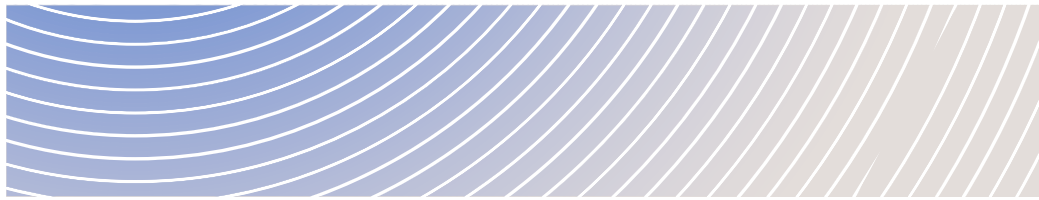


Consultation and Accommodation Report – Roberts Bank Terminal 2



February 2023

The Consultation and Accommodation Report (CAR) describes the Government of Canada and the Government of British Columbia's efforts to consult and, where appropriate, accommodate potential adverse impacts on potential or established Aboriginal or Treaty rights protected under Section 35 of the *Constitution Act, 1982*, and to engage with Indigenous groups about interests and asserted rights, to inform the decisions of the Minister of Environment and Climate Change and Governor-in-Council, on the Environmental Assessment (EA) of the proposed Roberts Bank Terminal 2 Project (the Project) under the *Canadian Environmental Assessment Act, 2012*.

The BC Environmental Assessment Office (BC EAO) will include this report in the referral package to provincial decision makers (Minister of Environment and Climate Change Strategy and Minister of Transportation and Infrastructure) to inform decisions for the provincial EA of the Project under the *BC Environmental Assessment Act, 2002*.

The report is not intended to determine the adequacy of the consultation and accommodation efforts that may be required in relation to any subsequent decisions to be made by other federal or provincial departments or agencies in relation to the Project. The report can, however, be used as appropriate by these departments or agencies to assess whether further consultation and accommodation is required prior to making any such decisions, and to inform their respective adequacy of consultation and accommodation determinations.

Executive Summary

The Impact Assessment Agency of Canada (the Agency), formerly the Canadian Environmental Assessment Agency, has prepared this report alongside the British Columbia Environmental Assessment Office (BC EAO) to document the consultation and/or engagement undertaken with Indigenous groups (inclusive of First Nations, Métis, and Indigenous groups based in the United States) with respect to environmental assessment (EA) decisions on the Roberts Bank Terminal 2 Project (the Project), as proposed by the Vancouver Fraser Port Authority (the Proponent), including proposed accommodation measures for potential impacts to potential or established Aboriginal or Treaty rights. The intention of this report is to summarize the efforts of the Federal and Provincial Crown (referred to herein as “the Crown”) in fulfilling the procedural and substantive aspects of the Crown’s constitutional duty to consult and, where appropriate, accommodate. The report also summarizes the engagement with Indigenous groups about interests and asserted rights, with respect to the Project to support decision-making under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012).

Consultation Process

Both the federal *Canadian Environmental Assessment Act, 2012* (CEAA 2012) and the provincial *Environmental Assessment Act, 2002* (EA Act 2002) required that an EA of the Project be completed. The Government of Canada and the Government of British Columbia agreed to work together in order to meet the requirements of respective EA laws and the Crown’s duty to consult.

The Crown has a duty to consult and, where appropriate, accommodate Indigenous Peoples when the Crown contemplates conduct that might adversely affect potential or established Aboriginal or Treaty rights and title, as recognized and affirmed by Section 35 of the *Constitution Act, 1982* (Section 35 rights). The federal Minister’s decisions under CEAA 2012, and provincial Minister’s decisions under the EA Act 2002, are considered Crown conduct that gives rise to the duty to consult and, where appropriate, accommodate with respect to potential adverse impacts on Section 35 rights.

For the purposes of the EA, the Agency served as Crown Consultation Coordinator to facilitate a whole of government approach to consultation with Federal and Provincial Authorities. Transport Canada, Fisheries and Oceans Canada, Environment and Climate Change Canada, Health Canada, Natural Resources Canada, Canadian Coast Guard, Parks Canada, Indigenous Services Canada, Crown Indigenous Relations and Northern Affairs Canada, Canadian Heritage and Global Affairs Canada participated in the federal EA as expert federal authorities.

BC EAO also participated in Crown Consultation and coordinated provision of expertise of provincial agencies on the Provincial Review Team into the whole of government approach. BC EAO and provincial agencies provided input to the Agency, including recommendations for provincial agencies to be listed in the federal conditions where applicable to address Project effects within areas of provincial jurisdiction. The Agency and BC EAO worked together to provide a cohesive point of access for Indigenous groups, coordinating the involvement of other federal or provincial departments whenever appropriate.

The 26 Indigenous groups (comprised of 48 individual Nations) that were consulted are organized as follows: 12 groups (16 Nations) are being consulted on impacts from the terminal and from marine shipping; 7 groups (11 Nations) are being consulted on impacts from marine shipping only; and 7 groups (21 Nations) are being consulted on impacts from the terminal only.

Participation of potentially impacted groups in the EA process was supported by offering and providing funding to all Indigenous groups identified for consultation. Over the course of the EA, a total of \$2,838,118 was made available to Indigenous groups through the Agency's Participant Funding Program (PFP). Individual amounts made available to each Indigenous group are detailed in each respective Consultation and Accommodation Report (CAR) chapters.

Methodology for Assessing Potential Impacts on Rights

To identify the potential adverse impacts of the Project on the potential or established rights of Indigenous groups, the Crown applied the methodology and guiding principles set out in two Agency guidance documents: [Policy Context: Assessment of Potential adverse impacts on the Rights of Indigenous Peoples](#) and [Guidance: Assessment of Potential adverse impacts on the Rights of Indigenous Peoples](#). These guidance documents were published in 2019, and were used to guide the analysis for the Project from the Panel phase forward.

Review Panel Conclusions and Recommendations

On March 27, 2020, the Review Panel (the Panel) released the [Federal Review Panel Report](#). The Panel made 21 findings of significant adverse Project and/or cumulative effects, several of which informed the assessment of impacts on rights. These included significant residual and cumulative effects on the current use of lands and resources by Tsawwassen First Nation (Tsawwasen) and Musqueam Indian Band (Musqueam); significant residual and cumulative effects on the cultural heritage of Tsawwassen and Tsleil-Waututh Nations and significant cumulative effects on Musqueam; and, significant residual and/or cumulative effects on species of importance to Indigenous groups such as South Resident Killer Whale, Dungeness Crab, and Ocean-type juvenile Chinook salmon originating from the Lower Fraser and South Thompson Rivers, should sufficient mitigation measures not be put in place.

The Panel determined that 22 of the areas assessed were not likely to result in significant adverse effects.

The Panel was unable to conclude on the likelihood of significant adverse effects in 12 areas. These include some areas that may have impacts to Indigenous rights and interests:

- Eulachon, Fraser River population;
- Cumulative effects on the current use of lands and resources for traditional purposes by Indigenous groups that harvest in, or traverse, the marine shipping area;
- Cumulative effects on Maa-nulth Nation's commercial fishing;
- Project effects on food security and health for Indigenous groups;
- Project effects on stress and annoyance potentially affecting human health;
- Project effects on human health related to health inequity;
- Project and cumulative transboundary effects on the cultural practices of the Indigenous groups based in the United States related to the Southern Resident Killer Whale.

To inform assessment of impacts on rights in these areas, the Crown has further considered additional information from the Proponent, Indigenous groups, federal and provincial authorities provided following the release of the Panel Report.

The Panel further provided 71 recommendations in the Report. The Governments of Canada and British Columbia have prepared a whole of government response to the recommendations directed to the Crown that will be posted to the [Canadian Impact Assessment Registry](#) (CIAR), if the Project is approved.

Draft whole of government responses were prepared and sent to Indigenous groups and the Proponent in October of 2020 to provide an opportunity to obtain feedback on the draft responses to ensure that the final version was as responsive to Panel recommendations and Indigenous concerns as possible. The updated version of the whole of government response was provided to Indigenous groups alongside the final CAR sections in the Winter of 2023.

Post-Panel Information in Relation to Marine Shipping Associated with the Project

The RBT2 Project Review Panel provided its conclusions on Project effects based on the capacity of the Project to accommodate an additional 260 container vessels (520 vessel movements) each year. After the issuance of the Panel Report, on August 25, 2020, the Minister of Environment and Climate Change requested that the Proponent provide confirmation of projections for container vessel traffic associated with the Project.

In response to the Minister's request, the Proponent provided an updated vessel forecast that predicted the average number of container vessels calling at the Port of Vancouver will remain the same with or without RBT2 being operational.

Responding to Shared Issues Identified by Indigenous Groups

The Crown considered Proponent commitments; potential Project conditions; responses to Panel Recommendations directed at the Crown; additional Crown initiatives not contained in responses to Review Panel recommendations; and information obtained following the release of the Panel Report when responding to shared issues identified by Indigenous groups. The conclusions of potential impacts on Rights and interests of Indigenous groups are included in Section 5: Specific Chapters for Indigenous Groups.

During the review of this report, comments from several Indigenous groups have included concerns about the Project and CAR review process. These are detailed in each Nation's respective chapter. Common concerns include topics such as:

- Harvesting;
- Culture;
- Stewardship;
- Road and rail effects;
- Anchorages;
- Cumulative effects; and,
- Procedural concerns.

Proponent Commitments

In the Panel Report, the Panel recognized that the Proponent made numerous commitments to develop and implement a range of management, offsetting and mitigation plans, which are to include input and/or approvals from qualified professionals and federal and provincial authorities and, where appropriate, Indigenous groups.

The Proponent has also signed agreements or gained support from several Indigenous groups. While the Crown is not aware of the content of the agreements, it is anticipated that they may contribute to addressing potential adverse impacts on the rights of these Indigenous groups.

Additional commitments were made by the Proponent in the response to the Minister ECCC's information request. The Proponent requested information from Indigenous groups to support the development of these new commitments.

Potential Project Conditions

Several of the concerns identified by Indigenous groups may be addressed through potential federal Project conditions, should the Project proceed. Upon issuance of a federal Decision Statement, if the Project is approved, the federal Project conditions will be posted to the [Canadian Impact Assessment Registry](#).

The draft potential federal Project conditions include mitigation and follow-up monitoring that will help to reduce or avoid effects on the environment, if the Project is approved. The Crown is of the view that these conditions will also help reduce the Project effects on the issues identified in this report, and on Indigenous rights.

The draft federal conditions were shared with Indigenous groups for comment, and input received was considered in the final conditions.

The BC EAO continues to draft potential provincial conditions to be considered in the provincial EA decision for the Project under the *Environmental Assessment Act, 2002*. Should provincial conditions be developed to accompany the provincial EA decision, these may also serve to reduce the likelihood and/or severity of impacts to Indigenous groups.

Whole of Government Response to Panel Recommendations to the Crown

The whole of government response presents existing programs in place or proposed actions that the government is prepared to take to respond to the recommendations in support of future federal and provincial decisions on the Project. These programs and actions are considered in each Nation's chapter to explain how they will address potential adverse impacts on rights.

Consideration of Marine Shipping Associated with Roberts Bank Terminal 2

The RBT2 Project Review Panel considered Project effects based on the capacity of the Project to accommodate an additional 260 container vessels (520 vessel movements) each year. The Panel concluded that there is an existing significant, cumulative effect on cultural heritage in the marine shipping area, and that any increase in ship movements would further contribute to that significant cumulative effect. This information was used in preliminary draft assessments of potential impacts to the rights and interests of Indigenous Peoples.

The [information provided by the VFPA](#) in response to the Minister's information request anticipated that the average number of container vessels calling at the Port of Vancouver will likely remain the same with or without RBT2 being operational.

As the federal authority experts in this subject matter, Transport Canada reviewed the Updated Technical Forecast and provided [comments during the public comment period](#). Transport Canada found the updated Roberts Bank Terminal 2 container vessel call forecast study to be well-constructed and that it accounted for: expected future developments in the container shipping industry; the possible evolution of the global container market; and possible future trade patterns. Transport Canada's assessment was that the forecast contains plausible projections of future vessel traffic at the Port of Vancouver. This additional information supports that there is not likely to be an increase in ship movements that would further contribute to the existing cumulative effects in the marine shipping area.

This forecast is not without uncertainty, therefore, to address potential for variability in container traffic, potential Condition 12.3 will require the Proponent to proactively work with Indigenous groups to identify

options to be implemented if the number of vessels exceed the forecasts either temporarily or in the longer term. In the unlikely event that an increase in the number of ships does occur, there would be an incremental effect on right to harvesting, cultural practices, and stewardship.

While the Crown is of the view that the Project is unlikely to increase the number of ship movements, the Crown recognizes the cumulative effects of marine shipping within the area and has identified numerous existing or planned initiatives of relevance that may help address these effects.

Addressing Cumulative Effects of Marine Shipping

The Government of Canada is working to address concerns and improve both opportunity and access for Indigenous Peoples to practice rights in a safe manner regardless of whether this Project is approved. Collectively, government departments in partnership with Indigenous groups, have implemented several programs and initiatives to support these goals through both regional and Project-specific approaches. The Government of Canada's efforts to address cumulative effects of marine shipping extend beyond the RBT2 Project and include Canada's Marine Safety and Security Regulatory Regime as well as various programs and initiatives. These efforts are underway and are seeking to address effects from existing and future marine shipping activities to the environment and Indigenous groups. This includes programs and initiatives that are part of key government programs:

- Marine Spatial Planning Pacific South Coast Program;
- Oceans Protection Plan (OPP) Initiatives;
- Measures put in place and existing measures that were relied upon as part of Trans Mountain Expansion Project (TMX); and
- The Whales Initiative.

The Government of Canada welcomes Indigenous groups who fish, harvest or practise other cultural activities on BC's South Coast to continue to be, or become, involved in these federal programs and initiatives that are improving safety and access on the water, Indigenous stewardship and monitoring, environmental protection and restoration, and the recovery of Southern Resident Killer Whales.

Accommodation

In *Haida Nation v. British Columbia (Minister of Forests)* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (SCC, 2004), and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (SSC, 2005), the Supreme Court of Canada held that the Crown has a duty to consult and, where appropriate, accommodate when it contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights. Taking into account mitigation, serious impacts on potential or established Aboriginal or Treaty rights associated with the Project are anticipated. As such, there is a duty to accommodate stemming from the Honour of the Crown and the Crown's unique relationship with Indigenous Peoples.

All impacted Indigenous groups consulted over the course of the Project were provided an opportunity to identify any outstanding concerns that are not addressed in the Panel's report, and to suggest potential solutions to these concerns. Considering the proposed Project conditions, the responses to the Panel's recommendations, and existing or planned initiatives within federal and provincial jurisdiction, some of the concerns expressed by Indigenous groups have been addressed and do not require accommodation.

For outstanding impacts identified by Indigenous groups that are not addressed and that are outside of the care and control of the Proponent, the Crown is contemplating additional accommodation measures. There are outstanding impacts on rights where, to date, there have been no suitable mitigations

determined. Indigenous groups have indicated through consultations that impacts remain, and for which there may be a residual effect as a result of the Project. These outstanding impacts can be generally grouped into the following categories:

1. Culture and Stewardship; and
2. Project Monitoring and Post-decision Engagement.

These outstanding impacts, in the Agency's view, require accommodation measures to address potential impacts on rights should the Project proceed.

Contemplated Accommodation Measures for Outstanding Concerns

Generally, the most appropriate measures are those which are most effective in eliminating or reducing adverse impacts on potential or established Aboriginal or Treaty rights while taking into account broader societal interests. The Crown is contemplating potential accommodation measures that, when considered alongside each other and with the measures outlined above, would satisfactorily accommodate outstanding concerns from Indigenous groups, as understood by the Agency.

Conclusion

The Agency and EAO have heard from Indigenous groups that there would be outstanding impacts on rights should the Project proceed. Based on the analysis of the potential environmental effects of the Project; the potential impacts of the Project on Aboriginal or Treaty rights; the related mitigation measures; the implementation of other federal and provincial programs and initiatives; and the accommodation measures being contemplated, the Agency is satisfied that there could be a path to addressing the potential adverse impacts of the Project on potential or established Aboriginal or Treaty rights. The Agency is also satisfied that the consultation activities undertaken have been procedurally adequate to support the decision of the Minister of Environment and Climate Change under CEAA 2012.