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Court File No. T-1065-23

FEDERAL COURT

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| FILED | FEDERAL COURT COUR FÉDÉRALE | DÉPOSÉ |
| | MAY 19 2023 | |
| | SORAYA PREMJI | |
| VANCOUVER, BC | | |

BETWEEN:

GEORGIA STRAIT ALLIANCE, DAVID SUZUKI FOUNDATION,
RAINCOAST CONSERVATION FOUNDATION and WESTERN CANADA
WILDERNESS COMMITTEE

Applicants

- and -

MINISTER OF ENVIRONMENT AND CLIMATE CHANGE, ATTORNEY
GENERAL OF CANADA, and VANCOUVER FRASER PORT AUTHORITY

Respondents

APPLICATION UNDER SECTION 18.1
of the *Federal Courts Act*, RSC 1985, c F-7

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicants. The relief claimed by the applicants appears below.

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 file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicants' solicitor or, if the applicants are self-represented, on the applicants, 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: MAY 19 2023

**ORIGINAL SIGNED BY
SORAYA PREMJI
A SIGNÉ L'ORIGINAL**

Issued by: _____
(Registry Officer)

Address of local office: Pacific Centre
P.O. Box 10065
701 West Georgia Street
Vancouver, BC V7Y 1B6

TO: MINISTER OF ENVIRONMENT AND CLIMATE CHANGE
CANADA and ATTORNEY GENERAL OF CANADA
Deputy Attorney General of Canada
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Ottawa, ON K1A 0H8

AND TO: VANCOUVER FRASER PORT AUTHORITY
Head Office
100 The Pointe, 999 Canada Place
Vancouver, BC V6C 3T4

APPLICATION

This is an application for judicial review of the Governor in Council's decision under s. 52(4) *Canadian Environmental Assessment Act, 2012 (CEAA 2012)* that the likely significant adverse environmental effects of the Vancouver Fraser Port Authority's (VFPA's) Roberts Bank Terminal 2 Project (**Project**) on the Southern Resident Killer Whales (**Southern Residents**) – an endangered species protected under the *Species at Risk Act*, SC 2002, c 29 (**SARA**) – and on their critical habitat are justified in the circumstances, as set out in Order in Council 2023-0330 (**Order in Council**), dated April 19, 2023, and as set out in the Minister of Environment and Climate Change Canada's (**Minister's**) April 20, 2023 decision statement (**Decision Statement**) under s. 54(1) of *CEAA 2012*, which also sets out the conditions in relation to the Project that the Minister established under s. 53 of *CEAA 2012* (together, the **Decision**).

The Decision purports to authorize under *CEAA 2012* Project effects that are unlawful under *SARA*: harm to and harassment of Southern Residents, destruction of Southern Resident critical habitat, and jeopardy to the Southern Residents' survival and recovery. The Decision also unreasonably fails to meet requirements in *SARA* to ensure all feasible measures are in place to lessen or avoid effects on the Southern Residents and their critical habitat.

THE APPLICANTS MAKE APPLICATION FOR:

1. An order or orders:
 - a. declaring that the Minister and Governor in Council unlawfully failed to ensure that the requirements of s. 79(2) of *SARA* were met before making the Decision;
 - b. declaring that the Governor in Council failed to satisfy the requirements of s. 77(1) of *SARA* before making the Decision;
 - c. declaring that the Governor in Council unlawfully deemed effects that are contrary to *SARA* to be justified under *CEAA 2012*;
 - d. declaring that the Minister and Governor in Council lacked the power or jurisdiction to make the Decision until the requirements of *CEAA 2012* and *SARA* were met;
 - e. in the nature of *certiorari* quashing or setting aside the Order in Council and Decision Statement, or setting them aside and referring them back to the Minister and Governor in Council for redetermination in accordance with the Court's directions;
 - f. prohibiting any person or body from issuing any other authorization for any aspect of the Project until the Minister and Governor in Council meet the requirements of *CEAA 2012* and *SARA*; and
 - g. quashing any such authorizations that are issued before the Court reaches a decision in this matter.
2. Costs of this application.

3. An order that the applicants shall not be required to pay costs to the respondents in any event of the cause, pursuant to Rule 400 of the *Federal Courts Rules*.
4. Such further and other relief as the applicants may request and this Honourable Court may see fit to order.

THE GROUNDS FOR THIS APPLICATION ARE:

The parties

1. The applicants Georgia Strait Alliance, David Suzuki Foundation, Raincoast Conservation Foundation, and Wilderness Committee (**Applicants**) are not-for-profit organizations with an interest in environmental conservation, including conservation of Chinook salmon and the Southern Residents. They participated in the environmental assessment of the Project by a review panel under *CEAA 2012*, focusing their participation primarily on the Project's effects on Chinook salmon and the Southern Residents.
2. The Applicants are public interest litigants and have no personal, proprietary or pecuniary interest in the outcome of this application.
3. The Governor in Council determined that the Project's effects were justified in the circumstances under s. 52(4) of *CEAA 2012* and issued the Order in Council; the Attorney General of Canada is named as a respondent on behalf of the Governor in Council under Rule 303(2) of the *Federal Courts Rules*.
4. The Minister is named as a respondent as he determined the conditions under s. 53 of *CEAA 2012* and issued the Decision Statement under s. 54(1) of *CEAA 2012*.

5. The respondent VFPA is the Project's proponent and is named as a party directly affected by the orders sought in this application under Rule 303(1)(a) of the *Federal Courts Rules*.

The Project will operate in the endangered Southern Residents' critical habitat

6. The Project includes the construction, operation, maintenance, and eventual decommissioning of a three-berth marine container terminal at Roberts Bank in Delta, British Columbia, in the Fraser River estuary, as well as incidental marine shipping in shipping lanes in the Salish Sea.
7. The terminal will be located along the migration path of ocean-type juvenile Chinook salmon, and within the critical habitat of the Southern Residents, a population of 73 killer whales listed as endangered under Schedule I of *SARA*.
8. The shipping lanes transect the Southern Residents' critical habitat.
9. Vessel activity around the terminal and in the shipping lanes will be associated with underwater noise.
10. Critical habitat is defined in *SARA* as habitat "necessary for survival and recovery". The Southern Residents' critical habitat is identified in the Recovery Strategy for the Northern and Southern Resident Killer Whales (*Orcinus orca*) in Canada (**Recovery Strategy**) and includes features such as availability of Chinook salmon and an acoustic environment that does not interfere with life functions such as foraging and communication. The main threats to the Southern Residents' survival and recovery, identified in the Recovery Strategy, correspond with these features. The Recovery Strategy also identifies vessel strikes as an emerging threat.

11. The Southern Residents' critical habitat is legally protected by s. 58 of *SARA*, which protects any part of critical habitat identified in the Recovery Strategy from destruction, though the operation of the *Critical Habitats of the Northeast Pacific Northern and Southern Resident Populations of the Killer Whale (Orcinus orca) Order*, SOR/2018-278.
12. In 2018, Fisheries and Oceans Canada (**DFO**), Environment and Climate Change Canada, Transport Canada, and the Parks Canada Agency published an Imminent Threat Assessment which concluded that the Southern Residents face an imminent threat to their survival and recovery, including due to reduced availability of Chinook salmon prey and acoustic and physical disturbance within critical habitat.
13. The Project terminal will be located in a high-use area for the Southern Residents within their critical habitat.

The Project will have significant adverse environmental effects on the Southern Residents and their critical habitat, including Chinook salmon

14. In 2014, the Minister referred the environmental assessment of the Project to a review panel under s. 38 of *CEAA 2012*.
15. In March 2020, the review panel issued its final report, under s. 43(1)(d) of *CEAA 2012*, concluding that:
 - a. The Project would have significant adverse effects on ocean-type juvenile Chinook salmon from the Lower Fraser and South Thompson Rivers, due to migration disruption and underwater light and noise from the terminal;

- b. The Project would have significant adverse effects on the Southern Residents, in the form of underwater noise, reduced Chinook salmon prey availability, and potential vessel strikes;
 - c. The Project's effects on Chinook salmon and underwater noise would amount to destruction of Southern Resident critical habitat; and
 - d. The Government of Canada should, in collaboration with VFPA and others, achieve an objective of a net overall decrease in underwater noise from commercial vessel traffic for the benefit of the Southern Residents.
16. In August 2020, the Minister requested additional information from VFPA under s. 47(2) of *CEAA 2012*. The Minister's questions concerned effects on Chinook salmon and the Southern Residents, and mitigation for those effects.
17. In September 2021, VFPA responded to the Minister's information requests.
18. In December 2021, the Agency posted VFPA's response to the information requests online, along with draft potential conditions for the Project prepared by the Agency, for public comment.
19. In February and March 2022, the Applicants and relevant government departments commented on VFPA's information and the draft potential conditions.
20. In April 2022, the VFPA replied to these public and government comments and commented on the draft potential conditions.

The Decision authorizes the Project notwithstanding the significant adverse environmental effects on the Southern Residents and their critical habitat

21. On April 20, 2023, as required by s. 54(1) of *CEAA 2012*, the Minister issued the Decision Statement informing VFPA of the Governor in Council's justification decision and listing the conditions for the Project that the Minister established under s. 53 of *CEAA 2012*.
22. The Decision Statement explains that the Minister decided under s. 52(1) of *CEAA 2012* that, taking mitigation measures into account, the Project is likely to cause significant adverse environmental effects. Under s. 52(2) of *CEAA 2012*, the Minister then referred the matter of whether those effects are justified in the circumstances to the Governor in Council, which decided under s. 52(4) that the Project's likely significant adverse environmental effects are justified in the circumstances.
23. The Governor in Council's Order in Council, dated April 19, 2023, lists the factors that the Governor in Council considered in reaching its justification decision and specifies that the Project's significant adverse environmental effects include effects on fish and fish habitat, including ocean-type juvenile Chinook salmon, and on the Southern Residents.
24. The Decision Statement and Order in Council fail to grapple with the central issue of consistency with all applicable requirements of *SARA*.
25. On April 20, 2023, the Impact Assessment Agency posted the Decision Statement on its web page for the Project, along with two additional documents: the Government Response to the Review Panel Recommendations

(**Government Response**) and the Crown Consultation and Accommodations Report—Executive Summary (**Consultation Summary**).

26. On April 26, 2023, the Agency sent the Applicants and other participants in the environmental assessment an e-mail with links to the Decision Statement, Government Response, and Consultation Summary, as well as the Order in Council.

The Decision unreasonably fails to comply with ss. 79(2) and 77(1) of *SARA*

27. Subsections 19(1)(a), (d) and (e) of *CEAA 2012* require that an environmental assessment must identify a project's environmental effects, including cumulative effects; technically and economically feasible mitigation measures; and the requirements of the follow-up program.
28. *SARA* adds additional requirements in the case of projects that may impact federally protected species at risk or their critical habitat.
29. Subsection 79(2) of *SARA* required the Review Panel and the Minister, when conducting the environmental assessment, to identify the Project's adverse effects on the Southern Residents and their critical habitat so that the Minister and Governor in Council could ensure the Project was not approved until all technically and economically feasible mitigation measures within federal jurisdiction were in place to avoid or lessen, and to monitor, the effects. Such measures must also be consistent with the Recovery Strategy and Action Plan for the species.
30. Under s. 77(1) of *SARA*, the Governor in Council could only authorize the Project under *CEAA 2012* if it was reasonably of the opinion that all feasible

measures would be taken to minimize the Project's impacts on the Southern Residents' critical habitat.

31. The conditions in the Decision Statement and the additional initiatives outlined in the Order in Council do not include all feasible measures to lessen, avoid, or minimize, and to monitor, the Project's effects on the Southern Residents and their critical habitat, as required by ss. 79(2) and 77(1) of *SARA*, nor are they consistent with the Recovery Strategy and Action Plan for the Southern Residents, as required by s. 79(2).
32. The shortcomings include, but are not limited to, the following:
 - a. There are feasible measures available that were omitted;
 - b. Some conditions are too vague to be enforced or are otherwise not practically enforceable; and
 - c. In many instances the conditions fail to put measures "in place", instead leaving measures and/or their feasibility to be identified by VFPA at some later date, with no criteria for determining feasibility.

The Governor in Council cannot lawfully justify effects under *CEAA 2012* that are contrary to *SARA*

33. *CEAA 2012*'s purposes, as set out in s. 4(1), include (b) ensuring that projects are considered in a careful and precautionary manner to avoid significant adverse environmental effects. Further, s. 4(2) of *CEAA 2012* requires the Governor in Council and Minister to exercise their powers in a manner that protects the environment and applies the precautionary principle.

34. The purposes of *SARA*, as set out in s. 6, include preventing extinction and providing for recovery of listed species.
35. *SARA* is intended to meet Canada's commitments under the United Nations *Convention on Biological Diversity*, which includes recent commitments under the Kunming-Montreal Global Biodiversity Framework to halt species extinction.
36. Subsection 32(1) of *SARA* prohibits harm to or harassment of endangered species.
37. Subsection 58(1) of *SARA* prohibits the destruction of critical habitat of endangered aquatic species.
38. Subsection 73(3) of *SARA* provides that the competent minister can only issue authorizations for activities affecting a listed species or its critical habitat if the competent minister is of the opinion that all feasible measures will be taken to minimize the impact of the activity on the species or its critical habitat, and the activity will not jeopardize the species' survival or recovery. Under s. 74, an authorization under another statute, such as the *Fisheries Act*, RSC, 1985, c F-14, has the same effect as a s. 73 authorization only if these same requirements are met.
39. As set out above, ss. 79(2) and 77(1) of *SARA* require measures to avoid, lessen or minimize effects on listed species and their critical habitat before projects can be authorized under *CEAA 2012*.

40. The Governor in Council unlawfully deemed the Project's effects, which are contrary to the above provisions, justified.

General grounds for the Application

41. The Applicants rely on: ss. 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7; the Federal Courts Rules, SOR/98-106; *CEAA 2012*; *SARA*; the *Critical Habitat of the Killer Whale (Orcinus orca) Northeast Pacific Southern Resident Population Order*, SOR/2018-278; the *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993); the *Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity: Kunming-Montreal Global Biodiversity Framework*, CBD/COP Dec 15/4, UNEP/2022, 1 at 4; and such further and other grounds as counsel may advise the Court.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

1. The review panel's report;
2. Portions of the record before the review panel;
3. The Decision Statement, Order in Council, Government Response and Consultation Summary;
4. Portions of the record before the Minister and Governor in Council when they made the Decision;
5. Affidavit of Jeffery Young, David Suzuki Foundation;
6. Affidavit of Misty MacDuffee, Raincoast Conservation Foundation;
7. Affidavit of Charlotte Dawe, Wilderness Committee;
8. Affidavit of Lucero Gonzalez Ruiz, Georgia Strait Alliance; and
9. Affidavit of Elizabeth Gabel, Senior Legal Assistant, Ecojustice;

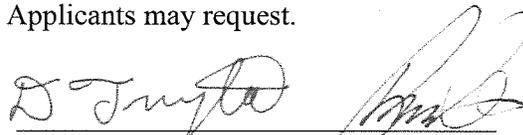
10. Affidavit of Hussein Alidina;
11. Materials from the certified tribunal record produced under Rules 317-318 of the *Federal Courts Rules*; and
12. Such further and additional materials as counsel may advise and the Court may allow.

RULE 317 REQUEST

Pursuant to Rule 317 of the *Federal Courts Rules*, the Applicants request that the Minister and Governor in Council send to the Applicants and to the Federal Court Registry a certified copy of the following material that is not in the possession of the Applicants but is in the possession of the Minister or Governor in Council:

1. All material that was before the Minister when making his determination under s. 52(1) of *CEAA 2012*.
2. All material that was before the Governor in Council when making its determination pursuant to section 52(2) of *CEAA 2012*.
3. All material that was before the Minister when establishing the Project conditions under s. 53 of *CEAA 2012*.
4. Such further and other material as the Applicants may request.

May 19, 2023



Dyna Tuytel, Kegan Pepper-Smith

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**Solicitors for the Applicants,
Georgia Strait Alliance, David Suzuki
Foundation, Raincoast Conservation
Foundation, and Western Canada
Wilderness Committee**

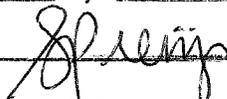
I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the _____

MAY 19 2023

day of _____ A.D. 20 _____

MAY 19 2023

Dated this _____ day of _____ 20 _____



**SORAYA PREMJI
REGISTRY OFFICER
AGENTE DU GREFFE**