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March 07 , 2022

Impact Assessment Agency of Canada
160 Elgin Street, 22 Floor
Ottawa, ON K1A 0H3

Attention: Impact Assessment Agency of Canada

Re: GCT Deltaport Expansion – Berth Four
Reference Number: 81010

I act as representative for the Tsartlip First Nation (“Tsartlip”) regarding the Deltaport Expansion – Berth Four Project (“the Project”). I write to provide Tsartlip’s comments and feedback related to the Draft Joint Assessment Plan (“the Assessment Plan”), the Draft Joint Guidelines (“the Guidelines”) and the Draft Joint Indigenous Engagement and Partnership Plan (“the Engagement Plan”). We have been in contact with Finn MacDonald of the Impact Assessment Agency (“IAA”) and Jessie Hannigan of the BC Environmental Assessment Office (“EAO”), both of whom have been made aware of Tsartlip’s intention to provide the comments herein.

Overview

The Deltaport Expansion Project is located within the traditional territory of the W̱SÁNEĆ people, including Tsartlip. Tsartlip members hold constitutionally-protected Aboriginal and treaty rights to fish and hunt throughout Tsartlip’s extensive marine traditional territories.

The lands and waters surrounding the Project remain important for the contemporary land and resource use of Tsartlip members and their exercise of constitutionally-protected Treaty rights to fish and hunt. Tsartlip members face significant, compounding barriers to the access to and availability of marine resources needed to exercise those rights within Tsartlip’s traditional territory as a result of already existing developments and intensive marine vessel activity in the area.

This Project has the potential to increase the barriers to access and availability of marine resources faced by Tsartlip and its members. Therefore, Tsartlip is very interested in this assessment process and ensuring that what remains of access and availability is protected.

Bifurcation of Related Assessment Processes

First, Tsartlip is concerned about the approach taken to considering the Deltaport Expansion Project separately from the Roberts Bank Terminal 2 Project. The two projects are undeniably related, and are each necessary for the other's success. Both Projects involve expansions, and road and rail improvements, to the Roberts Bank Causeway, expansions of container handling and storage areas, berth expansions, intermodal railyard expansions, and tug basin expansions or relocations, all of which require dredging and construction both in and out of water.

All of these activities will have impacts both on the environment and on the exercise of the constitutionally-protected Aboriginal and treaty rights held by Tsartlip and other Indigenous nations.

By separating the assessment and consultation processes of these two highly-related and adjacent Projects, the IAA and EAO have placed unnecessary additional administrative and assessment burdens on Indigenous nations that are affected by the Projects, and that are already stretched for capacity as they manage the many and increasing consultation and governance demands on their time. Coordinating projects to reduce consultation fatigue and the duplication of efforts was acknowledged as an objective identified by Indigenous nations in the Engagement Plan.

Bifurcating these two related processes also allows the impacts of each Project to be considered separately, masking the cumulative effects of two projects being undertaken at the same time and in the same location, with impacts on the same ecosystems and species. We also note that a detailed cumulative effects assessment for the Roberts Bank Terminal 2 Project, arguably the larger of the two and the Project that will be constructed first if approved, has not been completed. Studies and assessments undertaken for the Deltaport Expansion Project now will not be able to incorporate either the anticipated cumulative effects, nor the actual impacts of the Roberts Bank Terminal 2 Project, as there will not yet be data illuminating the impacts of construction and dredging, operation or related marine traffic.

For these reasons, a single comprehensive assessment process would be more appropriate to assess the Projects' impacts on the environment, on Indigenous nations and the exercise of constitutionally-protected Aboriginal and treaty rights. It also makes common sense; without the Roberts Bank Terminal 2 Project there would be no need for the Deltaport Expansion Project, and without the Deltaport Expansion, the Roberts Bank Terminal 2 could not adequately service the increase in container capacity it aims to create.

Terminology

As a preliminary matter, Tsartlip wishes to call attention to the use of the phrase “Indigenous interests” throughout the Guidelines when describing impacts on Indigenous peoples. While some of the matters potentially-affected by the proposed Project can be described as mere “interests,” it is also true that many of the impacted interests are constitutionally-protected Aboriginal and treaty rights, a fact that is not reflected consistently throughout the Guidelines.

The wording used throughout the Guidelines should recognize that Indigenous nations are unique, rights-holding entities. It is more appropriate to state that the proponent must consider “Indigenous interests and constitutionally protected rights.”

Assessment Boundaries

Section 8.3.2 of the Guidelines requires the proponent to define the temporal boundaries for each Valued Component, taking into account a list of factors including Indigenous interests, practices and land and resource use.

Given the close relation between the Deltaport Expansion Project and the Roberts Bank Terminal 2 Project, the schedule of all phases of the Roberts Bank Terminal 2 Project should be listed as one of the factors affecting this Project’s temporal boundaries to ensure that the adverse effects of the two Projects are spaced out adequately to avoid significant, grave concurrent adverse impacts exceeding assessed environmental thresholds. A joint schedule should be produced that includes the anticipated schedules of both Projects, if approved, and identifies any additional risks posed by conducting activities concurrently.

Additionally, section 8.3.1 of the Guidelines requires the proponent to establish a Regional Assessment Area (“RAA”), and potentially a Cumulative Effect Assessment Area (“CEAA”). Given the migratory nature of some of the aquatic species potentially affected by the Project such as salmon and Southern Resident Killer Whales (“SRKWs”), the RAA, or CEAA if applicable, should include at a minimum the migration routes and critical habitat for salmon and SRKWs, particularly along marine shipping corridors.

Free, Prior and Informed Consent

Both Canada and British Columbia have passed legislation aimed at giving the *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”) the force of law in Canada and the Province, and implementing the principles enunciated therein. The concept of free, prior and informed consent is a foundational principle throughout the document, and in particular, Article 32.2 states that

*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to **obtain** their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. (emphasis added)*

Article 32, and the other Articles in which the principle is incorporated, enunciate a substantive obligation to obtain free, prior and informed consent before taking actions on or affecting Indigenous lands, territories and resources. This acknowledges the substantive right of Indigenous peoples to determination over the use of their lands and other resources, not merely a procedural right to consult and cooperate in good faith.

In the Engagement Plan, a stated Crown objective is to “engage in a manner that is consistent with the Crown’s commitment to implement the United Nations Declaration on the Rights of Indigenous Peoples. UNDRIP also emphasizes the need to work together in partnership and respect, as articulated through the principle of free, prior and informed consent. This principle reflects working together in good faith on decisions that impact Indigenous peoples, with the intention to achieve consensus.”

Similarly, section 5.2 of the Guidelines states that the principle of free, prior and informed consent “reflects working together in good faith on decisions that impact Indigenous nations, with the intention to achieve consensus.”

Meanwhile, Indigenous involvement in the decision-making phase set out in the Engagement Plan is limited to “continued dialogue with the Crown and proponent if there are remaining outstanding issues.”

In fact, Indigenous nations are not given an active role in the decision-making process at all, aside from having the opportunity to provide a notice of consent or lack of consent as part of the Impact Assessment Phase Part 2. The goal of provincial engagement measures set out in the Assessment Plan is to “understand a participating Indigenous nation’s consent or lack of consent in advance of decision-making” and to seek consensus on the recommendation to provincial Ministers and the provincial referral package.

While these documents recognize the procedural aspect of the principle of free, prior and informed consent, they do not recognize or reflect that UNDRIP – and the domestic legislation implementing it – creates a substantive obligation to obtain consent, not merely to consult and collaborate before making an ultimately unilateral decision. In doing so, these documents misinterpret – and will ultimately misapply – UNDRIP and the Canadian and British Columbian Acts, and the substantive rights of Indigenous nations set out therein.

Engagement with Indigenous Nations

Second, Tsartlip has the following suggestions regarding the engagement requirements set out in the draft Guidelines.

First, section 5 of the Guidelines establishes that the proponent must collaborate with Indigenous nations to prepare its Impact Statement, including sharing project information, incorporating Indigenous knowledge and expertise, and cooperating to identify preferred mitigation and accommodation measures.

In Tsartlip's view, the proponent should also be required to collaborate with Indigenous nations at a nation-specific level to identify opportunities for Indigenous employment and training or education opportunities relevant to affected nations whose territories are near the Project. Currently, the proponent is required by section 2.3 of the Guidelines to describe training, policies and programs for Indigenous employment. However, a more collaborative approach to Indigenous employment would permit the development of an understanding of each most-affected nation's needs, capacity and interest, and allow for a tailored approach to providing employment and training opportunities to nation-members, potentially through agreements between the proponent and affected nations.

Second, section 5.2.1 requires the proponent to provide a record of the proponent's engagement with each affected Indigenous nation summarizing the proponent's collaborative efforts and the perspectives, concerns and feedback provided by Indigenous nations. Indigenous nations should be given an opportunity to provide comments on their respective record of engagement to ensure that these records adequately reflect what transpired and to allow the Indigenous nation an early opportunity to provide their perspective on the adequacy of engagement and consultation to-date.

Third, section 5.2.2. of the Guidelines requires the proponent to include in the Impact Statement a description of how the proponent collected, considered, addressed and responded to Indigenous nations' concerns, including by describing the potential effects on each Indigenous nation and describing each Nation's interests and rights.

This statement should, as a baseline, describe the current barriers faced by each Nation to exercising their Aboriginal and treaty rights, and the potential impacts of the Project on the meaningful exercise of those rights considering the cumulative effects that are likely to result from the Project and other developments or activities in the region.

Finally, section 5.2.3 of the Guidelines states that the proponent must explain how it intends to continue engaging with Indigenous nations in subsequent phases of the assessment process and throughout the Project's lifecycle.

The Guidelines should specifically include that the Impact Statement must describe the intended or proposed involvement of Indigenous nations in follow-up, monitoring, compliance and enforcement activities, and describe an engagement plan for addressing impacts on Aboriginal and treaty rights that were unanticipated or worse than anticipated.

Existing Conditions

Section 8.4 requires the proponent to describe the existing conditions for each Valued Component within the study areas, including interactions and interrelations between the environmental, health, social, cultural and economic components of the Valued Components.

Sections 10.4 and 10.5 of the Guidelines require the proponent to specifically consider and describe the current conditions and potential effects of the Project on marine use and land and resource use, including impacts on access to resources, quality and quantity of resources, impacts on the overall experience, and impacts on waterways.

Finally, section 12.3 of the Guidelines requires the proponent to describe the current context of affected Indigenous nations and existing conditions affecting that context, setting out minimum requirements for information to be included in the Impact Statement.

Section 12.3 should also explicitly require the proponent to provide in the Impact Statement descriptions of the existing conditions and barriers faced by Aboriginal and treaty rights-holders that exercise rights within each level of the Project's spatial boundaries, based on input from Indigenous nations, including the adequacy of current access to and availability of potentially-affected preferred resources to establish a realistic baseline of existing conditions for rights-holders affected by the Project. The exercise of Indigenous rights is critical to the physical, social, cultural and community health of many Indigenous nations, including Tsartlip. Therefore, only once the current conditions specific to the exercise of Indigenous rights is understood can the interconnections with health, social and economic components be understood.

A current, accurate baseline developed based on input from the Indigenous rights-holders is essential to the ability of decision-makers to accurately assess impacts on constitutionally-protected rights, and ensure affected Indigenous nations maintain the ability to meaningfully exercise those rights.

Cumulative Effects

Section 12 overall requires a very holistic and fulsome assessment of the existing conditions and cumulative effects faced by Indigenous nations in addition to the cumulative environmental effects assessments required in section 8.8, and responds largely to the concerns raised by Indigenous nations and documented in the Engagement Plan.

The fulsome cumulative effects assessment required by section 12.4 should be more explicitly incorporated into other requirements throughout the Guidelines.

For example, section 1.3 sets out the Matters and Factors to be Considered in the Assessment, including “the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*.” This section should explicitly incorporate that these impacts must be assessed in light of pre-existing conditions and cumulative effects likely to result from the Project in combination with other existing or future developments and activities.

Similarly, section 3.4 sets out factors the proponent must consider in assessing alternative means of carrying out the Project, including the impacts of alternatives on Indigenous interests. This section should explicitly require the proponent to assess the relative impacts of alternative means in their cumulative context, allowing the decision-maker and affected Indigenous nations to assess whether the least impairing alternative is considered and ultimately selected.

Section 16, which requires the assessment of marine shipping related to the Project, should also explicitly incorporate a fulsome cumulative effects assessment in light of the pre-existing significant and intensive marine vessel traffic already present in the region. That assessment must include the input of the Indigenous nations, including Tsartlip, located along and directly affected by the marine shipping route associated with the Project, and the location of important Indigenous fisheries to the extent that Indigenous nations are willing to share that information and can be assured of its confidentiality.

Follow-up and Monitoring

Section 7.1.5 of the Engagement Plan establishes roles and responsibilities for the Crown and Indigenous nations, stating that Indigenous nations “may participate” in follow-up and monitoring activities, compliance and enforcement activities, and will be consulted on project amendment impacts on Indigenous interests. Additionally, section 8.10 of the Guidelines acknowledges the need to follow-up and monitor effects on Indigenous interests during all phases of project development.

Tsartlip wishes to stress that follow-up programs must adequately incorporate the participation of Indigenous nations in follow-up and monitoring activities. Follow-up and monitoring activities must include feedback from Indigenous nations that have specialized expertise in and understanding of managing the local ecosystem developed over millennia, and may be able to recognize impacts not anticipated by Western science. Additionally, without the active participation of affected Indigenous nations, impacts on Indigenous rights and interests that were

not anticipated or go beyond the expected impacts may not be adequately accounted for and addressed.

Indigenous participation in follow-up and monitoring is essential to ensuring that unanticipated impacts on Indigenous physical, social, cultural and community health, or impacts that exceed what was expected, can be addressed and the Project adapted. This is especially critical for ensuring that the cumulative impacts of this and other Projects in the region are addressed and affected Indigenous nations maintain the access necessary to meaningfully exercise their Aboriginal and treaty rights.

It follows that all of this participation must be adequately funded by the proponent.

Nation-Specific Assessment

Chapter 13 of the Guidelines sets out Nation-specific Assessments detailing a preliminary understanding of how affected Indigenous nations would like to participate in the assessment process, their specific interests and values to be included in the assessment, and relevant information that the Nation has provided for assessing effects on those interests and values.

Because Tsartlip was not involved in developing the Draft Joint Assessment Guidelines, Tsartlip has not yet had the opportunity to provide the information required to develop a Nation-specific preliminary assessment and looks forward to developing a nation-specific assessment in the future, as required by section 13.23 of the Guidelines.

Conclusion

Thank you for the opportunity to provide feedback on these three foundational documents. As the holders of Aboriginal and treaty rights that are directly impacted by the Project and related shipping, Tsartlip remains concerned about the cumulative effects of pre-existing developments and activities in the area, including both this Project and the Roberts Bank Terminal 2 Project. We look forward to further engagement to fully assess the potential impacts of this Project on Tsartlip's constitutionally-protected rights.

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A handwritten signature in black ink, appearing to be 'Don Tom', written in a cursive style.

Don Tom, Chief of Tsartlip First Nation