

FIRST NATION CEAA REVIEW

Lhoosk'uz Dene Nation & Ulkatcho First Nation

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Executive Summary

As members of the Carrier Chilcotin Tribal Council in Williams Lake, British Columbia (BC), the Lhoosk'uz Dene Nation (LDN) and the Ulkatcho First Nation (UFN) represent remote communities in the central interior of British Columbia. Both communities are challenged by low income and employment rates, frequently poor housing conditions, and a variety of social and health issues. Both communities are currently actively engaging on the Blackwater Gold Environmental Assessment, a 3,300 hectare gold mining area proposed approximately 110 kilometres southwest of Vanderhoof, BC and within the traditional territories of these two First Nations. Neither community had taken part in an Environmental assessment (EA) process prior to the Blackwater project; as such the two communities have a fresh and unique perception of the incredible burden placed on them for a major mining EA and other negotiations. In an attempt to fully realize the potential benefits of the project, both Nations have agreed to work closely with each other in order to achieve the best possible outcomes for the environment, and for their communities.

Background

A recurring key issue for the Blackwater EA review team is the serious and continually shifting time constraints surrounding the project, the cost of a meaningful technical review and the fact that a major distraction is placed upon the Band office. As with other EAs, the documents are a burdensome challenge as they are incredibly large (approximately 22,000 pages), technical, frequently laid out in a manner that makes review difficult and have little content understandable to staff in the Band office. The solution was to hire a technical consultant, Keefer Ecological Services (KES), who in turn had to assemble a diverse team of technical consultants in order for the communities to have a meaningful third party review of the documents. The team reviewed documents from the technical perspective for other technicians and also strived to distil the documents to be understandable to one who has never been on a mine, has little knowledge of geochemistry or other such subjects but has an intimate

relationship with the land. Visual presentations were made from the interpreted reviews and brought to the communities in open meeting sessions and were also reviewed by Chief and Council.

As part of the EA and Impacts and Benefits negotiations the community also sought legal counsel. The Ulkatcho First Nation hired Aaron Bruce of Ratcliffe and Associates, whereas the Lhoosk'uz Dene Nation hired Jason Murray and Douglas Eyford of EM Lawyers. With this legal counsel, KES, the two communities' leadership as well as the federal and provincial governments, a ground-breaking Memorandum of Understanding (MOU) was developed and signed which outlines a new process for shared decision making on the EA. A key part of this MOU is the co-authorship of Part C of the BC portion of the assessment.

The Lhoosk'uz Dene Nation highly value and continue to participate in their traditional practices and continue with a contemporary version of their traditional governance systems. Activities include sweat lodges, smudge ceremonies, hunting, fishing, berry picking and making traditional crafts. This Nation's asserted traditional territory covers more than 1,400,000 hectares west of Quesnel, BC; encompassing the Blackwater River, part of the Fraser River drainage area (AMEC, 2015). This vast area of land was heavily impacted by the Mountain Pine Beetle epidemic and the closely associated post-beetle logging activities. Prior to the beetle epidemic much of the area was generally inaccessible, with only the grease trails (of which many are essentially wagon roads) or bush planes available for access; post beetle the territory is now heavily roaded and dominated by very young plantation forests, with the main Kluskus Forest Service Road reaching completion in 2007. Such changes to the land have created major cumulative effects that greatly challenge the traditional lifestyle, that include: incursion of recreational hunters, invasive plants, major changes to ungulate populations and migration routes, increased wolf predation, and many others.

The Ulkatcho First Nation's asserted traditional territory encompasses more than 3,000,000 hectares. The people of the Ulkatcho group rely on the land within their territory and have for many hundreds of years for hunting, fishing, and harvesting native plants, berries and wild mushrooms (AMEC, 2015). Through careful use of the food resources on their land, many of the community members supplement their incomes and feed their families. This vast area of land was also heavily impacted by the Mountain Pine Beetle epidemic and the closely associated post-beetle logging activities.

The Blackwater EA did not adequately address cumulative effects and in fact the proponent could not fairly handle it due to a profound lack of scientific data on the surrounding environs. The burden of effectively handling cumulative effects is most appropriately placed in a collaborative setting where First Nations, industry and appropriate levels of government address those effects in a manner that is meaningful to all parties and creates an effective tool for analysis.

Current Issues

The Lhoosk'uz Dene Nation and the Ulkatcho First Nation express a variety of concerns following extensive review of the Canadian Environmental Assessment Act (CEAA) 2012 documentation herein. Despite the tight, artificial timeframe in which our Nations were provided by the federal government to complete such a thorough task, we recognize this opportunity for input as an integral step towards reconciliation and it has been well received within our communities who view this project as a first step towards properly incorporating community concerns into a revised CEAA.

CEAA 2012: Interested Parties

As an initial step to fully achieving collaborative consultation with First Nation groups the Canadian Government needs to amend Section 19 - Factors to be considered, Subsection 3 - Community knowledge and Aboriginal traditional knowledge of the Canadian Environmental Assessment Act, to include that a "... designated project must take into account community knowledge and Aboriginal traditional knowledge". Incorporating meaningful inclusion into the process will involve deliberate expansion regarding the scope of the project area and consequently who is consulted. An interested party as defined in the CEAA 2012 documentation relates to a party which is "directly affected or that [has] relative information or expertise" and does not truly encompass public participation or take into consideration cumulative or other effects of those who are potentially affected downstream of a

project. The interconnectedness of the landscape is such that environmental effects related to one project do not stop at the project area boundary but have potentially profound environmental effects on downstream environments as well.

Cumulative Effects and Baseline Studies

The Lhoosk'uz Dene Nation and the Ulkatcho First Nation would like to see the cumulative effects analysis procedure expanded to include a broader geographical scale, whereby acknowledging the interconnectedness of the landscape and the true effects that a project imposes on the environment. Too often decisions are made in the absence of robust and thorough knowledge; analyzing the minimum possible area for environmental effects is insufficient. Additionally, if cumulative effects or baseline studies are conducted in previously impacted areas, the results must also incorporate other data so that an effective benchmark can be obtained which attempts to set the ecological benchmark as undisturbed by industrial development. Though using the post-beetle landscape surrounding the Blackwater project, it can be argued that an artificial baseline (or creeping baseline) was used for analysis and as such much of the analysis of effects has little meaning.

Incorporating thorough understanding and consideration of the precautionary principle in the EA process would arguably help ensure that only EAs are approved that are believed to have minimal impacts (i.e., to the environment, human health, and otherwise) even when all the evidence isn't present or available (Canadian Environmental Law Association, n.d.).

The Indigenous Leadership Initiative group submitted a proposal to the federal government in an attempt to remedy such effects through promoting, establishing and funding a national network of Indigenous guardians to monitor both land and water resources; effectively enabling Indigenous bands and Nations to control how resources are managed on their territory (Rumbolt, 2016). With respect to collaborative consultation, the appointed guardians would aid in conflict resolution and compliance issues in cases of disagreement by observing and interacting on those issues and maintaining conversation between parties. The Lhoosk'uz Dene Nation and the Ulkatcho First Nation also feel that

project specific EAs are too narrowly focused which has resulted in the fragmentation of landscapes and inadequate assessment of cumulative effects.

Traditional Land Use Plans

Traditional land use planning is an important tool in asserting rights and community values on the development of a Nation's traditional territory and should be used as an opportunity to engage the community in determining the future use of their natural resources (Ecotrust Canada, 2009). The process of land use planning should consider the interconnectedness of all aspects of the First Nation community, including such aspects as social, traditional, economic, cultural, spiritual and governance (Eco Canada, n.d.). The Lhoosk'uz Dene Nation and the Ulkatcho First Nation would like to see the federal and provincial governments provide funding to First Nation groups who wish to develop Traditional Land Use plans in advance of being part of future EA processes. These documents would be used to provide a detailed outline regarding specific plants, areas, and trails that are essentially non-negotiable zones for each Nation; cultural needs which require the utmost protection. We would like to see a CEAA process that respects our culturally significant entities in such a way that proposed projects aid in the preservation of our culture and in the sustainability of the ecosystem for future generations.

In the Blackwater EA, the Lhoosk'uz Dene Nation has requested that Kuyakuz Mountain be treated as a non-negotiable, no-development area as it is culturally significant to the membership and must be preserved. Additionally, we feel that encouraging First Nations to develop Traditional Land Use plans is paramount in increasing the transparency of the CEAA process as such documents may be used in determining a Nation's Strength of Claim or impacts on their established rights and interests. Prior to engagement in additional EAs the Lhoosk'uz Dene Nation and the Ulkatcho First Nation wish to more thoroughly develop their land use planning.

Strength of Claim

The *Practitioners Guide 5: Aboriginal Groups* is a confidential internal document that the federal government and CEA Agency use to assess a Nation's assertion of rights and title and determine their Strength of Claim. This document has not been shared to First Nations and is an example of a component of the process that is totally lacking in transparency - such problems result in substantial trust issues. We are of the opinion that an EA should not be used to measure the legitimacy of a Nation's territorial claims and that the Guide should not be a confidential document government. The standard Free, Prior and Informed Consent (FPIC), as well as Indigenous People's rights to lands, territories and natural resources are embedded within the universal right to self-determination as a fundamental principle embodied in the United Nations and International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (FAO, n.d.). As such, following the FPIC process a project must consider where Indigenous Peoples live, what their land and natural resources are and how they are used, and what their customary rights are, including customary land tenure, laws and rights. The Lhoosk'uz Dene Nation and the Ulkatcho First Nation would like to see a revised CEAA that considers and respects the rights and title of Indigenous Peoples as well as internal First Nation governance as was the intention of the Liberal government with their support and incorporation of the UN Declaration of Rights of Indigenous Peoples in May, 2016 (Fontaine, 2016).

Furthermore, it is not appropriately in the purview of government to address infringement on First Nation rights. The decisions regarding a project's infringement on First Nations rights and title cannot be made by the proponent or the federal government; it is a decision that must be made exclusively by the First Nation(s) in question. If a project is determined under CEAA 2012 not to have substantial environmental impacts, it may still impose impacts on First Nations land and other natural resources and should not be dismissed from the EA process because of this. The Lhoosk'uz Dene Nation and the Ulkatcho First Nation believe that the factors that trigger the need for an EA must be re-evaluated so that projects are no longer easily excluded from the process.

Siloization of Jurisdiction

The traditional territories of the Lhoosk'uz Dene Nation and the Ulkatcho First Nation fall within an astonishing number of administrative areas in BC, these include: Health Service Delivery Areas (two), Forest Districts (five), and Wildlife Habitat Areas (two); none of which correspond with the boundaries that these Nations have provided for their traditional territories, making integration with government process on use planning and natural resource planning a nearly insurmountable task. This legislative fragmentation arguably leads to unnecessary habitat fragmentation due to a lack of planning.

This fragmentation has inadvertently lead to an increase in public traffic on just recently nearly inaccessible lands, lands that provide valuable resources to the First Nations who fulfill their cultural hunting, fishing and gathering rights within their traditional territory. An increase in public traffic puts additional pressures on these cultural resources and increases competition. The increase in accessibility to First Nations traditional territory also increases the potential for further development of the area, as new proponents see previously established roads and other facilities in economically viable resource areas.

Post-Closure and Operations Monitoring

The Lhoosk'uz Dene Nation and the Ulkatcho First Nation would like to see stronger CEAA regulations in place surrounding the operating periods of major projects as well as post-closure monitoring, compliance and follow-up. Accomplishing effective post-closure monitoring and compliance will require proper consideration of time, specifically with respect to cumulative effects. Simply establishing a standard, short term monitoring program will not effectively address any long term environmental effects of the project. Establishing additional legal requirements outside of the reclamation monitoring and reporting currently required by BC law would enhance both mitigation efforts and accountability. A monitoring program that does not clearly identify the legal thresholds for action (i.e., clean-up efforts) when environmental standards are exceeded threatens the adequacy of environmental protection at closed mines (Fair Mining Collaborative, n.d.). Furthermore, post-closure monitoring of the mining site

for physical and chemical stability, spills, or the release of pollutants should occur on an enforceable schedule, whereby allowing effective follow-up to be carried out.

Funding

Participating in EA processes imposes many expenses on the community that include: distraction of staff and leadership from other duties, hard costs for staffing, and the costs of holding meetings as well as that of hiring third parties to assist in reviews. In the case of the Blackwater EA review, the hard costs to cover KES review has totalled nearly \$380,000 and this does not account for staff time, legal review or other expenses. Per community, CEAA has provided less than \$60,000, resulting in the majority of all costs of the technical review being born by the proponent. That in turn creates a major burden on project proponents and also potential trust issues by some community members who are not clear who their consultants are working for. In the case of the Blackwater project, the communities are fortunate that New Gold is a relatively generous proponent; in the event of a proponent that did not provide such funding it would not have been possible to conduct the proper technical review of the project.

Valued Components

The selection of proper Valued Components (VCs) and the use of them in analysis is a major concern within both provincial and federal processes. There are substantial questions of the validity of many VCs and the selection of VCs on the scale of analysis (geographical and temporal). Concerns regarding Valued Components chosen by the proponent are often dismissed and many of the recommended amendments and additional data collection requirements are pushed to the post-approval stage of the project. In the case of the Blackwater project the most startling example of inappropriate VCs was the use of the Yellow Rail, a federally listed species that was used as the VC that incorporates all shorebirds and their habitat - unfortunately this species is not known to be present in the project area. It was astonishing to find this species carried through in the EA despite previous review by federal and provincial biologists

and those of the proponent. When errors such as this are found, it poses a major credibility issue to the project documents. Furthermore, the Lhoosk'uz Dene Nation and the Ulkatcho First Nation also feel that First Nation concerns are not given the same weight of importance as the government regulator concerns. In the case of the Blackwater project, we raised concerns about wastewater treatment and the adequacy of using a wetland to filter out contaminants; an issue that was only truly considered once the Ministry of Energy and Mines confirmed it was in fact an issue worth analyzing.

Significance Assessment

The assessment of significance is a frequently flawed process and being proponent driven results in considerable bias in the analysis. As with VC selection and analysis, there are substantial questions regarding the temporal and geographical scales in many EAs that must be addressed to create more credible documents. There are countless examples of proponents who do not know the local geography, doing their assessment remotely, and coming to the spurious conclusions that there are low or no effects from project impacts. From the perspective of local First Nations, those effects that are not noticeable to outside consultants and proponents are often highly significant. Local significance also may be in forms which government or industry representatives do not readily understand and/or they may be of a highly sensitive manner such as sacred sites. There is also a substantial issue with trust amongst many First Nation members whereas they may have perceptions about environmental or other physical impacts about issues such as the safety of their traditional foods in the proximity of a mine. Though some of the concerns may not be scientifically verified they may have major impacts to traditional land use due to the fear of contamination, resulting in the abandonment of practices. Also of concern is the duration where a given part of a traditional territory may be inaccessible for a set number of years; from the geological perspective and/or non-local perspective, a 20 year loss of an area may sound insignificant; however, such a loss may cause a generation of people to stop using the area and result in the traditional knowledge for that area not being passed down to subsequent generations. Such infringements to communities are difficult to measure and should not be measured by outside interests.

Additional Concerns

Overall, we feel that the current EA process is too heavily proponent driven and the proponent has too much discretion regarding what baseline information is presented in the EA report.

The new CEAA should be updated to ensure that all data collection and concerns are addressed before any decision is made on the approval of the project. The proponent is also too heavily relied upon with respect to funding First Nations engagement in the EA process, such that First Nations may feel as though they are expected to agree with the proponent throughout the process. The costs associated with participating in an EA review may create a distraction, whereby limiting the amount of input a First Nation is willing and able to provide on the project. Additionally, the proponent must not use the threat of poverty as a tool in persuading a First Nation community to sway their decision towards favouring their proposed project. Together the provincial and federal governments should help fund the First Nations participation in the EA review process, whereby promoting First Nation participation, encouraging collaboration consultation and the protection of our natural resources.

The Lhoosk'uz Dene Nation and the Ulkatcho First Nation would also like to see the CEA Agency gain independence from the federal government, and elect a board of impartial members who will not be reprimanded for voting against a proposed project. In doing so, the EA process stands to regain legitimacy and build new trustworthy relationships with First Nations.

NOTE

The CEAA review timeframe does not align with the expectations of the Lhoosk'uz Dene Nation and Ulkatcho First Nation communities and their leadership. As such, this document may be revised at a later date following additional, more thorough consideration of the points made herein. These Nations also feel that this is opportunity only represents a small portion of collaborative consultation on behalf of the federal government and that the participation must go to a far greater depth than simply this review.

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