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File No.: 2136

March 30, 2023

Sent via e-mail to Deltaport@iaac-aeic.gc.ca

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

To the Impact Assessment Agency:

Re: Comments on the draft Terms of Reference and the draft Cooperation Agreement 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 Terms of Reference for the Review Panel for the GCT Deltaport Expansion - Berth Four Project (“DP4” or the “Project”) and related questions posed by the Agency for this public comment period.

Below, we provide general comments on the purposes of the *Impact Assessment Act* (the “Act”) which the Terms of Reference and the public participation time limits must support (Part I), followed by answers to the Guiding Questions posed in the Agency’s comment template, concerning the Terms of Reference (Part II) and Time Limits (Part III).

We have appended a table that separately sets out our detailed clause-by-clause comments on the draft Terms of Reference, as well as the comments on the specific time limits identified in the Guiding Questions.

I General Comments

The Terms of Reference need to facilitate a thorough assessment, consistent with the purposes of the Act as set out in s 6(1). These purposes 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;

(c) to ensure that impact assessments of designated projects take into account all effects — both positive and adverse — that may be caused by the carrying out of designated projects; and

(m) to encourage the assessment of the cumulative effects of physical activities in a region and the assessment of federal policies, plans or programs and the consideration of those assessments in impact assessments.

Further, the Terms of Reference and other timelines need to allow for meaningful public participation consistent with the purposes of the Act in s. 6(1), which include:

(h) to ensure that opportunities are provided for meaningful public participation during an impact assessment, a regional assessment or a strategic assessment.

II Terms of Reference

Is the Review Panel’s mandate, as described in the Terms of Reference, inclusive of areas of concern to you / your organization? If no, what areas of concern what you like to see added?

The geographic extent of marine shipping as described in clause 2 of the draft Terms of Reference is not fully inclusive of areas of concern to our clients. Our clients have an interest in a properly scoped assessment of the Project’s impacts on Southern Resident Killer Whales as well as other impacted species at risk who have habitat in or use Canada’s Exclusive Economic Zone (“EEZ”). As discussed further in the table below, excluding much of the EEZ does not align with a reasonable interpretation of a designated project in the Act and excludes from consideration effects on habitat used by many *Species at Risk Act* (“SARA”) listed species.

It is unclear from the Terms of Reference whether the “marine shipping” to be assessed includes short sea shipping from the short sea shipping barge berth mentioned in the Initial Project Description that is being considered for inclusion in the Project. This – and its effects, including on Southern Resident Killer Whales and their critical habitat – must be assessed.

Does the process described in the Terms of Reference promote the participation of Indigenous nations, federal and provincial authorities, non-government organizations, and the public in the assessment of the Project? Identify any challenges that you or your community are facing that would prevent you from taking part in the public participation opportunities outlined in the Terms of Reference. Examples of challenges could include, for example, those of a linguistic, social, economic, or technical nature.

Several clauses of the draft Terms of Reference and the draft Canada-British Columbia Cooperation Agreement, and the possible timelines identified in the Agency’s comment template, do not allow for sufficient time and flexibility for our clients or others to meaningfully participate, especially when they may need to consult experts advice on scientific and technical matters. Specifically, the unprecedented inflexibility with respect to time suspensions (clause 4.8 of the draft Terms of Reference), the short proposed time periods (the comment template), and the statement that comment periods on new information from the proponent would be at the panel’s discretion in the sufficiency review phase (clause 4.12 of the draft Terms of Reference) do not promote the participation of our clients.

III Time Limits for Public Participation Opportunities

Are the following proposed time limits for public participation opportunities sufficient to facilitate the participation of Indigenous nations, federal and provincial authorities, non-governmental organizations, and the public?

- 60 day public comment period for the review of the Impact Statement;
- 30 days notice prior to the start of a public hearing;
- 60 days for the public hearing;
- 21 day comment period for Indigenous nations to review draft sections of the impact assessment report; and
- 30 day public comment period to comment on potential conditions for the Project, the draft referral package and summary assessment report.

Comment periods and minimum notice periods must not be so short as to derogate from the public's ability to meaningfully participate in the impact assessment, which, as noted above, is one of the stated purposes of the Act. Some of the above proposed timelines are not sufficient for meaningful participation.

Time periods must account for the fact that parties may have limited resources, including directly impacted local individuals or volunteer organizations, or non-governmental organizations with limited staff time. Impact statements and supporting information filed by proponents are generally highly technical and hundreds or thousands of pages long. Draft conditions may also be voluminous and highly technical. Some parties may need to retain experts to assist them in engaging with technical information, drawing from a small pool of individuals with the appropriate specialized expertise who may have conflicting time commitments. Timelines that are overly short will therefore prevent participants from fully engaging with the material and from providing valuable input to the review panel.

Our specific comments on these suggested timelines are set out in the appendix.

Sincerely,

<original signed by>

Dyna Tuytel
Barrister & Solicitor

<original signed by>

Rachel Gutman
Barrister & Solicitor

Encl. Appendix: Comments on draft Terms of Reference and Guiding Questions
Letter from Ecojustice to Impact Assessment Agency, January 7, 2022

cc: David Suzuki Foundation, Georgia Strait Alliance, Raincoast Conservation Foundation,
Wilderness Committee

Appendix: Comments on draft Terms of Reference and Guiding Questions

Information Source <i>(Clause of Cooperation Agreement or Terms of Reference)</i>	Comment or Requested Change	Rationale
Part 2 of the draft Terms of Reference (Description of the Project)	Clarify that short sea shipping is included in “marine shipping”	The Initial Project Description includes potential short sea shipping from a short sea shipping barge berth that is being considered for inclusion in the Project. Such shipping, if still proposed, must be included in the scope of the Project in light of its effects, including effects on <i>Species at Risk Act</i> (“SARA”) listed Southern Resident Killer Whales.
Part 2 of the Terms of Reference (Description of the Project, describing the geographical scope of marine shipping).	Amend to include the entire Exclusive Economic Zone (“EEZ”) in the geographic extent of marine shipping	<p>The impact assessment should assess the effects of marine shipping to the outer boundary of Canada’s EEZ.</p> <p>Marine shipping anywhere in the EEZ is “incidental” and therefore part of the “designated project” as defined in section 2 of the Act. Further, the review panel must assess the designated project’s “effects within federal jurisdiction”, also as defined in section 2, which includes the effects of shipping on fish and fish habitat, SARA-listed aquatic species, and federal lands, which include both the Territorial Sea and EEZ. Any other interpretation of the requirements of the <i>IAA</i> and <i>SARA</i> would be unreasonable.</p> <p>Protection of the environment within the EEZ is within Parliament’s authority, and Canada is able to regulate environmental effects of shipping in the EEZ in accordance with international law.</p> <p>Assessing marine shipping to the outer boundary of the EEZ would also be consistent with the purposes of the <i>Impact Assessment Act</i> as 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; (c) to ensure that impact assessments of designated projects take into account all effects — both positive and adverse — that may be caused by the carrying out of designated projects; and (m) to encourage the assessment of the cumulative effects of physical activities in a region and the assessment of federal policies, plans or</p>

Information Source <i>(Clause of Cooperation Agreement or Terms of Reference)</i>	Comment or Requested Change	Rationale
		<p>programs and the consideration of those assessments in impact assessments;</p> <p>The draft Terms of Reference include parts of the EEZ within the assessment: those that fall within the critical habitat identified for Southern Resident Killer Whales and the Maa-Nulth Domestic Fishing Area. There is no reason that the review panel can assess those areas and not the remainder of the EEZ, where shipping will also have effects within federal jurisdiction. For the reasons outlined above, it can and should assess those areas <u>and</u> the remainder of the EEZ.</p> <p>Please refer to the appended January 2022 letter setting out our clients’ previous detailed submissions to the Agency regarding this scoping issue in their comments on the draft Joint Guidelines and draft Joint Assessment Plan for this project, under the heading “Geographic extent of marine shipping incidental to the project” on pages 2-7 of the letter.</p>
<p>Clause 4.8 of the draft Terms of Reference (“This time limit runs continuously. For clarity, the time limit does not pause if the Review Panel issues any information requirements to the Proponent” during the Impact Assessment Phase).</p>	<p>The second and third sentences in clause 4.8 should be deleted.</p> <p>A new clause should be added following it, which says one or more of the following things: a) “the 450 day time limit does not include the time period(s) between when the Review Panel may require information from the proponent and the receipt of the requested information”;</p>	<p>Clause 4.8 is unclear. While the second sentence, stating that “This time limit runs continuously” appears to refer to the 450 day timeline from the s. 19(4) notice to the Review Panel submitting its report, the third sentence, which is supposed to “clarify” the second sentence, refers to clause 4.10. Clause 4.10 concerns the Review Panel sufficiency review phase, which precedes the s. 19(4) notice and therefore the 450 day timeline.</p> <p>The suggested revisions and the following comments respond to the problem that, at least as currently written, clause 4.8 suggests that there will be no pauses in the 450 day timeline for the phase that follows the sufficiency review and runs from the s. 19(4) notice to the Review Panel report, including if the Review Panel requests further information of the proponent during that time.</p> <p>The 450 day period for the Review Panel to conduct the hearing and prepare the resulting report may not be adequate if the Agency needs to issue any information requirements to the Proponent that arise throughout the process due to circumstances that are specific to this project and allow for</p>

Information Source <i>(Clause of Cooperation Agreement or Terms of Reference)</i>	Comment or Requested Change	Rationale
	<p>b) “the Agency will suspend the time limit for the Review Panel to submit its report if the proponent is required to undertake studies or collect information related to a change in the design, construction or operation plans for a designated project and the resulting effects of the change, if the review panel is of the opinion that the change would alter the potential effects of the project”.</p> <p>If the above is not done, or in addition,:</p> <p>c) the overall 600 day limit should be extended, to enable an extension of the 450 day limit, on the basis that the Agency thinks more time is required in light of the complexity of the project and the potential need for the review panel to</p>	<p>meaningful public consultation. This is a complex project, with the potential for significant adverse environmental effects, and it is reasonable to expect that additional information may be required of the proponent by the panel in the course of the assessment, that the proponent might file new evidence that needs to be reviewed, that evidence could be struck out and potentially replaced, or other circumstances that necessitates time for the Review Panel and other parties to review information, ask questions, or otherwise respond.</p> <p>It is inconsistent with the Agency’s and Minister’s powers under the <i>IAA</i> to establish in the Terms of Reference that time should not be paused.</p> <p>Option (a) (which is preferable because it is comprehensive and does not require the time limit to be extended in advance based on an informed guess) is supported by the Minister’s power under s 37(3) of the Act to extend time limits as “necessary to permit the review panel...to take into account circumstances specific to the designated project.; the Governor in Council can further extend it on the Minister’s recommendation under s. 37(4). As the Minister establishes the terms of reference under s. 41(1), this Minister-initiated option can be reflected in the terms of reference. This option would be consistent with the terms of reference for the highly analogous Roberts Bank Terminal 2 Project, which in clause 4.14 that the Review Panel’s 430 day time limit to submit its report “does not include the time period(s) between when the Review Panel may request information from the proponent and receipt of the requested information”.</p> <p>Option (b) is supported by , the Agency’s power under s 37(6) of the Act to suspend the time limit to submit the report until an activity prescribed by certain regulations is completed, and by s 2(b) of the <i>Information and Management of Time Limits Regulation</i>, SOR/2019-283, which establishes that time limits may be suspended when there is information related to a change in the design, construction or operation plans that the Review Panel believes would alter the potential effects of the project.</p>

Information Source <i>(Clause of Cooperation Agreement or Terms of Reference)</i>	Comment or Requested Change	Rationale
	seek further information during the assessment.	<p>Option (c) is supported by s. 37(2), under which the Agency can establish a time limit greater than 600 days if it is “of the opinion that more time is required to allow the review panel to take into account circumstances that are specific to [the] project.”</p> <p>By excluding the possibility of suspending time for information requests, clause 4.8 of the Terms of Reference deprives the Review Panel of the flexibility afforded by these provisions. Should applicable circumstances arise, the provisions above should be utilized.</p> <p>A failure to extend time in these circumstances would use up limited time that should be used for analysis of high volumes of evidence and for public participation opportunities. This would prevent the Review Panel from conducting an appropriately thorough assessment and from providing meaningful opportunities for public participation, both of which are necessary to fulfill the Act’s purposes. In a worst-case scenario, terms of reference that fail to pause time while the proponent provides requested information could allow a proponent to – whether intentionally or not – run down the clock, leaving little to no time for analysis of or meaningful public comment about the new information.</p>
Clause 4.12 of the draft Terms of Reference (“At any time during its sufficiency review, the Review Panel may, at its discretion, hold a public comment period on any additional information	Revise to say “The Review Panel will hold a public comment period on any additional information provided by the Proponent. The Review Panel may, at its discretion, hold a public comment period on any additional information	<p>The Review Panel’s duty as expressed in clause 3.2(d) to “hold hearings in a manner that offers the public an opportunity to participate meaningfully” and the principle expressed in clause 3.9 that “opportunities are provided for meaningful public participation” are at odds with the current version of clause 4.12.</p> <p>If the Panel is to take into account comments on the sufficiency of the information in the proponent’s Impact Statement, it should also take into account comments on the sufficiency of additional information or studies filed by the proponent that supplement that information.</p>

Information Source <i>(Clause of Cooperation Agreement or Terms of Reference)</i>	Comment or Requested Change	Rationale
provided by the Proponent or other participants”).	provided by other participants.”	
Clause 4.17 of the draft Terms of Reference (virtual participation)	Revise to say “The Review Panel must consider, and if feasible accommodate, virtual participation at the public hearing, where this has been requested. ...”	Facilitating public participation in the event that a participant or expert is unable to travel to the hearing location or cannot attend in person for health reasons is a matter of fairness
Clause 7.14 of the draft Canada-British Columbia Cooperation Agreement (60 day public comment period for the review of the Impact Statement).	The public comment period for the review of the Impact Statement should either be extended by 30 days or there should be a requirement to 30 days’ notice of when the comment period will begin.	Impact Statements are lengthy and highly technical documents. 60 days, especially without prior notice, is not sufficient time for participants to review this information themselves or to retain and instruct experts and receive their opinions. As such, without an extension of the proposed timeline or prior notice of the commencement of the public comment period, participants will not be able to meaningfully engage in review.
30 days notice prior to the start of a public hearing (not indicated in either document, only in comment template).	The Review Panel should provide at least 60 days notice of the oral hearing portion of the assessment.	Participants and their experts may not be able to make themselves available with only 30 days notice. For reference, the T2 Review Panel gave 75 days notice for the start of the oral hearing sessions. It should be possible to provide 60 days’ notice or more. Doing so, as well as allowing for remote video participation (per the comment above) will reduce barriers to participation in the hearing. Travel logistics, when combined with short notice, can pose a significant barrier to hearing participation.

Information Source <i>(Clause of Cooperation Agreement or Terms of Reference)</i>	Comment or Requested Change	Rationale
60 days for the public hearing (not indicated in either document, only in comment template).		This may be sufficient, but should be increased if more time would be needed to allow for not only oral summary argument but also questions from the panel, and questions between parties and the proponent. This will depend in part on the number of participants.
30 day period to comment on the potential project conditions, the draft referral package, and the summary assessment report (not indicated in either document, only in comment template).	The public comment period for potential project conditions, the draft referral package, and the summary assessment report should be 60 days and should be preceded by 30 days' notice.	30 days may be inadequate to allow for meaningful public participation given the complexity and number of the documents to be reviewed, and in particular the anticipated length and technical nature of the conditions. If participants need to retain experts, they will need a longer time period and adequate notice to ensure experts' availability.

January 7, 2022

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

GCT Deltaport Expansion – Berth Four Project
Impact Assessment Agency of Canada
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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%5Fhbw%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 Venten
Barrister & Solicitor

Dyna Tuytel
Barrister & Solicitor

- 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