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BY EMAIL

Mike Atkinson
Regional Director, Atlantic Region
Canadian Environmental Assessment Agency
1801 Hollis Street
Halifax, Nova Scotia
B3J 3N4

Subject: Determination of whether an environmental assessment is required for the Howse Property Iron Mine Project, located 24 km from Schefferville, Quebec

Dear Mr. Atkinson:

As the legal counsel for the Nation Matimekush-Lac John Council (and the members of the band represented by this Council), we have been instructed by the Council to inform you, herein, of its position on the above-mentioned subject.

1. ENVIRONMENTAL ASSESSMENT PROCESS

The *Canadian Environmental Assessment Act, 2012*¹ (hereafter referred to as the 2012 Act) prescribes that a project is subject to the federal environmental assessment process if it is designated by the *Regulations Designating Physical Activities*.² A designated project is defined as one or more physical activities carried out in Canada or on federal lands designated by the *Regulations Designating Physical Activities*. The list of physical activities set out in the Regulations includes the construction, operation, decommissioning and abandonment of a new metal mine with a production capacity of 3,000 t/day or more requiring an environmental assessment under the 2012 Act.

According to the 2012 Act, the proponent of a designated project must provide the Canadian Environmental Assessment Agency with a description of the project.³ Once a description of the

¹ S.C. 2012, c. 19.

² SOR/2012-147.

³ 2012 CEAA, s. 8.

designated project has been provided by the proponent, the project must be subject to screening to determine whether an environmental assessment is required under the 2012 Act.

The 2012 Act also prescribes that the proponent of a designated project must not do any act or thing in connection with the carrying out of the designated project if the environmental effects of the project have not been assessed.⁴

These environmental effects are: (1) a change that a designated project may cause to certain components of the environment that are within the legislative authority of the Parliament of Canada; (2) a change that could be caused on federal lands; (3) with respect to Aboriginal peoples, any change that may be caused to the environment and that has health, socio-economic, cultural, heritage or archaeological effects.

In addition, the 2012 Act expressly states that the purpose of the Act is to promote communication and cooperation with Aboriginal peoples with respect to environmental assessments.⁵ As a result, the environmental effects taken into account during the assessment of the designated project are broader when they affect an Aboriginal people. Furthermore, the Act specifically states that the environmental assessment of a designated project may take into account Aboriginal traditional knowledge.⁶

That being said, when the Canadian Environmental Assessment Agency conducts screening for a designated project, it must take into account, among other things, the description of the project, possible negative environmental effects and specific environmental effects relating to Aboriginal peoples and their observations.

2. THE CONSTITUTIONAL DUTY OF THE CROWN TO CONSULT AND ACCOMMODATE ABORIGINAL PEOPLES

The Supreme Court of Canada has interpreted the constitutional duties of the Crown to consult and accommodate Aboriginal peoples many times in a series of decisions. In *Haida*,⁷ the Court declared the following:

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown, which must be understood generously. While the asserted but unproven Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary, the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. The duty to consult and accommodate is part

⁴ 2012 CEAA, s. 6.

⁵ 2012 CEAA, s. 4.

⁶ 2012 CEAA, s. 19.

⁷ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.

of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 35 of the Constitution Act, 1982, demands.

The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. The Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith. The content of the duty varies with the circumstances and each case must be approached individually and flexibly. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal people with respect to the interests at stake. The effect of good faith consultation may be to reveal a duty to accommodate. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

... The honour of the Crown cannot be delegated, and the legal responsibility for consultation and accommodation rests with the Crown. This does not mean, however, that third parties can never be liable to Aboriginal peoples.

In March 2011, the Government of Canada published a document entitled *Aboriginal Consultation and Accommodation*, which sets out how federal officials are to consult and accommodate Aboriginal peoples. One of the guiding principles listed in the document states that the Government of Canada will use and rely on, where appropriate, existing consultation mechanisms, processes and expertise, such as the environmental assessment process in which Aboriginal consultation will be integrated.⁸ That being said, the consultation guide specifically provides a framework for federal government consultation with Aboriginal peoples.

3. THE INNU OF MATIMEKUSH-LAC JOHN (MLJ INNU)

The MLJ Innu are part of the Great Innu Nation, which in 1979 officially filed a comprehensive land claim on land that it calls Nitassinan, over which it has ancestral rights, including Aboriginal title and treaty rights. This claim was accepted by the Government of Canada.

⁸ Consultation guide available online: http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf.

The MLJ Innu in particular have ancestral rights, including Aboriginal title and treaty rights to their traditional land covered by the provinces of Quebec and Newfoundland and Labrador. They never ceded, yielded or surrendered their ancestral rights, including their Aboriginal title.

To this day the MLJ Innu possess Aboriginal title on their traditional land covered by the provinces of Quebec and Newfoundland and Labrador. They also exercise modern practices, traditions and customs on their traditional land that are in keeping with the practices, traditions and customs that their ancestors had exercised since time immemorial and that never ceased to be an integral part of their distinctive culture even though they have evolved.

More specifically, the MLJ Innu have occupied, used and possessed their traditional land in the exercise of the following practices, customs and traditions, which have formed an integral part of their distinctive culture: (1) resource extraction activities such as hunting, trapping, fishing and gathering for subsistence, social, ritual and commercial purposes; (2) forest, plant, water and mineral resource extraction activities for subsistence, social, ritual and commercial purposes; (3) the construction of camps, hideouts, dwellings and other infrastructure necessary to their way of life; (4) the holding of spiritual and cultural ceremonies; (5) the use of the land, waterways and bodies of water, including rivers and lakes, for transportation purposes; and (6) the exclusive or shared control and management of the land.

4. THE HOWSE PROJECT

Howse Minerals Limited (hereafter referred to as HML) is planning to develop the Howse Project iron ore deposit. This project is for the extraction of up to 30 million tons of iron ore at a rate possibly reaching 10,000 tons per day over a period of 12 years. The main infrastructure of this complex includes the following elements: a processing plant, piles of processed ore covered by a dome, a freight loading system, a railway track from the former operations of the Iron Ore Company (IOC), a camp for workers, offices, a warehouse, workshops, garages, a laboratory, a landfill and wastewater treatment facilities.

The Howse Project iron ore deposit is located less than 24 kilometres from the MLJ Innu community and on their ancestral land.

The MLJ Innu recognize the Howse Project as a designated project under the *Regulations Designating Physical Activities* and the 2012 Act. They also think that an environmental assessment is required for this project given its environmental impact on the fish and their habitat,⁹ aquatic species¹⁰ and migratory birds,¹¹ on the Matimekush-Lac John community (Indian reserve) and on the ancestral rights of the MLJ Innu.

⁹ *Fisheries Act*, R.S.C. (1985), c. F-14.

¹⁰ *Species at Risk Act*, S.C. 2002, c. 29.

¹¹ *Migratory Birds Convention Act*, S.C. 1994, c. 22.

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It should be mentioned first that during the construction, operation and decommissioning and abandonment phases, the potential sources of pollutants and emissions are and will be noise, vibrations, dust, suspended solids, exhaust gases and greenhouse gases from the heavy machinery and vehicle traffic.

Furthermore, these environmental effects will cause changes that are significant to the community and the MLJ Innu's rights. The dust in particular is having major repercussions on the MLJ Innu. They are complaining of the poor air quality due to the large quantity of dust from the work and mining activities. Their domestic animals are also affected by the dust. The MLJ Innu are also negatively affected by the noise from the vehicle and air traffic.

In addition, they have restricted or no access to their ancestral land in order to exercise their traditional activities given the work being conducted on the railway track and the blasting periods. Furthermore, the paths they use to access the areas where they exercise their traditional activities are completely inaccessible owing to the mud.

Also of note, the Howse Project is located in the George River caribou herd's migratory corridor, which links their calving grounds and their wintering grounds. Given the significant population decline of this species, the MLJ Innu are greatly concerned about the survival of the species. Protective and management measures should be taken to mitigate the impact of the Howse Project on this species and thus ensure its survival. Subsistence caribou hunting is a practice, custom and tradition that forms an integral part of the distinctive culture of the MLJ Innu.

Most migratory birds could be found along the Howells River, three kilometres from the Howse Project. However, the environmental impact of the project has been driving the migratory birds away and greatly affecting their reproduction and the traditional practice of wild goose hunting.

Lastly, given that the Project will have an impact on the water quality, the MLJ Innu are concerned about the presence of heavy metals in any fish caught near the Howse Project.

CONCLUSION

In light of the above, conducting an environmental assessment of the Howse Project is necessary. The Howse Project will have environmental effects. More specifically, this project will cause changes to certain components of the environment within the Parliament of Canada's legislative authority, within the Matimekush-Lac John community's competence and within the MLJ Innu's ancestral rights. An environmental assessment process will guarantee real and significant participation for the MLJ Innu and allow for the adoption of adequate accommodation measures in response to their concerns about the Howse Project.

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(Signature)

Marie-Christine Gagnon