

**BOUNDARY BAY CONSERVATION COMMITTEE**

Box 1251, Delta, B.C. V4M 3T3

Office of the Auditor General of Canada  
Commissioner of the Environment and Sustainable Development  
Attention: Petitions  
240 Sparks Street  
Ottawa, Ontario K1A 0G6

May 25, 2006

**Re: Petitions 153A and 153B – Comments on Ministers’ Responses and Update on Information on the Proposed Port Expansion at Roberts Bank, British Columbia**

Dear Madam Fraser:

Ministers responsible for the following federal departments were required to formulate responses to Petitions 153A and 153B:

Environment Canada  
Fisheries and Oceans Canada  
Indian and Northern Affairs Canada  
Transport Canada  
Parks Canada Agency

The Ministers’ responses to the Boundary Bay Conservation Committee (BBCC) have not satisfactorily addressed the issues.

**1. Federal Fiduciary Responsibility to the Environmental Review Process under CEAA**

**November 25, 2005 - Response from The Honourable Geoff Regan, Minister of Fisheries and Oceans**

**CUMULATIVE ENVIRONMENTAL EFFECTS ASSESSMENT UNDER CEAA**

Petitions 153A and B refer to cumulative environmental effects of past developments at Roberts Bank as well as current and future proposals for port expansion. This is a requirement under Section 16 of *CEAA*:

*“Section 16.1...(a) ...any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out:  
(b) the significance of the effects referred to in paragraph (a)”*

The response to the petitions from the Minister of Fisheries and Oceans claims that the VPA Deltaport Third Berth Studies include an analysis of the cumulative effects from potential development of Terminal 2 with 3 additional berths. This is contradicted by the VPA response to public input:

“The Terminal 2 proposal is completely independent of the Deltaport Third Berth Project in all aspects including site location, terminal configuration, environmental study and impact assessment, construction, operation and development schedule...

The VPA has not advanced the Terminal 2 proposal beyond the point of identifying a potential location and desired capacity.... .the Terminal 2 proposal will undergo its own harmonized federal and provincial environmental assessment process....”

Government and public submissions to the process confirm that the cumulative environmental effects assessment has not adequately included Terminal 2 as well as other future and past projects. A number of these are listed in *Appendices A and B*. One example is the submission from the Sencot'en Alliance, March 24, 2006, page 10:

“The assessment of potential impacts of Terminal 2 in conjunction with DP3 and previous developments affecting Roberts Bank was supposed to have been done as part of the environmental assessment, but was not done. This contravenes the scoping document and the terms of reference for the *Application* prepared by the assessment authorities”

#### **DFO LAWYERS ADVISED VPA HOW TO CIRCUMVENT CEAA CUMULATIVE EFFECTS**

Since the submission of Petitions 153A and B, the BBCC has learned that in October, 2004, lawyers for the Department of Fisheries and Oceans in Ottawa were of the opinion that Terminal 2 should be scoped out of the cumulative environmental effects assessment. They presented the Vancouver Port Authority with three Options:

- (i) leave T2 in the CE assessment and recommend referral to Panel;
- (ii) remove T2 from CE assessment and go back out for consultation;
- (iii) letter from VPA explaining uncertainty with respect to T2 and continuation as Comprehensive Study without T2 but no need to consult on the change.

The BBCC cannot understand how this can happen. Options 2 and 3 contravene *CEAA*. Plans for Terminal 2 were very certain as outlined in *Appendix B*. They were certain in the Memorandum of Agreement the VPA signed with the Tsawwassen First Nation in November, 2004. A map is attached to the MOA showing the site for Terminal 2. (*Appendix G*). How can DFO lawyers in Ottawa be advising a proponent to avoid certain aspects of *CEAA*? This defies due process.

Not only did the DFO lawyers advise the VPA how to avoid a proper cumulative environmental effects assessment, they requested that the VPA draft a letter for review by DFO legal and Environment Canada. The VPA wrote a letter; DFO lawyers reviewed the letter and Option 3 was followed.

Information was sent to the Minister of the Environment in the Environmental Assessment Track Report of November 16, 2004. BBCC has learned that Chapter 7, *Potential of the Project to Cause Environmental Effects*, was authored by the VPA. The document was supposed to have been written by the Responsible Authorities, DFO and EC, managing adherence to *CEAA*. It was supposed to be an independent analysis of information on behalf of the public, not the proponent. Based on the information, the Minister decided to proceed with a Comprehensive Study process rather than an independent Panel Review which was warranted by the legitimate scope of the project, the potential of the project to cause significant adverse environmental effects and the level of public concern.

Internal documents reveal that a Senior Environment Assessment Engineer of the Environmental Protection Branch, Pacific and Yukon Region advised colleagues that policy clearly indicates that Terminal 2 should be included by a Responsible Authority in a cumulative effects assessment. He warned of precedence:

“One of the arguments used in favour of removing Terminal 2 from the cumulative effects assessment is the Terminal 2 will undergo a detailed environmental assessment of its own in the future, and therefore considering at this point, when designs have not been finalized, is redundant and inefficient. This precedent would allow other proponents to successfully argue against including all manner of future projects in their cumulative effects assessment, and would eventually defeat the purpose of including future projects in the cumulative effects assessment.”

It is clear that the precedence being set by the Environmental Assessment of the Deltaport Third Berth has implications not only for this project but for all future projects that require environmental assessment under *CEAA*.

Documentation of the above information is in *Appendices C-1 & C-2*. The BBCC requests that the Office of the Auditor General review the information and take appropriate action.

## **December 22, 2005 – Response from The Honourable Stephane Dion, Minister of the Environment**

### **PROJECT IS LIKELY TO CAUSE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS**

In his response letter to Petitions 153A and B, The Minister of Environment refers to a revised *Cumulative Effects Study* dated November 21, 2005. The new document provides no new qualitative data and uses an unacceptable baseline of 2003. Impacts from previous projects are dismissed and Valued Ecosystem Components have not been identified.

The Minister reiterates plans by Environment Canada to move forward and adaptively manage impacts in spite of concerns by federal scientists that:

“The studies presented in support of the finding of no significant ecological impacts do not provide sufficient evidence to support that conclusion. As already discussed, the conclusions are based on data and analyses for which there exist major flaws;...”

According to a Reference Guide for *CEAA*, Determining Whether a Project is Likely to Cause Significant Adverse Environmental Effects:

“the focus of environmental assessment always narrows down to a decision about whether the project is likely to cause significant adverse environmental effects. . . .

If . . . the RA considers that the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, it must not do anything to permit the project to proceed. . . .

. . . if there is a determination that the project , taking into account the implementation of appropriate mitigation measures is likely to cause significant adverse environmental effects, then the RA must also determine whether or not such effects can be justified under the circumstances. The Act is clear that the project may be allowed to proceed if any likely significant adverse environmental effects can be justified after a screening, comprehensive study report or public review. It can decide that they are justified, however, only after a public review in the form of mediation or a panel review.” (Page 5)

To date, DFO and EC scientists have expressed major concerns about port expansion at Deltaport. There has been no evidence that mitigation measures can ensure that there will be no significant adverse environmental effects. To the contrary, all evidence points to lack of data, failure in the past to properly assess projects and flaws in the current studies by the VPA. As written by Paul Kluckner, Regional Director of the Pacific and Yukon Region of Environment Canada, July 26, 2005:

“..we are currently unable to determine whether the proposed Dp3 project will cause significant adverse environmental effects in the Roberts Bank ecosystem. Consequently, EC is not in a position to accept the conclusion of the VPA Application that DP3 would have no significant adverse environmental effects.”

The Responsible Authorities cannot ensure that the DP3 project, with mitigation, is not likely to cause adverse environmental effects. According to *CEAA* and Reference Guides, the only way the project could go forward is through mediation or a panel review.

Contrary to *CEAA* directives, the Minister of Environment, in response to Petitions 153A and B, states the intention of moving forward with adaptive strategies:

“there is neither sufficient knowledge nor predictive capacity at this time to either definitively state that the proposed project will have a negative impact, or identify specific mitigative measures be undertaken prior to project development. Thus, Environment Canada’s approach is for the Vancouver Port Authority to commit to ongoing monitoring of environmental factors in order to resolve science gaps and adaptively manage any impacts to the ecosystem that are a consequence of development. Environment Canada and the Vancouver Port Authority are attempting to reach an agreement that will formally commit the Vancouver Port Authority to undertake such a program. . .

The aim is to establish an innovative mechanism that binds the Vancouver Port Authority to monitor for and identify negative environmental impacts and respond with appropriate mitigative actions.”

The BBCC asks what section of *CEAA* provides for adaptive and mitigative measures after negative impacts have occurred. What section of *CEAA* promotes “innovative” solutions to problems as they arise? How can mitigation measures be designed and evaluated, as *CEAA* requires, when the potential impacts are not yet identified? Surely the onus is on Environment Canada to ensure that, with mitigation, there will be no significant adverse environmental effects.

The *CEAA* Reference Guide: Determining Whether a Project is Likely to Cause Adverse Environmental Effects, points out that:

“Deciding whether a project is likely to cause adverse environmental effects is central to the concept and practice of environmental assessment.”

The approach promoted by the Minister of Environment avoids this determination thereby appearing to bypass the purpose of *CEAA*. Surely this sets a new precedence that will render *CEAA* legislation useless.

## **2. Protection of Species and their Habitat**

**November 25, 2005 - Response from The Honourable Geoff Regan, Minister of Fisheries and Oceans**

### **HABITAT DESTRUCTION**

Petitions 153A (pages 3, 5 & 6) and 153B (page 3: Attachment B # 5-14) expressed concern that the Department of Fisheries and Oceans is not meeting its mandate to protect marine habitat. Both petitions quote 2003 letters warning the VPA that DFO would not be able to issue permits for the authorization for the destruction of habitat because of the critical value of the fish habitat in that area. The Minister of Fisheries, Robert G. Thibault, wrote to the VPA, July 29, 2003:

“Regional staff has met with VPA officials on several occasions over the last eight months to discuss this terminal expansion proposal. During these meetings, and in subsequent correspondence, DFO staff has clearly identified the unacceptable impacts to critical fish habitat that would occur with several of the proposed expansion options, specifically the Deltaport Expansion, and Terminal 2 Options #2 and #3. (Appendix D)

In his response to Petitions 153A and B, the Minister of DFO, Geoff Regan, does not directly respond to the questions. He quotes the responsibility of DFO:

“Under *CEAA*, RAs may only exercise a power, duty or function that has triggered the *Act* if the RAs conclude, after the EA is completed, that, taking into account mitigation measures that the RAs consider appropriate, the proposal is not likely to result in significant adverse environmental effects, including effects on marine organisms.”

Despite this statement, DFO is negotiating a Habitat Compensation Plan with the Vancouver Port Authority without the scientific data necessary to fully assess potential significant adverse environmental effects. The analysis of marine environment impacts was not properly completed in the Deltaport Third Berth studies. The fact that off-site compensation is being bargained demonstrates that important marine habitat will be destroyed and it **cannot** be mitigated. The success rate of off-site compensation is unproven and equivocation of lost habitat with proposed compensation habitat is not possible.

The Introduction to the Draft Habitat Compensation Report of November 7, 2005, describes consultation amongst DFO, the Canadian Wildlife Service (CWS), the VPA, and Ducks Unlimited to visit potential off-site compensation areas. For on-site:

“Conceptual compensation options were summarized for several on-site options.”

Also:

“VPA is entering into an agreement with the Crown (DFO, CWS), Ducks Unlimited and the Pacific Salmon Foundation whereby VPA will commit the \$1.5 million to establish at least 7.5 ha of off-site compensation which will be delivered by Ducks Unlimited in consultation with the Crown. This would be in addition to the on-site compensation that was described in detail in the proposed habitat compensation plan.

The amount was determined by the Crown to be adequate for the acquisition and creation of suitable fish and migratory bird habitat. The specific locations have not been established but they will be acquired generally within the Fraser estuary by Ducks in consultation with the Crown. “

These after-the-studies unscientific deals are unacceptable. They pay only lip-service to *CEAA* and *Fisheries Act* requirements. *CEAA* is clear that the net result, after mitigation, should be no residual adverse environmental effects. DFO and EC, by making compensation deals, are admitting that habitat destruction will occur and it cannot be mitigated. Their deals (behind the scenes) and plans to fix as they go are an insult to the intent of *CEAA*.

BBCC sent a response to the Habitat Compensation Plan pointing out that all of Roberts Bank is “Red Coded” under the Fraser River Estuary Management Plan (FREMP). This means that the area is designated “conservation” and **“habitat compensation is not an option as a rule.”** This designation is being ignored. The VPA attempted to have the “Red- Coded” designation removed from the area where they are planning to build Terminal 2 (Appendix E)

There is no ecosystem perspective and no evaluation of the current function of habitats on Roberts Bank, especially for critical species e.g. up to 5 million migrating shorebirds with very special diets and vital energy needs that must be met in a very restricted time period.

## **SPECIES AT RISK**

The Minister of Fisheries and Oceans claims that:

“DFO is seeking advice from internal marine mammal experts to determine what, if any, impacts may occur to orcas or their habitat as a result of the construction and operation of the proposed facility. This information will be considered in reaching an environmental assessment decision for this proposal.”

Unfortunately, very little has been done to address the issue of the threat to the habitat of the Endangered Southern Resident Orcas (Pods J, K, and L). This should have been included in the VPA studies. Objective 5 of the DFO Recovery Strategy for the Endangered Killer Whales (2005) states:

“Protect proposed critical habitat for resident killer whales and identify additional potential core areas for critical habitat designation and protection.”

Under *CEAA, Section 47*, DFO and EC should seek international assessment of the consequences of the Deltaport Third Berth Project which will result in more shipping through critical habitat. The assessment should include acoustic factors, air pollution and the potential for collisions with whales.

Since all the commercial vessels coming to and from Deltaport on Roberts Bank travel through “Orca Pass”, the Gulf Islands National Park and the Proposed National Marine Conservation Area Reserve of the Southern Georgia Strait, the project may cause significant adverse effects on these two federally protected areas as well as the international Orca Pass.

### **3. Plans to Transfer 1154 hectares of Crown Waterlot to Management of the Vancouver Port Authority**

**November 4, 2005 - Response from The Honourable Charles Hubbard, P.C., M.P.,  
Parliamentary Secretary to the Minister of Transport, Hon. Jean-C. Lapierre, P.C. M.P.**

#### **LACK OF TRANSPARENCY AND DISCLOSURE**

The response from the Ministry of Transport does not explain why the Harmonized Federal Provincial Environmental Assessment of the Deltaport Third Berth project lacks transparency and disclosure concerning two major agreements that are required for the project:

- A: A Provincial / Federal/ Vancouver Port Authority (VPA) agreement to transfer 1154 hectares of B.C. Crown Waterlot to the management of the Vancouver Port Authority.
- B: A Memorandum of Understanding between the Tsawwassen First Nation (TFN) and the Vancouver Port Authority (VPA), Nov. 2004, for past claims and planned use of crown lands.

At a presentation to the Agencies involved in the environmental assessment in August, 2004, these agreements were identified by the VPA as critical requirements for Deltaport Third Berth. This information was not given to the public. (*Appendix F*)

The response from the Minister of Transport does not answer question 6 (page 6 of Petition 153A) as to why the Minister of Transportation is planning to transfer 1154 hectares of waterlot (*REM. PARCEL "A" CT K25780E*) to management of the Vancouver Port Authority when only 20 hectares is required for the Deltaport Third Berth proposal.

The Environmental Assessment process of the Deltaport Third Berth has not included explanations about the extent, need, specifics and justification of the transfer of this waterlot. After the public process, in response to public questions, the VPA admitted that it has:

“a firm and binding agreement with the Transportation Financing Authority to acquire the remainder of Parcel A. The provincial crown will transfer fee simple title to the waterlot to the federal crown. The VPA will manage these lands as an agent of the federal crown ...”  
(*Appendix B page 8*)

The public learned this information after the public response period to the *Application* studies. Since that time, it has become clear that this agreement, coupled with the *Tsawwassen First Nation and Vancouver Port Authority Memorandum of Agreement (TFN/VPA MOA)*, is preparing the way for the Terminal 2 application. The stated purpose of the MOA is to facilitate the Roberts Bank Port Facility Expansion which includes the Deltaport Third Berth (DP3) and Terminal 2 (T2). The response from the Minister of Transport evades the issue:

“I am not in a position to comment on questions relating to the Memorandum of Agreement between the Vancouver Port Authority and the Tsawwassen First Nation as Transport Canada was not a signatory to this Agreement.”

This statement is contradicted on page 2 of the letter:

“... while the Vancouver Port Authority and the Tsawwassen First Nation have reached an agreement with regard to development at Roberts Bank, Transport Canada has to ensure that all First Nations that may have specific interests in the property have an opportunity to provide comments and, if appropriate, to enter into formal consultations to ensure the Honour of the Crown is upheld.”

It is unacceptable to evade the issues surrounding the TFN/VPA Memorandum of Agreement (MOA) because they are intrinsically intertwined with the past, current and future plans for port expansion at Roberts Bank. The VPA admits that the agreement with the TFN is a requirement of current and future port expansion and states that:

“certain portions of the waterlot not required for port purposes will be held for the potential future transfer to the TFN.”



Such a statement infers VPA has inappropriate knowledge (and powers?) related to federal – provincial Treaty Negotiations and/or agreements with the Tsawwassen First Nation. These agreements indicate sequential deals essential to port expansion. In the first place, they should have been presented fully to the public as part of the Deltaport Third Berth Environmental Assessment process. Secondly, the information is not fully available under the *Access to Information Act*. When the BBCC applied for a copy of the TFN/ VPA Memorandum of Agreement large portions of the document were severed. Most of Chapter 9 ADDITIONAL LANDS AND WATER LOTS was severed. (*Appendix G*) Page 8 of the MOA states:

“e) Commits to provide written confirmation and consent to the transfers of lands and water lots described in Chapter 9.”

Thirdly, as Transport Canada will acquire BC crown lands, the lands then become subject to the *Canadian Environmental Assessment Act*. It raises the question:

Will there be a new environmental assessment under Section 5. of *CEAA* because of plans to lease newly obtained crown lands?

Disclosure of these pivotal agreements and transparency about their effects should have been included in the Harmonized Federal Provincial Environmental Assessment of the Deltaport Third Berth Project.

It is interesting to note that the Minister of Transport dissociates his Ministry from the TFN/VPA Memorandum of Agreement when the agreement is necessary for port expansion. The federal government is accountable to all First Nations for past, present and planned projects at Roberts Bank. It was federal decisions in the past that created the problems for the Tsawwassen First Nation in terms of degradation to their environment. To make it a VPA responsibility and to disclaim federal responsibility is unacceptable given that the agreement deals with crown lands, First Nations issues and planned port expansion at Deltaport.

### **FAILURE TO CONSULT OTHER FIRST NATIONS**

The response from the Minister of Transportation does not answer question 12 (Petition 153A page 7) referring to consultation with other First Nations whom have claim to this territory.

In fact, the Sencot'en Alliance (*Pauquachin, Tsartlip, Tsawout, and Semiahmoo First Nations*) and Hul'qumi'num Treaty Group (*Chemainus First Nation, Halalt First Nation, Hwilitsum First Nation, Lyackson First Nation, Penelakut Tribe, Cowichan Tribes and Lake Cowichan First Nation*) have written to the process stating claims and there is no mention of consultation with these groups.

In a letter, dated July 28, 2005, to federal DFO, EC, CEAA, VPA and provincial Environmental Assessment Office the Hul'qumi'num Treaty Group claims the VPA application:

“...has indicated a strong potential for infringement of our Aboriginal rights in the Fraser River Estuary and therefore triggers the Crown's duty to consult with us.”...

“...it is apparent that the proposed activity will be a major undertaking with a strong potential to impact the site in both the short term and long term, so as a result, poses a strong likelihood for a major infringement of our Aboriginal rights. Consequently, we believe we have a significant stake in this project and must be part of the consultation and planning for it.”

Similarly, the Sencot'en Alliance, in a submission dated March 24, 2006, page 17, stated:

“Engagement with Canada

At this point in the DP3 review process, there has also been no meaningful initiative made by any federal Crown entity to consult with the Sencot'en First Nations on the DP3 project.”

On 25 May 2005, the Alliance wrote letters to the regional directors of Transport Canada, Fisheries and Oceans Canada and Environment Canada reminding them of the Crown's duty to consult with the affected First Nations, and the fact that no consultation had yet occurred. A request was made to each to contact the Alliance to begin the process. Only one response was ever received.

On 17 June 2005, the regional director general of Fisheries and Oceans Canada wrote to the Alliance with following points:

- an acknowledgement that the agency is aware of its obligations to First Nations and that it treats these seriously;
- a regret for the delay in contacting the Sencot'en outside of the technical process to discuss this project; and ,
- a commitment to have the agency representative at the DP3 review table contact the Sencot'en to arrange a meeting.

To our knowledge, no subsequent action was taken by the department.”

### **November 16 2005 - Response from The Honourable Andy Scott, P.C., M.P. Minister of Indian Affairs and Northern Development**

This is a letter taking no responsibility for First Nations claims as mentioned above. This is interesting since the Office of the Auditor General referred the petitions to this Ministry for response. As mentioned by First Nations comments above, the implications of proposed Port expansion at Roberts Bank:

“...has indicated a strong potential for infringement of our Aboriginal rights in the Fraser River Estuary and therefore triggers the Crown's duty to consult with us.”

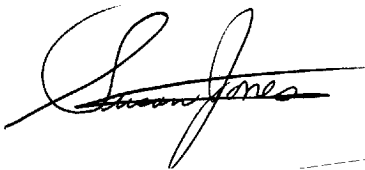
Surely the Office of the Auditor General will query a non-response such as this.

This letter has not addressed all the concerns of the BBCC relative to the environmental assessment of the Deltaport Third Berth project. However, we have attempted to respond to some of the comments from the Ministers.

The BBCC is discouraged by the plans and deals that are being made to bargain away fish and wildlife habitat that have provincial, national and international significance. Not only is due process being denied for the Deltaport Third Berth Environmental Assessment but agreements and plans are being made that include measures to assist the Vancouver Port Authority with the next phase of port expansion - Terminal 2 with 3 new berths. Not only are the most Important Bird Area in Canada and the most important salmon river in the world at risk but also the foundation of democracy - respect and adherence to legislation by public officials.

The BBCC urges the Office of the Auditor General to thoroughly investigate the actions of the Department of Fisheries and Oceans, Environment Canada, and the Ministry of Transportation and their attempts to manipulate the *CEAA* process, avoid transparency and make deals rather than enforce legislation.

Yours respectfully,

A handwritten signature in black ink, appearing to read "Susan Jones", written over a horizontal line.

Susan Jones  
Director: BBCC