

NO: **R185**

COUNCIL DATE: **October 20, 2014**

REGULAR COUNCIL

TO: **Mayor & Council**

DATE: **October 20, 2014**

FROM: **City Solicitor**

FILE: **8710-01**

SUBJECT: **Fraser Docks Coal Transfer Facility – Application for Intervener Status**

RECOMMENDATION

It is recommended that Council authorize and approve the City of Surrey applying for Intervener status in Federal Court Action No. T-1072-14, being an application for judicial review of the decision of Vancouver Port Authority to issue a Project Permit to construct and operate a Direct Transfer Coal Facility in Surrey.

INTENT

The intent of this report is to seek instructions from Council to file a Notice of Motion seeking Intervener status in Federal Court Action No. T-1072-14.

BACKGROUND

As Council is aware, Vancouver Fraser Port Authority (the "Port") made a decision to issue Project Permit 2012-072 (the "Permit" or "Permit Decision") to Fraser Docks Limited Partnership (the "Fraser Surrey Docks") on August 21, 2014. The Permit Decision authorizes Fraser Surrey Docks to construct and operate a Direct Transfer Coal Facility in Surrey.

An application seeking judicial review of the Permit Decision has been made by the Communities and Coal Society, Voters Taking Action on Climate Change, Christine Dujomovich and Paula Williams (the "Applicants") and filed in Federal Court by Ecojustice Canada Society, counsel for the Applicants. Among other things, the application challenges the Permit Decision on the basis of the Port's failure to consider certain environmental effects as required by the Canadian Environmental Assessment Act, 2012, SC 2012, c. 19, s.52 (the "CEAA 2012") and that the conduct of the Port and its officers and staff during the Project review process violated the principles of natural justice, procedural fairness and the rule against bias. Attached as Appendix "I" is a copy of the Notice of Application filed on behalf of the Applicants by Ecojustice.

At the recent 2014 UBCM Convention the following resolution was endorsed as amended by the membership:

B92 Environmental Assessment for Coal Transport

Therefore be it resolved that a comprehensive environmental and health impact assessment for the shipment of thermal coal by rail and over coastal waters be conducted;

And be it further resolved that an appropriate federal and/or provincial agency be named to monitor rail transport, barge transfer and transport of thermal coal, over coastal waters to ensure oversight and implementation of environmental and health protection measures.

DISCUSSION

The determination and issuance of the Permit requires compliance with the CEAA 2012 which requires that the Port determine that the Project is not likely to cause significant adverse environmental effects. This includes a consideration of environmental effects identified in s.5 of the CEAA 2012. Section 5(2)(a) of CEAA 2012 requires the Port to consider a change caused to the environment which is directly linked or necessarily incidental to the decision to issue a permit. The Notice of Application filed by Ecojustice on behalf of the Applicants, sets out that the Port acted without jurisdiction, beyond its jurisdiction and erred in law in making the CEAA determination by excluding or not considering relevant environmental effects.

Concerns have been raised about local environmental and health impacts as well as global impacts of the Project. These include concerns related to dust from train movements and coal transfer operations, chemicals used in train cars and barges for dust suppression, soil and water contamination and risks related to fires, explosions, spills and collisions. Concerns have also been raised related to local engine emissions from trains and tug boats and global Greenhouse Gas Emissions from burning the shipped coal. These concerns were not properly considered by the Port as relevant environmental effects in its Permit Decision.

As a matter of common law, the determination and issuance of the Permit also requires that the conduct of the Port and its officers and staff be in compliance with principles of natural justice, procedural fairness and the rule against bias. The Notice of Application attached as Appendix "I" also identifies the facts relied upon by the Applicants in support of this ground of attack on the Permit Decision.

Section 109 of the Rules of Federal Court allows the Court to consider a motion by any person to intervene in a proceeding:

Intervention

Leave to intervene

109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.

Contents of notice of motion

(2) Notice of a motion under subsection (1) shall

- (a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and*
- (b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.*

Directions

(3) In granting a motion under subsection (1), the Court shall give directions regarding

- (a) the service of documents; and*
- (b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.*

Pursuant to this Rule, the City of Surrey may seek Intervener status which may be granted with leave of the Court. If the Court grants leave, it will give directions regarding the role of the City of Surrey as an intervener. By seeking intervener status, the City will be in a better position to advocate for proper consideration of environmental, health and safety risks associated with the Project.

CONCLUSION

It is recommended that Council authorize and approve the City of Surrey applying for Intervener status in Federal Court Action No. T-1072-14, being an application for judicial review of the decision of Vancouver Port Authority to issue a Project Permit to construct and operate a Direct Transfer Coal Facility in Surrey.

CRAIG MacFARLANE
City Solicitor

TC:ld

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LJD 10/14/14 9:57 AM

Appendix "I" - Notice of Application filed in Federal Court

APPENDIX "I"



Court File No. T-1972-14

FEDERAL COURT

BETWEEN:

COMMUNITIES AND COAL SOCIETY, VOTERS TAKING ACTION ON
CLIMATE CHANGE, CHRISTINE DUJMOVICH and PAULA WILLIAMS

Applicants

AND:

ATTORNEY GENERAL OF CANADA, VANCOUVER FRASER PORT
AUTHORITY and FRASER SURREY DOCKS LIMITED PARTNERSHIP

Respondents

APPLICATION UNDER SECTIONS 18 and 18.1 OF THE *FEDERAL COURTS
ACT*, RSC 1985, c F-7

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at **Vancouver, British Columbia**.


IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicants' solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the

Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: SEP 19 2014

Issued by:  **MODELISA HENNESSY**
REGISTRY OFFICER
AGENT DU GREFFE

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Vancouver Registry
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Vancouver, BC
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TO: **Courts Administration Service**
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VANCOUVER FRASER PORT AUTHORITY
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CANADA V6C 3T4

FRASER SURREY DOCKS LP
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Vancouver, BC V6C 2B5

APPLICATION

This is an application for judicial review of the decision of Vancouver Fraser Port Authority (the “Port”) to issue Project Permit 2012-072 (the “Permit” or “Permit Decision”) to Fraser Surrey Docks Limited Partnership (“Fraser Surrey Docks”), on August 21, 2014. The Permit Decision authorizes Fraser Surrey Docks to construct and operate a Direct Transfer Coal Facility in Surrey, British Columbia (the “Project”). This application is in respect of the Port’s failure to consider certain environmental effects as required by the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 (“CEAA 2012”) and that the conduct of the Port and its officers and staff during the Project review (the “Project Review Process”) violated the principles of natural justice, procedural fairness and the rule against bias.

The applicants make application for:

1. An order or orders:
 - (a) declaring that the Port erred in its determination under subsection 67(a) of the *CEAA 2012* that the Project would not cause significant adverse environmental effects (the “CEAA 2012 Determination”);
 - (b) declaring that the Port failed to consider changes to the environment that will be caused by the combustion of the coal that will be exported outside Canada, contrary to the requirements of subsection 5(2)(a) of *CEAA 2012*;
 - (c) declaring that the Port and its officers and staff failed to observe the principles of natural justice, procedural fairness and the rule against bias, in the Project Review Process;

- (d) quashing or setting aside the Permit;
 - (e) quashing or setting aside the *CEAA 2012* Determination;
 - (f) referring the permit application back to the Port to be determined in a manner that complies with the principles of natural justice, procedural fairness, and the rule against bias, and such other directions as the Court considers appropriate; and
 - (g) referring the permit application back to the Port to reconsider the Project in accordance with subsections 5(2)(a) and 67(a) of the *CEAA 2012*.
2. In the event that this application is dismissed, an order that the Applicants shall not be required to pay costs to the Respondents pursuant to Rule 400 of the *Federal Courts Rules*.
 3. Costs.
 4. Such further and other relief as this Honourable Court may deem just.

The grounds for the application are:

The Parties

1. The applicant Communities and Coal Society (“**Communities & Coal**”) is a non-profit society registered under British Columbia *Society Act* RSBC 1996, c 433 (“*Society Act*”). Communities & Coal was created as a result of genuine community concern about the detrimental environmental and health effects of the Project. Communities & Coal consists of persons who live in the communities in and around where the Project would operate and who are directly affected by the Permit Decision.

2. The applicant Voters Taking Action on Climate Change (“VTACC”) is a non-profit society registered under the *Society Act*. VTACC has a genuine interest in encouraging action on climate change and is particularly concerned with the climate, environmental and health impacts from the combustion of coal.
3. The applicant Christine Dujmovich (“**Ms. Dujmovich**”) resides in Surrey adjacent to the Project site and is directly affected by the environmental and health impacts of the decision to issue the Permit.
4. The applicant, Paula Williams (“**Ms. Williams**”) resides in Surrey and is directly affected by the environmental and health impacts of the decision to issue the Permit.
5. The Port does business as Port Metro Vancouver and is established by Letters Patent pursuant to the *Canada Marine Act* SC 1998, c 10.
6. Fraser Surrey Docks Limited Partnership is the proponent of the Project and a limited partnership registered in British Columbia on December 27, 2000. Fraser Surrey Docks Limited is the general partner of Fraser Surrey Docks Limited Partnership.

The Project

7. On June 13, 2012, Fraser Surrey Docks submitted a project permit application (the “**Permit Application**”) to the Port for the construction and operation of the Project.
8. The Permit Application seeks to develop a direct transfer coal facility (the “**Facility**”) that would export up to four million metric tonnes of thermal coal per year.

9. The coal will be shipped by train from Wyoming's Powder River Basin to the Facility for export and combustion outside of Canada. At the Facility, the coal will be transferred from trains to barges. The loaded barges will be towed by tug boats down the Fraser River and then north to Texada Island where the coal will be stored until transferred to deep-sea vessels and exported.
10. Section 27 of the *Port Authorities Operations Regulations*, SOR/2000-55 issued under the *Canada Marine Act*, empowers the Port to issue permit authorizations to carry out certain activities within the Port's jurisdiction.

The Project Review Process

11. The Port's Guide to Project Review guided the review of the Project. The Project Review Process occurred between June 2012 and August 2014. The Project Review Process addressed the issuance of the Permit and the *CEAA 2012* Determination.
12. A Planning Review and an Environmental Assessment Procedure were part of the Project Review Process. The Port also considered an environmental impact assessment (the "EIA") submitted by Fraser Surrey Docks. Once the Planning Review and the Environmental Assessment Procedure were completed, a Project Review Report was prepared.
13. The Project Review Process includes a Project Review Committee to consider, recommend or decide on the Permit application.
14. There was significant and increasing public concern over the course of the review, including frustration with the Project Review Process. Between November 2012 and April 2013, the Port had received approximately 815 emails and letters expressing concerns about, and opposition to, the Project.

15. Throughout 2013, Communities & Coal and VTACC organized meetings, public forums, door to door petitions and community events to raise awareness of the climate, environmental and health impacts of the Project.
16. The applicants were among the many concerned stakeholders, including regional health authorities and other regional government bodies, who made submissions to the Port during the Project Review Process.
17. In their comments to the Port, the applicants raised concerns about climate change, environmental, and health impacts associated with the Project. These concerns included the manner in which the Project Review Process was conducted, alleging that the principles of natural justice, procedural fairness and the rule against bias had been breached.
18. On November 18, 2013, the Port released the EIA for a 30 day public comment period. Over 3,000 comments were submitted, the majority of which expressed concern about the Project.
19. On August 21, 2014, the Port issued the Permit to Fraser Surrey Docks. At the time that the Permit was issued, the Port also published related decision documents on its website, including a Project Review Report, an Environmental Review Decision Statement, a Human Health Risk Assessment, a Mitigation Strategy Description and a Public Comments Response Memo.
20. The Project Review Report does not identify the members of the Project Review Committee. The Project Review Report recommended that the Project be approved subject to identified conditions.
21. The Port did not provide any documentation regarding its approval of the Project Review Report's recommendation. After receiving the Project Review Report the

Port issued the Permit, which was signed by Port President and Chief Executive Officer Robin Silvester.

Grounds of Review – the conduct of the Port and its officers and staff violated the principles of natural justice, procedural fairness and the rule against bias

22. In exercising its statutory and administrative duties under *CEAA 2012* and the *Canada Marine Act*, the Port and its officers and staff failed to adhere to the principles of natural justice, procedural fairness and the rule against bias that it was required by law to observe.
23. The Port has a Code of Conduct for Directors and Officers (the “**Code of Conduct**”) found in the Port’s Letters Patent. Section 1.2(c) of the Code of Conduct emphasizes the principle that public confidence and trust in the integrity and impartiality of the Port may be as equally compromised by the appearance of a conflict as with an actual conflict.
24. Port officers and staff, including Robin Silvester, Peter Xotta and Greg Yeomans, made comments violating the rule against bias at various points during the review. The comments indicate that these individuals predetermined the outcome of the Project Review Process, the Permit Decision and the *CEAA 2012* Determination.
25. The executive compensation program links the economic performance of the Port to the compensation of executives. The Project will increase revenues for the Port. Officers receive executive compensation through this program. The financial link between the Project and the pecuniary interests of officers tasked with making a determination under *CEAA 2012* and under the Project Review violated the rule against bias.
26. Prior to and throughout the Project Review Process, the Port and its officers and staff maintained institutional affiliations with and sponsorship of organizations.

These organizations were actively promoting coal and the coal industry.

27. Further, through the Project Review Process, the Port and its officers and staff collaborated closely with Fraser Surrey Docks and Fraser Surrey Docks' contractors regarding messaging and public relations about the Project. This included sharing information related to the activities of groups and individuals opposed to or with concerns regarding the Project.
28. On December 17, 2013 Communities & Coal and VTACC wrote to the Port, expressing concern over bias and alleging that the conduct of the Port and its officers and staff gave rise to a reasonable apprehension of bias.
29. On August 6, 2014, Communities & Coal and VTACC wrote again to the Port, alleging that the Port and its officers and staff, and the Project Review Committee gave rise to concerns about actual or perceived bias.
30. The Port has not responded to any of the bias allegations, despite having been expressly so advised by the applicants Communities & Coal and VTACC.
31. As a consequence of making its decision to issue the Permit, the Port and its officers and staff failed to comply with the principles of natural justice, procedural fairness and the rule against bias that it was required by law to observe.

Grounds of Review – the CEAA 2012 Determination excluded certain environmental effects

32. The Port acted without jurisdiction, beyond its jurisdiction and erred in law in making the CEAA 2012 Determination and in issuing the Permit.

33. Section 67(a) of *CEAA 2012* requires that the Port determine that the Project is not likely to cause significant adverse environmental effects prior to making the Permit Decision.
34. Environmental effects that must be considered under s. 67 are identified in section 5 of *CEAA 2012*.
35. Section 5(2)(a) of *CEAA 2012* requires the Port to consider a change caused to the environment which is directly linked or necessarily incidental to the decision to issue the Permit.
36. The Port received comments throughout the Project Review Process regarding issues related to climate change, global warming and the export of coal.
37. The Port acknowledges in its Environmental Review Decision Statement that the end use of the coal is a greenhouse gas ("**GHG**") generator.
38. The Project will transport up to 4 million tonnes of thermal coal for export and combustion in Asia.
39. Combustion will result in GHG emissions. Emissions associated with coal combustion are a major source of GHGs and present significant harm to the environment.
40. The combustion of 4 million tonnes of thermal coal is roughly equivalent to 1% of Canada's 2012 GHG emissions.
41. Both the Environmental Review Decision Statement and the Project Review Report contained the Port's *CEAA 2012* Determination. The Project Review Report concluded that the Project was not likely to cause significant adverse

environmental effects. The *CEAA 2012* Determination did not address the environmental effects of the end use of coal.

42. The Port acted without jurisdiction, beyond its jurisdiction and erred in law by failing to consider the end use of the coal as an environmental effect of the Permit Decision as required by s. 5(2)(a), and therefore erred in making its *CEAA 2012* Determination, and in issuing the Permit.

General Grounds of Review

43. The Applicants rely on sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, the *Federal Courts Rules*, SOR/98-106, and the *Canadian Environmental Assessment Act, 2012*, the *Canada Marine Act* and the *Port Authorities Operations Regulations*.

44. Such further and other relief and additional grounds as counsel may identify and this Honourable Court may consider.

This application will be supported by the following material:

1. The affidavit on behalf of VTACC to be served.
2. The affidavit on behalf of Communities & Coal to be served.
3. The affidavit of Christine Dujmovich to be served.
4. The affidavit of Paula Williams to be served.
5. The affidavit of Matt Horne to be served.
6. Such further affidavits as counsel may advise and this Honourable Court may allow.
7. The record before the Port when the Port made the decision at issue in this proceeding.

8. Such further and additional materials as counsel may advise and this Honourable Court may allow.

Rule 317 Request:

The applicants request that the Port, the Minister of the Environment, the Minister of Fisheries and Oceans, the Minister of Transport and the Canadian Environmental Assessment Agency send a certified copy of the following material not in the applicants' possession:

1. The record of materials considered or relied on by the Port in making the Permit Decision and the *CEAA 2012* Determination and all documents that could give rise to a violation of the rule against bias even if those documents were not directly before the Port.
2. The record of materials considered or relied on by the Project Review Committee in relation to the Project, the record of any decision or recommendation made by the Project Review Committee in relation to the Project, the membership and composition of the Project Review Committee for this Project, and all documents that could give rise to the issue of the rule against bias even if those documents were not directly before the Project Review Committee.
3. The record of correspondence and communications between the Port, any of its officers and staff, and government ministries or agencies in relation to the Project.
4. The record of correspondence and communications between the Port, any of its officers and staff and Fraser Surrey Docks or Fraser Surrey Docks' contractors, in relation to the Project and all documents that could give rise to a violation of the rule against bias even if those documents were not directly

before the Port.

5. The Corporate Scorecard referred to in the Port's 2013 Executive Compensation Program summary, any other Port policies relating to compensation, incentive plans, or bonuses for Port officers and staff, including information on whether and the extent to which these plans and policies are affected by the economic performance of the Port.
6. Information indicating the circumstances under which Port officers and staff are eligible for additional compensation, including the names of those officers and staff.
7. Any record of material establishing the economic benefits of the Project accrued through fees, leases, rents, or any other form of compensation to the Port.

Date: September 19, 2014



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