

January 10, 2020

VIA EMAIL

Cindy
Panel Manager, Roberts Bank Terminal 2 Project

Parker

Dear Ms. Parker:

Re: Request to open the public record to include additional documents for the environmental assessment of the Roberts Bank Terminal 2 Project (the "Project")

Please find attached a letter from GCT, responding to the Chair's November 18, 2019 letter.

Yours sincerely,


Marko Dekovic

Vice President, Public Affairs
<contact information removed>

GCT Global Container Terminals Inc.
<contact information removed>

January 10, 2020

Jocelyne Beaudet
Panel Chair
Roberts Bank Terminal 2 Project

VIA EMAIL: panel.rbt2@ceaa.gc.ca

Re: Request to open the public record to include additional documents for the environmental assessment of the Roberts Bank Terminal 2 Project (the "Project")

Dear Ms. Beaudet,

Global Container Terminals Inc. ("GCT") writes in response to the Review Panel's letter, dated November 18, 2019, in relation to our request to include four additional documents in the public record for the Roberts Bank Terminal 2 Project (the "Project"). In your response, you invite GCT to provide further information regarding how the Vancouver Fraser Port Authority (the "VFPA") knowingly made false or misleading statements before the closing of the public record. The basis of GCT's request is that the additional documents contain an important admission from the VFPA:

...the Port still believes (based on prior assessments of the area) there are considerable risks with the proposed DP4 project as it relates to fish habitat. However, in the circumstances, **we are no longer of the view that they are of such a nature that any consideration of DP4 is not an option.**¹ (emphasis added)

That statement contradicts the VFPA's repeated assertions to this Review Panel that locating the Project adjacent to the existing Deltaport was not a technically feasible option that could be explored:

... before settling our current project, we considered several different locations and orientations. Two early alternatives considered are shown here. W3 in brown and E1 in blue. However, in 2003 the Minister of Fisheries and Oceans Canada DFO wrote to the Port Authority and stated the RB2 terminal could not be built inland or shoreward of the existing Roberts Banks Terminals because of valued ecosystems in the intertidal area. **This DFO directive effectively eliminated W3 and E1 options. As such, these options or their variants were not further considered.**² (emphasis added)

...The DP4 project is not an alternative means of carrying out the Project... the VFPA does not consider construction of additional capacity in the intertidal area to be technically feasible.³

The controversy surrounding the so-called "prohibition" by the Department of Fisheries and Oceans ("DFO") is already well known to the Review Panel, and led to a public hearing session dedicated to the topic of Alternative Means:

¹ Letter dated September 23, 2019 from the VFPA to GCT

² Kevin Karloff, Manager of Infrastructure Delivery, VFPA, Hearing Transcript volume 2: May 15, 2019 (CEAR #1738, p.121)

³ Closing Submission of the Vancouver Fraser Port Authority, August 26, 2019 (CEAR #2045, p.44)

“...Further, the Panel is aware of controversy over the specific question of whether GCT’s Deltaport 4 Project constitutes an alternative means to carrying out the Project, in light of a 2003 letter from the Department of Fisheries and Oceans (DFO) **apparently prohibiting further development at Roberts Bank in intertidal habitats within the Inter-causeway zone**. Accordingly, the Panel is prepared to grant GCT’s request for a topic-specific hearing session on alternative means of carrying out the Project that are technically and economically feasible. This session is tentatively scheduled for May 31, 2019.” (emphasis added)⁴

Following DFO’s comments, during the course of the remaining public hearings the VFPA avoided referencing the “prohibition” and instead deviated to referencing the technical unfeasibility of development east of the causeway. The new information is that the VFPA now admits, after the public record is closed, that locating the Project adjacent to the existing Deltaport may be technically feasible. It follows that every statement of the VFPA asserting that such an option is not technically feasible is a false statement. Attached is a detailed table of specific passages and references to documents on the Registry which contain these false and misleading statements.

For the purposes of determining whether section 98 of *CEAA 2012* has been breached, the sole remaining issue is whether the VFPA knew these statements to be false, or was reckless as to whether or not they were true, intending that they would be relied upon by the Review Panel.

GCT submits that at all relevant times the VFPA was fully aware that not only was there no “prohibition” on expansion of the existing Deltaport in the “E1” area but also that such an expansion was technically feasible because:

- at all relevant times the VFPA knew that the July 29, 2003 DFO letter was significantly outdated, was written in relation to different projects, and that in the intervening time both the *Fisheries Act* and *CEAA 2012* were substantially amended; and
- the VFPA commissioned a November 17, 2017 report from Hemmera Envirochem Inc., which concluded that the DFO’s 2003 letter was deliberately worded to preserve the ability to approve terminal layout options in the inter-causeway area, and was not an outright ban.⁵ The VFPA did not provide the Hemmera report to the Review Panel, and it only came to the Review Panel’s attention through GCT, after GCT’s obligations under a non-disclosure agreement had expired.⁶

The VFPA’s false assertion that Deltaport’s expansion was not technically feasible is misleading to the Review Panel, and other public hearing participants who expressed a strong desire that alternative location options be properly considered, including the Mayor of Delta⁷ and the Tsawwassen First Nation.⁸ The VFPA’s purported alternative means assessment is deficient, and tainted by the misleading, artificial and incorrect assumptions and limitations in its original analysis which was not cured during the time the public record was open, and this deficiency remains uncured.

⁴ Decision rendered on Global Container Terminals motion to adjourn public hearing, (CEAR #1777, p.7-8)

⁵ Exhibit 40 - Document presented by GCT Global Container Terminals on May 31, 2019 - Hemmera Summary Review of Regulatory Considerations regarding East Causeway Development (CEAR #1864)

⁶ Hearing Transcript volume 15: May 31, 2019 (CEAR #1859, p.3818)

⁷ Hearing Transcript volume 2: May 15, 2019 (CEAR #1738, p.214)

⁸ Tsawwassen First Nation to the Review Panel re: Written Submission for the Roberts Bank Terminal 2 Public Hearing (CEAR #1639, p. 8)



We trust this is sufficient information for the Review Panel to find that the VFPA breached section 98 of the *Canadian Environmental Assessment Act, 2012*.

Yours truly,

<Original signed by>

Marko Dekovic
Vice President, Public Affairs
Global Container Terminals Inc.
cc: David Levy
Douw Steyn

Enclosure: table of specific passages and references to documents on the Registry which contain false and misleading statements

Misleading Statements by the Proponent	CEAR Reference
<p>1. 5.3.1.1 Deltaport Terminal</p> <p>Deltaport Terminal at Roberts Bank (Figure 5-1) was most recently expanded in 2010 with the addition of Deltaport Third Berth (DP3), which added 600,000 twenty-foot equivalent units (TEUs) of container capacity, bringing the terminal's total design capacity to 1.8 million TEUs. A series of improvements under the Deltaport Terminal Road and Rail Improvement Project (DTRRIP), which is further described in Appendix 3-A Descriptions of Projects and Activities Contributing to Existing Conditions and Expected Conditions, will improve efficiency and further increase capacity at Deltaport Terminal by 600,000 TEUs to 2.4 million TEUs by 2017. Deltaport Terminal is expected to reach its maximum capacity by 2017. <u>No additional expansions were considered feasible as early feedback from regulatory agencies on the potential environmental effects of a Deltaport Terminal expansion within the inter-causeway area suggested that the potential environmental effects were unacceptable by regulators</u> (see Design Alternative E1 in Section 5.4.1.1). These planned Deltaport Terminal improvements through DTRRIP will help to meet short-term container demand, but are not expected to meet forecasted long-term container demand. As a result, this alternative will not be subject to further consideration [emphasis added].</p>	<p>Roberts Bank Terminal 2 Project - Environmental Impact Statement, Section 5.3.1.1 (CEAR #181)</p>
<p>2. 5.4.1.1 Historical Options</p> <p>Preliminary planning studies for RBT2 conducted from 2003 to 2004 considered four potential location options identified as E1, W1, W2, and W3 for the Project location at Roberts Bank (Figure 5-2). Options were given the labels of W1, W2, and W3 to represent that they were located on the west side of the existing terminal, and E1 for the east side option.</p> <p>These four historical options were reduced to two concept sites (W1 and W2) located immediately west of the existing Roberts Bank terminals in deeper waters. The rationale for exclusion of the other two sites, E1 and W3, which were both located in the intertidal areas closer to shore, was identified as follows:</p> <ul style="list-style-type: none"> Discussions with Fisheries and Oceans Canada (DFO) and the Canadian Wildlife Service (CWS) indicated potential increased adverse effects if the Project was located on the more productive intertidal habitat areas, as compared to a location in deeper waters (W1 and W2); 	<p>Roberts Bank Terminal 2 Project - Environmental Impact Statement, Section 5.4.1.1 (CEAR #181)</p>

- Previous environmental field studies related to the construction of Deltaport Terminal and DP3 had identified areas of valuable fish habitat (eelgrass) and high-value habitat areas for marine invertebrates in intertidal areas; and
- Monitoring conducted during implementation of the DP3 Adaptive Management Strategy further confirmed areas of high-value habitat in intertidal areas.

Early correspondence from DFO in 2003 suggested that potential environmental effects were potentially unacceptable by regulators for options W3 and E1 (DFO 2003).

Port Metro Vancouver continued discussions with DFO and Environment Canada (CWS) throughout 2003 and 2004. As a result of these early agency discussions, initial planning work, and knowledge gained from previous environmental field work and monitoring, PMV discontinued consideration of the E1 and W3 options and focused further studies on the W1 and W2 design concepts. The E1 and W3 locations will therefore not be subject to further consideration.

Table IR1-06-2 Feasibility Analysis for Terminal Location and Orientation, Layout, and Configuration Alternatives

Table IR1-06-2 Feasibility Analysis for Terminal Location and Orientation, Layout, and Configuration Alternatives

Alternatives Considered for Terminal Location and Orientation	Technical Evaluation		Economic Evaluation		Feasibility Assessment Conclusion	
	Potential Effects Acceptable by Regulators	Feasible?	Construction Cost/Schedule Acceptable (including dredge and fill and soil improvement requirements)	Operations Cost Acceptable (downtime from weather/navigation issues, effects on other terminal operations at Roberts Bank, yard efficiencies, maintenance dredging)	Feasible?	Rationale for Rejection as a Feasible Alternative
Option W1 – located west of existing terminals in deeper water, berth face facing offshore parallel to the shoreline	Yes	Yes	Yes, see B. below	Yes, see B. below	Yes	Not applicable, as alternative satisfies technical and economic criteria
Option W2 – located west of existing terminals in deeper water, berth face oriented perpendicular to the shoreline	Yes	Yes	Yes, see B. below	Yes, see B. below	Yes	Not applicable, as alternative satisfies technical and economic criteria
Option W3 – located on west side in intertidal zone	No	No	Not applicable as alternative not technically feasible		No	Compared to deeper water locations, potential for increased adverse effects associated with location in intertidal habitat areas with valuable fish habitat (eelgrass) and high-value marine invertebrate habitat. Such potential effects could be potentially unacceptable by regulators, posing a risk to permitting of the Project.
Option E1 – located on east side in intertidal zone	No	No	Not applicable as alternative not technically feasible		No	Compared to deeper water locations, potential for increased adverse effects associated with location in intertidal habitat areas with valuable fish habitat (eelgrass) and high-value marine invertebrate habitat. Such potential effects could be potentially unacceptable by regulators, posing a risk to permitting of the Project.

Responses to Information Request Package 1 - IR1-06 Methodology – Alternative Means, Sufficiency Information Request #06 (IR1-06), Page 3 (CEAR #897)

3.

4.

At Roberts Bank, expanding the existing Deltaport container terminal is not an option for two main reasons. First, Fisheries and Oceans Canada has **prohibited** further land reclamation inland from Deltaport, due to environmental sensitivity. The graphic below shows how further expansion at Deltaport would have to be built almost entirely in the sensitive intertidal habitat within the inter-causeway area. Second, expanding Deltaport would mean one terminal operator would control a significant majority of the market for container terminal services. [emphasis added]

Overview and Rationale, October 2018, page 21 (CEAR #1341)

5.	<p>MR. ARMSTRONG: So if you look at page 21 of the overview, there's an explanation as to why the expansion at Deltaport was not an option. And the rationale gives two reasons. It says expanding Deltaport is not an option for two main reasons. <u>First, Fisheries and Oceans Canada has prohibited</u> further land reclamation inland from Deltaport. And the second one is it's a competition issue. It says Deltaport would mean one terminal operator, etc., and in proposing RBT2, there would be a different operator and a different level of competition. So we say on the issue of alternatives and alternative means. With respect to alternative means, again, a number of alternative means of carrying out the project have been looked at. [emphasis added]</p>	<p>May 14, 2019 Procedural Motions Session, page 50-51 (CEAR #1728)</p>
6.	<p>MR. STEWART: So the letter says that, and it's a letter from the Minister -- the letter from the Minister says the work will not be permitted. So the answer is we did not go and do additional studies because if the work would not be permitted, it was irrelevant whether or not we did studies because it's in the Minister's discretion as to whether to permit or not.</p>	<p>May 15, 2019 General Hearing Session, page 153 (CEAR #1738)</p>
7.	<p>MR. STEWART: But in any event, we have <u>no information</u> on the record, nor did we at the time that we moved this project forward, <u>that makes any difference to the assertion in 2003 from the Minister of Fisheries that that work was not permissible.</u> [emphasis added]</p>	<p>May 31, 2019 Alternative Means Public Hearing Session, page, 3829 (CEAR #1859)</p>
8.	<p>MR. STEWART: In addition, from a regulatory risk perspective, at that time, prior to the new Fisheries Act on the west coast there was an <u>absolute prohibition</u>. And whether it was policy or just practice, but it was absolute on the ground that you could not destroy compensatory habitat. And the compensatory habitat -- and remember at the time we're talking about at this point is 2010-2011 when we first did this work, the compensatory habitat for the Third Berth Project was within the footprint of the E1 project. So at that point, from a regulatory risk perspective, there was simply no way to do that project. [emphasis added]</p>	<p>May 31, 2019 Alternative Means Public Hearing Session, page, 3838 (CEAR #1859)</p>
9.	<p>MR. STEWART: The Vancouver Fraser Port Authority has undertaken considerable analysis of both alternatives to and alternative means of carrying out the Roberts Bank Terminal 2 Project. We were pleased to have an opportunity to demonstrate to the Panel how thoroughly we have evaluated options to meet demand for container trade and then how we have refined the project that is the subject of this environmental assessment process to make it the best project possible.</p>	<p>May 31, 2019 Alternative Means Public Hearing Session, page, 3908 (CEAR #1859)</p>

10.	MR. STEWART: DFO has never indicated that their direction has changed, nor have they done so in any of their submissions to the Panel. ⁹	May 31, 2019 Alternative Means Public Hearing Session, page, 3910 (CEAR #1859)
11.	As addressed, at the time the Hemmera Review Report was commissioned, it was the VFPA's understanding that the DP4 project was being advanced as a project that, if possible, would be advanced subsequent to RBT2, and not as an alternative means of delivering RBT2. The RBT2 Project is referenced in section 3.5.3 of the Hemmera Review Report, but there is no mention of the DP4 project being an alternative means of delivering the project. This reflects the VFPA's understanding that this was not the purpose of commissioning the report, but instead, the purpose was to determine whether the DP4 project may be possible as a potential subsequent project, if further capacity was required.	Undertaking #51, from the Vancouver Fraser Port Authority - Response to Exhibits 38, 39, 40, and 41 from GCT Global Container Terminals, page 4 (CEAR #1932)
12.	The DP4 project is not an alternative means of carrying out the Project. There are two reasons for this. First, they are different projects with different proponents and different intended outcomes. Second, the VFPA does not consider construction of additional capacity in the intertidal area to be technically feasible.	VFPA Closing Submission, page 44 (CEAR #2045)
13.	Second, the VFPA does not consider the DP4 project to be technically feasible given the regulatory risk associated with development in the intertidal area, identified previously as Option E1.	VFPA Closing Submission, page 45 (CEAR #2045)
14.	Based on a comparative analysis of potential environmental effects to key valued components, the VFPA determined that the proposed location and configuration would have the least environmental effects due to its location in subtidal waters and because it had the smallest marine footprint (including requiring the smallest dredging footprint). While this option was neither the technically simplest nor least expensive option, the VFPA selected it as the preferred means because of its environmental advantages.	VFPA Closing Submission, page 46 (CEAR #2045)
15.	GCT claimed several times that the DP3 Project was constructed in the E1 area. This is not true. As shown in EIS Figure 5-2, and as discussed in the VFPA's presentation on alternative means, the DP3 Project and the E1 option are adjacent to each other but distinctly different footprints. Following direction from regulators during the DP3 regulatory review process, the VFPA significantly reduced the area of the DP3 Project and did not construct any terminal infrastructure in the E1 area. In fact, the VFPA constructed significant compensatory habitat in the E1 area as part of the DP3 Project. Further terminal development in the E1 area would likely result in the destruction of that compensatory habitat.	VFPA Closing Submission, page 47 (CEAR #2045)

⁹ On May 22, 2019, DFO indicated: "And again, I just want to reference that the letter indicated that particular project based on a footprint and a time and a review, the legislation then, that development would not have been approved or issued an authorization. The letter was not meant to indicate that there was any kind of blanket statement in terms of any development in that area. It was very specific to that project. So -- and again, each project is weighed and based on the application received, the current legislation and the current policies. So in future, should a project come in, DFO will review the application and make a decision based on the information that's presented to us. (CEAR #1797, page 1606)"

16.	The DP4 PPE submission to the VFPA and these preliminary reports clearly relate to a separate project, and not an alternative means of carrying out the Project. The Review Panel's Terms of Reference are clear that it's mandate is to assess RBT2, including an assessment of alternative means, not alternative projects. For the reasons set out above, the VFPA does not consider expansion in the intertidal area to be technically feasible. As a result, the Review Panel should place no weight on GCT's submissions with respect to the DP4 project and need not consider the DP4 project further.	VFPA Closing Submission, page 47 (CEAR #2045)
17.	Throughout the environmental review of RBT2, the VFPA has continued to consider alternative means of carrying out RBT2.	VFPA Closing Submission, page 49 (CEAR #2045)
18.	Nothing in the submissions of GCT provides any foundation for the assertion that the alternative means consideration for RBT2 was not adequate.	VFPA Closing Submission, page 49 (CEAR #2045)
19.	Location of the Project (a new three-berth terminal with a new operator) within the intertidal area on the east side of the causeway (the E1 area rejected by the Minister in 2003) would be inconsistent with the 2004 MOA.	VFPA Closing Submission, page 51 (CEAR #2045)
20.	The VFPA fully and properly considered the alternative means of delivering this preferred project, including design and construction options. GCT's DP4 project is not an alternative means of delivering the Project.	VFPA Closing Submission, page 53 (CEAR #2045)