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Wednesday, December 23<sup>rd</sup>, 2020

Sent Via E-mail ([jonathan.wilkinson@parl.gc.ca](mailto:jonathan.wilkinson@parl.gc.ca))

The Honourable Jonathan Wilkinson, P.C., M.P.  
Minister of Environment and Climate Change  
House of Commons Ottawa, Ontario  
K1A 0A6

**Re: MCK Final Decision on Contrecoeur port terminal expansion project**

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Dear Minister Wilkinson,

## I. Summary of MCK Decision

The Mohawk Council of Kahnawà:ke (MCK) hereby wishes to inform you of our final decision pertaining to the Contrecoeur port terminal expansion project, which consists of the construction of a container port terminal with a maximum annual capacity of 1.15 million containers on its property located in Contrecoeur, approximately 40 kilometres downstream from Montreal. The project would include the construction of a 675-metre dock for two berths to accommodate vessels between 39,000 and 75,400 deadweight tonnage (DWT).

We have determined certain conditions that must be fulfilled for this project to be approved. Many of these conditions are reflected in the Canadian Impact Assessment Agency's ("Agency") recommended conditions outlined in the draft EA report and were developed in collaboration with MCK or will be added to the final EA report based on recent consultations between the Agency and MCK. Unfortunately, certain of our recommended conditions have not been accepted by the Agency or Proponent and will not be included in the EA report recommendations to your office. These recommendations mainly pertain to measures needed to respond to cumulative effects. In the absence of project conditions to address these concerns, these recommended actions should be carried by the Crown if the project is approved.

The MCK's final position on the project is therefore that the project is capable of being approved with our consent, provided that additional Crown action is taken to address cumulative effects issues as outlined in Section IV. In communicating this decision to you, we are exercising our jurisdictional rights over a project that would have significant adverse impacts to our rights.

## II. Basis for MCK Decision

We conclude that the approval and implementation of this project would have moderate to high adverse impacts to the following rights:

- Aboriginal governance rights;
- Aboriginal fishing and stewardship rights generally;
- Aboriginal fishing and stewardship rights related to sturgeon;
- Aboriginal fishing and stewardship rights related to copper redhorse;
- Aboriginal harvesting and food sovereignty rights;
- Aboriginal language, cultural and cultural heritage property rights;
- Impacts to health/safety of Mohawk Territory of Kahnawà:ke and SSSL lands

Our position is based on the following:

- Impacts on Rights Assessment carried out jointly by the Impact Assessment Agency (IAAC) and MCK, dated December 23, 2020.
- The draft Environmental Assessment Report released by IAAC on November 18, 2020, including the assessment of deficiencies with this assessment outlined in Section III.
- Letter of MCK to DFO, dated July 14, 2020 pertaining to fish and copper redhorse compensation project requirements.
- The project and consultation record, including all information submitted by the proponent, the MCK Impacts to rights assessment, dated August 26, 2019 and results of meetings with the proponent, IAAC and federal government departments

Please consult these documents for a more detailed explanation of our conclusions pertaining to the impacts to rights that would result from the approval of this project.

Finally, our position is also based on the absence of a Regional Impact Assessment of the St. Lawrence river and the anticipated cumulative effects stemming from the various port expansion projects currently contemplated on the St. Lawrence river.

### **III. MCK Position on deficiencies with EA based on CEAA 2012**

#### Gap between Impacts to fish/fish habitat assessment under CEAA 2012 and Impacts to s. 35 rights analysis

The Agency found that residual effects on fish and fish habitat resulting from the destruction and alteration of fish habitat and changes to water quality are not likely to be significant. The key consideration the Agency used to reach this conclusion was the idea that impacts were limited to the local study area -- an area of about 7 km by 5 km (35 km<sup>2</sup>) surrounding the project. We were told that this is based on the limitations associated with what is mandated by the *Canadian Environmental Assessment Act of 2012* ("CEAA 2012"). However, the MCK reminds the agency and the Minister that the Crown is obliged to assess and consider the adverse impacts to the asserted and established rights of the Mohawks of Kahnawà:ke that could result from the Minister's decision on this project, and that this is mandated by s. 35(1) of the *Constitution Act, 1982* and the honour of the Crown.

We strongly disagree with the Agency's conclusion that impacts to fish and fish habitat, and traditional uses, are insignificant. These impacts are in fact significant, because fish are mobile and do not stay within the local study area.

Impacts to fish cannot be evaluated by drawing a rectangle on a map around the immediate project area. What is needed is a consideration of regional impacts. The regional study area used in this EA extends from Montreal to Sorel. Within this regional area, migratory fish complete their annual cycles

and life cycles by moving between spawning, rearing, feeding, and over-wintering grounds. The movements of some species, such as sturgeon and shad, extend far beyond even the regional study area; for other species, such as copper redhorse, the migrations are less extensive. In all cases, however, the range of migratory fish extends beyond the local project area as defined by the proponent and the Agency. Habitat losses impact the survival and reproduction of a population, not just the individuals that find themselves within the project area at a particular moment in time. It is therefore incorrect to draw conclusions about impacts to fish by studying only impacts within the local project area. The *CEAA 2012* approach is not only contrary to our approach to EA, based on the *Ohen:ton Karihwaterhkwen* (that is explained in our previous submissions related to this project) it is also bad science.

Likewise, impacts to rights, including those based on “traditional uses” cannot be evaluated using the tiny, 5 km by 7 km local study area considered by the Agency. Our territory extends from upriver of Kahnawà:ke to the saltwater estuary. Harvesting takes place at many sites within our territory, both upstream and downstream of Contrecoeur. When we experience declines in the abundance and health of fish populations, these declines are the end result of what fish have experienced throughout their lifetimes and across their migratory range. It makes no sense to consider impacts to traditional uses outside of this framework.

The vast majority of our harvesting takes place outside the Contrecoeur port and its immediate surroundings, both because the port is already heavily industrialized, and because the local study area represents a small slice of our traditional territory. This fact is used against us when the Agency considers impacts to traditional uses, and we are told that in any event, only impacts within the local study area can be considered when evaluating impacts to “valued components” such as traditional uses.

The regional impact of the project to fish and fish habitats, and to traditional uses of the Mohawks of Kahnawà:ke, cannot be separated from the issue of cumulative effects. The Agency did not conduct a cumulative effects analysis for fish and fish habitats generally, limiting its cumulative effects analysis to copper redhorse, wetlands, western chorus frog, and traditional uses. The Agency’s cumulative effects analysis for traditional uses did find that the project will have cumulative effects on current uses of lands and resources. The MCK is disappointed that this finding was not reflected in the Agency’s analysis of the project’s impact to traditional uses.

#### Impacts to copper redhorse

The MCK is deeply concerned about the Agency’s conclusions about the cumulative impact of the project to copper redhorse. The analysis is not informed by any thresholds, and there is no recognition that there can be a decline from which it is difficult or impossible to recover. Copper redhorse is in steep decline, yet the Agency argues that the relative contribution of the project to the cumulative effects on copper redhorse is low. We believe that this is not the right way to conduct a cumulative effects assessment, the point of which is to analyze the combined effect of past, present, and future impacts. Copper redhorse experience all impacts up to that point, not the contribution of the project in isolation. We conclude that the approval of this project will have severe impacts to fishing, governance and stewardship rights related to copper redhorse.

#### **IV. MCK Comments on Conditions proposed in EA report and Additional Requirements for Project Approval**

##### *MCK Comments and Additional Requirements Associated with Post-Approval Engagement and Monitoring*

Many of the project conditions call on the proponent to involve the MCK in the development and implementation of monitoring and compensation plans. The MCK requires adequate funding to be able to participate meaningfully in these important initiatives. A commitment to provide funding for our participation should be included within the wording of these conditions.

**Additional MCK Requirement 1:** The Crown must ensure that MCK obtains adequate funding, as determined by MCK, in order for conditions associated with MCK involvement post project approval are implemented.

Condition 3.34. The condition to evaluate the effectiveness of the mitigation measures with respect to the adverse environmental effects of the designated project on fish and fish habitat requires only a 5-year follow-up period. This period should be extended to a minimum of 20 years, as in the case of Condition 3.33.

**Additional MCK Requirement 2:** MCK requires that Condition 3.34 be amended to reflect a 20-year monitoring requirement.

Condition 3.36. The condition to create a follow-up program to judge the effectiveness of the mitigation measures with respect to bank erosion requires only a 5-year follow-up period. This period should be extended to a minimum of 20 years, as in the case of Condition 3.33. The MCK considers that bank erosion will be an ongoing impact from the project, as ship traffic to the existing port continues and increases with the port expansion.

**Additional MCK Requirement 3:** MCK requires that Condition 3.36 be amended to reflect a 20-year monitoring requirement.

##### *MCK Comments and Additional Requirements Associated with Impacts to Fish and Fishing Rights Generally*

Condition 3.22. This condition is not acceptable to the MCK because the DFO and the proponent agreed, in 2008 and without consulting with the proponent, that a “habitat bank” of habitat restoration projects would be created in the Boucherville Islands, and that it could be used to offset the impacts of future port projects. The fish habitat restoration work in the Boucherville Islands only addresses some of the historic damage caused when dredged material from the construction of the Port of Montreal in the 1960s was used to build up the Longueuil-Boucherville shoreline. This resulted in a reduction in flow through the channels in the Boucherville Islands causing sediment buildup and the destruction of fish spawning habitat. It is this historic damage that is now being partially remediated by the proponent through the restoration of spawning areas in parts of the Boucherville Islands maintained by the Port of Montreal.

In order for Condition 3.22 to be acceptable to the MCK, the location of the compensation project needs to be left open, and determined in consultation with the MCK. The MCK recommends that the proponent develop habitat compensation projects in the Contrecoeur Archipelago.

Condition 8.2. The MCK also notes that a condition to create a follow-up program to judge the effectiveness of the mitigation measures with respect to the adverse environmental effects caused by the designated project on the traditional fishing and hunting activities of First Nations, will not be at all effective in addressing impacts to our stewardship, governance, and fishing rights.

**Additional MCK Requirement 4:** The Crown must ensure that DFO carry out an engagement process with MCK pertaining to the practice of accepting habitat banks created to offset historic damages caused by proponents as valid compensation projects for damages stemming from new projects.

**Additional MCK Requirement 5:** As outlined above, Condition 3.2.2 should be amended and require that proponent established compensation projects at other sites. Should the Crown fail to amend this Condition, the MCK requires that the Crown undertake additional compensation projects *in lieu* of the proponent in the Contrecoeur Archipelago.

*MCK Comments and Additional Requirements Associated with Impacts to Copper Redhorse*

Given the severity of impacts to fishing, governance and stewardship rights related to copper redhorse, the MCK sent a letter to DFO, dated July 14, 2020 in which we outlined projects that should be completed to mitigate, compensate, and accommodate impacts to the copper redhorse.

The MCK is concerned that our position has not been fully appreciated and that the Agency has minimized the significance of the cumulative impacts of the project, in particular impacts to shoreline erosion. Shorelines within 300m of the shipping lane are rapidly eroding, and ship traffic is estimated to cause more than 50% of the observed erosion. Existing measures, such as voluntary speed reductions, are already being fully observed, yet the observed rates of erosion are alarming. The condition that the proponent shall participate, in any regional initiative relating to the monitoring, assessment and management of cumulative environmental effects on copper redhorse, in itself, will do nothing to slow, stop, or reverse the decline of copper redhorse [Condition 3.41]. The condition to develop a plan to offset the losses of grass beds constituting the essential habitat for feeding of adult copper redhorse is also inadequate as it only addresses impacts from the construction phase of the project. It does not address any of the impacts to copper redhorse in the operational phase.

In our view, the Agency has failed to adequately consider all available mitigation options, in particular measures to mitigate cumulative impacts to copper redhorse from the operational phase of the project. One of the major impacts during the operation phase will be a decrease in water quality (due to increased turbidity) and erosion of shorelines (due to wave action) from the passage of ships. The MCK acknowledges that our concerns were considered, and that a condition related to the restoration of the eastern tip of Ile Bouchard project [not yet formulated by IAAC] will be included in the final EA recommendations to your office. We acknowledge that this is an important step towards the protection of critical copper redhorse feeding habitats just behind the point.

However, the MCK considers that more needs to be done to address the issue of erosion. Restoration projects at Ile aux Prunes and Ile aux Boeufs must also be undertaken. These islands are directly in front of Ile Bouchard (and the Contrecoeur terminal), but they are rapidly eroding, thereby exposing Ile Bouchard's shoreline and grassbeds to the shipping channel. The MCK was told that our recommendations for additional restoration work would not be implemented because shoreline erosion in the project region is caused by a variety of activities in the area as well as climate change.

The Agency's position on this matter does not, in the MCK's opinion, rely on a proper cumulative effects assessment, nor does it recognize the impact of the shipping industry on habitat loss.

In addition to the Ile Bouchard project, the MCK recommended in our letter of July 14, 2020 that compensation projects be completed at the Ile Mousseau, Ile Hervieux, and Ile Saint-Ours-Archipel de Contrecoeur sites to accommodate impacts to the MCK's fishing and stewardship rights that cannot be mitigated or compensated. MCK indicated that it was supportive of these projects being completed as described in the ZIP Seigneuries report and that MCK would also be involved in developing the details of these compensation projects in collaboration with Canada and other appropriate partners. Unfortunately, these measures were not accepted by the Agency or proponent. Given the Agency's position on the limitations on the proponent's responsibility to address cumulative effects, it is our position that the Crown is responsible to intervene and ensure that cumulative effects are addressed should it wish to approve this project.

**Additional MCK Requirement 6:** The Crown must undertake restoration projects at Ile aux Prunes and Ile aux Boeufs in accordance with the requirements we have outlined in our letter of July 14, 2020.

**Additional MCK Requirement 7:** The Crown must undertake compensation projects at the Ile Mousseau, Ile Hervieux, and Ile Saint-Ours-Archipel de Contrecoeur sites in accordance with the requirements we have outlined in our letter of July 14, 2020.

As further outlined in the Impacts to Rights Assessment document, the MCK has identified the need to accommodate impacts to rights through contributions to Kahnawà:ke food sovereignty projects. Unfortunately, time constraints have not allowed sufficient time for the proponent and Agency to confirm the details of the support for these projects or to establish support for these projects as conditions associated with project approval. We nevertheless wish to formally communicate to you our position that support for these projects is required should be the Crown wish to approve this project, and that the Crown is responsible to ensure that significant support for the advancement of these projects is required.

**Additional MCK Requirement 8:** The Crown is responsible to ensure that significant support for the advancement of Kahnawà:ke food sovereignty projects is obtained.

## **V. Next Steps**

Canada's duty to consult and accommodate is at a high level for this project, and Canada cannot authorize this project without the free, prior, and informed consent of Indigenous Nations that would suffer impacts associated with this project.

The MCK is not fundamentally opposed to this project and believes that it can be approved provided that our additional requirements are addressed, and we look forward to additional engagement with your office on how our requirements can be met. We believe that action to address cumulative effects is urgently required by the Crown, given the Agency's view that responsibility for addressing these cannot be fully ascribed to the proponent. This engagement must be based on the Two Row Wampum treaty relationship between our nations, founded on mutual recognition and the principle of non-interference between our people and the Crown. This treaty relationship represents our role

as allies of the Crown and is a symbol of a relationship of peace and friendship. Pursuant to this treaty relationship, the Crown must not exercise its jurisdiction in a manner that interferes with the exercise of our self-government and jurisdictional rights, including Mohawk stewardship rights and responsibilities associated with the St. Lawrence River.

In Peace & Friendship,

<Original signed by>

Chief Ross Montour,  
Consultation Portfolio  
Mohawk Council of Kahnawà:ke