



Note de service Memorandum

A/TO: Lisa Walls
A/Manager
PPAD, EPB
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PRÉPARÉ PAR/
PREPARED BY: Adam La Rusic
SÉCURITÉ/
SECURITY: UNCLASSIFIED /
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DE/
FROM: Adam La Rusic
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DOSSIER/FILE: 2-4191-11-1
DATE: 10/21/2004

OBJET/
SUBJECT: **Deltaport Third Berth Expansion - Scope of the Cumulative Effects Assessment**

This memorandum states my position on the scope of the cumulative effects assessment for the proposed Deltaport Third Berth Expansion project. Specifically, it argues that the proposed Terminal 2 project should be included in the cumulative effects assessment and, if Terminal 2 is removed from the scope of the cumulative effects assessment, then the scoping document should be sent back out for public consultation.

The relevant legislation and policy are:

- *The Canadian Environmental Assessment Act.*
- *Operational Policy Statement: Addressing Cumulative Environmental Effects under the Canadian Environmental Assessment Act.* Canadian Environmental Assessment Agency. March 1999. OPS-EPO/3- 1999.
- *Cumulative Effects Assessment Practitioners Guide Prepared for: Canadian Environmental Assessment Agency.* February 1999. Prepared by: The Cumulative Effects Assessment Working Group (Hegmann, G., C. Cocklin, R. Creasey, S. Dupuis, A. Kennedy, L. Kingsley, W. Ross, H. Spaling and D. Stalker) and AXYS Environmental Consulting Ltd.

All of these references are available on the Canadian Environmental Assessment Agency website.

Scope of Cumulative Effects Assessment

The relevant part of the Act is paragraph 16(1)(a) of the Act, which states:

"Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the environmental effects of the project, including ... 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."

The Operational Policy Statement states that it was "issued by the Canadian Environmental Assessment Agency ... to provide clarification and guidance to responsible authorities (RAs) on how cumulative environmental effects should be considered in environmental assessments conducted under the *Canadian Environmental Assessment Act*" and is the senior policy document, apart from the legislation, of the references listed above.

The Operational Policy Statement reads that projects which are "certain" or "reasonably foreseeable" should be considered in a cumulative effects assessment. Projects that are "hypothetical" may be considered.

The Practitioners Guide (page 37) defines "certain" as:

- The action will proceed or there is a high probability the action will proceed;
- intent to proceed officially announced by proponent to regulatory agencies;
- submission for regulatory review is imminent;
- currently under regulatory review for approval; and,
- approved.

"Reasonably foreseeable" is defined as:

- The action may proceed, but there is some uncertainty about this conclusion;

- Not directly associated with the project under review but may proceed if that project is approved;
- Identified in an approved development plan in which approval is imminent;
- Identified in an approved development plan; and
- Directly associated with the project under review, but is contingent upon its approval

"Hypothetical" is defined as:

- There is considerable uncertainty whether the action will ever proceed;
- Conjectural based on currently available information; and,
- Discussed on a conceptual basis.

It is critical to note that these descriptors apply to whether or not the project will proceed, not to the level of detail of design that the proposed project has reached.

Based on the above it is clear that Terminal 2 would fall into the category of "certain." The proponent has officially stated to regulatory agencies of their intent to proceed, notably a Letter of Intent to proceed with the environmental assessment of the project from the proponent to the BC Environmental Assessment Office (BC EAO) on February 23, 2003. In their most recent draft correspondence to Fisheries and Oceans Canada, they have stated that submission for regulatory review of Terminal 2 is imminent.

Note that representatives of Fisheries and Oceans Canada stated in an October 15, 2004 conference call with Environment Canada and the Canadian Environmental Assessment Agency conference call that the Letter of Intent to the BC EAO and the BC EAO "Section 10" response were irrelevant as the BC EAO is a provincial agency. However, the Practitioner's Guide makes no distinction between regulatory agencies of federal, provincial or regional jurisdiction.

Material provided by the Terminal 2 proponent (VPA), including promotional material, press releases, public statements by senior managers, and website materials all indicate that it is intent on proceeding with the Terminal 2 project.

The proponent has publicly stated that several engineering and environmental studies have been or are being undertaken with respect to Terminal 2.

Terminal 2 is still in its early design stages, however it is also evident that the project is "certain" to proceed, based on definitions provided in Canadian Environmental Assessment Agency policy documents.

One of the arguments used in favour of removing Terminal 2 from the cumulative effects assessment is that 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 assessments, and would eventually defeat the purpose of including future projects in the cumulative effects assessment.

Policy clearly indicates that Terminal 2 should be included by a Responsible Authority in a cumulative effects assessment.

Need for Further Public Consultation

The Fisheries and Oceans Canada position that it is not necessary to go back to the public if T2 were removed from the scope of the assessment due to its uncertainty does not accord with either the intent or the letter of the *Canadian Environmental Assessment Act* (CEAA).

Commitment to public participation is a key feature of CEAA as stated in the preamble:

"the Government of Canada is committed to facilitating public participation in the environmental assessment of projects to be carried out by or with the approval or assistance of the Government of Canada and providing access to the information on which those environmental assessments are based;"

Specifically, the legislation requires, for a comprehensive assessment, that the public be *consulted* on the scope of the project. Subsection 21(1) of the *Act* states:

"Where a project is described in the comprehensive study list, the responsible authority shall ensure public consultation with respect to the proposed scope of the project for the purposes of the environmental assessment, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of the comprehensive study to address issues relating to the project."

The removal of T2 from the scope of the assessment is clearly a change in the "factors proposed to be considered in [the] assessment", as Terminal 2 was explicitly mentioned in the original scoping document upon which the public provided comments. Many public responders specifically mentioned Terminal 2 in their comments.

The Act states that the public must be consulted, as opposed to merely informed. Valid consultation must be meaningful. It is my opinion that removing a major factor from the environmental assessment scope without reissuing the scope for public comment would not be meaningful consultation on the scope of the project.

If T2 were removed from the scope of the assessment for any reason, that *Act* would require that Responsible Authorities consult with the public on this change.

Thank you for the opportunity to comment on this issue. Please contact me at (604) 666-8342 if you have any questions.

Sleightholme,Elena [PYR]

From: Walls,Lisa [PYR]
Sent: October 18, 2004 3:01 PM
To: LaRusic,Adam [PYR]
Subject: RE: Deltaport - T2 and Cumulative Effects

I just spoke with Darrell. He confirmed that we will receive a copy of the draft letter for review. Apparently VPA was presented with 3 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 Comp Study without T2 but no need to consult on the change. I said this was a bit more definitive than what we had discussed on Friday. Lisa

-----Original Message-----

From: LaRusic,Adam [PYR]
Sent: October 18, 2004 2:18 PM
To: Walls,Lisa [PYR]
Subject: Deltaport - T2 and Cumulative Effects

Hi Lisa,

I got a phone message from Georgina this morning who sat in on the call between VPA and DFO on the issue of T2 and the cumulative effects assessment. According to Georgina, the outcome is that VPA will be drafting a letter for review by DFO legal and EC on the issue. More on this after I speak with Georgina in person tomorrow.

Cheers
Adam

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Sleight, Elena [PVR]

From: Walls, Lisa [PVR]
Sent: October 21, 2004 11:35 AM
To: LaRusic, Adam [PVR]; McPherson, Morag [NCR]; Waters, Susan [NCR]
Cc: Hobby, Bev [PVR]
Subject: FW: draft letter clarifying the status of Terminal 2

Here is a draft letter from VPA explaining the likelihood of T2. I seek your advice on whether this letter would provide sufficient rationale to remove T2 from the cumulative effects assessment for Deltaport Third Berth Expansion Project, on the basis that it is hypothetical, rather than certain or reasonably foreseeable. Also, DFO has advised VPA that, with such a letter, T2 could be removed from the scoping document without the need to go back for public consultation. Are you in agreement with this? Lisa

-----Original Message-----

From: Desjardin, Darrell [mailto:Darrell.Desjardin@portvancouver.com]
Sent: October 20, 2004 8:31 AM
To: Kim Houston (E-mail)
Cc: Scott, Paul [CEAA]; Naismith, Georgina [CEAA]; Jeff Johansen (E-mail); Walls, Lisa [PVR]; McLaughlin, Patrick; Griggs, Mark
Subject: draft letter clarifying the status of Terminal 2

Kim,

Please find attached a copy of a draft letter clarifying the status of Terminal 2. I am just wondering whether this letter should be jointly addressed Environment Canada as well as the other RA? As discussed I have included everyone on the cc list that was present on the Monday conference call as well as Lisa Walls from Environment Canada in the region.

If you have any questions please feel free to give me a call.

Regards,

Darrell

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10/02/2005