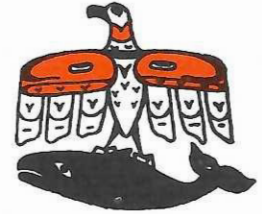




# MAKAH TRIBAL COUNCIL

P.O. BOX 115 • NEAH BAY, WA 98357 • 360-645-2201



IN REPLY REFER TO:

Email to [deltaport@iaac-aeic.gc.ca](mailto:deltaport@iaac-aeic.gc.ca)

GCT Deltaport Expansion - Berth Four Project  
Impact Assessment Agency of Canada  
160 Elgin Street  
22nd Floor  
Ottawa, Ontario K1A 0H3

March 30, 2023

*Re: Makah Tribal Council Comments on the Draft Review Panel Terms of Reference and Draft Canada-British Columbia Coordination Agreement for the assessment of the GCT Deltaport Expansion – Berth Four Project*

Dear Impact Assessment Agency of Canada Staff:

The Makah Tribal Council is writing to provide feedback on the Draft Review Panel Terms of Reference (Terms of Reference) and Draft Canada-British Columbia Coordination Agreement (Coordination Agreement) for the assessment of the GCT Deltaport Expansion – Berth Four Project (Deltaport Project). The Makah Tribe is located where the Strait of Juan de Fuca meets the open ocean, a highly productive marine ecosystem and an area with dense vessel traffic and high oil pollution risk. Notably, all inbound vessels headed to or from the Vancouver area (and to Seattle, Tacoma, and Olympia) pass the Makah Tribe's Usual and Accustomed Hunting and Fishing Stations (U&A). For over two decades, the Makah Tribe has worked with other leaders to advance oil spill planning, prevention, and response in the region and to ensure tribal authorities are appropriately recognized in these arenas and processes. The Deltaport Project is one of a portfolio of expansion projects in the region that are projected to increase vessel traffic and its associated risks. We are providing comments to help GCT achieve the highest level of protection for Makah treaty resources and to promote environmental protection and safety for coastal communities throughout the region. Our primary recommendation is for the Impact Assessment Agency of Canada to recognize the Makah Tribe's sovereignty and jurisdiction at the highest level throughout the Impact Assessment process. **We request a meeting to identify a path for elevating the Makah Tribe's input in the Impact Assessment in a manner that reflects the Tribe's sovereign status.** Additionally, we recommend that GCT raise and standardize their traffic safety and oil pollution prevention standards, require vessels calling to port to pay-in to the Neah Bay Emergency Response Towing Vessel, and address cumulative impacts including air quality, water quality, and underwater noise. Below, we provide background on the Makah Tribe and more details on our recommendations.

## **The Makah Indian Tribe**

The Makah Indian Tribe is a federally recognized Tribe indigenous to the northwestern portion of the Olympic Peninsula in Washington State, at the confluence of the Pacific Ocean and the Strait of Juan de Fuca and is the southernmost of the Nuu-chah-nulth Tribes. The current reservation is 30,067 acres and our treaty protected area includes Usual and Accustomed Hunting and Fishing Stations (U&A) in waters of the United States that extend off the outer coastline north from 48° 02'15" N latitude and east of 125° 44'00" W longitude, and in the western end of the Strait of Juan de Fuca east to 123° 41'56" W (Figure 1). However, the Makah area of interest and traditional use of the ocean, as well as the original boundaries of the U&A, extend far beyond the current boundaries including into what are today Canadian waters.



Figure 1: Map of present-day Makah Usual and Accustomed Fishing Area (U&A)

The existence and well-being of the Makah people have always been closely tied to our relationship with the natural environment, especially the ocean. The Makah hold a spiritual reverence and have inexorable ties to the ocean and its bountiful natural resources. This relationship to the ocean continues today, in part through our robust and valuable treaty fisheries, which support our local economy, the food security of our community, and our cultural practices and spiritual traditions. Current tribal members are charged by tradition and training with ensuring the continuation of our culture through the preservation of, and continued access to, our natural resources.

The 1855 Treaty of Neah Bay reserves the Makah's right to retain and exercise inherent sovereign authority over our treaty protected area and ownership of the resources therein. The Treaty of Neah Bay is the legal agreement between the Makah Tribe and the United States that recognizes the Makah Tribe's status as a sovereign nation and therefore a resource trustee. It reserves inherent sovereign rights to natural resources, cultural practices, and other services and benefits in exchange for the cession of approximately 500 square miles of territory to the US Government. Explicitly, the Treaty reserves the Makah Tribe's rights to hunt, fish, whale, seal, and gather within our U&A. These rights were later confirmed and interpreted through the 1974 federal court decision known as the Boldt Decision<sup>1</sup> and subsequent rulings.<sup>2</sup>

<sup>1</sup> *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676, 684-687 (9th Cir. 1975).

<sup>2</sup> E.g., *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 685-687 (1979) (salmon); *U.S. v. Washington*, 459 F. Supp. 1020, 1065 (W.D. Wash. 1978) (herring); *U.S. v. Washington*, No. C85-1606R, Subproceeding No. 92-1 (W.D. Wash. Dec. 29, 1993) (halibut); *U.S. v. Washington*, 873 F. Supp. 1422, 1445, n.30 (W.D. Wash. 1994), aff'd in part and rev'd in part, 157 F. 3d 630, 651-652 (9th Cir. 1998) (shellfish); *U.S. v. Washington*, No. 9213, Subproceeding 96-2 (Nov. 4, 1996) (Pacific whiting).



Unfortunately, the Makah Tribe has experienced the devastating impacts of oil spills on our treaty resources and important places. Over two million gallons of oil have been spilled within our U&A since the 1970s, primarily via the 1972 USS General M.C. Meigs, the 1988 Nestucca, and the 1991 Tenyo Maru. Previous studies have indicated that the entrance to the Strait is a particularly high-risk area for vessel traffic.<sup>3</sup> Inclement weather and ocean conditions have contributed to many major spills in the region and complicated response to more recent incidents such as the *MV Zim Kingston*.<sup>4</sup> The history of oil spills in this region as well as the frequency and location of deployments of the Emergency Response Towing Vessel (ERTV) from Neah Bay continue to confirm this risk profile.<sup>5</sup> This context and history informs our interest in engaging in the Deltaport Project's Impact Assessment.

Even though the Deltaport Project is located in Canada, the incidental and potential impacts of the project are transboundary and extend to the Makah Tribe. In our Makah Ocean Policy, the Makah Tribe defines our area of interest to include the entire migratory extent of our treaty resources. Changes in vessel traffic resulting from the Deltaport Project could exacerbate impacts to the marine environment, including changing the geographic location and extent of underwater noise and increasing risk of vessel strike and oil pollution. We are therefore particularly concerned about potential impacts to Makah treaty resources including, but not limited to, Southern Resident Killer Whales (SRKW), Western North Pacific Gray Whales, humpback whales, Pacific salmon, Pacific halibut, and Pacific whiting. The increase in underwater noise pollution that will result from both the operational and construction periods of the Deltaport Project could have detrimental impacts to these valued species, particularly to endangered SRKWs, interfering with their ability to hunt and communicate. Additionally, any spill incident in this species' range would create a major impact to SRKWs. All additional impacts imposed on this apex predator have downstream consequences for the entire ecosystem that must be carefully considered.

## Recommendations

- 1. Include the Makah Tribe at the highest level of decision making.** The Makah Tribe's sovereignty must be recognized at the highest level throughout the Impact Assessment process. This is in alignment with Canada's and British Columbia's stated goals in the Coordination Agreement of reconciliation and working collaboratively with Indigenous nations to conduct assessments of proposed projects. However, it remains unclear how recognition of the Makah Tribe's sovereignty will be achieved in the Impact Assessment process for the Deltaport Project. The Coordination Agreement and Terms of Reference do not provide a clear distinction between Indigenous engagement and consultation, or whether the Makah Tribe is included in the definition of "Indigenous nations." Regardless of terms, and how these terms may differ in their use across the US-Canadian border, we want to ensure that the Makah Tribe's treaty interests are accounted for throughout the Impact Assessment process and ultimately protected. This is particularly important to clarify early in this process as the Impact Assessment will be referred to a Review Panel, which does not have a duty to consult with Indigenous nations. Further, consultation with Indigenous nations has not always occurred as required on infrastructure projects with transboundary significance<sup>6</sup>. One potential solution is to recognize the Makah Tribe as an Intervenor and provide capacity funding for engagement. The Makah Tribe was recognized

---

<sup>3</sup> Van Dorp, J.R., Merrick, J. (2015), Final Report: Vessel Traffic Risk Assessment 2015. Prepared for the Washington State Department of Ecology. Retrieved May, 2020. <https://fortress.wa.gov/ecy/publications/documents/1708009.pdf>

<sup>4</sup> McFarland, R. (2022, January 11). *MV Zim Kingston Case Study*. U.S. Coast Guard Sector Puget Sound Area Committee Meeting, Virtual.

<sup>5</sup> Washington State Department of Ecology, Spills Maps – Neah Bay Emergency Response Towing Vessel Call Outs. Retrieved January, 2022. [https://fortress.wa.gov/ecy/coastalatlantlas/storymaps/spills/spills\\_sm.html?&Tab=nt2](https://fortress.wa.gov/ecy/coastalatlantlas/storymaps/spills/spills_sm.html?&Tab=nt2)

<sup>6</sup> *Tsleil-Waututh Nation v. Canada*, Federal Court of Appeal Decisions. 2018 FCA 153.



as an Intervenor in another transboundary project, the Kinder Morgan - Trans Mountain Pipeline Expansion Project. We look forward to finding an appropriate solution in our initial meeting. We also request information on how your agency is engaging the US Coast Guard District 13 so that we can comprehensively assess impacts to transboundary vessel traffic in our initial meeting.

2. **Raise standards of oil pollution prevention.** The Makah Tribe has helped to advance oil pollution planning, prevention, and response in Washington and the Pacific Northwest region for over two decades. As a member of the US Region 10 Regional Response Team and Northwest oil spill planning community, and through our Memorandum of Agreement with the US Coast Guard District 13, we have helped heighten oil pollution prevention standards. Because of the transboundary nature and potential incidental impacts of the Deltaport Project, we recommend that GCT meet the highest possible standards for oil pollution prevention to prevent impacts to Makah treaty resources and the region at large. We support Washington Department of Ecology's recommendations regarding the Terms of Reference (pages 7-8, sec. 3.13.b) to
  - a. Require tug escort for all large non-tank vessels over 125,000 deadweight tons.
  - b. Require additional safety measures for marine navigation activities to and from the project within the geographic scope of the project's incidental shipping area. This should include coordination with pilotage authorities in Washington and British Columbia to consider options including two pilots.
  - c. Require vessels transiting in and out of Washington and Canadian waters to have Reciprocal Arrangement Agreements, providing vessel coverage for contingency plans to ensure vessels are prepared to respond regardless of whether a vessel is in the waters of its designated port.
  - d. Require a Community Air Monitoring Plan for emergency responders to conduct community air monitoring that could be utilized during a potential incident.
3. **Pay-in for the Neah Bay Emergency Response Towing Vessel (ERTV).** The Makah Tribe played a key role in stationing the ERTV in Neah Bay in 1999 to protect treaty resources and the coastal and marine ecosystems of the Strait of Juan de Fuca and Washington's outer coast. The Neah Bay ERTV is currently funded through the Marine Exchange of Puget Sound by the vessels it serves: commercial cargo, passenger vessels of 300 or more gross tons, and tank vessels traveling to or from Washington Ports. Since its stationing, the ERTV has assisted over 84 vessels, many of which could have led to catastrophic oil spills without its intervention. Of these assists, 27 have been to vessels traveling to and from Canada, even though no financial assistance has been provided to assist these vessels. We recommend that GCT require vessels calling to port to pay-in for the Neah Bay ERTV in the GCT vessel vetting process.
4. **Address cumulative impacts.** We are glad to see in the Terms of Reference (page 7, sec. 3.13.a.ii) that cumulative impacts will be addressed. We look forward to discussing our specific interests in cumulative impact assessment in our first meeting, especially regarding potential changes in vessel traffic and associated impacts to the environment and human health including air quality, water quality, and underwater noise and to the exercise of Makah treaty fishing.

As a contributor to the high standards of oil pollution prevention in Washington and the greater Pacific Northwest region, the Makah Tribe expects GCT to meet the highest standards possible to protect our marine ecosystems and coastal communities. Thank you for considering our recommendations on the Terms of Reference and the Coordination Agreement. We look forward to working with you to appropriately recognize the Makah Tribe in your Impact Assessment process. Please contact the Makah Tribal Council Chief of Staff, Adriene Bowechop <contact information removed>, to set up an initial meeting.

Sincerely,

Makah Tribal Council

<Original signed by>

Timothy J. Greene, Sr.

Chairman

Cc:

Mr. Laird Hail, Director of the Puget Sound Vessel traffic System, USCG Sector Puget Sound

Mr. Andrew Connor, Tribal Liaison, USCG District 13

CDR Brendan Harris, USCG District 13