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Angeles Albornoz

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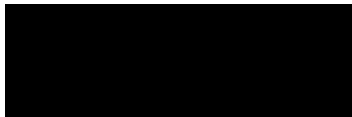
Impact Assessment Agency of Canada / Government of Canada

**RE: Malahat Nation Comments on GCT Deltaport Expansion Berth Four Project – Review Panel Terms of Reference**

Malahat Nation has reviewed the draft Review Panel Terms of Reference for the Deltaport Expansion Berth Four Project. Malahat’s comments are presented in the attached table.

Overall, among other worries, Malahat is deeply concerned with the restrictive timelines set out for the Review Panel and the language that is too broad and/or weak to be actionable. Further, Malahat is concerned that the terms of reference do not adequately distinguish between Indigenous engagement and public engagement and do not have sufficient requirements for upholding and adhering to the United Nations Declaration on the Rights of Indigenous People.

Sincerely,



Malahat Nation

Program Lead – Major Projects



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Table 1. Malahat Nation comments on the draft GCT Deltaport Expansion Berth Four Project – Review Panel Terms of Reference

Section	Content	Comment
1	“...these Terms of Reference reflect the issues documented in the Joint Summary of Issues and Engagement...”	There is a plain text hyperlink to the summary of Issues and engagement, which I only discovered accidentally. All hyperlinks should be clearly identifiable (e.g., blue and underlined) so readers know to click them.
1	“In accordance with section 49 of the IAA, these Terms of Reference reflect the issues documented in the Joint Summary of Issues and Engagement, as raised by the public, Indigenous nations <sup>1</sup> , and federal authorities, as well other issues raised during the Planning Phase.”	<p>The Summary of Issues and Engagement is limited to the issues raised prior to December 23, 2020. The summarized understanding of Malahat interests<sup>1</sup> in the Summary of Issues and Engagement is severely limited and not a full representation of Malahat’s interests that may be impacted by DP4. Malahat has repeatedly shared interests and concerns with the Crown that are not included in the Summary of Issues and Engagement.</p> <p>It is unclear whether “other issues raised during the Planning Phase” includes issues raised by Malahat that are not captured in the Summary of Issues and Engagement. Malahat requests that all of its interests and concerns shared with the Crown are considered by the Federal Review Panel.</p>
1	“The Agency is required to establish the overall time limit for the Impact Assessment Phase of the Project (i.e. from the issuance of the determination that the impact statement contains the required information or studies (subsection 19(4) of the IAA) until the submission by the Agency of its recommendations to the Minister (subsection 55.1(1) of the IAA)). The	<p>Malahat is concerned with the 600-day overall time limit for the Impact Assessment Phase. Malahat recognizes that this limit is due to the time limit requirements in the <i>Impact Assessment Act, 2019</i>. Understanding that the TOR time limits are constrained by the <i>IAA</i>, Malahat’s following comment on the time limit is directed towards the <i>IAA</i>:</p>

<sup>1</sup> “1. Marine shipping may adversely impact Malahat’s Aboriginal rights and its ability to exercise its Douglas Treaty rights in relation to fishing and marine resource harvesting.

2. Marine shipping introduces safety concerns for Malahat’s ability to continue cultural traditions, connect with places of significance, transmit intergenerational knowledge and maintain connections.

3. Malahat Nation has stewardship responsibilities to marine species and has interests in food harvesting for a wide range of species. Without continued and reliable access to these, Malahat is likely to experience negative health consequences and a loss of cultural identity.

4. Request funding for capacity to carry out a territory wide Traditional Knowledge, Use and Occupancy study.” (Joint Summary of Issues and Engagement for the GCT Deltaport Expansion, Berth four Project, 2020)



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	<p>Agency is proposing an overall time limit of 600 days.</p>	<p>Based on recent and ongoing experience participating in impact assessments under the <i>Canadian Environmental Assessment Act, 2012</i>, Malahat insists that 600 calendar days is not enough time for the Impact Assessment Phase of DP4. Considering the complexities of the Salish Sea ecosystem and the knowledge gaps regarding cumulative impacts in the region, a rigorous assessment of the additional impacts of DP4 cannot occur in 600 days.</p> <p>Further, as identified by West Coast Environmental law, “restrictive timelines [set out in the <i>IAA</i>] may dampen some collaborative efforts, especially with Indigenous people.” Malahat is concerned that insufficient time will impair collaboration between Malahat and the federal review panel.</p> <p>Moreover, Malahat emphasizes that restrictive timelines undermine the Review Panel’s ability to uphold and adhere to the Declaration, particularly the following articles:</p> <ul style="list-style-type: none"> <li>- Article 5 respecting Indigenous peoples' political, legal, economic, social, and cultural institutions and their right to participate fully in the State. Imposing restrictive timelines undermines respect for Indigenous institutions and participation within the review process.</li> <li>- Article 13 recognizes the rights of Indigenous people to understand and be understood in State proceedings. Imposing restrictive timelines undermines the right to understand and be understood.</li> </ul>
1	<p>“This time limit provides 450 days for the Review Panel to submit its impact assessment report to the Minister following the commencement of the Impact Assessment Phase. Once the</p>	<p>Recognizing that time limits for the impact assessment phase are constrained by the <i>IAA</i>, Malahat’s comments are directed towards both the <i>IAA</i> and these TOR:</p>



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	Review Panel submits its report, the Agency will have 150 days to post its recommendations under subsection 55.1(1)”	<ul style="list-style-type: none"> <li>- 450 days is not enough time for a rigorous impact assessment of DP4 by the review panel;</li> <li>- 150 days is not enough time for the Agency to post its recommendations;</li> </ul>
3	“In fulfilling its mandate, the Review Panel shall respect the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the <i>Constitution Act, 1982</i> , and ensure that its engagement efforts with Indigenous peoples are guided by the Government of Canada’s commitment to implement the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) as a comprehensive international human rights instrument and Canada’s roadmap for reconciliation.”	<p>The language in this section is not strong enough:</p> <ul style="list-style-type: none"> <li>- The <i>entirety of the Review Panel’s work</i> should uphold and adhere to the Declaration, not just “the engagement efforts.”</li> <li>- The work of the review panel should not just be “guided by” the declaration, the work should <i>uphold and adhere</i> to the Declaration</li> </ul> <p>Malahat requests strong commitments and requirements for the Review Panel to uphold and adhere to the Declaration in all their work. The requirements should be defined in detail with reference to specific Declaration articles, with specified actions and protocols the Review Panel must follow.</p> <p>Especially considering the time limits imposed on the Review Panel process, commitments to the Declaration must be determined prior to the start of the process. Doing so would ensure that the panel does not spend time determining how to uphold and adhere to the Declaration during the limited time that they have.</p>
3	“The Declaration emphasizes the importance of recognizing and upholding the rights of Indigenous peoples and ensuring that there is effective and meaningful participation of Indigenous peoples in decisions that affect them, their communities, and territories.”	This section should be expanded beyond a simplistic summary of the Declaration. Malahat requests that the relevance of the Declaration to the DP4 Review Panel process is presented in detail. Without specifying the articles of the Declaration and their relevance to the process, this section does not provide any value to the TOR.
3.1	“The Review Panel shall conduct an impact assessment of the Project, including incidental activities <sup>2</sup> , in accordance with the requirements of the IAA and in a	Malahat is concerned with the reliance on Section 16.4 of the Joint Guidelines to set out the “requirements related to the scope of the assessment of marine shipping” for several reasons:



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	<p>manner consistent with these Terms of Reference.”</p> <p><sup>2</sup> 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>From section 16.4 of the Joint Guidelines: “In assessing the effects of marine shipping incidental to the project, the proponent must describe the type, size, and capacity of the vessels used in its predictions and should base its selection on the vessels likely to call on the project (including Panamax, post-Panamax, New Panamax and very large container vessels).”</p>	<ul style="list-style-type: none"> <li>- Section 16.4 sets out requirements for the <i>proponent</i> to assess the effects of marine shipping. The review panel is not mentioned at all in Section 16.4, so their commitments to the assessment of marine shipping are not set out at all.</li> <li>- From Section 16.4, Malahat is deeply concerned with the statement that the proponent “should base its selection on the vessels likely to call on the project.” As experienced with the RBT2 assessment, reliance on <i>vessels likely to call</i> on the project can dismiss concerns related to an increase in the number of vessels incidental to a port expansion. This statement permits the assessment to be based on industry trends rather than concrete, quantitative commitments to vessel traffic from the Crown and Proponent. Malahat recognizes sensitivities and uncertainties in vessel traffic projections, especially considering current geopolitical instability and recent volatility in the shipping industry. Malahat calls on the Crown to apply the precautionary principle and require that the Review Panel base their assessment on the greatest possible increase in vessel traffic incidental to DP4 rather than on the scenario with “vessels likely to call on the project.”</li> </ul>
3.2.b.	<p>“ensure that the information that it uses when conducting the impact assessment is made available to the public;”</p>	<p>Malahat requests more information regarding how confidential and sensitive information from First Nations will be handled. What is the protocol for information provided by First Nations with the requirement that it is not shared with the public?</p> <p>Malahat requests clear commitments to uphold and adhere to the Declaration Act regarding information sharing. Article 31 of</p>



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		the Declaration states that Indigenous peoples have the “right to maintain, control, protect and develop their intellectual property” and that “states shall take effective measures to recognize and protect the exercise of these rights.” In the TOR, Malahat requests defined commitments from the Crown to fulfill their duty to take effective measures to protect Indigenous intellectual property rights throughout the Review Panel process.
3.2.c.	“In accordance with subsection 51(1) of the IAA, the Review Panel must...hold hearings in a manner that offers the public an opportunity to participate meaningfully, in the manner that the Review Panel considers appropriate and within the time period that it specifies, in the impact assessment;”	Malahat is concerned that section 3.2. of the TOR and section 51(1) of the IAA require public hearings, but do not require engagement with Indigenous peoples. It is inappropriate to group Malahat with the public in participation requirements in the TOR.
3.2.f	“In accordance with subsection 51(1) of the IAA, the Review Panel must:... on the Minister’s request, clarify any of the conclusions and recommendations set out in its report with respect to the impact assessment.”	Malahat requests that the review panel must also clarify any of the conclusions and recommendations on the request of First Nations, not just on the Minister’s request.
3.3	“The Review Panel shall consider the approach presented in the most recent version of the Agency’s <i>Guidance: Describing effects and characterizing extent of significance</i> when fulfilling the requirements of subparagraph 51(1)(d)(ii) of the IAA.”	<p>This language is too weak to be practical. What does “shall consider the approach” mean in practice? This section should describe <i>requirements</i> for the Review Panel’s approach.</p> <p>Further, Malahat is concerned that the restrictive timelines imposed on the Review Panel process limit the extent to which the panel will be able to adopt the approach in the Agency’s guidance.</p> <p>Malahat is also concerned with some aspects of the Agency’s guidance document. The scope of effects on Indigenous peoples to be assessed in the guidance document is too narrow. The guidance focuses on impacts to “current use” of lands and resources, which is inappropriate. Malahat considers traditional use to include past, present, and future use of</p>



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3.4	“To conduct its assessment, the Review Panel shall use the information collected during the assessment process available on the Public Registry, in addition to any information submitted to the Review Panel in confidence as per the provisions of the IAA.”	<p>Malahat requests clarification of how this requirement interacts with the requirement that all information used by the Review Panel in the impact assessment is made available to the public (section 3.2.b). How will information that is submitted in confidence be handled?</p> <p>“As per the provisions of the IAA” is too vague to be practical for readers of the TOR. Malahat requests references to specific sections of the IAA.</p>
3.5	“The Review Panel shall consider all relevant information from existing initiatives as well as past assessments in the region, to the extent that information is provided to the Review Panel on the record of the assessment.”	<p>Malahat requests clarification of “to the extent that information is provided to the Review Panel.” For information regarding Malahat Nation, may the Review Panel consider information provided from a third party or must the information be provided by Malahat Nation?</p> <p>Malahat insists that information regarding Malahat Nation that was shared in past assessments is not used in the assessment without Malahat’s consent.</p>
3.6	“The Review Panel shall ensure that the assessment takes into account scientific information, Indigenous Knowledge, and community knowledge.”	<p>“Takes into account” is too vague to be practical or enforceable. Malahat requests that specific requirements for considering knowledge and information are explicitly stated in this section.</p> <p>Further, Malahat is concerned that restrictive timelines imposed on the review will limit the ability of the Panel to receive and consider Indigenous Knowledge. It may not be appropriate to share and consider Indigenous Knowledge in the context of the timelines.</p> <p>Malahat is also concerned that the TOR does not have requirements for how the Review</p>



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		Panel shall handle conflicting information and knowledge in the assessment.
3.7	“The Review Panel shall assess the effects and impacts of the Project in a careful and precautionary manner in an effort to minimize the adverse effects of the Project and enhance positive benefits.”	<p>This language is too vague to be practical or enforceable. Malahat requests specific requirements for the Review Panel’s “careful and precautionary manner.”</p> <p>Malahat agrees that the approach must be careful and precautionary and will be happy to see practical and enforceable requirements in the TOR. For example, the TOR should include explicit requirements for applying the precautionary principle in the assessment.</p> <p>Further, Malahat is concerned that restrictive timelines imposed on the Review Panel will limit the carefulness of the review. It may not be feasible for the Review Panel to put its full care into each aspect of the impact assessment within the timelines of the IAA and TOR.</p>
3.8	“The Review Panel shall strive to establish a fair, predictable, efficient and cost-effective process.”	This language is too vague to be practical or enforceable. Malahat requests specific requirements for the Review Panel in establishing a fair, predictable, efficient, and cost-effective process.
3.9	“The Review Panel shall ensure that opportunities are provided for meaningful public participation and Indigenous engagement during the impact assessment.”	<p>This requirement is too broad to be practical or enforceable. Malahat requests explicit requirements for Indigenous engagement in the TOR.</p> <p>Malahat also raises concerns with the requirement for Indigenous engagement being presented alongside the requirement for public engagement. Indigenous engagement should differ from public engagement in intention, purpose, process, and content. The TOR should respect the distinctions by presenting requirements for public engagement and Indigenous engagement separately.</p>
3.10	“The Review Panel shall design its approach to engagement and participation	Malahat requests clarification of what it means for the Review Panel to follow





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	in compliance with the IAA and following the most recent frameworks and guidance documents produced by the Agency, including:"	guidance documents. Are there any practical and enforceable requirements to adhering to the guidance?
3.11	"The Review Panel shall design its approach to engagement and participation in consideration of the objectives presented in the Joint Assessment Plan and the objectives identified by Indigenous nations in Section 3 of the Joint Indigenous Engagement and Partnership Plan."	<p>Ensuring engagement between the Review Panel and Malahat Nation is aligned with the objectives in Section 3 of the engagement plan is important to Malahat. Malahat is concerned that there are no practical and enforceable requirements for this in the TOR. Rather than requiring the panel to consider the objectives, Malahat requests explicit requirements in the TOR that ensures the panel will work towards the objectives.</p> <p>Malahat is also concerned that the restrictive timelines will impact the ability of the Review Panel to meet the objectives for Indigenous engagement. For example, the objective to "incorporate Indigenous laws, norms, and customs" in Section 3 of the Joint Indigenous Engagement and Partnership Plan may be inappropriate or exceedingly difficult under tight time constraints.</p>
3.13	"...economically feasible..." throughout section 3.13.	Malahat requests that "economically feasible" be defined for the purpose of the Review Panel TOR. At what cost would a mitigation measure be deemed economically feasible?
3.13.c	"...the impact that the Project may have on any Indigenous groups and any adverse impact that the Project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the <i>Constitution Act, 1982</i> ;"	Malahat requests this be expanded to include impacts on Douglas Treaty rights.
3.15	"The Review Panel shall make conclusions and recommendations pertaining to the matters identified in clause 3.14, to the extent the Review Panel receives specialist or expert information or knowledge related to the assessment of the Project from provincial authorities.	Malahat requests that this requirement be expanded to include matters that are not listed in section 3.14, including the factors in Section 3.13.
3.16.	The Review Panel shall identify the adverse effects of the Project on species listed under the Species at Risk Act and their	Malahat requests that this requirement be expanded to include species of cultural and



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	critical habitat, and identify measures that could be taken to avoid or lessen those effects and to monitor them. The Review Panel must document in its assessment report how those measures are consistent with any applicable recovery strategies and action plans.	ecological significance, identified throughout the assessment, in addition to species at risk.
Footnote 3	“(ii) the current use of lands and resources for traditional purposes...”	Malahat considers traditional use to include past, present, and future use of lands and resources. Further, considering cumulative impacts and colonization that has alienated Indigenous peoples from their lands and traditional uses, “current use” is an inappropriate baseline.
3.18.	“The Review Panel shall make meaningful attempts to accommodate requests of an Indigenous nation regarding their preferred means of participation.”	Malahat is concerned that restrictive timelines will undermine these attempts.
3.21.	“In undertaking its analysis and reaching its conclusions and recommendations on the potential impacts of the Project on Indigenous interests, the Review Panel must use the methodology as described in the most recent version of the Agency’s <i>Guidance on the Assessment of Potential Impacts on the Rights of Indigenous Peoples.</i> ”	Stronger language is required. Hard requirements should be defined rather than requiring the review panel to use a <i>guidance</i> document.
3.23	“Should an Indigenous nation choose to share Indigenous Knowledge with the Review Panel in confidence, as provided by section 119 of the IAA, the Review Panel shall ensure it follows any Indigenous Knowledge protocols of that Indigenous nation, and that the Indigenous Knowledge is protected in accordance with the most recent version of the Agency’s guidance on <i>Protecting Confidential Indigenous Knowledge under the Impact Assessment Act.</i> ”	For clarity and certainty, this section should explicitly state how this requirement relates to the requirement in section 3.2.b.
3.23.	“The Review Panel may develop procedures for the protection of Indigenous Knowledge. If any such procedures are developed, they will be posted on the Public Registry.”	With restrictive timelines, it is unrealistic that the review panel will be able to develop these procedures; the procedures should be developed in advance.



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4.1.b.i	“A time limit of 450 days has been established for this part of the process.”	See previous comments regarding restrictive timelines.
4.5.	“The Agency will appoint a Chairperson and at least two other members.”	For clarity, this section should specify whether the federal review panel is made up of three people or than three people and the others are appointed by some other means.
4.6.	“As provided by subsection 41(1) of the IAA, the persons appointed to the Review Panel must be unbiased and free from any conflict of interest relative to the Project...”	How will biases be identified?
	“the person appointed to the Review Panel must...have knowledge or experience relevant to the Project’s anticipated effects or have knowledge of the interests and concerns of Indigenous nations that are relevant to the assessment.”	Malahat is concerned that there is no requirement that at least one member must have knowledge of the interests and concerns of Indigenous nations. As written, the panel could only have members who have knowledge and experience related to the effects.
4.7.	“In the event that a Review Panel member resigns or is unable to continue to work, the remaining members shall constitute the Review Panel unless the Agency determines otherwise. In such circumstances, the Agency may choose to replace the Review Panel member.”	Malahat is concerned that the loss of a member, in combination with restrictive timelines, would create a severe lack of capacity. Malahat requests that the TOR require the appointment of a replacement.
4.8.	“The Review Panel must submit its impact assessment report to the Minister within 450 days from the day after the posting of the Agency’s notice under subsection 19(4) of the IAA. This time limit runs continuously. For clarity, the time limit does not pause if the Review Panel issues any information requirements to the Proponent as described in clause 4.10.”	See previous comments regarding restrictive timelines.
4.16.	“The Review Panel shall make reasonable efforts to hold the public hearing in the communities in closest proximity to the Project, including Indigenous communities, to provide access for Indigenous nations and local communities.”	Considering the marine shipping component of the Project, the public hearings should also be held in close proximity to shipping routes.
4.29.	“Following the public hearing, the Review Panel may post on the Public Registry the draft sections of its report described in clause 4.28 (a). Should the Review Panel	Malahat is concerned that the review panel is not required to post a draft but <i>may</i> post a draft, and therefore there is no requirement to invite Indigenous nations to comment on sections pertaining to their interests.



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	post the draft sections of its report on the Public Registry, the Review Panel shall: a. invite Indigenous nations to comment on those sections pertaining to their specific Indigenous nation to validate the Review Panel’s understanding and characterization of potential effects and impacts of the Project on Indigenous interests;”	
4.29.	“provide Indigenous nations up to 21 days to review the draft sections and provide comments;”	Malahat is concerned with this timeline; 21 days is grossly insufficient for Indigenous nations to review an document on the sections pertaining to their interests.
A	IAA 2019 sections referenced throughout the document	To make the document more accessible, every IAA 2019 section referenced should have a footnote outlining the relevance of that section to the Review Panel TOR.