

## **Questionable Treatment of Marine Shipping in the Environmental Assessment of the Terminal 2 Project**

By Crystal Cook and Anthony Ho  
Supervised by Chris Tollefson and Calvin Sandborn

January, 2015

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### Abbreviations and Short Forms

CEAA	<i>Canadian Environmental Assessment Act, 2012</i>
The Agency	Canadian Environmental Assessment Agency
EA	Environmental assessment
PMV	Port Metro Vancouver
ToR	Terms of Reference

# 1.0 Introduction

## 1.1 Issue Overview

It is uncertain whether marine shipping is set to receive appropriate consideration by the Canadian Environmental Assessment Agency in its assessment of PMV’s Terminal 2 Project. In its present form, the draft ToR indicates that the scope of the project only includes marine transportation within the area that PMV has jurisdiction, not all marine transportation along the marine shipping route. There is concern that because this jurisdiction is very limited (see *Figure 1* below), this treatment of marine shipping will prevent the full environmental effects of increased ship traffic from being adequately evaluated. This memorandum will clarify *CEAA*’s framework for EA and consider what arguments may be put forward in favour of marine shipping being considered more broadly in the Agency’s assessment of the Terminal 2 project.



**Figure 1.** PMV’s area of jurisdiction<sup>1</sup>.

<sup>1</sup> Port Metro Vancouver, “Port Metro Vancouver Jurisdictional Map” Retrieved from: <http://www.portmetrovancover.com/docs/default-source/default-document-library/port-metro-vancouver-jurisdictional-map.jpg?sfvrsn=0>.

## 1.2 Relevant Provisions of CEAA 2012

This section lays out key parts of CEAA's legislative framework for EA that should be clearly delineated and understood before considering the marine shipping issue identified above.

### What is a Designated Project?

Under CEAA, only designated projects are assessed for their potentially adverse environmental effects. CEAA's 1992 predecessor gave the Minister or responsible authority discretion to determine the scope of a project.<sup>2</sup> In other words, they could choose which physical activities would constitute part of the project to be assessed and leave other components out. In the current Act, there is no provision that explicitly gives the Minister such authority. Instead, section 2(1) of CEAA 2012 defines a designated project as one or more physical activities that are:

- Carried out in Canada or on federal lands;<sup>3</sup>
- Designated in CEAA's regulations or by an order made by the Minister if the project is not captured by the regulations;<sup>4</sup> and
- Linked to the same federal authority as specified in the regulations or order<sup>5</sup>

The Act also says that a designated project includes any physical activity that is incidental to the project's primary physical activities.<sup>6</sup> These primary activities are set out in CEAA's *Regulations Designating Physical Activities*. Under these regulations, different categories of proposed projects (e.g. canals, marine terminals or nuclear facilities) have predetermined physical activities that are deemed to be a part of the designated project.

### What Factors are Applied in the Assessment of a Designated Project?

Once the designated project is established, the body responsible for EA must take into account several factors pursuant to s. 19 of the Act, including:

- The environmental effects of the designated project and malfunctions or accidents that may occur in connection with it;<sup>7</sup>
- Any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;<sup>8</sup> and

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<sup>2</sup> *Canadian Environmental Assessment Act*, SC 1992, c 37, s 15, as repealed by *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19, s 66.

<sup>3</sup> *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52, s 2(1).

<sup>4</sup> *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52, s 2(1).

<sup>5</sup> *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52, s 2(1).

<sup>6</sup> *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52, s 2(1).

<sup>7</sup> *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52, s 19(1)(a).

<sup>8</sup> *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52, s 19(1)(a).

- The significance of the effects referred to above.<sup>9</sup>

It is important to note that the Minister has the discretion to determine the scope of most of these factors, including those listed above.<sup>10</sup> Therefore, despite the authoritative wording of s. 19(1) that the Agency “must” take these factors into account, the Minister may limit their actual application in the assessment. Unlike project scoping, factor scoping does not have to do with determining the physical activities that constitute a designated project but how project will be assessed.

### What is an “Environmental Effect”?

For the purposes of a federal environmental assessment, the environmental effects referred to in s. 19(1)(a) of the Act are not just any impact that the proposed project may have on the surrounding environment. Rather, the environmental effects that are considered under *CEAA* fall within several categories:

- Changes to components of the environment within Parliament’s legislative authority including fish and fish habitat, aquatic species under the *Species at Risk Act*, and migratory birds as defined in the *Migratory Birds Convention Act*;<sup>11</sup>
- Changes on federal lands, in another province or outside Canada; and<sup>12</sup>
- Changes that may affect First Nations’ health and socio-economic conditions, physical and culture heritage, current use of land and resources for traditional purposes and any structure, site or thing of historical or archeological significance.<sup>13</sup>

Overall, in order to ensure that the marine shipping route is subject to this framework of EA, it is necessary to argue that it is a component of the designated project by virtue of being either 1) a physical activity that the Act has defined as being part of the designated project, or 2) a physical activity that is incidental to any physical activities that the Act has defined as being part of the designated project.<sup>14</sup> If this can be achieved, then the s. 19 factors can be applied to the marine shipping route and accordingly provide a more complete and comprehensive basis for the review panel’s recommendation as to whether the project is likely to cause significant adverse environmental effects.

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<sup>9</sup> *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52, s 19(1)(b).

<sup>10</sup> *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52, s 19(2).

<sup>11</sup> *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52, s 5(1)(a).

<sup>12</sup> *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52, s 5(1)(b).

<sup>13</sup> *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52, s 5(1)(c).

<sup>14</sup> *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52, s 2(1).

## 2.0 Application of CEEA’s Framework to the Terminal 2 Project and Marine Shipping

This section applies the CEEA framework as discussed in the previous section to the Terminal 2 Project and provides arguments that may be put forward in favour of marine shipping being considered more broadly in the Agency’s assessment of the Terminal 2 project.

The Terminal 2 project proposed along Roberts Bank qualifies under the *Regulations Designating Physical Activities* (“*Regulations*”) as a marine terminal project.<sup>15</sup> The *Regulations* list the physical activities that comprise this type of project as being the “construction, operation, decommissioning and abandonment” of the terminal.<sup>16</sup> Since these activities are not defined in the Act or *Regulations*, the Minister or the responsible authority has some discretion in defining and scoping these activities within the draft ToR. In this way, despite the fact that the Act no longer explicitly provides for project scoping by the Minister, the *Regulations* provide a way for indirect scoping—something that may be at play in the Terminal 2 case given the current extremely limited consideration of marine shipping.

### 2.1 Should the shipping along the marine route be part of the designated project?

In the Agency’s scoping of the Terminal 2 Project, marine transportation is explicitly mentioned as a physical activity constituting part of the designated project but only to the extent that it is within the area for which PMV has jurisdiction.<sup>17</sup> As a result, PMV has defined their terminal operations to include the berthing and mooring of vessels, transport of containers, terminal maintenance activities and the operation of support and administrative facilities.<sup>18</sup> Since marine shipping extends well beyond the jurisdiction of PMV and the activities identified, an alternative argument may be that it is part of the designated project by virtue of being an incidental activity. What constitutes an incidental physical activity has not yet been litigated; however, the Agency suggests that a proponent should consider several criteria when trying to anticipate the components of their project in their Project Description. These criteria are<sup>19</sup>:

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<sup>15</sup> *Regulations Designating Physical Activities*, SOR/2012-147, Schedule, s 24(c).

<sup>16</sup> *Regulations Designating Physical Activities*, SOR/2012-147, Schedule, s 24.

<sup>17</sup> Canadian Environmental Assessment Agency, *Guidelines for the Preparation of an Environmental Impact Statement*, online: Canadian Environmental Assessment Agency < <http://www.ceaa-acee.gc.ca/050/documents/p80054/97463E.pdf>> at page 2.

<sup>18</sup> Port Metro Vancouver, *Roberts Bank Terminal 2 Project Description Executive Summary* (2013) Retrieved from: <http://www.ceaa-acee.gc.ca/050/documents/p80054/94520E.pdf>, at xix.

<sup>19</sup> Canadian Environmental Assessment Agency, *Guide to Preparing a Description of a Designated Project under the Canadian Environmental Assessment Act, 2012*, online: Canadian Environmental Assessment Agency <<https://www.ceaa-acee.gc.ca/default.asp?lang=En&n=3CA9CEE5-1>>.

- The nature of the proposed activities and whether they are subordinate or complementary to the designated project;
- Whether the activity is within the care and control of the proponent;
- If the activity is to be undertaken by a third party, the nature of the relationship between the proponent and the third party and whether the proponent has the ability to “direct or influence” the carrying out of the activity;
- Whether the activity is solely for the benefit of the proponent or is available for other proponents as well; and,
- The federal and/or provincial regulatory requirements for the activity.

This memorandum will not attempt a comprehensive application of these criteria to the Terminal 2 project. First of all, the Agency does not suggest what weight should be assigned to each factor or explain how their significance may shift in given circumstances. Furthermore, several factors, such as the care and control over the activity and ability to direct it, are likely best evaluated by the proponent. However, a cursory examination suggests that traffic along the marine shipping route is likely directly influenced by PMV – increased traffic will be directly incidental and complementary to the project. Indeed, the proponent itself will undoubtedly argue that increased vessel traffic actually *necessitates* the new terminal – thus the new terminal and the new traffic are necessarily and inextricably linked. Quite simply, such increased vessel traffic cannot take place without new terminal facilities. The new terminal is the *sine qua non* for the increased level of vessel traffic. The increased vessel traffic depends entirely on the new terminal, and in many cases could not exist without the new shipping facility. In sum, without the expansion of the terminal, there would not be a significant increase in traffic along the marine route and PMV would not see a change in operational activities. Additionally, PMV appears to be the only proponent that would benefit from the increased shipping along the marine route as it is their terminal that would receive the extra traffic and enjoy a surge in profit-making activity.

In view of this, it appears that there is at least some basis for concluding that shipping along the marine route is a physical activity incidental to the operation of the Terminal 2 project. However, even if some uncertainty remains after applying the criteria, there may be additional considerations that would encourage a broader scoping of marine shipping than is currently provided for in the draft ToR.

## **2.2 Are there potential “environmental effects” of increased traffic along the marine route?**

As noted above, “environmental effects” have a somewhat restricted meaning under *CEAA* in that they are limited to a number of environmental components under federal jurisdiction. If a

physical activity (including any incidental physical activity) has impacts that fall outside of the meaning definition of “designated project” under the Act, then there may be justification for a more limited scoping of an activity so that time and resources are not wasted. However, this does not seem to be the case with marine shipping in these circumstances.

As BC Nature and others have pointed out, Roberts Bank is an important area for fish (especially salmon), migratory birds, and orca; these are all components of the environment within federal jurisdiction.<sup>20</sup> Furthermore, much of the marine shipping route is within what *CEAA* deems federal lands/waters, and many of the areas along this route and on Roberts Bank are part of the traditional territories of various First Nations.<sup>21</sup> These features clearly align with the categories of “environmental effects” under *CEAA*, and so the next consideration is whether changes to them may be impacted by either shipping along the marine route or just marine transportation within PMV’s area of jurisdiction.

Although the consideration of marine transport within PMV’s jurisdiction would allow the Agency to capture many potential environmental effects along Roberts Bank in their assessment, any incidents outside PMV’s small area of jurisdiction would not be considered in the EA. This is concerning because pollutants, whether they are released in the regular course of shipping (e.g. discharge of bilge water or sewage) or as a result of a serious accident or malfunction (e.g. oil or fuel spills), would not be kept out of Roberts Bank by virtue of the boundary used to scope shipping in the EA. Whether these are released within PMV’s jurisdiction or just outside of it may not matter in terms of environmental effects, the results could be just as devastating. This, combined with the fact that *CEAA* explicitly allows for the inclusion of incidental physical activities makes this limited scoping of marine shipping in the draft ToR seem arbitrary. This is because, despite the fact that there is a genuine possibility that events and activities along the shipping route will produce the exact type of environmental changes that the federal EA is designed to evaluate, these associated risks will go unevaluated by the Agency if the scope of marine shipping is not expanded.

### **2.3 Does the rationale for EA support a broader scoping of marine shipping?**

Although the enactment of *CEAA* 2012 brought considerable change to federal environmental assessments, the two-step process remains. First, a responsible authority or review panel carries out an EA for the project with a view of recommending whether it is likely to cause adverse environmental effects. Then, a federal authority (usually the Minister of the

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<sup>20</sup> BC Nature, *Submission to Canadian Environmental Assessment Agency on Roberts Bank Terminal 2 Project*, online: BC Nature, < <http://www.bcnature.ca/wp-content/uploads/2013/12/ON-ROBERTS-BANK-TERMINAL-2-PROJECT.pdf>>.

<sup>21</sup> BC Nature, *Submission to Canadian Environmental Assessment Agency on Roberts Bank Terminal 2 Project*, online: BC Nature, < <http://www.bcnature.ca/wp-content/uploads/2013/12/ON-ROBERTS-BANK-TERMINAL-2-PROJECT.pdf>>.



Environment) reviews this recommendation and the evidence to make an official determination as to whether adverse effects are likely and if the project should be authorized. Because the EA forms the basis of the Minister's decision, Canadian courts have considered it to be an important information-gathering and planning tool necessary to sound decision-making.<sup>22</sup> The provisions of *CEAA* itself also provide some insight into what Parliament intends environmental assessment to achieve. In particular, the Act is meant to ensure that designated projects are "considered in a careful and precautionary manner to avoid significant adverse environmental effects."<sup>23</sup>

The limited scoping of marine shipping for the Terminal 2 project does not seem consistent with this rationale for environmental assessment or the purposes of *CEAA*. If the main goal is providing a sound basis for decision-making, failing to adequately assess all of the potentially serious effects would seemingly result in an incomplete record for the Minister to base his or her decision on. It also seems inconsistent with the idea of precautionary consideration as it excludes some of the risk that is linked to the project's operations.

### 3.0 Summary

Overall, given the framework of the Act and the rationale behind environmental assessment, it seems as though marine shipping is inappropriately limited in scope in the draft ToR. First of all, it is plausible that activities along the marine shipping route, not just within PMV's area of jurisdiction, constitute an incidental physical activity that is part of the designated project. Activity along the route is complementary to the project as it is necessary to the terminal's use and economic viability. Additionally, shipping activity on the route is influenced by the proponent because, if not for the terminal being built to accommodate more vessels, there would be no reason to increase vessel traffic.

Moreover, there does not appear to be any justification for limiting the scope of marine shipping due to any difference in the types of environmental effects that result from transportation within PMV's jurisdiction and transportation along the route. This is because, due to the nature of water pollution, contaminants such as bilge water or sewage and in more serious scenarios oil could cause changes in environmental components that are in areas of federal jurisdiction, whether or not they occur within PMV's jurisdiction or on the shipping route. These changes are precisely the type that *CEAA* deems to be environmental effects that must be considered in a federal EA.

Finally, a limited consideration of marine shipping seems contrary to what courts have determined to be the rationale for environmental assessment. Limiting the scope of marine

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<sup>22</sup> See *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3, 1992 CarswellNat 1313 at paras 103-109.

<sup>23</sup> *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52, s 4(1)(b).

shipping compromises the information-gathering function of the Agency as it cuts out risk information that goes directly to the weighing of whether significant adverse environmental effects are likely. It is arguable that an assessment that ignores real potential risks does not provide a sound basis for the Minister to make his or her decision as to whether to authorize a project.

On the other hand, a broad scoping of marine shipping is consistent with the goals of *CEAA* to protect the components of the environment that are within federal jurisdiction and to ensure that designated projects are considered in a “careful and precautionary manner” to avoid significant adverse environmental effects. It would also provide a more complete and comprehensive record for the Minister to base his or her final determination and justify public trust in the effectiveness and credibility of the assessment process.