

208.265.9565 • PO Box 2308, Sandpoint, ID 83864 • www.idahoconservation.org

Fraser Ross, Project Manager 210A - 757 West Hastings Street Vancouver, BC, V6C 3M2 Tel: 604-666-2431 IAAC.Castle.AEIC@canada.ca

October 30, 2020

## Subject: Initial Project Description and request to designate a federal review panel for the Castle Project

## Dear Mr. Ross:

I am writing on behalf of the Idaho Conservation League (ICL) to comment on the Initial Project Description for the Castle Project. ICL has been Idaho's leading voice for conservation since 1973. As Idaho's largest state-based conservation organization, we represent over 30,000 supporters, many of whom have a deep personal interest in protecting human health and the environment. The Idaho Conservation League works to protect these values through public education, outreach, advocacy and policy development.

Teck Coal Limited proposes to expand its existing Fording River Mining Operations onto the adjacent Castle Mountain site. Teck anticipates that its existing Fording River Mining operations will be exhausted by the mid 2020s unless the Castle Project is approved. The Castle Project would extend the lifespan of Teck's Fording River operations for "several" decades. The project is being reviewed under the BC Environmental Assessment Act (EAA) and the federal Impact Assessment Act (IAA). ICL appreciates the decision to undertake federal review as the existing and proposed coal mining operations in the Elk River Valley affect water quality and fisheries in Lake Koocanusa and the Kootenai River below Libby Dam in the United States.

In 1972, the United States Congress passed the Clean Water Act (CWA). The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the reduction and eventual elimination of the discharge of pollutants into those waters. 33 U.S.C. § 1251(a). In addition, the CWA establishes an "interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife." Id. at § 1251(a)(2).

To meet these goals, the law requires the establishment of water quality standards. Water quality standards are promulgated by the states and establish the desired condition of each waterway within the state's regulatory jurisdiction. 33 U.S.C. § 1313(a). Water quality standards under the CWA are

required to include three elements: (1) one or more designated "uses" of that waterway; (2) water quality "criteria" specifying the amount of various pollutants that may be present in those waters and still protect the designated uses, expressed in numerical concentration limits and narrative form; and (3) an antidegradation policy (with implementation methods) to protect all existing uses. 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B.

The designated beneficial uses of the Kootenai River in Idaho include primary contact recreation, cold water aquatic life, and salmonid spawning. Section 303(d) of the CWA requires all states to identify and prioritize water bodies that do not meet water quality standards. For those water bodies on the § 303(d) list, Idaho must develop water quality improvement plans, called total maximum daily loads (TMDLs). TMDLs specify the pollutant load reductions needed in order for those water bodies to achieve water quality standards.

In the absence of site-specific water quality standards for selenium, the State of Idaho applies the U.S. Environmental Protection Agency's (EPA) national water quality standards. The EPA's chronic criterion for the protection of aquatic life requires that the concentration of selenium in fish eggs and ovaries is not to exceed 15.1 mg/kg dry weight (IDAPA 58.01.02.210.01a, Table 1 footnote I). The egg-ovary criterion element supersedes any whole-body, muscle, or water column criterion element. The comparison to the egg-ovary criterion element requires a sample of at least five individuals of the same species from the water quality assessment unit (AU).

In 2018, three mountain white fish were sampled in the canyon reach (AU ID17010104PN029\_08 (USGS Site KR9)) of the Kootenai River in Idaho, just downstream from the Montana border. Selenium eggovary concentrations ranged from 15.4 to 24.8 mg/kg dry weight. However, as mentioned above, EPA requires at least five samples for comparison to the egg-ovary criterion. So in 2019, nine mountain white fish were sampled from this AU by the U.S. Geological Survey and the Kootenai Tribe of Idaho. Selenium egg-ovary concentrations ranged from 17 to 26.3 mg/kg dry weight, with an average concentration of 20.4 mg/kg dry weight, which exceeds the selenium egg-ovary criterion.

Given these data for egg-ovary selenium concentrations in mountain whitefish, and additional data demonstrating that the source of the selenium is the Teck Coal Elk Valley mines in Canada, the Idaho Department of Environmental Quality (IDEQ) added selenium as a cause of impairment to the cold water aquatic life beneficial use for AU ID17010104PN031\_08, which is reflected in IDEQ's 2018/2020 Integrated Report. The other three AUs in the Kootenai River in Idaho may also exceed the selenium criterion and given the need for more data, federal, state and Tribal agencies are prioritizing the remaining Kootenai River AU's for data collection in 2021.

The listing of AU ID17010104PN031\_08 as impaired by selenium pollution will require the calculation of a Total Maximum Daily Load (TMDL) to reduce selenium pollution in this reach and achieve water quality standards that protect cold water aquatic life. A TMDL is a legally enforceable quantitative limit on the loading of a particular contaminant in a water body. Since the Kootenai River in Idaho is downstream from the State of Montana, Idaho will likely assign a selenium load allocation to Montana. The State of Montana will only be able to meet its selenium load allocation through adoption of its own site-specific water quality standards for selenium. Furthermore, because none of the selenium pollution in the Kootenai Watershed originates from within the U.S., achievement of U.S. water quality standards for selenium will require cooperation from the Province of British Columbia and the Federal Government of Canada. While cooperation is the goal, jurisdiction of international waters lies with the U.S. and

Canadian federal governments, and the U.S. can act to enforce its water quality standards on its northern neighbors through the Boundary Waters Treaty of 1909.

It is also important to note that governments in the U.S. (federal, tribal or state) have the authority to bring charges against governments and/or companies in Canada for damages incurred on federal, state or tribal lands, from pollutant sources originating in Canada. Precedence for this was set in the ruling of *Pakootas v. Teck Cominco Metals, Ltd.* (Teck), which found Teck liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Reduction of selenium pollution in the Kootenai Watershed is also vital to fish recovery programs in the United States. Enacted in 1973, the purpose of the U.S. Endangered Species Act (ESA) is to "provide a program for the conservation of...endangered species and threatened species" and to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). The ESA defines "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range." Id. § 1532(6). A "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Id. § 1532(20). The term "species" is defined to include "any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." Id. § 1532(16). Federal agencies in the U.S. are required to use "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to...the Act are no longer necessary." Id. § 1532(3).

The Kootenai River white sturgeon (*Acipenser transmontanus*) is 1 of 18 land-locked populations of white sturgeon known to occur in western North America. Kootenai sturgeon occur in Idaho, Montana, and British Columbia, Canada, and are restricted to approximately 167.7 river miles extending from Kootenai Falls, Montana, downstream through Kootenay Lake to Corra Linn Dam at the outflow from Kootenay Lake in British Columbia. Kootenai sturgeon migrate from Kootenay Lake into the Kootenai River in Idaho and Montana to spawn. The population has declined from approximately 7,000 white sturgeon in the late 1970s to fewer than 500 fish in 2005. Kootenai River white sturgeon were listed as endangered in 1994 by the U.S. Fish and Wildlife Service, and a Recovery Plan for Kootenai River white sturgeon was approved in 2019. The Kootenai Tribe of Idaho (KTOI) plays a significant role in Kootenai River white sturgeon recovery. Among other recovery actions, KTOI operates a sturgeon hatchery and is restoring several river reaches to improve habitat.

Burbot (*Lota lota*) are endemic to the Kootenai River, where they once provided an important winter fishery to indigenous people. This fishery and that of Kootenay Lake in British Columbia may have been the most robust burbot fisheries in North America. Facing possible extinction and listing under the ESA, a conservation strategy was prepared to outline the measures necessary to recover burbot. Thanks in large part to KTOI, burbot are rebounding in the Kootenai River system. In fact, for the first time in years, a sport fishing season was allowed in 2019.

Increasing concentrations of selenium in the Kootenai River threaten to undermine these recovery efforts. As we have seen, some fish populations in the Fording River and Elk River have already been affected by selenium pollution from coal mines in the Elk River Valley. High selenium levels have resulted in physical deformities, reduced viability of eggs, and even population crashes. If selenium levels in the Kootenai River downstream of Libby Dam continue to increase, similar impacts are

predictable and perhaps inevitable over time, for the white sturgeon, burbot and other culturally and economically important fish species.

It is our position that the Castle Project and any other proposed coal mine expansions in the Elk River Valley should be denied. The Castle Project would extend the lifespan of Teck's Fording River operations for "several" decades and further enlarge the footprint of mining in the Elk River Valley from which selenium pollution originates. Coal mines in the Elk River Valley are expected to bleed selenium pollution into the watershed for 700 to 1,000 years--long after Teck is done mining. Current efforts should prioritize regulatory mechanisms for bringing the legacy and on-going selenium pollution under control. The existing data for selenium impacts in the Kootenai River raises important questions about Teck's liability. We respectfully request that consideration of potential existing liabilities be weighed heavily as the review process is initiated for a project that will increase both the scope and scale of the mine contamination.

With respect to the impact assessment process, ICL urges the Impact Assessment Agency to designate a federal review panel for the Castle Project. An independent, federal review panel is needed to ensure that experts in applicable fields are commissioned to provide an objective review of the project. Canadians and Americans alike deserve to know that the process will be objective, thorough, transparent, and non-exclusive. We hope that you will approve our request to designate a federal review panel and continue to welcome the participation of U.S. citizens and indigenous nations in this process. Thank you for your consideration.

Sincerely,

Bunky E. Sim

Brad Smith North Idaho Director