

McKiggan Hebert

LAWYERS

November 14, 2024

File No. 8463-034

VIA EMAIL: mike.atkinson@iaac-aeic.gc.ca

Mike Atkinson
Regional Director
Atlantic Regional Office
Impact Assessment Agency of Canada

Dear Mr. Atkinson:

Re: Draft EA Report - Boat Harbour Remediation Project

Please accept the following as PLFN's comments on the Draft Environmental Assessment Report and the Potential Conditions for the Boat Harbour Remediation Project.

1. On page 6 of the Draft Report, there is reference to 128 acres of land to be transferred to PLFN. It should be noted with respect to this land, that it was promised to PLFN in the 1990s once the then promised cleanup of Boat Harbour had taken place. As such, the transfer of those 128 acres of land is to fulfil a longstanding legal obligation of the Province, rather than reflecting any fresh accommodation measures.
2. On page 90 of the Draft Report, when discussing the assertion of Aboriginal title, please consider inserting a comment that an analysis of Aboriginal title claims was beyond the scope of the environmental assessment and no strength of claim analysis has been carried out.
3. Beginning at page 91, the Draft Report discusses three categories of Aboriginal rights: (a) fishing rights, (b) hunting and trapping rights; and (c) the right to cultural continuity. Missing is a discussion on the Aboriginal right to the use and enjoyment of reserve land and Aboriginal title land. Use and enjoyment of lands includes fishing, hunting and trapping and other cultural practices, but the concept of "use and enjoyment" goes beyond those activities and encompasses all uses to which land may be put. For example, it will not be possible to locate a residence on portions of IR37 and IR24G because of their proximity to the containment cell. The Province has acknowledged that the presence of the containment cell will continue to adversely impact the use and enjoyment of IR37 and IR24G. The use and enjoyment of other lands subject to a claim of Aboriginal title will also be impacted. Indeed, if Aboriginal title is established on the land upon which the containment cell is located, the containment cell would need to be removed. The stronger the claim for Aboriginal title, the more likely it is that the proposed project requires the actual consent of PLFN and the more likely it is that the containment cell will need to be relocated. All of these have implication for the project which are not addressed in the Draft Report. We believe that a fourth section 7.2.4 addressing Aboriginal title is required.
4. In section 7.4 of the Draft Report, at p. 96, a summary of the proposed section 7.2.4 on use and enjoyment of reserve and Aboriginal title lands, as outlined above, should be included.

5. In section 8 of the Draft Report, at p. 97, IAAC's conclusions on s. 35 rights should address impacts on use and enjoyment of reserve lands and Aboriginal title lands.

6. In the Potential Conditions, a new section 2.5 should be added to require the proponent to reimburse the Mi'kmaq of Nova Scotia, including PLFN, for the reasonable expenses incurred by them in connection with any consultation, collaboration, agreement, review, oversight or monitoring activity contemplated in the Potential Conditions.

7. In the Potential Conditions, section 7.1 should be revised to add "acceptable to and approved by PLFN" after the words "the services of Indigenous monitors" in the first sentence.

8. In the Potential Conditions, section 8.1 should be revised to add "acceptable to and approved by PLFN" after the words "the services of a third-party independent environmental monitor" in the second line.

As general comments to support the forgoing, we sat that because the proposed containment cell sits on land claimed by Aboriginal title land and is also adjacent to IR37 and IR24G, an analysis of the impact of the project on those lands and on IR37 and IR24G must be included in the report.

Adequate resources are always a concern for Indigenous communities. Consultation, engagement, collaboration, monitoring, reviewing, commenting, and overseeing, are all time consuming and expensive activities. This needs to be recognized and the proponent required provide adequate resources for those activities as a condition of the approval.

Where monitors are required, they should be people approved of by PLFN.

Finally, we reiterate that Canada's duty to consult and accommodate before approving of the Boat Harbour Remediation Project is broader than the environmental review process and relying on the EA process alone is not sufficient to discharge fully Canada's duty to consult. As an example, while an assessment of the strength of the Aboriginal title claims to the land on which the proposed containment cell would be situate may be beyond the scope of an environmental review, it is something Canada must consider in carrying out its duty to consult and accommodate. This is of vital importance. A finding of Aboriginal title would mean that the project could not be approved without PLFN's consent. Accordingly, we expect the Minister, and potentially the Governor in Council, to address this issue before deciding to approve the project. We are happy to have further discussions with the appropriate representatives of Canada on that issue.

Thank you for the opportunity to comment on the Draft Report and Potential Conditions.

Yours truly,

McKiggan-Hebert

<Original signed by>

Brian Hebert