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29 May 2012

Ken Shaw  
Via email

Dear Mr. Shaw:

**Re: Westview Terminal Environmental Assessment**

You have asked me to examine whether the current environmental assessment of the proposed pellet plant at the Westview terminal site should be conducted by way of a comprehensive study assessment, or whether the current screening assessment being conducted is sufficient under the *Canadian Environmental Assessment Act*.

**Brief Answer**

There is a strong argument that the assessment should be conducted as a Comprehensive Study Assessment. Section 28 of the *Comprehensive Study List Regulations* clearly indicates that marine terminals of more than 25,000DWT will generally require a comprehensive study assessment, subject to two exceptions. While the Prince Rupert Port Authority has asserted, without discussion, that both of these exceptions apply, a more detailed review suggests that neither clearly applies. The Port Authority should be asked to provide a written decision, with reasons, on whether or not a comprehensive study is required.

**Analysis**

The current environmental assessment is being conducted by the Prince Rupert Port Authority, pursuant to the *Canadian Environmental Assessment Act*, including, notably, the Canada Port Authority Environmental Assessment Regulation (CPAEAR), and the *Comprehensive Study List Regulations*.

Under the CPAEAR, (and under the current *Canadian Environmental Assessment Act*) a comprehensive assessment – more detailed than this screening assessment – is required if a project is described in the *Comprehensive Study List Regulations*, section 28 of the which does list large-scale port facilities, including:

**28.** The proposed construction, decommissioning or abandonment of ...

(c) a marine terminal designed to handle vessels larger than 25 000 DWT unless the terminal is located on lands that are routinely and have been historically used as a marine terminal or that are designated for such use in a land-use plan that has been the subject of public consultation.<sup>1</sup>

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<sup>1</sup> Comprehensive Study List Regulations, SOR-94/638, s. 28.

The Comprehensive Study List Regulations defines Marine Terminal as follows:

*“marine terminal”* means

- (a) an area normally used for berthing ships and includes wharves, bulkheads, quays, piers, docks, submerged lands, and areas, structures and equipment that are
  - (i) connected with the movement of goods between ships and shore and their associated storage areas, including areas, structures and equipment used for the receiving, handling, holding, consolidating, loading or delivery of waterborne shipments, or
  - (ii) used for the receiving, holding, regrouping, embarkation or landing of waterborne passengers; and
- (b) any area adjacent to the areas, structures and equipment referred to in paragraph (a) that is used for their maintenance.

It does not include

- (c) production, processing or manufacturing areas that include docking facilities used exclusively in respect of those areas; or
- (d) the storage facilities related to the areas referred to in paragraph (c); (terminal maritime)

The new facility will exceed this 25,000 DWT limit, handling up to 75,000 DWT. However, the Screening report asserts, with no real discussion, that it meets the other exceptions contained in s. 28(c):

*The Project as designed is located on waterfront industrial zoned lands that have been routinely and historically used as a marine terminal and is designated for that use in a land use plan that has been subject to public consultation. The proposed Project therefore does not meet the criteria for requiring a comprehensive study under the Comprehensive Study List Regulations.<sup>2</sup>*

The Report therefore claims both of the exemptions from a Comprehensive study that are implicit in section 28(c):

- Located on lands that are routinely and have been historically used as a marine terminal; or
- Are designated for use as a marine terminal larger than 25,000 DWT in a land-use plan that has been the subject of public consultation.

Unfortunately the Port Authority seems to assert that each exemption applies, rather than examining it in detail. While a superficial examination might imply that one or both apply, we believe that a more detailed look reveals that this conclusion is legally problematic.

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<sup>2</sup> Pinnacle EA Report, p. 4.

## **Routinely and have been historically**

That the Westview Terminal site has been historically used as a marine terminal is not in question. However, you advise that its primary use for this purpose ended in the mid-1980s. Since then it has been used, as I understand it, by tug boat companies and by a marine sea-food company.

“Routinely” does not seem to be defined. The *Merriam Webster* dictionary defines it as “of a commonplace or repetitious character”. However, when connected with historic use, in the Regulation, it seems likely that “routine” includes an element of repetitious use up to and including recent times.

The exemption is presumably based on the assumption that a more detailed assessment is not required where people and ecosystems are accustomed to the activities of a marine terminal. But this is clearly not the case if the use of terminal has ceased to be routine, through non-use of the lands for that purpose in recent years.

Certainly, if the site has not been used as a marine terminal since the 1980s, we do not feel that its use for that purpose can any longer be said to be routine.

The Westview Terminal is currently closed and not used as a marine terminal, a fact which is acknowledged in the *Prince Rupert Port Authority 2020 Land Management Plan*: “The existing Westview terminal is in poor condition and remediation or rebuilding will be essential to allow this facility to reopen.”<sup>3</sup>

At present the Port Authority has not actually articulated its reasons for believing that the use of the facility as a marine terminal has been “routine”, so it is difficult to comment in full. We would suggest that the onus is on the Authority to provide reasons that the land is, in its view, used as a marine terminal to the present day.

It is possible that the Port Authority might attempt to argue that other, much smaller, operations which continue on the site fall within the definition of “marine terminal.”

We note that on their face, the tugboat operations do not appear to fall within the definition of “marine terminal”.

Similarly, the facility run by Diep Seafood Products, according to its website, involves the processing and freezing of fish and seafood products, would appear to be caught by 28(c) and (d) (and therefore excluded from the definition of marine terminal). We also understand that this operation is located at the far end of the Westview Terminal lands and is not located on the specific area being considered for development as a pellet terminal.

We believe that the exemptions from the definition of “marine terminal” should be interpreted narrowly. It is absurd to assume that a very small-scale operation that might technically be a terminal should remove the need for an in depth examination the large-scale industrial facility being considered. We would argue that the intent of the exemption is to address circumstances where there has been large-scale use of a property as a marine terminal up to and including the present day – and not a circumstance, as here, where the current use bears no resemblance to the proposed use.

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<sup>3</sup> 2020 Land Management Plan, p. 35.

## Designated for such use

The other basis for refusing to hold a comprehensive study assessment for a marine terminal of this size is the claim that these lands have been “designated for such use in a land use plan that has been the subject of public consultation.”

The land use plan in question in this case is the 2020 Land Management Plan, which does discuss the future of the Westview terminal, among other areas.<sup>4</sup> It describes the “long term potential” use contemplated for these lands as: “Cruise ship terminal, mini bulk terminal, or mixed use development.”<sup>5</sup>

Similarly, it explains that

Other inner harbour locations suffer from limited back up lands or support storage and ancillary uses and are thus best suited to specialty shipping and mixed use development that can also take advantage of nearby commercial services. The existing Westview terminal is in poor condition and remediation or rebuilding will be essential to allow this facility to reopen. Care will be required given the foreshore environmental sensitivity which will necessitate appropriate mitigation/remediation. The limited availability of upland properties within the inner harbour suggests that future development here is best suited to smaller scale uses. Opportunities exist for specialty cargo handling operations, cargo storage and transfer, short sea shipping, bulk commodities with limited needs for back up lands and services catering to the commercial fishery.<sup>6</sup>

These passages do contemplate the renewed use of the Westview Terminal lands for some type of marine terminal but apparently not, it should be noted, for the type of large-scale cargo terminal being contemplated in the current EA.

The Pinnacle EA report states:

The proposed Westview Terminal Redevelopment Project will be designed specifically to receive wood pellets from rail cars, to store wood pellets in metal silos, and to load wood pellets onto bulk cargo ships bound for overseas markets in Western Europe and Asia.<sup>7</sup>

It also explains that the Terminal, once finished, will be able to accommodate vessels of up to 75,000 DWT.<sup>8</sup>

The EA report goes on to assert that this type of international shipment of pellets on bulk cargo ships meets the “general description of a mini-bulk terminal, and would be compatible with the

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<sup>4</sup> We understand that you have some reservations about the adequacy of the public consultation which occurred, and, indeed, it is difficult to consult members of the public about possible development in the abstract, at a time when no particular development has been proposed. That being said, we assume for the purposes of this letter that the consultation complied with the relevant legal requirements.

<sup>5</sup> 2020 Land Management Plan, above, p. 41.

<sup>6</sup> Ibid., p. 41.

<sup>7</sup> Pinnacle EA Report, above, p. 3.

<sup>8</sup> Ibid., p. 8.

long-term potential use of the site described in the Land Use Management Plan.”<sup>9</sup> No definition of “mini-bulk” is provided in reaching that conclusion.

We note that the term “mini-bulk” is not defined in the 2020 Land Management Plan. However, in that report the concept was clearly presented as closely short-sea shipping, and definitely not used in relation to international shipping.

We further note that various industry sources define “mini-bulk carriers” as being very significantly smaller than the 75,000 DWT vessels to be accommodated by this development. For example:

*Mini bulk carriers or MBCs are relatively small bulk carriers usually have capacity between 500 – 2500 tons and are used typically used for coastal trading.*<sup>10</sup>

**Mini Bulk Carrier** (100 - 130m length , less than 10m draft & 3000 ~ 23,999 DWT)  
*Employed in coastal trade, serving as feeder vessels to large ships. Their main trade consists of short sea voyages, carrying limited quantities of bulk cargoes generally to smaller ports without restriction on size of vessels.*<sup>11</sup>

These definitions corroborate the view that mini bulk shipments are not generally thought to include trans-pacific or further shipping.

On its face, then, there would have been nothing in the 2020 Land Management Plan or its consultations which would have identified for residents of properties close to the Westview Terminal site that they should be anticipating a project even remotely as large as the current pellet terminal proposal.

In our view the 2020 Land Management Plan does not indicate any clear intention to designate the Westview Terminal as a marine terminal of over 25,000 DWT, and there was certainly nothing in the plan that would suggest that public consultation occurred on the possible use of the site as a terminal on that scale. Indeed, the plan as a whole gives the impression that the property is likely to be used only for smaller, less intrusive projects.

To the extent that section 28 ties this exemption to public consultation, the courts are likely to consider whether the land use plan which is relied upon was sufficiently detailed to allow the public to understand the types of development contemplated for the site, and to make appropriate comments. This was clearly not the case in the present case. There is nothing in the Land Management Plan which would indicate to members of the public that a project of the size now being proposed was being contemplated.

## **Conclusion**

In our view the onus is on the Port Authority to demonstrate why this project, which clearly exceeds the 25,000 DWT level which would ordinarily require a comprehensive study under section 28 of the Comprehensive Study Regulations should not require such an assessment. To date, the Pinnacle EA has asserted without any discussion, identification of relevant definitions

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<sup>9</sup> Ibid., p. 29.

<sup>10</sup> <http://www.brighthub.com/engineering/marine/articles/11736.aspx>, last accessed 29 May 2012.

<sup>11</sup> <http://www.bulkcarrierguide.com/size-range.html>, last accessed 29 May 2012. See also

or criteria or other information, that the exemptions contained in section 28 apply to the project, and therefore that only a screening level assessment is required.

We disagree, for the reasons above, and encourage you to ask the Port Authority for a response and for a clear written decision as to whether or not a comprehensive study should be required.

Sincerely,

A handwritten signature in cursive script, appearing to read "Andrew Gage".

Andrew Gage,  
Staff Lawyer