

BOUNDARY BAY CONSERVATION COMMITTEE
Box 1251, Delta, B.C. V4M 3T3
604-943-6406 or 604-946-2438
taitt@telus.net or susan@dccnet.com

Hon. Rona Ambrose
House of Commons
Ottawa, Ontario K1A 0A6
Ambrose.R@parl.gc.ca

April 6, 2006

(82029)

Attention: Honourable Rona Ambrose, Minister of Environment

**Re: Concerns about the Harmonized Process for the Deltaport Third-Berth Project
Under BCEA and CEEA**

The Boundary Bay Conservation Committee (BBCC) is concerned that the provincial-federal harmonized environmental assessment of the Deltaport Third Berth proposed expansion at Roberts Bank, British Columbia fails to comply with associated legislation, regulations and policies. While federal and provincial bureaucrats may state that they are proceeding in accordance with the legislation, a review of the process to date demonstrates inappropriate manipulation of the process and ongoing dismissal of public concerns.

Scoping Document and Terms of Reference of the Project

The process whereby the Scope of the project was decided was inappropriate as it was separated from the provincial process and not included on the provincial Project Information Centre web site which is the central information site for the public. Right from the start there is manipulation to separate the federal and provincial processes to obscure opportunities for public input and then harmonize the processes when it suits the purpose of pushing forward. The Scoping Document was listed on the federal information site which has been used minimally during the process. A visit to the federal web site at that time listed three notices. One was the Notice of Commencement. The other two in July, 2004:

"Request for public input into the environmental assessment"

"Description of factors considered in the environmental assessment"

These cannot be described as clear requests for input to the Scoping Document with a deadline. If one opens the notices, the information can be found. The titles of the notices are definitely not obvious and appear to be deliberately vague.

The public comment period for the Scoping Document was held during August, the month when most Canadians go on holiday. How do bureaucrats explain the fact that they disregard the availability of the public when selecting dates for the public input process? How can they call the process transparent when they minimize the opportunity for public input at the early stages of a highly controversial issue? Page 9 of the Environmental Assessment Track Reports notes that requests by the public for more time to review the Scoping Document were denied.

Let August go

The provincial managers of the harmonized process may claim that the Scoping Document is not a requirement of the provincial process and therefore refer these questions and comments to the federal

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~~process. (This is a common inappropriate response to the public throughout this process.) However, a review of the process indicates that the provincial government used the Scoping Document process as an excuse not to follow normal procedure for the Terms of Reference:~~

~~"The Project Director also acknowledges the public consultation carried out by the federal agencies pursuant to section 21 of the Canadian Environmental Assessment Act, closing August 23, 2004. (Section 11 Order - Schedule A 12.1, Sept. 17, 2004)~~

~~Please note that the public input to the federal public consultation was not posted on the Project Information Centre even though it was decided (after the fact) to call it the public input to the provincial Terms of Reference. It is not difficult to conclude that the harmonized process is compromised and confusing at the early stages.~~

~~At the Pre-application Meeting of March 11, 2003, the Chair of the meeting, Ray Crook, Project Assessment Director of the B.C. Environmental Assessment Office stated that:~~

~~"Normally, proponents prepare EA application terms of reference (ToR) based on the identified issues, and the draft is sent out for public comment (30 to 60 days)."~~

~~As a group who is monitoring the process, the BBCC read the notes of the meeting and expected to have an opportunity to comment on the Terms of Reference. This normal procedure of the B.C. Environmental Assessment Act was not followed and the draft Terms of Reference were never advertised or presented to the public for comment.~~

~~At this stage of the process, Jan Hagen, Project Director for the B.C. Environmental Assessment process, exercised liberties with the process. Under Public Consultation, Section 12 of Order Under Section 11, September 17, 2004, Mr. Hagen claimed that he was satisfied that the public meetings of May/June 2003 and June, 2004, along with the federal process for the Scoping Document was:~~

~~"an adequate basis for identifying public views issues and concerns with respect to the Project for the purposes of developing and finalizing the Application Terms of Reference." (Section 11 Order - Schedule A 12. Public Consultation)~~

~~It should be noted that the public meetings of May/June 2003 and June, 2004 were general in nature and included Terminal 2 in the project. Attendees were told that there would be plenty of opportunity for input and the meetings were very preliminary. The public was never told that these meetings represented their input into the Terms of Reference for the Deltaport Third Berth Project. Information relevant to the Terms of Reference was not provided.~~

~~The consequences of obscuring the scoping process, not taking the Terms of Reference to the public, and muddling the two processes are far-reaching because a proper process would have given the public an opportunity to emphasize the issues that should have been included in the process.~~

~~Transparent requests for public input with provision of relevant information would likely have led to a decision for the more objective process of an Independent Panel Review instead of the current Comprehensive Study Review. Considering the environmental history at Roberts Bank and the implications of past, current and planned future projects (Terminal 2, the South Fraser Perimeter Road and rail upgrades) which should have been included in the cumulative effects, more accurate information should have been given to the responsible federal Ministers. With full disclosure and~~

Decision not to go to panel
→

more complete information, they would have been compelled to recommend an Independent Panel Review process to the Minister of Environment.

Not only was the process flawed but public requests for an Independent Panel Review were ignored. This is confirmed on page 10 of the Environmental Assessment Track Report which states that six groups representing significant memberships, as well as the Corporation of Delta, requested a Panel Review Process. The impacts of port expansion will significantly impact Delta yet the people and local government of the community were, and continue to be, dismissed.

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Cons. 2

⇒ Not being ignored

In October 2004, communications between Environment Canada (EC), the Department of Fisheries and Oceans (DFO) the Vancouver Port Authority (VPA), and CEA Agency expressed concerns about meeting requirements of Section 16.(1)(a) of the CEEA, "projects or activities that have been or will be carried out" in respect to Terminal 2. Internal government legal advice recommended that Terminal 2 should be scoped out of the cumulative effects assessment because Terminal 2 would undergo an assessment of its own. Environment Canada noted that the removal of Terminal 2 from the cumulative effects would entail going back out to public comment since the original scoping document included Terminal 2.

VPA was presented with three options:

1. leave T2 in the CE assessment and recommend referral to an Independent Review Panel
2. remove T2 from CE assessment and go back out for public consultation
3. VPA could write a letter explaining uncertainty with respect to T2 and continue as a Comprehensive Study without T2 but no there was no need for public consultation on the change

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The consortium of public servants and the proponent agreed that the VPA would draft a letter for review by DFO legal and EC on the issue. Again the process is compromised at this stage with government agencies and their lawyers assisting a proponent to bypass proper transparent public process. With these ongoing collaborative meetings, how can these ministries possible serve the interest of the environment, the public, or the Minister of Environment?

Legal advice from the Responsible Authorities, DFO and EC, enabled the VPA to bypass an Independent Review Panel and avoid going back to the public. This is a serious consequence of internal collaboration. DFO and EC are supposed to be managing this process for the public and for the Minister of Environment who makes the decisions based on their recommendations. These actions are unethical and undermine the environmental assessment process. With internal conspiracies and with government lawyers acting on behalf of a proponent, how can there possibly be a credible process?

The outcome of the October discussions led to the Comprehensive Study approach rather than an Independent Review Panel. It also led to an amendment to the Scoping Document in terms of Terminal 2. It was sort of left in and sort of taken out. Armed with the legal advice paid by taxpayers, the VPA refused to respond to public input on the issue stating that T2 would go through its own environmental assessment. The agencies requested inclusion of T2 on some aspects of the assessment but not all. The process was unjustly altered by government bureaucratic interference on behalf of the proponent.

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This raises the question about the impartiality of ministries when dealing with crown corporations. Surely this is conflict of interest. Private companies have to undergo stringent environmental assessments for their projects. Imagine what government agencies would say if a mining company wanted to dredge the sensitive habitat at the mouth of the Fraser River!

Public Consultation Process

After following an unacceptable process for the Scoping Document and the Terms of Reference, subsequent actions by the agencies have continued to manipulate the process. Notices for the public comments period placed restrictions on written submissions. Nowhere in the legislation is it stated that public written comments can be restricted and disallowed. The regulations and legislation clearly call for opportunities for all interested parties to identify issues and provide input on projects that may cause significant adverse environmental, socioeconomic, community, heritage or health effects.

~~The Guide to the British Columbia Environmental Assessment Process states that the purpose is to ensure that decision-making by governments is informed and that the process provides a framework to address a broad range of issues for all interested parties. The process calls for inclusiveness, neutrality, transparency, flexibility and reporting on public issues. How can this be achieved if a so-called neutral agent is restricting and refusing public input?~~

After a 5-year review of the *Canadian Environmental Assessment Act*, Amendments came into effect in October, 2003. Public Participation was amended to read:

Act reference 4.(1)(d) "to ensure that there be opportunities for timely and meaningful public participation throughout the environmental assessment process."

A document, *Explanation of the Amendments to the Act*, states:

"This amendment adds the concept that opportunities for public participation need to be "timely and meaningful" throughout the environmental assessment process."...

"The value of meaningful public participation in the environmental assessment process was one of the strongest messages that came out of the Five Year Review of the Act."

~~By placing content restrictions and refusing submissions, the EAO Office has not only compromised the B.C. Environmental Assessment process but also the federal CEAA process which is required by law to report public concerns to the Minister of Environment. Under Section 55.5(1) of CEAA a project file shall contain:~~

"... all records produced, collected or submitted with respect to the environmental assessment of the project including...(c) any comments filed by the public in relation to the assessment"

~~Under the process followed by the provincial government, the federal law has not been enforced because:~~

1. ~~Public consultation input was restricted in content. Advertisements stated limitations so many people were denied the opportunity to comment on general impacts on their community and the environment.~~
2. ~~The Project Director has claimed that at least 40 submissions were rejected with the comments such as the following:~~

Provincial
Council/proc

~~"Thank you for your email providing comments on the review of the Deltaport Third Berth Project (Project). Although I value your participation and input, the current public comment period does not address the Project at large. As is apparent from the advertisements in the local Newspapers and as posted on our website, we are soliciting public comments on four specific documents that we released for public review on 2 December 2005. Unless the public provide specific comments on the content of these four documents, such submissions will not be posted on our website and will not be forwarded to the proponent for action/responses."~~

~~It is interesting to note that the Project Director supposedly scanned or read the documents and made judgments on the input. This is a bureaucrat with extraordinary powers. What expertise was he supposed to be exercising? Not only did he reject a significant number of submissions, he made inappropriate comments:~~

~~"I am sure that I sound bureaucratic, but we have issued 4 Documents for public and agency review. One is the amended air quality chapter 13 of VPA's January Application, that was out for public comments in February-May 2005. General statement on air quality like The quality of air that we breathe is vital to our health. is not really specific to the document that is posted on our website. We solicit public input on the content of the revised chapter, not general comments that the air quality will deteriorate. The revised chapter outlines the results of the emission analysis and the mitigation measures proposed and we are interested in specific public comment.~~

~~And on another score - Prince Rupert:
Please note that the environmental assessment (EA) process under provincial legislation addresses the specific project a proponent is proposing, such as the Delta project. The EA process is not a master-planning process, such as investigating the best location of a container port in BC or in Canada for that matter."~~

~~Not only are these comments dismissive of public concerns, his comments about Prince Rupert are erroneous. A requirement of environmental assessment is to justify the rationale and need for the project. Therefore, it is correct for a citizen to point out the alternatives.~~

~~The message here is that a citizen has to understand a confusing process and read lengthy documents as a prerequisite to making comments about the effects of a project on his/her health, environment and community. The fundamental right of freedom of speech is denied. The intent of the CEAA is~~

~~not honoured. The irony is that the four documents mentioned above are unclear, unscientific and badly written. The document on Air Quality is incomprehensible.~~

~~Such behaviour by the Project Director certainly does not adhere to the purpose of the BCEA quoted above:~~

~~"provides a framework to address a broad range of issues for all interested parties"~~

~~Why is the Project Manager limiting and denying public consultation and making comments that appear to further the cause of the project?~~

~~There has been significant public concern with 12 NGO and 169 individual submissions. The submissions that were accepted can be found on the provincial Project Information Centre web site. Responses from the Vancouver Port Authority to public input have not been satisfactory. The VPA refers to the agencies, reiterates the information from the flawed studies, disagrees with the comments or claims a committee will be formed to address the issue. There appears to be no intent to respond effectively or accurately to public input.~~

Adaptive Management Strategy

The Adaptive Management Strategy (AMS) is another example of collaboration between the ministries and the VPA:

"The primary objective of this work was to, cooperatively with Environment Canada, develop an Adaptive Management Strategy (AMS)."

Environment Canada and the Department of Fisheries and Oceans, by collaborating with the VPA to develop the AMS, now appear to be proponents of the project rather than Responsible Authorities overseeing the process. Surely, this is not the intent of the *Canadian Environmental Assessment Act*. How can EC and DFO, as Responsible Authorities under *CEAA*, now undertake an unbiased review of all the information and submit an unbiased report for public review? All of this has taken place behind closed doors without credible scientific data and studies.

The contradictory information from Environment Canada and DFO make it difficult for the public to have meaningful input. First EC and DFO made very strong statements about disastrous potential impacts and the lack of proper data and science. Then EC came forward as a co-author of this unproven plan with a promise:

"to jointly develop a rigorous science based adaptive management strategy that will provide practical advance warning of any potential emerging negative ecosystem trends during Project construction and operation."

The VPA has been saying it is committed to sustainable port development since its inception and yet to this date hasn't collected the data and undertaken credible scientific studies as promised. Environment Canada and the Department of Fisheries and Oceans, by co-authoring mitigation and compensation plans, are taking unacceptable liberties with the *CEAA* legislation. The Adaptive Management Strategy (AMS) is a list of promises by EC and the VPA. The AMS will "plan",

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Mitigation Strategy
Common Practice

"establish", "identify", "monitor", and "evaluate". Then five years after completion of DP3, there will be a report about what was learned. This can scarcely be called the Precautionary Principle. If port expansion causes environmental degradation at Roberts Bank, as warned by EC in its April, 2005 report and other scientists since 1979, a report of such degradation:

- is not likely to be produced - the agencies are hardly going to admit failure to protect the ecosystem
- will not protect the habitat, salmon, migratory birds and marine mammals

Why

A report after the fact will be as useful as a post mortem.

The only way DFO and EC could justify approving the project on the basis of the Adaptive Management Strategy would be if they both determined that the Third Berth project does not pose a significant adverse environmental effect. It appears that the agencies intend to rely on an adaptive management strategy even though they have not made that finding. On July 26, 2005, Paul Kluckner, Senior Program Officer of CEA Agency, wrote:

EC Input
remains to be seen

"we are currently unable to determine whether the proposed DP3 project will cause significant adverse environmental effects in the Roberts Bank ecosystem...EC is not recommending additional field studies to resolve the potential risk that may be associated with the Project prior to the conclusion of the environmental assessment. Instead, EC is proposing a formal arrangement under which the VPA would mitigate any significant impacts of DP3 on the intercauseway area in accordance with a scientifically rigorous adaptive management plan developed jointly with EC."

This contradicts the CEEA which states that:

Adoption is unhygienic

(c) where

(i) it is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects

regulatory mechanism to ensure effects are monitored

mitigation's applied as necessary (highlight yellow ask DFO/EC input)

iii) public concerns warrant a reference to a mediator or a review panel,

the responsible authority shall refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

To find that there would likely be no significant adverse effects with implementation of the AMS would be scientifically irresponsible given the information in EC and DFO submissions to the process:

Science based decisions based on monitoring

"the importance of the area to a variety of migratory birds of conservation concern is not being appropriately recognized in the Application."

Page 25: "Given the international significance of Roberts Bank for migratory birds, and fish and wildlife generally, EC urges caution, and recommends a more detailed understanding of ecological impacts of past, present, and future planned projects, before any further changes are made to the system... We are concerned that the "chain" of the Pacific Flyway could be broken for shorebirds at some point given the ongoing economic development in the Delta. This constitutes a major risk for Canada's environmental reputation and the economic and social benefits derived from wildlife."

The Adaptive Management Strategy document and Mr. Kluckner's letter confirm that EC still does not have a more detailed understanding of the potential ecological impacts, and, according to the CEEA, without this information, EC must not do anything that would permit the project to proceed.

It is therefore surprising to read in the AMS Introduction that:

"The Agreement on an AMS enables Environment Canada to conclude its Canadian Environmental Assessment Act (CEAA) assessment of DP3 effects on migratory birds."

migratory measure
This indicates that collaboration has taken place and agreements have been made without science, without transparency and without consideration of agency and public concerns. The statement above indicates approval by EC even before preparing the final Report on the Comprehensive Study for public input. This will render the report and public input meaningless.

How can the subjective Adaptive Management Strategy be presented as providing credible scientific mitigation for identified adverse environmental impacts of the project? It is difficult to comprehend that EC and the VPA think that this plan, enshrined in a Memorandum of Agreement, will begin to address the concerns raised in response to the Studies of the Application. Due to the lack of scientific information, the AMS cannot ensure that the purpose of the CEEA can be met:

"to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects"

Plans to transfer of 2,860 acres of B.C. crown foreshore lands to VPA Management

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This is another example of collaboration behind closed doors. When this issue was raised at the public meeting of May 5, 2005, agency representatives and the VPA feigned ignorance and did not provide information in response to questions. Full disclosure has not been provided to date.

*land agency
16 project
associated*
It is unclear when this transaction is to take place. There are plans to transfer 2,860 acres (1,158 hectares) of public foreshore property over to VPA Management to accommodate port expansion. The foreshore property has been removed from a Wildlife Management Reserve and transferred to the BC Transportation Financing Authority pending lease to the federal government, presumably for port expansion. This covers all the foreshore land surrounding Roberts Bank and the causeway. This land has been protected by an Order-in-Council# 2374 but the province could easily remove that protection with a new Order-In-Council.

Another Order-In-Council #908, formed under the former *Environment and Land Use Act*, is legally stronger and supports the ecological importance of the area. It requires an environmental assessment prior to permits for construction. However, the example of the Deltaport Third Berth environmental assessment offers little comfort or credibility.

The BBCC objects to the transfer of these public assets for industrialization. Plans to protect Roberts Bank as a Wildlife Management Area are being abandoned to industrialize the mouth of the Fraser River. This will literally pave the way for the planned Terminal 2. The public can only speculate as to the bargaining that has occurred behind closed doors.

BC Assessment Report - Appendix E: Owner's Table of Commitments and Assurances

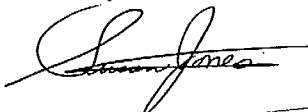
~~The recent protests from the public and the Corporation of Delta about Appendix E being shrouded in secrecy is yet another example of inappropriate management of the assessment. It is unacceptable that the Project Director advised the Chief Administrative Officer (CAO) of Delta that comments from Delta staff and the CAO could not be shared with Mayor and Council. This violates the obligations of the CAO under the Community Charter. The CAO emphasized the fact that Delta will be most directly impacted by the project.~~ EAO

Deltaport Third Berth Environmental Assessment Fails to Serve the Environment and the Public

This is supposed to be a democratic process about internationally significant habitat, public assets, public servants, a public crown corporation and public money managed by public governments. Why are we witnessing disrespect and disdain of the public? Why are our governments undermining environmental assessment processes? Why are our governments willing to support degradation of internationally-significant habitat for migratory birds, resident birds, salmon and endangered orcas? Why are they promoting the industrialization of farmland and the community of Delta? Why are they willing to gamble with questionable, unproven mitigation and compensation plans? (7)

The provincial-federal harmonized environmental assessment of the Deltaport Third Berth is failing to meet ethical, legal, and policy standards. This undermines not only globally-significant species and their habitats, but also the basis of democracy whereby the public expects elected officials to ensure due process and demonstrate due diligence in protecting the environment and in administering the laws of Canada.

Yours truly,



Susan Jones: Director: BBCC

In compliance Act has been adhered to and applied measures.

cc: The Right Hon. Stephen Harper, Prime Minister of Canada
Loyola Hearn, MP, Minister of Fisheries and Oceans
Vic Toews, MP, Minister of Justice and Attorney General of Canada
Robert Douglas Nicholson, MP, Minister for Democratic Reform
David Emerson, MP, Minister for the Pacific Gateway and Vancouver
Lawrence Cannon, MP, Minister of Transport, Infrastructure and Communities
John Cummins, MP Delta-Richmond East
Carol Skelton, MP, Minister of Western Economic Diversification
Mayor and Council, Corporation of Delta
Jan Hagen, Project Assessment Director BCEAO
Dave Carter, Senior Project Office CEA Agency

