



340-1122 Mainland Street
Vancouver BC V6B 5L1
T 604 687 0549
F 604 687 2696
www.jfklaw.ca

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VIA electronic mail

Analise Saely
Crown Consultation Coordinator
Impact Assessment Agency of Canada
Government of Canada

Brendan Mather
Project Assessment Director
Environmental Assessment Office
Government of British Columbia

Tejas Madhur (she/her)

Associate

<contact information
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File No. 1354-005

**Re: Tsawwassen First Nation comments on the draft Joint Guidelines for
Deltaport Fourth Berth Project**

We are counsel for Tsawwassen First Nation (“TFN” or “Tsawwassen”). Please find attached our written submission on behalf of Tsawwassen First Nation, in response to the Joint Guidelines and Joint Indigenous Engagement and Partnership Plan (“JIEPP”) for the Deltaport Fourth Berth Project (“Project”). These comments serve to supplement the collaborative work we have underway on an integrated approach for a Tsawwassen-led assessment. Thank you for accommodating an extension for our comments as we collaboratively worked through some elements of the integrated approach.

We also appreciate you incorporating all of our preliminary comments from our October 4, 2021 correspondence in your preparation of the Joint Guidelines and JIEPP. As we noted in that correspondence, we reserved our substantive comments on the Joint Guidelines for the public comment period. Please find our comments below.

I. Joint Guidelines

Section 2.2: Project Activities

Tsawwassen recommends that the Project description include an assessment of all audible alarms and signals directly and indirectly related to the Project.

Section 8.3.1: Spatial Boundaries

Tsawwassen recommends that the Impact Statement must include a spatial boundary for Tsawwassen Territory, a clearly delineated area in the *Tsawwassen First Nation Final Agreement*. Tsawwassen submits that, particularly with respect to cumulative effects analysis, a “whole of territory” approach should be taken. A such, biophysical boundaries for cumulative effects should mirror specified Tsawwassen Territory boundaries to ensure that there are no information gaps with respect to the information needed to assess the Project’s impacts on Tsawwassen’s Indigenous interests.

Section 8.3.2: Temporal Boundaries

Tsawwassen recommends that the Impact Statement include a “context” section within each description of the temporal boundaries established for each VC. Tsawwassen recommends that these context sections could include, at a minimum, pre-contact conditions, pre-industrial development, and pre-port development. These conditions remain in the living memory of Tsawwassen and are critical in understanding Tsawwassen’s past and future use. A temporal boundaries analysis with a primary emphasis on “current conditions” will be incomplete.

Tsawwassen also recommends that a temporal boundary baseline of “historical conditions pre-industrial disturbance” be established for each VC and that rationale be required for any deviation from this pre-industrial disturbance baseline, including whether and how Tsawwassen’s Indigenous interests and knowledge were considered in the decision. Tsawwassen suggests that this temporal boundary of “historical conditions pre-industrial disturbance” could appropriately be set at or around the year 1960.

Section 8.4: Existing Conditions

Tsawwassen recommends that the Impact Statement reflects the most current modelling and information when assessing expectations for change. For example, input parameters like intensity, density, and frequency curves and flood return periods must be adjusted to ensure that design is sufficient for expected climatic variability.

Section 8.8: Cumulative Effects Assessment

Tsawwassen recommends that the Joint Guidelines provide greater clarity for how a combination of Effects of the Environment on the Project and Cumulative Effects will be assessed in conjunction and how exactly this is to be done. For example, how will the cumulative effect of climate change and industrial development impact riparian, intertidal, and shallow subtidal habitat?

Section 8.9: Extent to which Effects within Federal Jurisdiction are Significant

Tsawwassen recommends that the Joint Guidelines confirm that adverse effects within federal jurisdiction includes cumulative effects.

Section 9.2: Meteorological Environment

Tsawwassen recommends that “frequency, duration, seasonality of fog events” be added to ensure that the data necessary to assess potential impacts on other VCs such as soundscape, night viewscape, and harvesting access.

Section 9.4: Air Quality

Tsawwassen recommends that assessment boundaries be based on functional ecological units (airsheds). Tsawwassen submits that if a square model domain is used the rationale for doing so must be provided and must also explain how this model captures funnelling effects and air quality impacts in the Fraser Valley.

Section 9.5: Atmospheric Noise

Tsawwassen recommends that the Impact Statement include a clear identification of existing conditions and exceedances relative to any applicable thresholds.

Section 9.8: Visual Environment

Tsawwassen recommends that, for clarity, existing conditions of the visual environment include “fog” and “leaf-off/winter” conditions when describing night-time illumination levels.

Section 9.9: Marine Fish and Fish Habitat

Tsawwassen recommends adding shiner perch, surf smelt and reef fish to the list of subcomponents and species for which GCT must, at a minimum, assess the potential effects of the Project.

Section 9.10: Marine Mammals

Tsawwassen notes that there is currently a proposal to establish critical habitat for transient killer whales within the Project area. As such, Tsawwassen recommends that transient killer whales be added to the subcomponents and species for which GCT must, at a minimum, assess the potential effects of the Project.

Section 9.14: Climate Change

Tsawwassen recommends that the description of the Project’s main sources of greenhouse gas emissions be required to expressly identify all source emissions by category (i.e., stationary combustion, mobile equipment, flaring, emissions from marine traffic, and indirect emissions from acquired energy). Similarly, Tsawwassen recommends that the Impact Statement include an assessment of all upstream greenhouse gas emissions.

Section 10.1.4: Potential Effects

Tsawwassen recommends that this section expressly acknowledge that the Project includes all aspects of the Project, including physical components, construction, operations and maintenance, mitigation measures, follow-up and monitoring, and decommissioning.

Section 10.4.1: Relevant Statutes, Policies and Frameworks

Tsawwassen recommends that the following agreements be added to the list of relevant statutes, policies and frameworks that may be relevant to land and resource use VCs:

- *Tsawwassen First Nation Final Agreement*, and
- *Tsawwassen First Nation Harvest Agreement*

Section 10.5.1: Relevant Statutes, Policies and Frameworks

Tsawwassen recommends that the following agreements be added to the list of relevant statutes, policies and frameworks that may be relevant to marine use VCs:

- *Tsawwassen First Nation Final Agreement*, and
- *Tsawwassen First Nation Harvest Agreement*

Section 12: Assessment of Impacts on Indigenous Interests

Tsawwassen notes that it is a modern Treaty nation and as such it is in a unique position with regards to its relationship with the Crown and the rights and interests which it possesses. Specifically, as stated in the Preamble of the Tsawwassen First Nation Final Agreement, both Canada and British Columbia acknowledge the aspiration of Tsawwassen First Nation to preserve, promote and develop the culture, heritage, language and economy of Tsawwassen First Nation. Therefore, the promotion and development of Tsawwassen's Indigenous rights and interests necessarily includes a forward-looking exercise.

Section 12 currently indicates that for the purposes of this assessment, the term Indigenous interests refers to all the requirements relating to Indigenous nations specified by both the *Impact Assessment Act* and the *BC Environmental Assessment Act*, which includes, among other things: the current use of lands and resources for traditional purposes. Tsawwassen submits that Section 12 does not properly capture the ongoing ability to exercise proven Aboriginal and Treaty rights, and to meet its Indigenous interests. As such, Tsawwassen recommends that Section 12 reference "current and future use of lands, waters and resources".

Section 12.2: Cumulative Impacts on Indigenous Interests

Tsawwassen recommends that the Impact Statement include an examination of interconnections between cumulative impacts on Indigenous rights and interests with

other cumulative impacts in the region, such as over-harvesting and climate change. The totality of these cumulative factors contribute to Tsawwassen's ability or inability to meet their land and resource use needs.

Section 12.3: Existing Conditions

Tsawwassen notes that the proponent is advised to consult certain guidance materials of the Agency and EAO to guide its engagement with Indigenous nations and its assessment of the Project. To meet these requirements, the Impact Statement must describe and consider the efforts of the Indigenous nations to restore traditional practices, to the extent that this information is available. As noted above, Tsawwassen is a modern Treaty nation and as such Tsawwassen is in a unique position. The assessment of Tsawwassen's rights and interests must not be limited to its efforts to restore traditional practices. Rather, it must account for the ongoing promotion and development of Tsawwassen's rights and interests and the new forms these may take. As such, Tsawwassen recommends that the Impact Statement must describe and consider the efforts of Tsawwassen to restore traditional practices as well as promote and develop contemporary methods of exercising its rights and pursuing its interests.

Tsawwassen also notes that the Impact Statement must consider potential impacts on the health of Indigenous nations, including nations' physical, spiritual, mental, and emotional health. Tsawwassen is encouraged by the holistic approach to health and Tsawwassen submits that referring to an Indigenous nation's "health and well-being", as opposed to just "health", would further demonstrate this holistic approach.

Section 12.4.3: Positive Impacts

Tsawwassen is of the view that this section focuses too heavily on economic benefits and does not account for the various other benefits that may be obtained by an Indigenous nation in relation to a Project, whether through agreement or otherwise. Tsawwassen further notes that while certain activities may be framed as "positive impacts" for one or more Indigenous nations, these "positive impacts" may nonetheless result in adverse impacts for one or more Indigenous nations. As such, Tsawwassen submits that these "positive impacts" must be assessed in the same manner as all other potential Project effects.

Section 12.5: Summary

Tsawwassen notes that the Impact Statement must provide a table summarizing an Indigenous nation's views on an impact of the Project on its Indigenous rights and interests and GCT must work with Indigenous nations and respect their preference regarding the representation of the following impacts:

- the extent of significance for any residual effects on current use of lands, waters and resources for traditional purposes, physical and cultural heritage, to structures, sites or things of historical, archaeological, paleontological or architectural

- significance change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; and
- the seriousness of any impact on Tsawwassen’s rights and interests.

Tsawwassen further notes that tied into this process is the EAO consensus building and consent seeking processes for Participating Indigenous Nations, in addition to the Agency’s public interest determination. It remains unclear to Tsawwassen how determinations of significance, seriousness, consensus building, consent seeking, and an ultimate public interest determination work together procedurally and substantively. Tsawwassen requests that further clarification be provided by the Agency and EAO in the Joint Guidelines on how these concepts will work together throughout the Project assessment and Tsawwassen recommends the development of a schematic or process chart to better demonstrate the process.

Section 13.25: Tsawwassen First Nation

Since the Joint Guidelines were issued, Tsawwassen has met with the federal and provincial Crowns on several occasions to collaboratively develop an integrated approach for a Tsawwassen-led assessment. We recommend that the totality of Section 13.25 be deleted and replaced with the following:

NEW Section 13.25: Tsawwassen First Nation

Tsawwassen First Nation (also “**Tsawwassen**” or “**TFN**”) self-identified as a participating Indigenous nation to the EAO on November 27, 2020. The Impact Statement must include a nation-specific assessment of project effects on Tsawwassen First Nation’s Indigenous rights and interests.

Tsawwassen First Nation, along with Canada and British Columbia, is a party to the *Tsawwassen First Nation Final Agreement* (“the **Treaty**”). The Treaty, which came into effect in 2009, recognized and affirmed Tsawwassen First Nation’s constitutionally protected land and self-government rights. The Treaty provides a framework for an ongoing government-to-government relationship between Tsawwassen and the federal and provincial Crowns. The honour of the Crown carries with it a duty of diligent implementation of treaties such as the *Tsawwassen First Nation Final Agreement*.¹ Canada and British Columbia’s treaty obligations are understood through and supported by both Crowns’ reconciliation objectives set out in the *Impact Assessment Act*, SC 2019, c 28, and the *Environmental Assessment Act*, SC 2018, c 51, respectively.

Given the above, Canada, British Columbia and Tsawwassen remain committed to working together in a manner guided by the following principles:

- **Reconciliation:** All parties are committed to the practice of reconciliation, which involves all three governments (Canada, BC, and Tsawwassen) supporting the flourishing of Tsawwassen culture, language, and governance. Every participant

¹ *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, at para 78

in the assessment process expresses this commitment by contributing a level of effort that reflects the seriousness of the reconciliation imperative.

- **Tsawwassen identity:** Tsawwassen people are salmon people, for whom the Salish Sea and Fraser River serve as the lifeblood of its food and cultural systems. The parties recognize that the Project – given its proximity to Tsawwassen Lands, and marine location – is proposed to be constructed at “Tsawwassen’s kitchen table”.
- **Tsawwassen vision:** The parties share the view that enabling the implementation of Tsawwassen’s self-government strategic vision – as expressed through the governing Strategic Plan, and operationalized according to the priorities of elected leadership – is part of supporting the exercise of Tsawwassen’s right to self-determination.
- **“Nothing about us without us”:** Each of the governments shares the responsibility for ensuring that the understanding of impacts is tied to current and future community concerns, values, and practices. The parties will work together to validate any assessment information regarding Tsawwassen with the Tsawwassen community.
- **Solution-oriented:** Each participant in the assessment process will approach their work in a solutions-oriented manner. This means that when concerns are expressed that are beyond the scope of the assessment, the parties will consider other alternatives such as broader systems change efforts. The parties are committed to candid dialogue, and approaching all work with open hearts and minds. Recognizing this, the Parties will work towards flexibility and nimbleness in the assessment, in a manner that supports course correction where necessary.

The Tsawwassen-specific assessment should be informed by the above principles. As such, the assessment must be undertaken in collaboration with Tsawwassen First Nation. It should follow a methodology advanced by Tsawwassen First Nation, which will be based upon the below elements. The documents referenced in the below elements (e.g. Tsawwassen’s Strategic Plan, and Tsawwassen’s Offsetting Vision) will be shared with the Crown in a letter with accompanying materials.

Element 1: The Tsawwassen-specific assessment must determine the context in which potential impacts on Tsawwassen rights will occur. This determination will include:

- identifying the conditions that support Tsawwassen’s exercise of rights;
- understanding how historic, existing, and approved/anticipated activities have affected the conditions that support Tsawwassen’s exercise of rights; and
- identifying the importance of the Project’s location in relation to Tsawwassen’s exercise of rights.

Element 2: The Tsawwassen-specific assessment must evaluate potential project impacts to rights and interests. This evaluation will include:

- identifying the pathways for potential impacts of the Project (positive and negative) on Tsawwassen's exercise of rights and interests;
- determining whether the Project will have a low, medium or high level of impact on Tsawwassen's exercise of rights and interests.

Element 3: The assessment must provide for a Tsawwassen role in validating the assessment. For example, the assessment must ensure that Tsawwassen is able to provide comment on the adequacy of the Review Panel's understanding of Tsawwassen's laws, cultural values, and traditions, as well as the thresholds and factors for consideration established by Tsawwassen. The Tsawwassen-specific assessment must also contemplate a future role for Tsawwassen in follow-up and validation of predictions from the assessment, should the Project be approved.

Element 4: The assessment must reflect Tsawwassen's modern treaty status. It must uphold the spirit and intent of treaty, and take into account Tsawwassen's aspirations as set out in the Treaty, to:

- preserve, promote and develop the culture, heritage, language and economy of Tsawwassen First Nation;
- participate more fully in the economic, political, cultural and social life of British Columbia in a way that preserves and enhances the collective identity of Tsawwassen people; and
- evolve and flourish in the future as a self-sufficient and sustainable community.

Element 5: The assessment must take into account Tsawwassen's self-government strategic vision, updated every five years through its Strategic Plan, and implemented according to the priorities of elected leadership. The strategic vision must guide the assessment on Tsawwassen interests and on the right to self-determination.

Element 6: The Tsawwassen-specific assessment must take into account Tsawwassen well-being, culture, and traditional way of life, in a manner that assesses potential project effects as related to four pillars: social and human health; harvesting rights; cultural heritage; and stewardship and governance. The assessment of impacts on Tsawwassen rights requires more than assessing mere environmental effects on the current use of lands and resources for traditional purposes or on physical and cultural heritage.

Element 7: Tsawwassen will approach the assessment in a manner that takes into consideration which entity (federal Crown, provincial Crown, or proponent) is best situated to address the impact.

Element 8: Tsawwassen will work in an integrated manner with the federal and provincial Crowns to review the Impact Statement once it has been finalized.

Element 9: The Tsawwassen-specific assessment must be informed by Tsawwassen's Offsetting Vision.

Section 14: Effects of the Environment on the Project

Please see the comment for Section 8.8 above.

Section 15: Accidents and Malfunctions

Tsawwassen recommends that the Joint Guidelines make clear that the Impact Statement be required to include modelling for any contaminants spilled or released directly or indirectly into water or air. Tsawwassen also recommends that the Joint Guidelines confirm that collisions in this context include collisions with marine mammals.

Section 16: Marine Shipping

Tsawwassen recommends that the Impact Statement be required to include a description of the number of vessels expected to require anchorage while waiting to load/unload at the facility, as well as the location and duration of stays at anchor, and the effects of anchorage on marine flora/fauna.

Section 17: Road and Rail Activities

Tsawwassen recommends expanding the geographic scope of the Project area to include broader road and rail activities. Tsawwassen wishes to discuss this potential geographic scope change with the Agency and EAO. Tsawwassen submits that, at a minimum, the Impact Statement should include an assessment of all traffic effects on bridges, tunnels or other infrastructure that would impact access to Tsawwassen Lands and to the broader territory.

Should you have any questions regarding the above, TFN would be happy to meet with you prior to your finalization of the Joint Guidelines.

Yours truly,

JFK Law Corporation

Per: /s

Tejas Madhur

TVM