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VIA EMAIL - Shauna.sigurdson@ceaa-acee.gc.ca / CEAA.Amisk.ACEE@ceaa-acee.gc.ca

Canadian Environmental Assessment Agency
Suite 1145, 9700 Jasper Avenue
Edmonton, AB T5J 4C3

**Attention: Shauna Sigurdson
Regional Director**

Dear Ms. Sigurdson:

Re: Dene Tha' First Nation (DTFN) - Comments on the draft Environmental Impact Statement Guidelines (EIS) on the proposed Amisk Hydroelectric Project ("Project")

I am legal counsel to Dene Tha' First Nation ("Dene Tha'") and am writing to provide Dene Tha's comments on the draft Environmental Impact Statement ("EIS") Guidelines ("EISG").

As a holder of Treaty 8 rights, one of Dene Tha's most critical concerns in relation to the environmental assessment of the Project is that it properly assesses and addresses impacts to Dene Tha' constitutionally-protected Treaty rights. Dene Tha' has concerns that the approach set out in the draft EISG is not sufficient to ensure an adequate, let alone robust, assessment of impacts to its Treaty rights. Dene Tha' also has a number of technical comments on the EISG which are set out in the enclosed table.

With respect to the assessment of effects to Aboriginal groups' rights and interests, section 5 of the draft EISG sets out that the proponent will be required to engage Aboriginal groups to develop its EIS for the Project. The draft Guidelines specify that the engagement must be on:

- Effects of changes to the environment on Aboriginal peoples (health and socio-economic issues; physical and cultural heritage, including any structure, site or thing that is of historical, archaeological, paleontological or architectural significance; and current use of lands and resources for traditional purposes); and
- Potential adverse impacts of the project on potential or established Aboriginal or Treaty rights.

No information is provided in relation to how impacts to Aboriginal peoples and their rights will be measured; i.e. what types of criteria or thresholds will be used to assess impacts. A threshold of "significance" is not an appropriate measure to assess adverse impacts to Treaty or Aboriginal

rights. In addition, as the Joint Review Panel concluded in relation to the Site C Dam project, in response to concerns raised by Dene Tha' and other First Nations, it is not adequate to use effects to biophysical elements as a proxy for effects to the exercise of Treaty rights or current uses for traditional purposes. For example, even if a significant effect to moose is not identified, this does not mean that there will be no significant impact to a First Nation's moose hunting practices. Valued components relating to the use of lands and resources for traditional purposes should include historic, current and future uses. Treaty 8 rights are forever and the EIS must be relevant to the exercise of these rights currently, how these rights have evolved to the present, and how these rights may evolve and persist meaningfully into the future. Given all of these considerations, Dene Tha' wishes to ensure that an appropriate methodology is used for assessing Project impacts to its Treaty rights in this process. This issue needs to be addressed in s. 5 of the EISG to make the methodology clear.

It should also be a requirement that the proponent meaningfully engage with First Nations, including Dene Tha', to ensure that the selected Valued Components are appropriate indicators to assess potential adverse project effects to its rights and to ensure that these Valued Components are described in sufficient detail.

We also note that it is not clear in parts of the draft EISG that non-physical cultural effects will be addressed in the EIS. As currently worded in s. 5, it appears that the EISG is only identifying the need to assess cultural heritage that is physical in nature (such as burial sites and archaeological resources). Adverse effects can result not just to physical cultural sites, but to intangible cultural heritage as well. For example, if Dene Tha' members can no longer harvest in a particular area, cultural knowledge of that area will be lost, as will the ability to pass some traditional ecological knowledge about that site to future generations. These types of effects need to be assessed, which appears to be contemplated in s. 6 of the EISG. This needs to be made clear in s. 5 of the EISG, to leave no ambiguity that effects to non-physical cultural heritage will be assessed, not just physical cultural heritage.

Section 5 of the EISG also specifies issues that the EIS must address with respect to Treaty rights in particular. Dene Tha' is concerned that the approach set out in the EISG places the onus entirely on First Nations to provide information on their potential or established rights (including geographical extent, nature, frequency, timing), including maps and data sets, such as fish catch numbers, without any commitment on the part of the proponent to fund the collection of this information. Although it is clear that this type of information is necessary to assess Project effects on First Nations' rights and interests, the cost to collect this information should not be borne by First Nations. The proponent is required to collect other relevant assessment information for the EIS at its own cost, and the same should be the case with respect to the collection of the requisite information to assess effects to Treaty rights.

As a related issue, Dene Tha' is concerned about the possibility that the potential adverse Project impacts will only be identified "based on the proponent's perspective". The case law is very clear that the aboriginal perspective **must** be taken into account when considering impacts to rights. The proponent's perspective on impacts may be very different than First Nations' perspectives on those impacts. The EISG needs to be revised to require the proponent to collect information, at its expense, on First Nations' perspectives of Project impacts on their Treaty rights. The onus cannot be

placed on First Nations to provide their perspectives in the absence of adequate funding to permit them to do that.

Given the rampant development that has taken place in Dene Tha's Traditional Territory, cumulative impacts to its Treaty rights is one of Dene Tha's main concerns in all regulatory processes. Dene Tha's ability to continue to exercise its constitutionally-protected Treaty rights is being eroded away with each new oil and gas development, clear-cut and hydro-electric facility that is proposed for its Territory. Dene Tha' is very concerned that the continuity of its Treaty rights is coming close to a tipping point, and that future generations may not be able to exercise the rights at all.

The Joint Review Panel for the Site C dam found that the level of cumulative effects in the region of that dam was already significant and urged governments to address this serious problem. Given the seriousness of cumulative effects, and the critical importance of properly assessing and addressing them, it is not appropriate for it to be left to the proponent to determine the spatial scoping for the cumulative effects assessment in the EIS, as is proposed in the draft EISG for this Project. The spatial scoping needs to be set out for consideration and third party input in the EISG. The proponent should be required to meaningfully engage with First Nations, including Dene Tha', to ensure that the spatial and temporal boundaries are appropriate and adequate to consider potential adverse impacts to Treaty and Aboriginal rights. The spatial boundaries for Valued Components should span all phases of the project.

It is not clear in the draft EISG whether the assessment of impacts to Treaty rights will include an assessment of cumulative impacts on Treaty rights. The Joint Review Panel for the Site C Dam criticized BC Hydro's approach because it failed to properly account for cumulative effects. BC Hydro concluded that the effects of the Site C dam on First Nations' Aboriginal and Treaty rights would not be significant because the exercise of rights is adaptable and, therefore, First Nations could essentially "go elsewhere". BC Hydro reached this conclusion without considering the cumulative effects of development that has seriously decreased the number of "elsewheres" available for the exercise of rights. The Joint Review Panel criticized that as an inappropriate and inadequate approach. As a result, for this Project, the EISG need to specify, either in the section on impacts to Treaty rights or in the cumulative effects section, that data on cumulative impacts to Treaty rights will be collected and considered in the EIS. Similarly, the EISG should require collection of information, at the proponent's expense, on the aboriginal perspective of proposed mitigation measures.

In addition, it is essential that the EISG require the proponent to use a pre-industrial baseline (to the extent reasonably possible with available data) in assessing cumulative effects. As the Joint Review Panel found in relation to Site C, it is not an appropriate assessment of cumulative effects to merely compare the status quo today with what the situation will be like post-project. Such an approach is essentially a residual effects assessment, rather than a cumulative effects assessment.

Dene Tha' also has questions for CEAA in relation to the Crown's assessment of potential impacts of the Project on Treaty and Aboriginal rights. The draft EIS Guidelines state at page 4, para. 2: "This information [gathered through the EA process] will also contribute to the Crown's understanding of any potential adverse impacts of the project on potential or established Aboriginal or Treaty rights and the effectiveness of measures proposed to avoid or minimize those impacts." We seek

clarification from CEAA as to whether it will conduct its own assessment of potential Project impacts to DTFN's rights, independent of the proponent's assessment in the EIS? How will Canada undertake its assessment of Project impacts to DTFN's Treaty rights?

We ask that CEAA provide a written response to the issues that Dene Tha' has raised in this letter and in the enclosed table before the EISG are accepted, including CEAA's view on the concern raised; whether it will be addressed in the final EISG; if so, how and, if not, why not. Such a response will ensure transparency in the process and permit Dene Tha' to engage with CEAA in relation to how the issues will be addressed before the EISG are finalized.

Yours truly,

MANDELL PINDER LLP

<original signed by>

Rosanne Kyle

RK/er
Encl.

cc: AHP Development Corporation, Attn. David Berrade (via e-mail info@amiskhydro.com)
Dene Tha' Chief and Council
Baptiste Metchooyeah, Director of DTFN Lands Dept. (baptiste.metchooyeah@denetha.ca)
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Dene Tha' First Nation (DTFN) Comment Tracking Table
Project: Amisk Hydroelectric Project

Comment ID#	EISG Section	Issue Theme	Comment to CEAA
1	Part 1 - 2.3	Aboriginal engagement	The EISG states that "The proponent will make reasonable efforts to integrate traditional Aboriginal knowledge into the assessment of environmental impacts." DTFN requests an opportunity to review and comment on a description of the methods and process for appropriately integrating Aboriginal knowledge into the EIS. This needs to begin early on in EA scoping for it to successfully lead to a meaningful inclusion of information. Similarly, the identification and scoping of Aboriginal issues needs to occur early on in EA scoping so that the appropriate information (including complementary environmental studies) is assessed in the EA, leading to the identification of suitable mitigation measures. In general, identification of required Aboriginal knowledge flows out discussions that identify Aboriginal issues to address in the EA. These are objectives achieved only through meaningful and deep engagement with the First Nations during the scoping stage.
2	Part 1 - 2.4	Precautionary principle	Regarding the section "Application of the precautionary approach", we assume this to be synonymous with "the precautionary principle". The discussion on precaution in the EIS should include special attention and acknowledgment of the potential effects where there is higher risk and uncertainty, and what decisions would be made considering the precautionary approach/principle. We expect that CEAA will require this information to follow federal regulatory decision-making guidance in: <i>A Framework for the Application of Precaution in Science-Based Decision Making About Risk</i> .
3	Part 1 - 2.4	Precautionary principle	Where data gaps or insufficient information exist within the EIS and predictions cannot be made of adverse effects with reasonable certainty, then the proponent should undertake any additional work/studies to fill these insufficiencies or gaps until predictions can be made with reasonable certainty about significant adverse environmental effects and any impacts to Aboriginal and Treaty rights. The words "... and any impacts to Aboriginal and Treaty rights." should be added to the end of s.2(4)
4	Part 1 - 3.1	project scope	We request that the Agency require the scope of the project to include any alternatives considered for the headpond (e.g., its size), the substation, and transmission line (similar to the considerations required for the fish passage and boat passage). The scope of the designated project must include the operational plans for the facility (beyond filling the headpond). There are critical elements of the project's proposed operating parameters and procedures that will dictate how the headpond and downstream flows will be managed. The proposed management of instream flows downstream, including flow ramping, is essential information to understand the impacts on VCs.
5	Part 1 - 3.1	project scope	DTFN is concerned that the proponent has mischaracterized and understated the nature of the proposed project in its Project Description and online and print media by characterizing the project as a "Run-of-River" hydroelectric facility instead of a hydroelectric "Dam". Natural Resource Canada describes 'run-of-river' as a dam where water is diverted around the river's main channel, without disturbing the natural flow of the river, aside from a small "headpond". AHP's project proposes to create a dam head of 17m above the current level of the Peace River resulting in a 50km long retention area to actively store and impound water. In s.3.1 of the dEISG, the proponent includes (incorrectly) under the heading "Main Works", a "Headpond" as a project component instead of a "Reservoir". The manner in which AHP has decided to downplay the magnitude and falsely characterize the description of its project as a 'run-of-river' instead of a 'dam', and a "Headpond" instead of "Reservoir" project component, is concerning to DTFN.
6	Part 1 - 3.3.1	Changes to the Environment	In scoping the potential changes to the physical environment that may occur, the proponent should also include all potential changes to the environment and how these changes may potentially impact Treaty and Aboriginal rights.
7	Part 1 - 3.3.2	Valued components selection	A rationale for selecting or excluding a VC should be accompanied by a description of any effects/concerns/issues that may have been communicated during consultation activities that will not be included in the scope of the EA as a result of the exclusion, and how the proponent responded to the concern. In the section stating: "If comments are received on a component that has not been included as a VC, these comments will be summarized.", the following should be added to the end: "... and the proponent will meaningfully engage with Aboriginal peoples on any of these comments in sufficient detail as to allow the reviewer to understand their importance and to assess the adverse environmental effects and impacts to Treaty rights by the proposed project in relation to these concerns.
8	Part 1 - 3.3.2	Valued components to be examined	Environmental Effects linked to section 5 of CEAA 2012 should consider changes to Treaty rights-based activities including hunting, trapping, fishing, and incidental activities in support of these rights (such as access, navigability and resource processing sites), as separate and distinct Valued Components due the unique ecological, social, cultural, economic, historical, archaeological and aesthetic values the First Nations people place upon these activities - values that cannot be assessed by proxy from biophysical effects to resources (like equating moose effects as 'hunting' effects or effects to sport fish as 'fishing' effects for example).
9	Part 1 - 3.3.3 & Part 2 - 6.6.3	Spatial boundaries & cumulative effects assessment	DTFN requests to review and comment on proposed boundaries for each VC. The EISG should specifically require that the boundaries selected for Cumulative Effects Assessments should follow best practice and the CEAA operational policy statement on Cumulative Effects Assessment. The identification of boundaries to consider cumulative effects on various VCs is commonly poorly scoped due to a focus on the extent of the project effects rather than the extent of the VC that we wish to protect and better understand. With focus on the extent of the VC itself, the CEAA can achieve a holistic view of all the other activities affecting the sustainability of the VC and hence the overall cumulative effect. Spatial boundaries are major scoping decisions that should be identified early on as part of consultation. We consider these to be best practices in scoping boundaries for assessing the effects on a VC: <ul style="list-style-type: none"> • Consider ecological and human systems to fully capture the possible effects on interconnected ecosystems and the people that use those ecosystems. • Use a precautionary approach when scoping from a broad perspective so that all areas of potential adverse effects are included. • Consider the sensitivity and vulnerability of ecological and social receptors, particularly when dealing with complex cause and effect pathways. A highly sensitive receptor could suffer great harm from seemingly negligible physical change if it occurs at certain times and places. Highly sensitive areas should be included in the scope of assessment so that the risk of impact can be addressed as part of the EA. • Explain scoping decisions and rationales early in the process to stakeholders and decision makers to allow for transparent and thorough discussions to take place with the aim of identifying well-justified study areas. Deferring the presentation of rationales to the EIS review phase is too late and inappropriate.
10	Part 1 - 3.3.3	Spatial and Temporal boundaries	The spatial and temporal boundaries used in the EIS should include upstream hydroelectric facilities including Site C and downstream of the Peace to the Peace/Athabasca Delta for the RAA, at a minimum.

11	Part 1 - 4.1	Guidance regarding EA information requirements	Referring to information required for federal authorities to make their regulatory decisions, the EISG states that "Although that information is not necessary for the EA decision, the proponent is encouraged to submit it concurrent with the EIS." This direction could be misleading in that certain information may very well be required to understand particular effects and mitigation required to make an EA decision. We suggest the EISG is edited to indicate that the information may not necessarily be required for an EA decision, but that it could be required depending on the issue.
12	Part 1 - 4.2	Methods	The EISG requires that "the proponent will take an ecosystem approach" to assess effects. This would require that the chosen VCs include specific ecosystem types of concern to truly understand the interconnected cumulative impacts on an ecosystem.
13	Part 1 - 4.2	Study strategy and methodology	The dEISG states, "If the baseline data have been extrapolated or otherwise manipulated to depict environmental conditions in the study areas, modelling methods and equations will be described and will include calculations of margins of error and other relevant statistical information, such as confidence intervals and possible sources of error." In addition, the EISG should also state that "Any extrapolated or otherwise manipulated data should incorporate all relevant Aboriginal peoples' data into these models and explain how these data factored into model outputs."
14	Part 1 - 4.2	Study strategy and methodology	The assessment should also include: predicting and evaluating potential changes to First Nations' ability to meaningfully exercise their rights in and about the proposed project area, identifying technically feasible mitigation, avoidance and accommodation measures for any impacts to First Nations' rights, appropriately describing any potential residual impacts to First Nations' rights and appropriately describing any residual potential impacts to First Nations' rights following the implementation of mitigation.
15	Part 1 - 4.2	Study strategy and methodology	The proponent's selection of the most appropriate methods to compile and present data should include free, prior and informed consent of the DTFN in accordance with the UN's Declaration on the Rights of Indigenous Peoples.
16	Part 1 - 4.2	Study strategy and methodology	The proponent's selection of the most appropriate methods to compile and present data should include free, prior and informed consent of First Nations, including DTFN, in accordance with the UN Declaration on the Rights of Indigenous Peoples.
17	Part 1 - 4.4 and Part 2 - 1.1	Professional authorship	The EIS should indicate the technical authors of each section. Wherever professional opinion is used as a rationale for a conclusion, then the relevant professional(s) should be identified along with their credentials. Same comments to section 1.1 in part 2 below
18	Part 1 - 4.4	Report format	We request an integrated table of contents in the PDF to aid in document navigation.
19	Part 2 - 1.3	Project Location	The EIS should also contain information on other existing, in-progress, or under-review hydroelectric or other projects that have effects upon the Peace River.
20	Part 2 - 1.4	Regulatory framework and role of government	The EIS should clearly identify which responsible authority(s), delegated proponent(s) or agents will conduct and consider the necessary assessment of impacts to First Nations' Aboriginal and Treaty rights including potential adverse project impacts to rights, cumulative and residual effects, and the effects of any mitigation, avoidance, accommodation measures, and discuss the appropriateness of any type of construction, operational, mitigation, offset, avoidance or accommodation plans designed to reduce impacts to First Nations' Treaty and Aboriginal rights.
21	Part 2 - 2.2	Alternative means scope of project activities	The EISG should require that the EIS include an alternative means analysis of the different operating options available to manage the headpond and regulate the downstream flows in the river. Only through this analysis will we be able to evaluate the appropriate operating parameters and procedures for balancing environmental concerns with operating requirements. There are important variables in the way the project is operated that will affect the environment in different ways, such as the size and level of the headpond, the maintenance of instream flows to meet seasonal ecological requirements, and flow ramping that risks fish stranding.
22	Part 2 - 3.2.1	Site preparation and construction	The EISG should include "headpond filling methods including flow management procedures" and "plant commissioning procedures" as part of the scope of activities in the construction phase. These are essential elements of a thorough EA.
23	Part 2 - 3.2.1	Site preparation and construction	This section should include a new bullet point: "- contribution to MeMg contamination and other harmful to life toxins"
24	Part 2 - 3.2.2	scope of project activities	The operating procedures related to headpond / flow management need to be added to the list of operational activities required in the EIS project description. Specifically, how this project is going to be operated to change the flow of the river is an important component to assess. Relevant operating parameters would include proposed limits on flow ramping, instream flow requirements, management of Total Gas Pressure (and any abatement methods to manage risk of effect on fish), and potentially other parameters.
25	Part 2 - 3.2.2	scope of project activities	Details on the operational procedures for dam maintenance are required to assess the aquatic effects in the headpond and downstream river.
26	Part 2 - 5.	Aboriginal engagement and concerns	The analysis in the EIS needs to consider not only current uses, but also historic and future uses.
27	Part 2 - 6.1.4	past Peace River development	On the top of page 21, the list of BC Hydro projects to consider should include Site C as a future potential project.
28	Part 2 - 6.1.8	baseline on Aboriginal peoples	The EISG list of baseline requirements for potential effects on Aboriginal peoples includes "reliance on country foods". This does not seem relevant to understanding how the project may affect Treaty rights. The Treaty rights are protected regardless of the level of "reliance" on traditional foods.
29	Part 2 - 6.2.2	changes to surface water	The scope of the EA should include a prediction of the effect on Total Gas Pressure related to dissolved gas supersaturation and potential impact to fish downstream of the spillway.
30	Part 2 - 6.2	changes to physical environment	The list of physical changes should include changes to fluvial geomorphology; changes to sediment load; and changes to ice regime and subsequent hydrological and geomorphological change.
31	Part 2 - 6.2.3	changes to terrestrial landscape	The list should include changes to stability and erosion of upland areas along the proposed reservoir.
32	Part 2 - 6.3.1	fish and fish habitat	The EISG should require an assessment of the risk of impacts to fish from elevated Total Gas Pressure downstream of the dam.
33	Part 2 - 6.3.1	fish and fish habitat	The EISG should require an assessment of the risk of impacts (mortality) to fish from entrainment depending on the intake structure.
34	Part 2 - 6.3.5	VC selection	The lack of VC selection in the EISG limits the strength of the EIS requirements. The list of VCs is such a fundamental part of the scope of the EA, that, without it, the EISG is incomplete. DTFN wishes to be part of thorough EA scoping phase for this project beyond the general directives provided by the EISG.
35	Part 2 - 6.4	Mitigation	The EISG should make it clear that the mitigation measures must be described at a sufficient level of detail to be reasonably certain that suitable mitigation of the effect is feasible. Vague descriptions of commitments to develop more detailed mitigation measures are not acceptable to draw EA conclusions.

