



Impact Assessment
Agency of Canada

Agence d'évaluation
d'impact du Canada

160 Elgin St., 22nd floor
Ottawa ON K1A 0H3

160, rue Elgin, 22^e étage
Ottawa ON K1A 0H3

NOTICE OF NON-COMPLIANCE

Date: 31 July, 2020

CIAR #: 80007

New Gold Inc.
c/o Ms. Sylvie St-Jean
5967 Highway 11/71
PO Box 5
Emo ON P0W 1E0

BY E-MAIL, FOLLOWED BY A HARD COPY SENT BY REGISTERED MAIL OR MESSENGER

RE: Rainy River Project – Stockpile Dam seeping

Ms. St-Jean:

I, Carl Johansson, am a designated person pursuant section 89 of the former *Canadian Environmental Assessment Act, 2012* (CEAA 2012) for the purpose of the administration and enforcement of CEAA 2012. Pursuant to section 177 of the *Impact Assessment Act* (the IAA) I am also a designated enforcement officer for the purpose of the administration and enforcement of the IAA.

The Minister of Environment and Climate Change issued a decision statement for the Rainy River Project pursuant to section 54 of CEAA 2012 in 2015. Please note that as per section 184 of the IAA, the decision statement for Rainy River Project is now deemed to be a decision statement issued under the IAA and is subject to the provisions therein.

On March 3, 2020 and March 4, 2020, I conducted an inspection at the location of the Rainy River Project at 48°50'8.9"N, 94°0'47.2"W. During this inspection, I observed and noted that the water level in the Stockpile Pond would not allow for water to enter the spillway and flow down the Stockpile Pond Diversion Channel. Following the inspection, I reviewed photos and inspection records from past inspections and noted that the Stockpile Pond Diversion Channel was never wetted sufficiently, in my opinion, to allow for fish passage during those inspections. Furthermore, I recently reviewed the annual report for the 2019 reporting year and the document in Appendix M titled "No. 3.7 RRM 2019 Offset Monitoring FINAL", which is the report of annual monitoring of compensation and offset features for 2019. As it relates to the Stockpile Pond Diversion Channel, the report states that:

"This lack of connectivity isolates the fish community within the pond and does not satisfy the requirement for watercourse connectivity for the passage of fish."



Additionally, the report states:

The primary underperformance of the West Creek Diversion system is that the Stockpile Pond is disconnected from the downstream portions of the Compensation habitat. This will need to be addressed if the system is to function as designed and thus pass required success criteria.

I understand that New Gold Inc. is currently assessing whether the Stockpile Dam is leaking, and if so, what measures New Gold Inc. can take to ensure connectivity between the Stockpile Pond and the rest of the West Creek Diversion system. While I appreciate that this assessment is underway and New Gold Inc. is being proactive, it does not immediately address the current lack of connectivity of the Stockpile Pond to the rest of the downstream compensation habitat system.

Based on the relevant facts described above, I have reasonable grounds to believe New Gold Inc. is not in compliance with the IAA. In particular, I allege that New Gold Inc. is not in compliance with the following condition of the Minister's Decision Statement related to this designated project:

3.7 The Proponent shall both offset any residual serious harm to fish in accordance with subsection 35(2) of the Fisheries Act and associated regulations, and compensate for the loss of fish habitat resulting from the deposition of a deleterious substance into a tailings impoundment area in accordance with the Metal Mining Effluent Regulations, by recreating fish habitat in the West Creek Diversion Channel, West Creek Pond, Stockpile Pond Diversion Channel, Stockpile Pond, Clark Creek Diversion Channel, Clark Creek Pond, and Teeple Road Pond.

Specifically, I allege that New Gold Inc. is not compensating for the loss of fish habitat in accordance with the *Metal and Diamond Mining Effluent Regulations* (formerly known as the *Metal Mining Effluent Regulations*) by failing to achieve the success criteria of recreating functional fish habitat in the Stockpile Pond.

In so doing, New Gold Inc. has allegedly contravened subsection 7(3)(b) of the IAA, therefore allegedly committing an offence contrary to subsection 144(1)(a) and subsection 144(1)(b) of the IAA, punishable on summary conviction and liable, for a first offence to a fine of not more than \$4,000,000 and for any subsequent offence, to a fine of not more than \$8,000,000. Subsection 146(1) further states if an offence of contravening section 7 or subsection 144(b) is committed or continued on more than one day, it constitutes a separate offence for each day on which it is committed or continued.

This Notice of Non-compliance is neither a legal proceeding nor a judgment. It points out non-compliance with the IAA. If, during a future inspection, I or another Enforcement Officer identifies the same non-compliance or additional non-compliance, I or the Enforcement Officer carrying out the inspection may take further enforcement action. I am bringing this alleged contravention to your attention in order for you to take corrective action.

If you have comments regarding this Notice of Non-compliance, you may submit comments to the undersigned by no later than August 21, 2020. I will examine your comments and determine whether to maintain this Notice of Non-compliance, amend it or withdraw it. Once a decision is made, I will communicate my decision to you. If I amend the Notice of Non-compliance, I will send you a revised text. If I choose to maintain or withdraw the Notice of Non-compliance, I will send you written notice of this. You will receive future communication by e-mail, followed by a hard copy sent by registered mail or by messenger.

The Impact Assessment Agency of Canada (the Agency) will retain your comments, and the action that I take after considering your comments, in the compliance file for the Rainy River Project. Should you require additional information of this matter, please contact me by e-mail at iaac-compliance.conformite-aeic@ceaa-acee.gc.ca.

Please note that as required by subsection 152(c) of the IAA, the Agency will publish this Notice of Non-compliance on the Agency's Compliance Promotion and Enforcement website.

<Original signed by>

Carl Johansson
Senior Enforcement Analyst
Impact Assessment Agency of Canada

Cc: Steven Fraser, A/Chief, Compliance Promotion and Enforcement Unit
Phil Seeto, A/Director, Compliance, Enforcement and Follow-Up