

Participant: [Roderick Malcom]

Organization (if applicable): [Suquamish Indian Tribe of the Port Madison Reservation]

General Comments:

The DeltaPort Expansion – Berth Four Project site itself and the areas that will be used by vessels transiting to and from the project area lie within the traditional fishing area of the Suquamish Indian Tribe of the Port Madison Reservation (Suquamish Tribe or Tribe). The Suquamish Tribe signed the Treaty of Point Elliott, 12 Stat. 927, in 1855 with the United States. Article V of the Treaty of Point Elliott recognizes and reserves to the Tribe the right to continue practicing fishing and hunting activities, “[t]he right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands.” The United States Federal Courts have recognized that the Suquamish Tribe’s usual and accustomed grounds and stations (U&A) includes all marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River, including Haro and Rosario Straits. The Tribe actively works to ensure that activities within that area, on both sides of the border, do not negatively impact (1) habitat and natural systems; and (2) the exercise of treaty and/or Aboriginal fishing rights.

The Suquamish Tribe historically fished in the Strait of Juan de Fuca , waters adjacent to San Juan and Gulf Islands including but not limited to Haro Strait, Rosario Strait, Boundary Pass, waters of the Strait of Juan De Fuca, and waters adjacent to Roberts Bank to the Fraser River. Currently, the Tribe fishes for finfish (including, but not limited to salmon, herring, rock fish, and halibut) and shellfish (including, but not limited to, crab, shrimp, geoduck, sea urchins, sea cucumbers, clams, and oysters). The proposed expansion has the potential to (1) degrade habitat for species and stocks that migrate through areas the Tribe fishes, reducing the numbers available for harvest; (2) interfere with fishing activities by the increased vessel traffic to and from Roberts Bank; and (3) destroy habitat through increased potential for industrial and shipping spills.

Though comments have only been requested on the “Terms of Reference” and the “Cooperation Agreement”, both documents incorporate other documents by reference and therefore, comments on those documents at times are required. For example, the “Joint Guidelines”, which outline the scope of the assessment, require revision to address Suquamish Tribal interests.

The Joint Indigenous Engagement and Partnership Plan (JIEPP) pg 7 states:

“Tribes of Washington State Given the location of the project near the border of Canada and the United States (U.S.), it is recognized that Indigenous communities in the U.S. may have interests and concerns regarding the project, including potential project impacts that may affect their communities. The Crown acknowledges that the recent R. v. Desautel,

2021 Supreme Court of Canada SCC decision may have implications that need to be considered if Tribes of Washington State assert Indigenous rights in Canada.

This assessment should proceed on the assumption that that the Suquamish Tribe, one of the Tribes listed on page 7 of the JIEPP, has Aboriginal rights in Canada given that their traditional fishing areas, as confirmed by the U.S. Federal Courts include what are now Canadian waters.

Additionally, throughout the TOR and Cooperation agreement, there are references to most recent version of documents. As these referenced documents influence the assessment, the Suquamish Tribe should be included in consultation for any proposed changes to the following documents:

1. Guidance: Describing effects and characterizing extent of significance;
2. Framework: Public Participation under the Impact Assessment Act;
3. Guidance: Public Participation under the Impact Assessment Act;
4. Policy Context: Indigenous Participation in Impact Assessment;
5. Guidance: Indigenous Participation in Impact Assessment;
6. Agency's Guidance on the Assessment of Potential Impacts on the Rights of Indigenous Peoples;
7. Government of Canada's Indigenous Knowledge policy framework for project reviews and regulatory decisions;
8. Agency's guidance on Protecting Confidential Indigenous Knowledge under the Impact Assessment Act;
9. External Technical Reviews; and
10. Any other frameworks and guidance documents produced by the Agency.

Comment Template

Information Source <i>(Clause of Cooperation Agreement or Terms of Reference)</i>	Comment or Requested Change	Rationale
<p>Cooperation Agreement pg 3 - Indigenous interests</p> <p>This definition includes the following with respect to the Indigenous peoples of Canada, including an impact — occurring in Canada and resulting from any change to the environment — on (i) physical and cultural heritage,</p>	<p>Suggest adding new sentence.</p> <p>This definition includes the following with respect to the Tribes of Washington State within the marine shipping activity area incidental to the Project zone , including an impact — occurring outside of Canada and resulting from any change to the environment — on (i) physical and cultural heritage, (ii) the current use of lands and resources for traditional purposes, or (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance; and any change occurring outside Canada to the health, social or economic conditions of the Tribes of</p>	<p>The Agreement as currently written could be interpreted that impacts occurring outside of Canada need not be considered. The Agreement is therefore inadequate to address the Tribe's Aboriginal and Treaty rights on both sides of the international boundary.</p>

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(ii) the current use of lands and resources for traditional purposes, or (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance; and any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada.	Washington State who have established treaty rights, and who may also be Aboriginal Peoples of Canada.	
Cooperation Agreement pg 3 - Indigenous interests EAO's Effects Assessment Policy describes Indigenous interests as "those interests related to an Indigenous nation and their rights recognized and affirmed by section 35 of the Constitution Act, 1982, including Treaty rights and Aboriginal rights and title, that may be impacted by a proposed project" which must be assessed per section 25(1) of the Environmental Assessment Act;	At the end of this add a new sentence. Indigenous interests also include the Treaty Rights of Tribes of Washington State, and Aboriginal rights asserted by the Tribes of Washington State as the "modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact."	The EAO's Effects Assessment Policy dates from 2020, which predates the 2021 SCC <i>R. v. Desautel</i> decision where the The Court concluded that the Aboriginal rights protected by section 35 of the Constitution Act, 1982 — which applies to the "aboriginal peoples of Canada" — can be held by "modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact." Including the proposed wording word reduces confusion among those not aware of <i>R. v. Desautel</i> .
Cooperation Agreement pg 3 - Indigenous nations: First Nations and Métis peoples of British Columbia	Amend to read: Indigenous nations: First Nations, and Métis peoples of British Columbia; and the Tribes of Washington State with US treaty rights and who assert Aboriginal rights in Canada, within the marine shipping activity area incidental to the Project	To reduce potential for confusion.

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<p>Cooperation Agreement -Section 3.3</p> <p>The Agreement shall be interpreted in accordance with the Impact Assessment Act (IAA) and the Environmental Assessment Act (B.C. Act).</p>	<p>Amend to read: The Agreement shall be interpreted in accordance with the Impact Assessment Act (IAA) and the Environmental Assessment Act (B.C. Act), United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and the Supreme Court of Canada’s decision in R. v. Desautel.</p>	<p>Both UNDRIP and the Desautel decision properly inform the interpretation of the Agreement.</p>
<p>Cooperation Agreement - Section 4.1</p> <p>This Agreement is consistent with the documents issued during the planning phase of the Assessment, including the Joint Guidelines, the Joint Assessment Plan, the Joint Indigenous Engagement and Partnership Plan, and the provincial Process Order.</p>	<p>See global comments re referenced documents.</p>	
<p>Cooperation Agreement - Section 5.1</p> <p>A Review Panel is a group of independent experts selected based on their knowledge or experience relative to the potential effects of the Project or knowledge of Indigenous issues and must be free from bias or conflict of interest relative to the Project.</p>	<p>Amend to read:</p> <p>A Review Panel is a group of independent experts selected based on their knowledge or experience relative to the potential effects of the Project or knowledge of Indigenous issues in both BC and Washington State and must be free from bias or conflict of interest relative to the Project.</p>	<p>Due to differences in treaty status, court decisions, internal governance structures, fishery management regimes, what is applicable to First Nations might not be applicable to Washington Tribes.</p>

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<p>Cooperation Agreement - 6.3</p> <p>To the extent possible, the Crown will make use of information from existing initiatives as well as past assessments in the region to inform its analysis on the potential impacts on Indigenous interests.</p>	<p>Much of the information in the project file regarding aboriginal fishing in the project predates the 2021 SCC R. v. Desautel decision and/or does not properly reflect Suquamish Tribal interests. This information will need to be updated to reflect the Suquamish Tribe's established and asserted rights in their traditional waters on both sides of the international boundary.</p>	
<p>Cooperation Agreement - 7.14</p> <p>7.14 The Agency and EAO will hold a joint public comment period of at least 60 days on the Impact Statement, and will collectively review and analyze the information received from all participants</p>	<p>TOR Section 4.29 contains the following wording - "<i>provide Indigenous nations up to 21 days to review the draft sections and provide comments;</i></p>	<p>There appears to be a discrepancy between 4.29 and 7.14. The Indigenous Nations and Tribes of Washington should receive an additional 21 days to review documents and provide comments.</p>
<p>Cooperation Agreement - 7.29</p> <p>The Parties will, where practicable, coordinate the opportunity for the Proponent, Indigenous nations, and the public to review draft federal conditions and the draft provincial referral package, through a joint or concurrent public comment period.</p>	<p>Suggest a pre-public draft of the draft federal conditions and the draft provincial referral package be distributed to First Nations and Tribes of Washington for review and comment.</p>	<p>This would help identify major issues earlier and as noted below, the review period of the pre-public draft should, at a minimum, be 30 days.</p>
<p>TOR - page 3</p> <p>The Joint Assessment Plan, the Joint Indigenous Engagement and Partnership Plan and the Joint Permitting and Regulatory Coordination Plan set out general</p>	<p>The Panel should review these and consider how the comments provided by the Suquamish Tribe and other Tribes of Washington will require these plans to be adapted before beginning the assessment and consult with each Tribe submitting comments.</p>	

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<p>expectations for the assessment process. However, the Review Panel may elaborate on these plans, where relevant, and adapt its approach based on changes that may be required during the assessment, or based on comments and requests received from participants.</p>		
<p>TOR – page 4</p> <p>The geographic extent of marine shipping incidental to the Project includes the marine shipping routes from the proposed terminal at Roberts Bank to the outer limit of Southern Resident Killer Whale critical habitat, as defined in the 2018 Recovery Strategy for the Northern and Southern Resident Killer Whales (Orcinus orca) in Canada.</p>	<p>Amend to read:</p> <p>... as defined in the 2018 Recovery Strategy for the Northern and Southern Resident Killer Whales (Orcinus orca) in Canada, and all U.S., waters within 4 nautical miles of the routes used by inbound and outbound traffic.</p>	<p>Figure 5 of the Recovery Strategy is labelled as follows: <i>"Critical habitat areas identified for Southern Resident Killer Whales. Critical habitat is identified as the areas within the identified geographic boundaries, given that they contain the described biophysical features, attributes and the functions they support, as described in Table 4. The hatched areas in the transboundary waters of southern BC and off southwestern Vancouver Island are the critical habitat areas in Canadian waters for Southern Resident Killer Whales, as designated under SARA. The hatched area in the transboundary waters of northern Washington State is designated as Southern Resident Killer Whale critical habitat under the U.S. ESA"</i></p> <p>Inbound shipping heading to the existing port facility uses U.S. waters until near Race Rocks and then transits into Canadian waters until moving back into U.S. waters in Haro Strait and Boundary Passage until reaching the international maritime border. Outbound traffic, shortly after leaving the port, remains mostly in U.S. waters until halfway through Haro Strait. Therefore, both inbound and</p>

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		<p>outbound traffic can interact with Suquamish fishing in U.S. waters.</p> <p>To reduce the potential for confusion that the assessment of the impacts caused by marine shipping routes is restricted to Canada waters and does not include impacts to the Suquamish Tribe interests in U.S. waters, a change in wording is required.</p>
<p>TOR, page 4 footnote - For clarity, the term “Indigenous nations” is defined as the First Nations and Métis peoples of British Columbia.</p>	<p>Amend to read: Indigenous nations: First Nations, and Métis peoples of British Columbia; and the Tribes of Washington State with US treaty rights and who assert Aboriginal rights in Canada, within the marine shipping activity area incidental to the Project.</p>	
<p>TOR - page 5 footnote 2 The requirements related to the scope of the assessment of marine shipping and rail transportation incidental to the Project are set out in Section 16.4 and Section 17.4 of the Joint Guidelines, respectively.</p>	<p>Chapter 13 (Nation-specific Assessment) of the Joint Guidelines contains no reference to the Suquamish Tribe. These guidelines must be modified to include the Suquamish Tribe’s treaty rights and Aboriginal rights.</p> <p>Chapters 16 (Marine Shipping) of the Joint Guidelines should be modified to include a description of the projected increase in vessel traffic along various segments of likely shipping routes, and should describe vessel traffic, due to the project, transiting through the Suquamish Tribe’s usual and accustomed fishing area with Boundary Passage and Haro Strait considered separate segments.</p>	<p>Unless the guidelines are modified, impacts to Suquamish Tribal interests will not be explicitly considered.</p>
<p>TOR page 9. Note 3</p> <p>EAO’s Effects Assessment Policy describes Indigenous Interests as “those interests related to an Indigenous nation and their rights recognized and affirmed by section 35 of the Constitution Act, 1982, including Treaty rights and Aboriginal rights and title,</p>	<p>At the end of this add a new sentence. Indigenous interests also include the established treaty rights of the Tribes of Washington State, along with their asserted Aboriginal rights in Canada as “modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact.”</p>	<p>The EAO’s Effects Assessment Policy dates from 2020, which predates the 2021 SCC decision where the Court concluded that the Aboriginal rights protected by section 35 of the Constitution Act, 1982 — which applies to the “<i>aboriginal peoples of Canada</i>” — can be held by “<i>modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact.</i>”</p>

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<p>that may be impacted by a proposed project” which must be assessed per subsection 25(1) of the EAA.</p>		<p>Including the proposed wording word reduce confusion among those not aware of <i>R. v. Desautel</i>.</p>
<p>TOR page 11. Review Panel Appointment Section 4.4a.</p> <p>training and orientation activities such as cultural training with Indigenous nations, and orientation sessions with federal and provincial authorities;</p>	<p>The Panel will need training on differences between U.S. and Canadian fishery management practices, such as setting of seasons, openings, etc.</p>	<p>Such training is needed to ensure that proposed accommodation measures for First Nation fisheries are not assumed to automatically be transferable to treaty fisheries in Washington State.</p>
<p>TOR page 14. Impact Assessment Report Section 4.29b</p> <p>provide Indigenous nations up to 21 days to review the draft sections and provide comments;</p>	<p>Amend: Indigenous nations and Tribes of Washington.</p> <p>Clarification is needed that the 21 days is in addition to the public comment period. Suggested that instead of 21 days a minimum of 30 days is provided for additional review by the Indigenous nations and Tribes of Washington.</p> <p>See also comment to Cooperation Agreement - 7.14</p>	<p>As noted in rationale to comment 7.14 there needs to be clarification as to the 21 days provided to the Indigenous Nations and Tribes of Washington. Even assuming that the 21 days is an additional period of time given to the Indigenous Nations and Tribes of Washington Indigenous Nations and Tribes of Washington prior to the public period to review the draft sections, it is still too short and should at a minimum be 30 days.</p>

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<i>Please use as many pages as necessary.</i>		