



Myers LLP

Barristers & Solicitors

September 20, 2019

Reply to: Alex J. Nisbet
anisbet@myersfirm.com
Writer's Direct Line: 204 926 1528

Via Email

Lake Manitoba and Lake St. Martin Outlet Channels Project
Impact Assessment Agency of Canada
Canada Place
9700 Jasper Avenue, Suite 1145
Edmonton Alberta T5J 4C3

Attention: Anna Kessler

Dear Madam:

RE: Environmental Impact Statement Conformity Review

Please be advised that we represent Pinaymootang First Nation, Sagkeeng First Nation, and Sandy Bay Ojibway First Nation (collectively the "Three First Nations") regarding the Lake Manitoba and Lake St. Martin Outlet Channels Project (the "Project").

This letter is in response to your email correspondence dated August 30, 2019 and September 13, 2019 which contain an invitation to provide comments on the Environmental Impact Statement ("EIS") provided by Manitoba Infrastructure ("MI") on August 30, 2019. We thank you for this opportunity to provide comments to assist the Impact Assessment Agency of Canada (the "Agency") with its conformity review to determine whether the EIS meets the information requirements outlined in the guidelines issued to MI on May 15, 2018 (the "EIS Guidelines"). The conformity review includes determining whether the requirements of the *Canadian Environmental Assessment Act, 2012* S.C. 2012, c. 19, s. 52 ("CEAA 2012") and applicable legislation are addressed, whether the Agency's guidance was considered, and whether there are any information gaps that would prevent the start of the technical review of the EIS.

It is the position of the Three First Nations that the technical review of the EIS must not commence as there are significant information gaps due to the premature and incomplete nature of the EIS. The EIS is non-conforming and premature as a result of the lack of meaningful consultation with numerous First Nations, including the Three First Nations. We request that the Agency direct MI to carry out and conclude engagement and consultation plans with potentially affected First Nations prior to the submission of a revised EIS so that their concerns can be properly addressed in the effects assessment of the EIS.

The EIS Guidelines indicate that, for the purpose of developing the EIS, MI as the proponent is expected to "strive towards developing a productive and constructive relationship based on on-going dialogue with" Indigenous groups listed in the EIS Guidelines, which includes the Three First Nations, in order to support information gathering and the effects assessment. It is the position of the Three First Nations that a productive and constructive relationship has not occurred to date and that the necessary consultation and effects assessment would therefore be impossible. The concerns over the lack of meaningful consultation are not isolated to the Three First Nations. Your letter addressed to MI dated June 27, 2019 states as follows:

Multiple First Nations and Manitoba Metis Federation indicated that they had not been engaged or consulted by Manitoba Infrastructure or that engagement or consultation done to date has been insufficient. Multiple participants articulated anticipated deficiencies in the Environmental Impact Statement (EIS) related to the reflection of their nations' perspectives, concerns, knowledge, and expertise, especially given the proposed August 2019 submission date.

The Agency expects to receive an EIS that meets the information requirements of the EIS Guidelines, issued on May 15, 2018 and subsequent revisions communicated to Manitoba Infrastructure on August 16, 2018, December 21, 2018, and June 27, 2019. The EIS Guidelines require Manitoba Infrastructure to engage with the Indigenous groups identified in order to fulfill the statutory obligations of the Canadian Environmental Assessment Act, 2012 and to assist the Agency in fulfilling the Crown's constitutional obligations to consult with potentially impacted First Nations and Métis on potential impacts to potential or established Aboriginal or treaty rights. Failure to meet the requirements of the EIS Guidelines, including requirements pertaining to engagement of Indigenous groups in the gathering, analysis, presentation, and verification of information presented in the EIS, could result in the Agency deeming the EIS as non-conforming with the EIS Guidelines.

To our understanding, minimal actions have been taken by MI since the date of your letter to correct the above noted deficiencies to ensure that the EIS conforms with the EIS Guidelines. This understanding is supported by the fact that the EIS makes it clear that engagement and consultation by MI is in the early stages of its implementation and that MI has not established consultation plans and budgets with numerous First Nations. Specifically, page 5.27 of the EIS states as follows:

Phase 2: Implementation

*For communities that are potentially highly impacted by the Project, **Manitoba Infrastructure is working on consultation plans and budgets to accommodate community participation.** Records of contact are documenting community questions and concerns. Meetings and information exchanges **attempt to address** relevant biophysical (e.g., wildlife, vegetation), socio-economic or cultural questions and comments **so that they can be considered in relation to VCs and addressed in the effects assessment of the EIS and applied throughout all phases of the Project including construction, operation, and maintenance.***

Page 112 of the EIS Summary states that while many First Nation communities have received "some level of engagement with MI, **several are still in the preliminary phases of engagement.**" Page 28 of the EIS Summary also states the following:

*Manitoba Infrastructure has corresponded with the communities identified in the EIS Guidelines. Meetings and email exchanges continue with First Nations in 2019 to answer questions, and exchange information on potential environmental effects and **develop workplans and budgets to facilitate ongoing engagement and consultation.** Manitoba Infrastructure will continue to engage with Indigenous peoples and communities on this Project regarding development of engagement plans and TK studies.*

The fact that MI is still working to set up consultation plans and budgets to engage with First Nations clearly demonstrates that there is a major gap in knowledge and understanding of the potential impacts upon First Nation Treaty rights associated with the Channels Project.

Pursuant to the EIS Guidelines, MI is expected to engage with potentially affected Indigenous groups starting as early as possible in the Channels Project planning process to carry out the following (non-exhaustive) items:

- Establish an engagement approach
- Engage with First Nations on the **planning and development of relevant sections of the EIS**, including effects from changes to the environment and impacts to potential or established Aboriginal or Treaty rights as well as the assessment of environmental effects as outlined in paragraph 5(1)(c) of *CEAA 2012*
- Provide First Nations the opportunity to review and provide comments on the information used for describing and assessing effects on Aboriginal peoples and respond to comments of First Nations **prior to submitting the EIS** to ensure that the comments are adequately addressed
- Engage First Nations in **project design and analysis** and identification of preferred means of carrying out the Channels Project from the alternative means
- Engage with potentially affected First Nations for the purposes of developing the EIS to obtain their views on **spatial and temporal boundaries** for the assessment and the **selection of valued components** and the **assessment of effects to these valued components**

The list of items required of MI as stated above have not occurred or have not been carried out to a satisfactory level for numerous First Nations, including the Three First Nations. The requirements above must be carried out by MI as the proponent in order to:

1. Fulfill the statutory obligations of *CEAA 2012* to assess environmental effects of the proposed Project on Aboriginal peoples; and
2. Assist the Agency fulfilling the Crown's consultation obligations to consult with potentially impacted Indigenous groups on potential impacts to potential or established Aboriginal or Treaty rights.

If the EIS is allowed to proceed to technical review at this time without further engagement and consultation to ensure that the requirements listed above are satisfied, **it is highly unlikely that points 1 and 2 above could ever be fulfilled.** This is due to the fact that the review of the EIS and further consultation will be constrained to the tight 365-day review timeline set forth by *CEAA 2012*. There will simply not be enough time for adequate consultation and accommodation to occur within what remains of the 365-day review timeline. There will also be no incentive

for MI to attempt to engage in further consultation as MI could simply allege that First Nations have provided all the information they intend to share, or that First Nations have chosen not to engage.

The proposed Channels Project is a massive undertaking that would create a barrier extending from Lake Manitoba to Lake Winnipeg, isolating First Nations and impeding the free flow of terrestrial wildlife. The Channels Project would also affect fish and fish habitat, impact water quality and affect groundwater input and flow regime. There would also be countless impacts to health conditions, cultural and spiritual areas, and traditional resources. Adequate consideration has not been given to the Three First Nations' Treaty rights, nor the impact that the proposed Channels Project will have on those rights.

The concerns of the Three First Nations are best expressed in the following quote from the 2017 decision of the Supreme Court of Canada in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, 2017 CSC 40:

*24 Above all, and irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review. **That said, judicial review is no substitute for adequate consultation. True reconciliation is rarely, if ever, achieved in courtrooms.** Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, **but adequate Crown consultation before project approval is always preferable to after-the-fact judicial remonstrations following an adversarial process.** Consultation is, after all, "[c]oncerned with an ethic of ongoing relationships" (*Carrier Sekani Tribal Council*, at para. 38, quoting D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at p. 21). As the Court noted in *Haida Nation*, "[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests" (para. 14). **No one benefits — not project proponents, not Indigenous peoples, and not non-Indigenous members of affected communities — when projects are prematurely approved only to be subjected to litigation.***

(emphasis added)

If technical review of the EIS proceeds at this time, the EIS as drafted and the woefully inadequate consultation and engagement to date will form an integral part of the eventual Environmental Assessment Report and Environmental Assessment Decision

Statement from the Minister. The deficient EIS would be a crucial point in any eventual judicial review calling into question whether the honour of the Crown was upheld in the consultation and environmental review process.

It is the request of the Three First Nations that the Agency direct MI to finalize consultation plans and budgets to accommodate First Nation participation so that meaningful consultation and accommodation can be carried out prior to the submission of a revised EIS. Adequate consultation right now is far preferable to a lengthy judicial review process.

We thank you for this opportunity to participate in the conformity review and look forward to receiving additional information and providing further comments in the near future.

Yours truly,

MYERS LLP

Per:

<Original signed by>

ALEX J. NISBET