



TSAWOUT FIRST NATION

<personal information removed>

December 16, 2015

VIA EMAIL - Analise.Saely@ceaa-acee.gc.ca

Canadian Environmental Assessment Agency
701 West Georgia Street
Suite 410
Vancouver, BC V7Y 1C6

**ATTN.: Analise Saely,
Crown Consultation Coordinator, Review Panels**

Dear Ms. Saely:

Re: Roberts Bank Terminal 2 Project - Aboriginal consultation approach for Tsawout First Nation on marine shipping within the federal environmental assessment process and comment period on marine shipping addendum completeness

We are writing in response to your letter dated November 12, 2015.

In your letter you advise that the Federal Government has made a preliminary determination that the duty to consult with the Tsawout First Nation in relation to marine shipping associated with the Roberts Bank Terminal 2 Project (the "Project") is at the moderate end of the consultation spectrum. We do not agree. In Tsawout's view, only deep consultation will uphold the honour of the Crown in relation to this proposed Project. Nothing less is acceptable in Canadian law. In addition, we understand that the Federal Crown is committed to developing an honourable meaningful nation-to-nation relationship which upholds the United Nations Declaration on the Rights of Indigenous Peoples. Such a commitment requires that we engage at a deep and meaningful level. For the reasons set out below, it is very unclear as to how the Crown has determined that your duty to consult Tsawout on this proposed Project is moderate.

As noted in your letter, Tsawout First Nation is a signatory to the Douglas Treaties, and we have established Douglas Treaty rights as affirmed by the British Columbia Court of Appeal ("BCCA") in *Claxton v Saanichton Marina Ltd*, [1989] 5 WWR 82, leave to appeal to the Supreme Court of Canada denied. These rights afford Tsawout an independent source of protection to carry on our fisheries as formerly, including the right to travel to and from our fisheries. The Project has the potential to have a number of harmful impacts on this established right which requires that the Crown consult on a deep and meaningful basis.

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The British Columbia Court of Appeal has recently spoken to the depth of consultation required when an established Douglas Treaty right is infringed. In *Chartrand v British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345 [*Chartrand*] the Court made clear that Treaty claims rightly occupy the high end of the spectrum of claims demanding deep consultation.

As mentioned in your letter, this Project carries with it the very real possibility of numerous impacts to, among other things, our fisheries and the environment. The law is clear on this point; the potential for such serious impacts on our Douglas Treaty rights demand the need for deep consultation. Tsawout is not required to establish specific adverse effects before the Crown must engage in deep consultation. Even high-level forestry decision making such as the approval of a Forest Stewardship Plan may attract the need for the Crown to engage in deep consultation (as in *Chartrand*).

In addition to our established Douglas Treaty rights, Tsawout continues to hold Aboriginal rights, including title, throughout our traditional territory. As confirmed in *Chartrand*, such claims are not dubious or peripheral. As evidenced by many facts found on the public record, our claim of Aboriginal rights and title to our traditional territory is strong, further supporting the need for nothing less than deep, meaningful consultation on the Project.

Furthermore, in the Trans Mountain Expansion Project, which has a similar marine shipping route to the Roberts Bank Project, the Crown, as represented by Natural Resources Canada, acknowledged Tsawout's established s. 35 rights, and that deep consultation by the Crown with Tsawout would be required.

Finally, there is strong ethnographic and oral history evidence that Tsawout had villages, reef-net and other fishing sites at Point Roberts and in the Project Area. These sites were used by our people for centuries before the time of contact and at the assertion British Sovereignty (Jenness 1934-35, 37-38; in Turner and Jones 2000, 7; MacDonald and MacMillan 1827-1830; in Bouchard and Kennedy 1991, 9; Duff 1997 in Vandenberg 1997; Suttles 1974: 24-25, 154-156, 202-215). Those sites continued to be used by our people after contact and after the assertion of sovereignty, and continue to be used today. Given the potential impacts of the Project on these sites and Tsawout's s. 35 rights, including title, the Crown must consult with Tsawout, not only in respect of the marine shipping component of the Project, but on the Project itself.

Given all of the above, it is very unclear as to the basis on which the Crown is now suggesting that your obligation to consult with Tsawout is moderate.

Tsawout is of the view that the Crown's proposed Consultation Plan is wholly inadequate and is not consistent with a nation-to-nation relationship between Tsawout and the Crown. The Consultation Plan takes a purely procedural approach to consultation, which runs counter to the Federal Government's promise to engage with us on a nation-to-nation basis and to uphold the United Nations Declaration on the Rights of Indigenous Peoples. If the Crown hopes to fulfil the commitments, such a formalistic approach to consultation must be abandoned.

We call on the Crown to work with us to develop a deep, meaningful consultation process for review of the Project, including the Project Area and the Marine Shipping component, as required by law, and in the spirit of reconciliation.

As requested, please also find enclosed a copy of Tsawout's comments on the EIS for the Marine Shipping Component of the Project.

We look forward to further discussions on this matter, and to your confirmation that deep and meaningful consultation with Tsawout will be conducted related to the Project and its Marine Shipping Component on a nation-to-nation basis.

Yours truly,

<Original signed by>

Chief Harvey Underwood
Tsawout First Nation

Enclosure: Tsawout's Comments on EIS for Marine Shipping

cc: Mandell Pinder LLP, Attn.: Crystal Reeves <email address removed>

References:

Bouchard, Randy and Dorothy Kennedy, 1991. Traditional Territorial Boundaries of the Saanich Indians. B.C. Indian Language Project. 1991.

Duff, Wilson, 1997. The Indian History of British Columbia: The Impact of the White Man. Victoria: Royal British Columbia Museum, Victoria.

Jeness, Diamond, 1934-1935. The Saanich Indians of Vancouver Island. No. VII-G-8M in Canadian Ethnology Service Archives, National Museum of Civilization, Ottawa.

Turner, NJ and James Jones, 2000. "Occupying the Land: Traditional Patterns of Land and Resource Ownership among First Peoples of British Columbia." Unpublished Conference Paper.

Vanden berg & Associates, 1997. "Report on the Saanich People's Fishing Territory and Practices on the Fraser River." Vanden Berg and Associates, np.

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Participant: Completed by Dr. Peter Evans for Tsawout First Nation

Organization (if applicable): Tsawout First Nation

General Comments: The assessments of likely project shipping effects on current use of lands and resources by Tsawout for the exercise of Aboriginal and Treaty rights, including traditional purposes, need more detail and a more expansive, ecological analysis that makes appropriate linkages between the social and biological components, and incorporates the knowledge of Tsawout and other First Nations."

Comments on Completeness of Information in the EIS

Issue <i>(if possible, please include reference to the relevant section of the EIS Guidelines)</i>	Reference to EIS Addendum	Requested Completeness Information	Rationale
<p>Anticipated Level of Effort:</p> <p>7.0 Tier 1 Qualitative vs Tier 2 Mixed Method data: "It is likely that a Tier 1 approach (Qualitative; description based on expert opinion and traditional and local knowledge) will be an appropriate level of detail in most cases. For select environmental effects and</p>	<p>9.5 Current Use</p>	<p>Provide a description of the data available to inform the Current Use assessment and the Treaty Rights section, and more information on the methodology used to undertake the assessment, i.e. whether the indicators are qualitative or quantitative, and what the implications of this are for the assessment's conclusions (strengths and weaknesses)</p>	<p>It is impossible to tell at present how the information was marshalled to produce the "negligible" findings. The analysis appears at first glance to be purely qualitative, but the characterization of residual effects schema suggests that some kind of metric was used in order to produce or align with residual effects characterization scale.</p>

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<p>locations where there may be a higher risk of environmental effects, a Tier 2 approach (Semi-quantitative; measured site-specific data and existing site information) would likely be an appropriate level of detail.”</p>			
<p><i>17.1.1 – Valued Components: “At a minimum, the proponent will consider the effects on.....current use of land and resources by Aboriginal peoples including fishing, cultural practices, and sites of importance; and tourism, commercial, and public recreational</i></p>	<p><i>9.2.4.2 and 9.2.4.3, Aboriginal Marine Fish and Commercial Harvesting</i></p>	<p>The proponent should supply quantitative and qualitative data and analysis on the Aboriginal fishery and aquaculture relevant to the LSA and RSA. This information should discuss both Aboriginal companies (Salish Straits Seafood, etc...) and the participation of W’SANEC individuals in the commercial fishery. This discussion should link to the assessment of the subsistence fishery in 9.5 and the assessment on impacts to rights in 9.5.11.</p>	<p>There is a paucity of information in the addendum dealing with Aboriginal commercial harvesting to support the EIS Addendum’s findings of “negligible” effects. More information is available in the public record, or from key interviews with Aboriginal fishers.</p>

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<p>use.”</p>			
<p>17.1.2 – Marine Spatial Boundaries – “...the extent of aquatic and terrestrial ecosystems, local communities, potential or established Aboriginal or Treaty rights, and current use of lands or resources for traditional purposes which could potentially be affected by marine shipping associated with the Project...</p>	<p>9.5.1.1, Potential Impacts on Asserted or Established Aboriginal and Treaty Rights; and 9.5.1 Component Overview</p>	<p>Although different rights regimes are identified, the spatial extent of established Treaty rights and asserted Aboriginal rights is not discussed in detail.</p>	<p>Although the existence of and relations among federal, provincial, and state jurisdictions is treated extensively, there is limited discussion, or visualization, of the existence of established Treaty Rights and asserted Aboriginal Title and Rights. Tsawout’s Douglas Treaty right to “fish as formerly” requires a more extensive treatment in order to accurately inform the effects assessment.</p>
<p>17.3.2 – Existing Human Environment: “The information required to describe the baseline for the</p>	<p>9.2 (Marine Commercial Use);</p>	<p>Spatial and numerical data and information on the Aboriginal fishery including vessel number, size, type, statistics etc... currently lacking in the Addendum.</p>	<p>These statistics shape both the baseline and provide the indicators for this VC and without them, it is not possible to understand and evaluate the assessors’ conclusions of “negligible” effects. There may be important differences between the non-Aboriginal and Aboriginal fishery which would result in effects of different magnitude.</p>

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<p><i>human environment is described in Section 9.1.7 of the EIS Guidelines. In addition, the proponent will provide:a description of fishing activities including:- types, number, size and capacity of fishing vessels used in the area, gear types and existing interactions with shipping; commercial, recreational and aboriginal fisheries statistics (eg. Species, annual catch and number of licenses); maps of fishing areas in the study area and descriptions of their relative importance in a broader regional context (e.g. representative percentage of regional landings or</i></p>			

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<p><i>economic value)</i></p>			
<p><i>17.3.2 – Existing Human Environment: “...an inventory, description (including maps) and evaluation of any archaeological, cultural, and historical resources, sites, or practices that may be affected by the marine shipping associated with the Project.”</i></p>	<p><i>9.4, Archaeological and Heritage Resources Effects Assessment; and 9.5 Current Use</i></p>	<p><i>Inventory of, and assessment of the Project on, cultural resources and sites beyond narrowly restricted registered heritage sites, including culturally important sites, places, or practices.</i></p>	<p><i>The archaeological assessment is restricted to registered heritage sites, and does not engage the wider associated meaning of “cultural, and historical resources, sites, or practices.” These issues are not addressed in the Current Use Section, but might include, among other things, multiple-use locations, named places, story sites, etc...</i></p>
<p><i>17.4.2 Effects on Human Environment: “...[T]he EIS will describe the effects of changes to the environment resulting from marine shipping</i></p>	<p><i>9.4, Archaeological and Heritage Resources Effects Assessment; and 9.5 Current Use</i></p>	<p><i>Please provide a baseline discussion of Aboriginal cultural heritage, and an assessment describing potential adverse effects of shipping and/or accidents on W’SANEC.</i></p>	<p><i>Currently, there is no baseline discussion of cultural heritage, no attempt to link it to the effects assessment, and no assessment of the Project’s impacts upon it. Cultural heritage currently falls between the cracks of the discrete chapters, but is necessary to understand the linkage between the biophysical and social environments</i></p>

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<p><i>associated with the Project. This will include the effects of changes to the environment on Aboriginal peoples (including health and socio-economic conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes...)"</i></p>			
<p>17.4.2 Effects on Human Environment: <i>"...[T]he EIS will describe the effects of changes to the environment resulting from marine shipping associated with the Project. This will include the effects of changes to the environment on Aboriginal peoples (including health and socio-economic</i></p>	<p>9.5 Current Use</p>	<p><i>Assess the adverse effects of shipping associated with the Project on the current use of lands and resources for traditional purposes for each First Nation or by group, in respect of their unique marine use patterns and rights. This approach should also be followed in the rights section (9.5.11), given that there are several different rights frameworks contiguous with the study areas.</i></p>	<p><i>First Nations have different subsistence economies, resource use patterns, territories, rights regimes, etc... A biophysical effect on a species at a particular locale might have different magnitudes of effect on current use for different First Nations.</i></p>

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<p><i>conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes...”</i></p>			
<p><i>17.4.2 Effects on Human Environment: “[T]he EIS will describe the effects of changes to the environment resulting from marine shipping associated with the Project. This will include the effects of changes to the environment on Aboriginal peoples (including health and socio-economic conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes...”</i></p>	<p><i>9.1 Human Health Effects</i></p>	<p><i>Provide more information on the importance and reliance upon marine foods to W’SANEC.</i></p>	<p><i>The EIS Guidelines (9.1) call for this information. Currently it is not provided in such a way as to inform the assessment with useful indicators or qualitative information. There is information available in the public realm.</i></p>

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17.3.2	9.5.8 – Cumulative Effects Assessment	Provide information on the effects of past projects and activities on current use of lands and resources for traditional purposes, and on the exercise of Aboriginal and Treaty rights.	The cumulative effects assessment methodology employed by the proponent is not useful in so far as it restricts the scope of the assessment to only cumulative future effects, without taking into account the effect of past or ongoing projects or activities on the VC. This methodology is not capable of adequately describing the baseline ability of Tsawout harvesters to undertake marine use activities or exercise their Aboriginal and Douglas Treaty rights, of locating thresholds beyond which they would no longer be able to do so, or predicting future outcomes.
17.3.2	9.5.10 – Follow-up Programs	Describe follow-up programs for current use and Aboriginal and Douglas Treaty rights.	There is not enough context information provided on the characterization of residual effects (certainty, confidence, etc.) or on the proposed mitigations to determine whether or not follow-up programs may be warranted. This information is essential when approaching a qualitative assessment, where both the effects prediction and the characterizations appear uncertain.
Please use as many pages as necessary.			