanes in the Strait of Juan de Fuca. Vessels enter and exit this shipping lane within the Strait of Juan de Fuca at Buoy J at the 12 nm limit (see Figure 1).

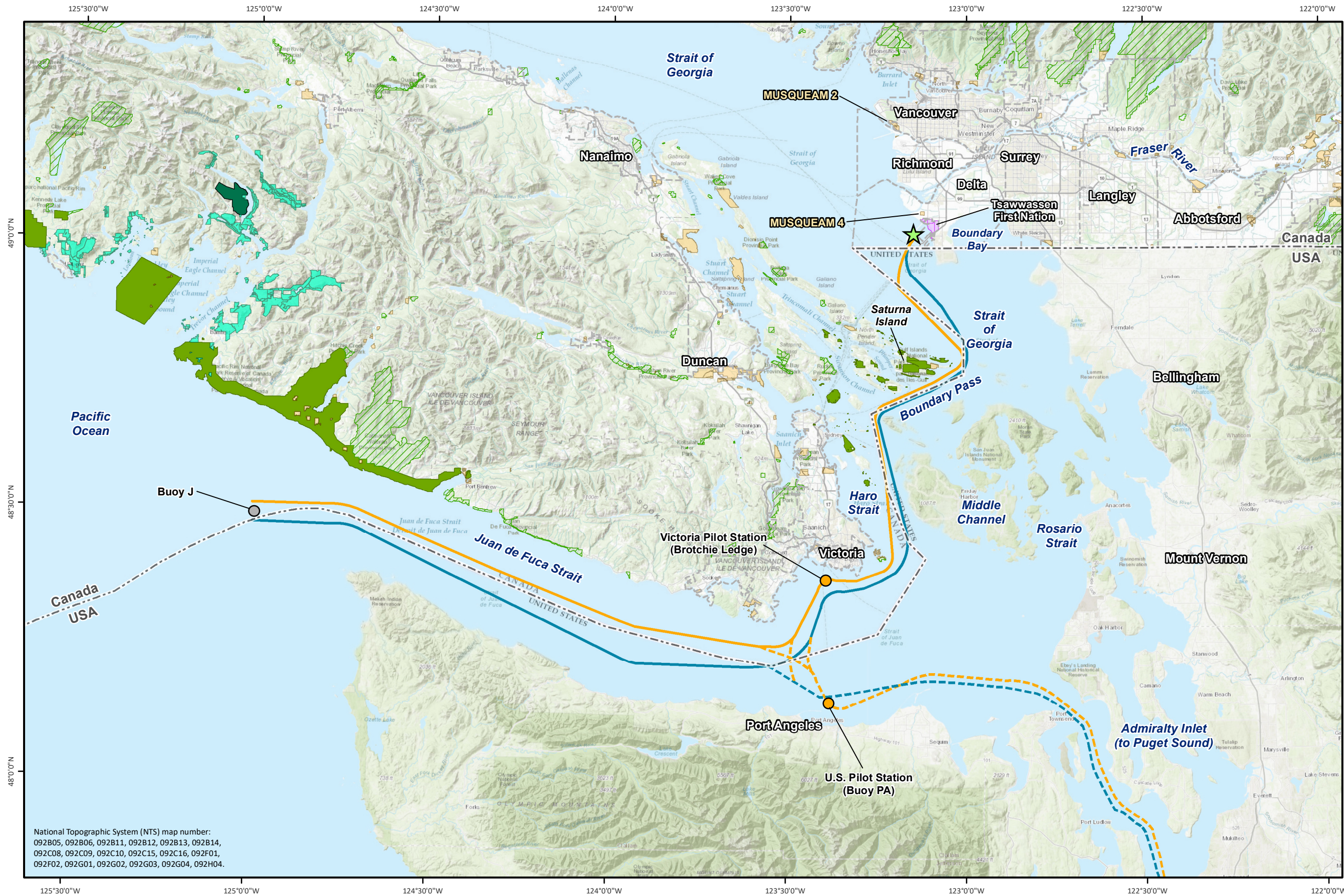
## 1.1 Objectives and Approach

The purpose of this memo is to describe GCT's approach for using the 12 nm limit (represented by Buoy J) for the DP4 Impact Assessment. GCT's approach is informed by, amongst other things:

1. Legislative and regulatory framework, including Canada's guidance, policies, and positions
2. Past projects and relevant case law
3. Indigenous interests and GCT's engagement principles and commitments

The approach recognizes the purposes of the *Impact Assessment Act* (the IAA), the relevant criteria for determining which activities are incidental to a project, and the spatial boundaries for the assessment, and the practical challenges associated with assessing potential environmental effects beyond 12 nm. This approach builds upon the existing issues and information raised and addressed in projects such as Roberts Bank Terminal 2 (RBT2) and Trans Mountain Expansion Project (TMEP).

**Figure 1: Marine Shipping Route – GCT Deltaport Expansion Berth Four Project.**



- Legend**
- DP4 Project Location
  - First Nation Reserve
  - Tsawwassen First Nation Land
  - Maa-nulth First Nation Land
  - Protected Areas
  - Provincial Parks
  - National Parks
  - Municipal Boundary
  - Pilot Station
  - Outbound Shipping Route
  - Inbound Shipping Route
  - Outbound USA Route
  - Inbound USA Route



0 5 10 20 km  
 Scale: 1:800,000  
 Projection: NAD 1983 UTM Zone 10N

Data Sources:  
 a) DP4 project footprint, Hatfield 2021, (based on Project components, Ausenco 2021).  
 b) First Nation Reserve and Municipal boundary, DataBC 2021.  
 c) Tsawwassen First Nation Land and Maa-nulth First Nation Land, Ministry of Indigenous Relations and Reconciliation.  
 d) Parks and protected areas, Ministry of Environment 2021.  
 e) Background, Topographic map, Esri Online Service.

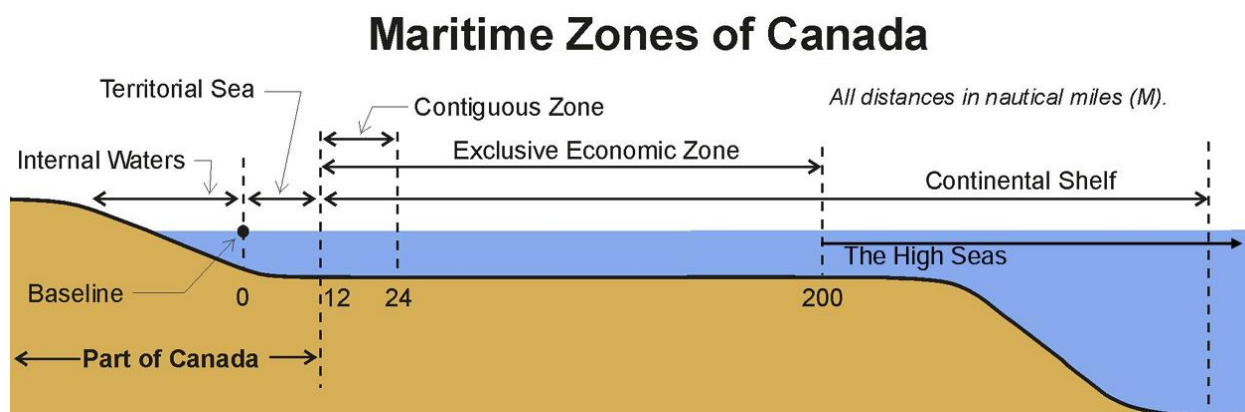


National Topographic System (NTS) map number:  
 092B05, 092B06, 092B11, 092B12, 092B13, 092B14,  
 092C08, 092C09, 092C10, 092C15, 092C16, 092F01,  
 092F02, 092G01, 092G02, 092G03, 092G04, 092H04.

## 2 LEGISLATIVE AND REGULATORY FRAMEWORK

The purposes of the IAA include protecting 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, while establishing a fair, predictable and efficient process for conducting impact assessments that enhances Canada’s competitiveness and that is conducted in a timely manner.

While Canada has certain rights beyond the territorial sea limit, the incidental activity that is at issue is marine traffic that has a certain level of proximity as well as possibly a causal connection between activities to DP4. To define the geographical extent of the Project, it is critical to establish the project location and the route of the marine traffic, both which are known, however the latter is only known up to Buoy J.



**Figure 2: Maritime Zones of Canada (Source: Association of Canada Land Surveyors).**

Buoy J marks the 12 nm limit of Canada’s territorial sea, within which, a comprehensive legal and regulatory regime exists for marine shipping and related safety, security and environmental protection, including through the *Canada Shipping Act, 2001*. This includes the authority to impose mandatory vessel traffic practices and procedures within this area. Beyond Buoy J, there are no established shipping lanes. Canada has noted that as a result this poses a fundamental challenge to expanding the spatial extent of projects similar to DP4 beyond 12 nm, as such an expansion would result in speculative assessments that would be counterproductive to a meaningful evaluation of environmental effects of the project and will not enable an adequate evaluation of the technically and economically feasible mitigation measures.

A more exhaustive summary of the regulatory framework has been previously canvassed in publicly available documents such as the National Energy Board's (now known as Canada Energy Regulator) [October 12 2018 decision regarding TMEP](#).

### 3 PAST PROJECTS AND RELEVANT CASE LAW

The IAA maintained the legislative principles and policy which provide guidance on the criteria for determining which activities are incidental to the project. For example, the *Guide to Preparing an Initial Project Description and a Detailed Project Description* provides similar guidance to the *Guide to Preparing a Description of a Designed Project under CEAA 2012* on factors to consider when assessing whether an activity is incidental to the designated project. Precedents established by project assessments under the *Canadian Environmental Assessment Act, 2012* and related case law, remain relevant, informative, and binding. Consistency of purpose is fundamental to maintaining the integrity of the impact assessment process.

In reviewing past practices of Canada in other environmental assessments that may be, in some respects, analogous to the Project, the scope of these assessments did not extend beyond 12 nm (see Table 1 below). In TMEP, the approach to define the spatial boundary of the project-related marine shipping assessment to 12 nm did not raise concerns when the Federal Court of Appeal considered the adequacy of Crown consultation, amongst other issues.

**Table 1: Examples of Marine Assessment Boundaries from Other Projects.**

Project	Scope of Marine Assessment
RBT2	Up to 12 nm
TMEP	Up to 12 nm
Cedar LNG	Less than 12 nm
St. Lawrence Fluorspar Marine Shipping Terminal Project	Up to 12 nm
Kwispa LNG Project	Up to 12 nm
Pacific Future Energy Refinery Project	Up to 12 nm
Energy East Pipeline Ltd	Up to 12 nm

In addressing the identical issues raised by parties during the RBT2 environmental assessment process, Canada emphasized the regulatory landscape and practical and technical challenges in expanding the spatial extent of that project-related marine shipping beyond 12 nm based on the desire to preserve the integrity of the assessment regime. Canada emphasized the issues raised by the National Energy Board for TMEP including that:

- *“relevant case law suggests that the word “incidental” should be interpreted to require a “certain level of proximity as well as possibly a causal connection between activities and the designated project.” The Board is not persuaded that a sufficient “level of proximity” exists once the tankers exit the territorial sea.”*
- *The “geographic extent should not be so broad as to frustrate the CEAA 2012’s purpose of timely EAs, or to produce results that are not useful in protecting the environment and reducing harm.”*

- *“given that there are no defined shipping lanes in the EEZ – a vast area of ocean – no shipping “route” for the Project can be identified with any degree of certainty.”*
- *“The lack of a certain route means, in turn, that appropriate spatial boundaries cannot be identified. It is not possible to predict the project-environment interactions and the full impacts of that project, nor can one adequately evaluate technically and economically feasible mitigation as required by the CEAA 2012.”*
- *“Attempting to conduct an EA in the EEZ*
  - *Would produce speculative, as opposed to meaningful, information about project impacts and, accordingly*
  - *Would not be useful as a planning and decision-making tool for the [Government]*
  - *is a marked and material difference from marine shipping within the territorial sea limit.”*
- *“incremental marine shipping within the EEZ is not “incidental” and should not be included in the “designated project.”*
- *“although only Project-related marine shipping within the territorial sea is to be considered as part of the “designated project,” effects from that shipping that occur outside of the territorial sea can still be considered by the Board, including certain trans-boundary effects.”*

Furthermore, on March 8, 2019, the Honourable Catherine McKenna, the then Minister of Environment and Climate Change, echoing the reasoning the Board provided in the TEMP, amended the terms of reference to include Project-related marine shipping in the designated project associated with RBT2 “only to the 12 nautical limit of Canada’s territorial sea” as described on the [RBT2 Public Record](#). The Minister assessed and concluded that there was no legislative or policy rationale that would enable extension beyond the 12 nm limit and that doing so may frustrate the purposes of the relevant legislation.

## 4 INDIGENOUS INTERESTS AND GCT'S ENGAGEMENT APPROACH

The Indigenous nations that could potentially be affected by DP4 are the same as those that could be potentially affected by RBT2. Therefore, it is useful to review concerns about the assessment area raised by Indigenous nations with respect to RBT2. Several Indigenous nations raised concerns that by limiting the assessment area to 12 nm/Buoy J, the assessment would not adequately address their Indigenous interests. For example, the Maa-nulth First Nations supported extending beyond 12 nm by referring to the commercial fishing licenses they hold which are pursuant to a Harvest Agreement and that harvesting under these licenses extends beyond the 12 nm limit.

Going further, in their panel submission, the Cowichan Tribes, Halalt First Nation and Stz'uminus First Nation indicated that they would not consider their nations to have been properly consulted and accommodated if the assessment did not include impacts out to the limits of Canada's Exclusive Economic Zone (EEZ). Additionally, several Indigenous nations indicated that because traditional marine use studies were not completed, the Review Panel did not have sufficient information to adequately assess the full extent of potential effects from shipping on the Indigenous nations.

A table containing issues raised by Indigenous nations during the DP4 Detailed Project Description review process and GCT's response to these issues in respect of marine shipping is included in Appendix A of this memo. Appendix A also includes a summary of comments in relation to the RBT2 Marine Shipping Area and notes the number of additional Indigenous nations that DP4 and the Crown may need to engage with if the marine assessment is extended beyond 12 nm.

GCT is committed to working collaboratively with all parties to ensure an appropriately scoped Impact Assessment for the proposed DP4 Project. This will include ongoing engagement with:

- Regulators (Federal, Provincial, Municipal)
- Indigenous Nations
- Environmental Non-Government Organizations
- Local Communities

GCT will work with Indigenous nations to identify the environmental effects of the Project on their territories and the relevant measures to mitigate, avoid or offset such effects. This approach reinforces GCT's distinction between the effects of the Project from the extent of the Project itself.

### 4.1 Initiatives Outside the Impact Assessment Process

GCT is committed to working with regulators on Strategic Environmental Assessment (SEA) or Regional Initiatives as part of the larger marine shipping community. For example, GCT will actively work to support and influence third party operated vessels (outside GCT's ability to directly manage) to participate in programs listed below, and the development of additional regional initiatives concurrent with the Impact Assessment process and during operation of the proposed DP4 Project. These include, but are not limited to:



- IMO 2014 Guidelines on reducing underwater noise
  - 2014, IMO approved [guidelines](https://www.imo.org/en/MediaCentre/HotTopics/Pages/Noise.aspx) on reducing underwater  
<https://www.imo.org/en/MediaCentre/HotTopics/Pages/Noise.aspx>
- Salish Sea Initiative
  - [Salish Sea Initiative | Pacific Region | Fisheries and Oceans Canada \(dfo-mpo.gc.ca\)](#)
- Enhancing Cetacean Habitat and Observation (ECHO) Program
  - VFPA underwater noise reduction initiatives. The ECHO Program works collaboratively with its many partners and advisors to coordinate yearly voluntary initiatives focused on reducing the impact of commercial shipping on at-risk whales off British Columbia's southern coast.
- Green Marine
  - GCT is a signatory
  - [Underwater Noise Performance Indicator's Objective:](#)
    - Manage underwater noise sources during ongoing activities, development/construction, and/or port maintenance activities to reduce impacts to marine mammals.
    - 2021 criteria have 5 levels ranging from “Monitoring of regulations” through to “Offer a recognition program to ship owners for vessel noise reductions” (Level 3) and finally “Meet reduction targets on underwater noise.” Including “Demonstrate continual improvement in implementing the Underwater Noise Mitigation and Management plan to utilize noise reduction solutions and technologies that reduce underwater noise.” (Level 5)
- Western Canada Marine Response Corporation (WCMRC)
  - GCT is a voluntary subscriber

## 5 CONCLUSIONS

GCT is committed to ongoing engagement with regulators and Indigenous nations. We are confident in our ability to assess marine shipping to the 12 nm limit of Canada's territorial sea, but as Canada has previously stated extending the spatial boundaries of the project-related marine shipping beyond 12 nm will present challenges associated with assessment accuracy and lead to low confidence in Impact Assessments for both GCT and regulators.

The inclusion of marine shipping beyond 12 nm as activities incidental to the Project would set a precedent which would apply to all projects, including potentially impacting the projects referenced in Table 1. In response to effects of marine shipping generally, GCT recognizes and supports the ocean carrier industry and is also working collaboratively with regulators on long-term "regional assessment in the proposed project area or any relevant strategic assessments" (as framed in the Joint Guidelines) to continuously improve the management and regulation of marine shipping to 12 nm and beyond, as relevant. Therefore, extending the spatial extent of Project-related marine shipping to be considered as part of the designated project beyond the 12 nm limit of Canada's territorial sea is unreasonable, especially given the need to distinguish between the environmental effects of the designated project and the geographic extent of the designated project itself.

Sincerely,  
<Original signed by>

Mike McLellan  
Vice President, Project Development  
**GCT Global Container Terminals Inc.**

# APPENDIX A

**Table A.1: DP4 Detailed Project Description Issue and GCT Response to Indigenous Nation comments on Marine Shipping.**

Indigenous Interests and Issues Raised	GCT Response
<p>Concerns about the current scope of the assessment, Tsleil-Waututh Nation requires the spatial scope of the assessment of impacts from marine activities associated with marine shipping extend to the 200 nautical mile limit from the coast to encompass all of Canada’s exclusive economic zone, as well as all of SRKW critical habitat.</p>	<p>The spatial scope of the Impact Assessment will be determined by the IAAC and the BCEAO. Notwithstanding this determination, GCT will work with Indigenous nations to determine potential options to assess Project-related marine shipping effects in their traditional territory, which may extend beyond the spatial scope determined by the IAAC and the BCEAO. Such assessment will explore opportunities to partner with regulators and Indigenous nations on potential mitigation options and wider management initiatives.</p>
<p>Assessment should extend beyond the 12 nautical mile limit to 200 nautical miles. Impacts outside Esquimalt waters can impact Esquimalt too.</p>	
<p>Assessment should extend beyond the 12 nautical miles limit to 200 nautical miles. Scoping the assessment to include First Nations of Maa-nulth Treaty Society’s territorial waters is necessary to adequately assess impacts of the Project on First Nations of Maa-nulth Treaty Society and to adequately consider the interconnectedness of all things. Having GCT advocate for such a scope is important to First Nations of Maa-nulth Treaty Society’s early relationship with GCT. If GCT is indeed agreeable to an expanded scope, this needs to be reflected in regulatory documents.</p>	

For comparison to DP4, below is a list of Indigenous nations that wished to expand the RBT2 assessment scope beyond 12 nm:

- Tsleil-Waututh (specifically requested extension to EEZ)
- Esquimalt (requested extension beyond 12 nm)
- Scia'new (Beecher Bay) (requested extension beyond 12 nm)
- Pauquachin (requested extension beyond 12 nm)
- Maa-nulth (specifically requested extension to EEZ)
- Cowichan Tribes (requested extension beyond 12 nm)
- Halalt (requested extension beyond 12 nm)
- Stz'uminus (requested extension beyond 12 nm)
- Lyackson (requested extension beyond 12 nm)

In addition, below is a list of Indigenous nations that expressed ‘other’ concerns regarding the RBT2 12 nm limit

- Pacheedaht (specifically requested extension to EEZ)
  - Considered a participant in the Final Panel Report and were trying to file a new Traditional Use Study in August 2019
- T'Sou-ke (specifically requested extension to EEZ)
  - Considered a participant in the Final Panel Report and also presented at public hearings
- U.S. Tribes (requested extension beyond 12 nm)
  - The Panel provided them with an opportunity to present their views, but RBT2 did not engage with them or consider their specific effects in the assessment

**Table A.2: RBT2 Detailed Concerns Raised by Indigenous nation Related to the Marine Shipping Assessment Area.**

Indigenous nations	RBT2	Detailed Concerns
Tsleil-Waututh	Extension to EEZ	<ul style="list-style-type: none"> <li>• A large portion of critical habitat for the SRKW extends beyond the 12 nm territorial limit.</li> <li>• Concerned about the impact that marine shipping would have on the SRKW.</li> <li>• Impact of construction on loss of habitat for chinook salmon and other fish species.</li> <li>• Negative impacts could potentially end TWN's source of traditional maritime food.</li> <li>• Concerned about the impact on their rights, including the current, future and desired right to fish.</li> <li>• Generally, Port failed to address the extent of the potential impact on the Esquimalt Nation and their ability to exercise their treaty rights.</li> <li>• Failure to extend beyond 12 nm would be contrary to <i>CEAA 2012</i> (the applicable legislation at that time) and threaten the validity of the public hearings.</li> </ul>
T'Sou-ke	Extension to EEZ	<ul style="list-style-type: none"> <li>• Rely on territorial sea for social, cultural, and economic health.</li> <li>• Concerned about the impact of marine shipping on the SRKW's and about the impact on their Aboriginal title, rights and treaty rights.</li> <li>• Requested a Project-specific Marine Traditional Use Study to better understand and quantify the impacts of marine shipping and other Project-related impacts on T'Sou-ke.</li> </ul>

Indigenous nations	RBT2	Detailed Concerns
		<ul style="list-style-type: none"> <li>Concerned that the Panel did not have critical information on the environmental effects of Project-related marine shipping on the SRKW population, and T'Sou-ke's use of lands and resources for traditional purposes.</li> </ul>
Pacheedaht	Extension to EEZ	<ul style="list-style-type: none"> <li>Wished to seek consultation with the Crown about whether an assessment out to 12 nm would be sufficient, or if the assessment should extend to the EEZ at 200 nm.</li> </ul>
Maa-nulth	Extension to EEZ	<ul style="list-style-type: none"> <li>A large portion of vessels calling on Roberts Bank will likely traverse their Treaty Fishing Areas which includes both Kyuquot Sound and Barkley Sound.</li> <li>An assessment of only 12 nm will fail to capture the entirety of their Treaty Fishing Area and will fail to address their concerns regarding how to protect their treaty rights including: right to domestically harvest and trade fish, aquatic plants, wildlife and migratory birds. Their treaty rights further include a right to participate in fisheries-related management activities within the Treaty Fishing Area.</li> <li>Project-related impacts including those related to Project-related vessel traffic and the generation of underwater noise, construction on loss of habitat for chinook salmon and other fish species, and impact of accidents and malfunctions including spills.</li> <li>Wanted federal government to fund the Maa-nulth and other FN's to co-develop cumulative effects management plans for the Salish Sea, commit to a co-development process to design governance structures recognizing FN authority to manage regional cumulative effects, and commit to interim cumulative effects measures (i.e., regional studies or assessments).</li> <li>Compliance with <i>CEAA 2012</i> and the Crown's duties require an assessment of Project-related marine shipping activities beyond 12 nm and into the EEZ. They cite the critical habitat area of the Northern and Southern Resident Killer Whales as a point of concern.</li> <li>If their concerns remain unaddressed, RBT2 will not have the support of the Maa-nulth moving forward.</li> </ul>
Esquimalt	Beyond 12 nm	<ul style="list-style-type: none"> <li>Similar as Maa-nulth</li> </ul>

Indigenous nations	RBT2	Detailed Concerns
Scia'new (Beecher Bay)	Beyond 12 nm	<ul style="list-style-type: none"> <li>Similar as Maa-nulth</li> </ul>
Pauquachin	Beyond 12 nm	<ul style="list-style-type: none"> <li>Similar as Maa-nulth</li> </ul>
US Nations: Swinomish, Suquamish, and Tulalip	Beyond 12 nm	<ul style="list-style-type: none"> <li>Note these nations were not considered in the assessment. This may change given the recent discussions within government on the implications of the SCC decision.</li> <li>Failure to assess beyond 12 nm will fail to capture the impact on their communities and directly interfere with their ability to access and harvest treaty-reserved resources.</li> </ul>

If the DP4 marine assessment were to be extended from 12 nm to cover the EEZ, then, in addition to the 51 Indigenous nations (represented by 33 Indigenous organizations) currently being engaged by GCT for the DP4 Project, many additional Indigenous nations (see Table A.3 below) may also need to be engaged by GCT and consulted by the Crown.

**Table A.3: Preliminary list of additional Indigenous nations that may need to be engaged if the scope of the DP4 assessment is extended past the 12 nm limit of Canada’s Territorial Sea.**

Indigenous nations on the West Coast of Vancouver Island	Indigenous nations on the East Coast of Vancouver Island	Indigenous nations within the Islands on the North East coast of the Island
Ahousaht First Nation	Da'naxda'xw/Awaetlala First Nation	Dzawada'enuxw First Nation
Ehatteshaht	Gwa'sala-'Nakwaxda'xw Band/Nations	Gwawaenuk Tribe
Hesquiaht	Homalco First Nation	Klahoose First Nation
HupaÇasath First Nation	K'ómoks First Nation	Kwiakah
Mowachaht/Muchalaht	Kwakiutl	Kwikwasut'inuxw Haxwa'mis First Nation
Nuchatlaht First Nation	Kwicksutaineuk-ah-kwaw-ah-mish	Mamalilikulla-Qwe'Qwa'Sot'Em Band/First Nation
Tla-o-qui-aht First Nation	Namgis First Nation	Tanakteuk Indian Band (Da'naxda'xw/Awaetlala)
Tseshaht First Nation	Nanoose First Nation	Tla'amin

Indigenous nations on the West Coast of Vancouver Island	Indigenous nations on the East Coast of Vancouver Island	Indigenous nations within the Islands on the North East coast of the Island
Yuu_u_i__at_ Government	Qualicum First Nation	Tlowitsis Tribe
	Quatsino First Nation	Tsawataineuk Indian Band (Dzawada'enuxw)
	Snuneymuxw First Nation	
	Tlatlasikwala First Nation	
	We Wai Kai Nation	