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The Honourable Jonathan Wilkinson MP
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Attention: Minister Wilkinson

Re: Further Submissions re Request for Designation of the Vista Thermal Coal Mine Expansion Phase

1. Introduction

I write to you on behalf of Keepers of the Water, Keepers of the Athabasca and the West Athabasca Bioregional Society (the "Applicants"). The Applicants make the following submissions in response to the submissions of Coalspur Mines Ltd. ("Coalspur") dated May 29, 2020, and in support of their May 1, 2020 designation request.

The Expansion Phase, as defined in the May 1, 2020 designation request, is a listed project under the *Physical Activities Regulations* (the "*Regulations*") and ought to undergo an impact assessment. In the alternative, Minister Wilkinson should exercise his discretion under s. 9(1) and designate the project for an impact assessment.

There are clear and compelling reasons why the Impact Assessment Agency (the "Agency") is required to consider the Expansion Phase as a whole in its consideration of whether the Expansion Phase is a designated project. It cannot parcel up an expansion into smaller projects based on assurances from the proponent. If the Agency condones this type of project splitting it

would serve as a blueprint for future proponents allowing them to divide an expansion into smaller pieces rendering s. 19(a) of the *Regulations* toothless.

As set out in both the Applicants' and the Louis Bull Tribe's requests for designation (collectively, the "Designation Requests"), the current decision relates to are a number of issues not previously considered by the Minister. Coalspur's failure to inform the Agency of its proposed underground operations during the previous designation request should be a complete answer to any argument that it is inappropriate to reconsider the Minister's December 20, 2019 decision.

Underground operations are a part of the area of mining operations. The inclusion of underground operations is consistent with the purpose behind the addition of the definition, and would ensure the entire facility and its impacts are captured by the *Regulations*.

There is no question that the Expansion Phase may result in adverse impacts on the rights of Indigenous peoples. However, as has been detailed in the submissions of the impacted First Nations, the provincial consultation process is woefully inadequate to address these concerns. The Minister cannot, as he did in his December 20, 2019 decision, rely on these processes providing a mechanism for satisfying the duty to consult and the federal government's responsibilities under s.35 of the *Constitution Act, 1982*.

Finally, Coalspur's response to the Applicants has not addressed the undergirding rationale behind their request to designate the Expansion Phase under s. 9(1):

1) Coalspur is proposing the largest thermal coal mine in Canadian history;
2) Despite the fact that a mine one eight the size of the Vista mine would be automatically designated for an impact assessment, the Vista mine has never undergone a federal assessment;
3) Coalspur has repeatedly failed to keep the agency fully informed of its expansion plans obligating the Applicants to bring those plans to the attention of the Agency;
4) While underplaying its expansion ambitions in submissions to the Agency, Coalspur recently stated it intends to expand its operations far beyond that which is currently proposed to upwards of 20 MT/year.[1]

It is clear that Coalspur intends to continue to expand the Vista Mine on a piecemeal basis all the while avoiding any federal assessment of impacts. This is exactly the reason why the s. 9(1) provision exists – to act as a safety net where the unique circumstances of a project necessitate a review not otherwise triggered by the *Regulations*.[2]

[1] Kuykendall, Taylor. "Cline Groupp exec's team continues Canadian mine project after his death" *S&P Global Market Intelligence* (2020) online: <https://www.spglobal.com/marketintelligence/en/news-insights/trending/TSD3gB-GIFbEJZ3WoCvJMg2> See: "Vista produced 2 million tons from both properties in 2019, Beyer said, but expects to produce 5 million to 6 million tons in 2020 *with the ability to grow its annual production capacity to 20 million tons." (emphasis added)*

[2] "Regulatory Impact Analysis Statement: Regulations Amending the Regulations Designating Physical Activities" (20 April 2013), online: http://www.gazette.gc.ca/rp-pr/p1/2013/2013-04-20/html/reg1-eng.html.

2. Project Splitting Should Not Be Condoned by the Agency

Coalspur's suggestion that each facet of the expansion can be considered in isolation is a dangerous interpretation of the Minister and the Agency's obligations under s. 9(1) of the *Impact Assessment Act* (the "*IAA"*) and s. 19(a) of the *Regulations*, and would open the floodgates to project splitting, watering down this provision of the *Regulations*.

a. S.19(a) Focuses on the Increase in the Area of the Facility as a Whole

Coalspur is proposing to expand its operations at the Vista Mine to build one of, if not, the largest thermal coal mines in Canadian history. If the components of the Expansion Phase were proposed as a standalone project – a geographically and temporally proximate large mine pit and an underground operation relying on the same processing infrastructure – it would trigger an impact assessment under section s. 18(a) of the Schedule to the *Regulations* as a coal mine with more than 5,000 t/day in production capacity. The Expansion Phase is clearly of the size and scale of the type of major project presumptively subject to scrutiny under the *IAA*, its connection to the existing mine is the only reason an assessment is not a default requirement.

In that context, the pertinent question under s. 19(a) of the *Regulations* for both the Agency and the Minister is whether the Expansion Phase is "the expansion of an existing mine" that "would result in an increase in the area of mining operations of 50% of more." This provision is focused on the "result" of a proposed expansion.

The "connected actions" test, as further addressed below, has little relevance to the question asked by the *Regulations*: what is the resulting impact of the proposed expansion on the area of mining operations of the facility as a whole, including both existing operations and any expansion. It is impossible to assess the resulting impact on the overall area of mining operations of the Expansion Phase by looking at each component in isolation. None of the jurisprudence or guidance that Coalspur refers to deal with s. 9(1) of the *IAA* or s. 19(a) of the *Regulations* and in its submissions it has not attempted to address the plain statutory language of the *Regulation* that focuses on the "result" of the expansion on the size of the overall facility.

b. The "Connected Actions" Test has no Relevance to S.19(a)

All of the law and guidance Coalspur refers to in support of the "connected actions" test arises from the old *Canadian Environmental Assessment Act, 1992* ("*CEAA 1992"*), a scheme Coalspur itself argues is "entirely different" and "therefore irrelevant"[3] to the current facts and legislative framework.

The "connected actions" test arose out of the Agency's "*Operational Policy Statement: Establishing the Project Scope and Assessment Type under the Canadian Environmental Assessment Act"* (the "*Operational Policy Statement*") which was issued to implement the

[3] Coalspur Mines Ltd., "Coalspur Response to IAA Letter re Requests for Designation" (29 May 2020), online: https://registrydocumentsprd.blob.core.windows.net/commentsblob/project-80731/comment-47491/Coalspur%20Response%20to%20IAA%20Letter%20re%20Requests%20for%20Designation.pdf at 13-14.

MiningWatch decision[4] and was interpreted in the *Conseil des innus* case referred to by Coalspur.[5] The *Operational Policy Statement* was drafted to provide guidance on the consistent application of the Minister's scoping decision of projects under section 15 of the *CEAA 1992* after it had already been determined that a project or projects required an assessment. As demonstrated in *Conseil des innus*, the *Operational Policy Statement* and the "connected actions" test was used to determine whether the Minister could combine two separately triggered projects into one review. It had nothing to do with whether related components of a proposed expansion are jointly of a sufficient size to warrant a new impact assessment nor does it relate in any way to the *Regulations*. Or put another way, this test has been applied to determine whether there are to be two separate assessments, not to determine that there be no assessment at all.

Further, it is questionable whether the *Operational Policy Statement*, and thus the "connected actions" test, has any applicability to the current statutory scheme at all. Section 15 of *CEAA 1992* has been repealed and there is no similar provision of this nature in the *IAA*. Indeed, the *Operational Policy Statement* no longer appears on the Agency's list of applicable policy and guidance.[6] Coalspur has not provided any rationale for its proposed novel application of a test that arose out of a now rescinded section of the *CEAA 1992*, not to mention in a totally different arena of the impact assessment scheme that it has admitted was "entirely different" and "therefore irrelevant" to the facts and legislative framework of the current decision.

Section 19(1) of the *Regulations* specifically considers proposed expansions in relation to the existing facility. To fail to take this critical aspect of the regulatory context into account would grant proponents a licence to project split. This cannot have been the intention behind the *Regulations*. A proponent could easily expand an existing mine by far more than a 50% increase in the area of mining operations simply by proposing expansions on opposite ends of the existing mine using separate provincial approvals and claiming that the decision related to one was independent from the other. This would be a dangerous endorsement by the Agency of project splitting, and is a radically different outcome than what the Court's considered when weighing whether the "connected actions" test should couple assessments into one or allow two separate assessments.

While the applicability of the *Operational Policy Statement* arising out of the *MiningWatch* decision has arguably been rendered obsolete by the repeal of s. 15 of the CEAA, the Supreme Court of Canada's general interpretation of the overarching principles of impact assessment in that decision remain pertinent to the decision at hand. The Supreme Court of Canada's recognition of the dangers of project splitting are just as applicable under the *IAA*. Impact assessment is still proponent driven and thus the *IAA* still assumes that "the proponent will represent the entirety of the proposed project in relation to a physical work".[7] The dangers

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[4] Canadian Environmental Assessment Agency, "Operational Policy Statement: Establishing the Project Scope and Assessment Type under the Canadian Environmental Assessment Act" (updated December 2011).
[5] *Conseil des innus de Ekuanitshit c. Canada (Procureur général)*, 2013 FC 418 ["*Conseil des innus*"] at para 57.
[6] See Impact Assessment Agency of Canada, "Policy and Guidance: Impact Assessment Act (IAA)", online: https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance.html.
[7] *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR 6 ["*MiningWatch*"] at para 40.

identified by the Supreme Court of Canada that "a proponent could engage in 'project splitting' by representing part of a project as the whole, or proposing several parts of a project as independent projects in order to circumvent additional assessment obligations"[8] are just as applicable to the *IAA*.

The obvious connection among the different components of the Expansion Phase was recognized by Fisheries and Oceans Canada who determined that "both Vista Phase II and the Vista Test Underground Mine will be considered in a single review under the *Fisheries Act* and *Species at Risk Act*."[9] There is no reason for the Agency to differ from this approach under the *IAA*.

c. Coalspur's Interpretation of s. 19(a) Would Restrict its Application

There are not only clear legal reasons for considering the Expansion Phase as a whole, but there are serious policy implications from Coalspur's proposed interpretation that would enable a piecemeal consideration of each component.

As previously stated, under Coalspur's interpretation of s. 19(a), a proponent could propose multiple expansions to an existing mine in different directions by a cumulative amount far exceeding the threshold increase in the area of mining operations, but because the proponent asserts each expansion is "completely independent" from the other expansions it would escape scrutiny. Under Coalspur's interpretation of s. 19(a), a proponent would have no incentive to advance an expansion resulting in an increase in area of mine operations of 50% of more, as it could parcel up those expansions into smaller sizes to avoid the need for federal assessment. The policy implications of such a watering down of the *IAA* are exactly the danger the Supreme Court of Canada recognized in the above quoted passage from *MiningWatch*.

In the alternative, if the Agency rejects the Applicants' above submissions that all components of the Expansion Phase are to be considered jointly for the purposes of determining whether the Expansion Phase is a designated project under s. 19(a) of the *Regulations*, there is nothing preventing the Minister from exercising his discretion to designate the entirety of the Expansion Phase under s. 9(1). Under that section the Minister has full discretion to designate any "physical activity" that is not prescribed in the regulations. Nothing in Coalspur's argument suggests any curtailment of the Minister's power to exercise this discretion over the whole of the Expansion Phase.

3. New circumstances since the Minister's decision on December 20, 2019 warrant redetermination of these issues

As was detailed in the initial Designation Requests, there are a number of new issues that have arisen since the Minister made his determination on December 20, 2019, specifically the Vista

[8] *Ibid*.
[9] Fisheries and Oceans Canada, "Federal Authority Advice Record: Designation Request under IAA -- Proposed Expansion Activities of the Vista Coal Mine Project" (8 June 2020), online: https://registrydocumentsprd.blob.core.windows.net/commentsblob/project-80731/comment-47598/Vista%20Test%20Underground%20Mine%20Designation%20Request%20DFO%20FAAR%208Jun2020.pdf.

Test Underground Mine (the "VTUM"). Both the Agency and the Minister are well within their discretion to consider this new information and to make a new determination based on this information. This is particularly true where the proponent had not provided this pertinent information prior to the previous decision.

Curtailing the Minister's ability to reconsider a previous decision based on new information is not only baseless in law, but would encourage proponents to withhold information during the s. 9(1) designation review process in the hopes that an initial decision based on incomplete information was binding on future designation requests. If a proponent is concerned about "regulatory certainty", as Coalspur suggests, they can ensure that these concerns are addressed by notifying the Agency of any proposed changes to existing projects. Indeed, Coalspur has had an ongoing obligation to notify the Agency of any proposed changes to the Vista Mine since May 4, 2012[10] and despite having applied to the Alberta Energy Regulator ("AER") for the VTUM on April 17, 2019 appears to have not informed the Agency during the previous designation request. A new 3 million tonne underground mine[11] surely triggers this obligation.

Coalspur cautioning against "reversing" a previous designation request ignores the underpinning rationale behind the new Designation Requests – that significant and pertinent new information has come to light. Even if the Minister had received a request that related substantially to the same project, he would be obligated to provide a response and to respond to the request as outlined by the applicant. Section 9 of the *IAA* does not preclude the Minister from considering another request received from the public for a related physical activity. In fact, the Minister is obligated to provide a response to any request her receives under s. 9(1) and is only prevented from making a designation under two circumstances: if the physical activity has already substantially begun, or if a federal authority has already exercised a power that could permit the activity to be carried out.[12]

Coalspur refers to the Agency's own Operational Guide where it is stated that, among nine other factors, the Agency *may* consider a previous response to a request to designate a project to support its position that the Minister should not revisit his original decision. The presence of this factor in the Operational Guide demonstrates that it was not only envisioned by the Operational Guide that the Minister was not bound by a previous determination and could receive multiple s. 9(1) requests for the same project, but also that the Agency or the Minister are not even obligated to consider a previous determination – they simply have discretion to weigh whether a previous

[10] See "Letter from Michelle Camilleri at the Canadian Environmental Assessment Agency to Curtis Brinker re Coalspur Mines Ltd. Vista Coal Mine Project" (4 May 2012): "The Agency should be notified of any Project changes to confirm that this conclusion still applies to the Project"; and "Letter from Wajeeha Siddiqui at the Canadian Environmental Assessment Agency to Will Fisher re Determination of Vista Coal Project (Phase II) as a Physically Designation Activity under CEAA 2012": "Should the Project or any of the planned activities change…please contact the Agency to discuss the application of CEAA 2012."

[11] Alberta Energy Regulator, "Proposed Expansion Activities of the Vista Coal Mine Project" June 10, 2020, Submissions to Impact Assessment Agency, online: <https://registrydocumentsprd.blob.core.windows.net/commentsblob/project-80731/comment-47520/Response%20to%20IAAC%20Coalspur%20Underground-%20June%2010%202020.pdf> at p 1.

[12] *Impact Assessment Act*, SC 2019, c 28, s 1 at s 9(7).

determination has bearing on the subsequent request. This discretion is particularly relevant where a number of new issues have arisen since the Minister's previous determination.

Finally, the *Syncrude* case referred to by Coalspur not only relates to a different statute and decision making context, but involved a situation where there were no new issues. As the Court in that case stated "The onus was on Syncrude to raise new issues that had never been considered before."[13] As is abundantly clear from the differences between the May 2020 requests and the May 2019 request there are a number of new issues including the VTUM, the impacts of the Phase II Pit as well as all other expansion activities on both the Louis Bull Tribe and Stoney Nakoda Nations' aboriginal and treaty rights, the impact of Highwall Mining on the area of mining operations, and Coalspur's April 8, 2020 application to the AER.

The Agency is well aware of the new issues in the Designation Requests. The IAA Registry entry in relation to the two May 1, 2020 designation requests is separate and distinct from the original designation request made in May 2019. The May 2020 requests (Reference # 80731) relate to "Coalspur Vista Coal Underground Mine and Expansion Activities Project"[14] whereas the May 2019 request (Reference # 80341) refers to the "Coalspur Vista Coal Mine Phase II Expansion".[15]

4. "Area of mining operations" includes underground workings

The Applicants' May 17, 2020 designation request set out that the definition of "area of mining operations" should be interpreted to include the underground workings of the mine. As the definition of area of mining operations is "the area at ground level occupied by any open-pit or underground workings, mill complex or storage area for overburden, waste rock, tailings or ore" they submitted that underground workings should be calculated as the area they would occupy if present at ground level.

In support of this argument the Applicants provided references to the Regulatory Impact Assessment Statement that accompanied the addition of this definition to the *Regulations*, which clearly indicates that the definition is meant to capture the facilities of the mine as a whole, whether on the surface or underground. Especially in the context of mining, a failure to consider underground operations on an application for expansion would defeat the purpose behind the thresholds in the *Regulations*.

In Coalspur's response, they have suggested that including underground operations would cause significant difficulties in calculating the project's footprint:

> "[Including the area of underground operations] would lead to absurd and confusing results. For instance, if two waste rock piles occupy the same surface area at ground level but one is deeper than the other, does this change the calculation? If so, is it based on the surface area of the rocks in the pile, the number of rocks in the pile, or some other

[13] *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2014 FC 776 ["Syncrude"] at para 168.
[14] IAA Registry, "Coalspur Vista Coal Underground Mine and Expansion Activities Project", online: https://iaac-aeic.gc.ca/050/evaluations/proj/80731,
[15] IAA Registry, "Coalspur Vista Coal Mine Phase II Expansion Project", online: https://iaac-aeic.gc.ca/050/evaluations/proj/80341.

consideration? What if an open-pit mine contains two seams, one underneath the other separated by overburden, which is mined in two separate passes? Should the 'area at ground level' be doubled?"

Including underground operations as part of the area of mining operations would not cause absurd and confusing results, as Coalspur suggests. Underground operations would be calculated just as Coalspur did in its application to the AER: on a two-dimensional basis, as with facilities occupying the surface. Overlapping operations, such as operations mined in two separate passes, or the area of underground operations that overlap with surface facilities, would not be calculated twice.

Coalspur's application to the provincial AER illustrates the routine nature of these kinds of calculations. Coalspur provided mapping information and detailed calculation of area for the VTUM (121.8 ha),[16] despite the fact that this planned expansion is primarily made up of underground workings. Coalspur did not engage in an analysis of the "surface area of the rocks in the pile, the number of rocks in the pile", or any other "absurd" analysis to reach this estimated area. The calculation was simple – the area, in hectares, of the underground workings, measured as if they were present at surface level.

The Agency has previously accepted footprint for underground operations that were included in a proponent's calculation of the area of mining operations. When calculating the area of mining operations for the Lynn Lake Gold Project, an expansion to an existing gold mine, the proponent Alamos Gold Inc. included the "historical extent of the underground workings" as part of the operational area for the original project.[17] This information, as provided by the proponent, appears to have been accepted by the Agency.

By advancing an interpretation of "area of mining operations" that only considers surface area, Coalspur would have the Agency treat a small mine and a major underground operation identically with no consideration for their actual size. Obviously a larger mine may have a greater surface area disturbance, however it is all too easy for a proponent to piggy-back processing infrastructure onto an existing approval. Provided a mine entry for a 100,000 tonne/year mine and a 10,000,000 tonne/year mine is similar, Coalspur asks the Agency to treat them identically. This cannot have been the intended interpretation of a regulation whose purpose was to target major projects and allow minor projects to proceed.

5. It is not a legal error to rely on a range of potential area for the proposed expansion

In the Analysis Report prepared to assist the Minister's December 20, 2019 determination for Phase II, the Agency relied on a range of potential area of mining operations to determine whether the expansion was a prescribed project under the Regulations. Communication between counsel to the Applicants and the Agency revealed which figures were relied upon to determine

[16] Coalspur, "Vista Test Underground Mine: Joint Application for Amendments to Approvals under the Environmental Protection and Enhancement Act, Water Act, Public Lands Act and Coal Conservation Act" (February 5, 2020), online: https://dds.aer.ca/iar_query/ApplicationAttachments.aspx?AppNumber=1927365 at 7.
[17] Alamos Gold Inc., "Project Description – Lynn Lake Gold Project" (22 June 2017), online: https://iaac-aeic.gc.ca/050/documents/p80140/119533E.pdf, at 6.

this range: a potential area from 1319.6 ha to 1281.5 ha for the existing Phase I, based on anticipated reductions to the original footprint, and a potential area of 590.3 to 652.2 for Phase II. The largest possible expansion was determined to be 49.4%, based on the maximum reduction to Phase I (1391.6 ha) and the largest potential area for Phase II (652.2 ha).

Coalspur now takes issue with the Agency's reliance on a range of potential areas:

> "[I]t is improper to use the smallest possible size of Phase I (1319.6) and the largest possible size of Phase II (652.2) when determining the size of the expansion. Doing so means that different criteria are being applied when calculating the respective sizes and this would constitute an error of law."

There is no evidence that the discrepancy in the range of the area of Phase I and Phase II was based on the use of a different definition or criteria of "area of mining operations". If Coalspur had that evidence one would assume they would have referred to it. They did not. Instead they have postulated that the Agency did so and have suggest that the Agency used one criteria for the higher range and one definition for the smaller range without any evidence. In fact, the evidence says just the opposite. The footprint of Phase I has changed over time, and the area range used is based on uncertainty around planned future reductions to operations. On the other hand, the discrepancy in the size of Phase II was based on other factors, as the project was still conceptual and that it may change based on factors independent of whether Phase I was reduced. Therefore it is perfectly appropriate for the Agency to consider an outcome – which Coalspur has not denied could arise – where Phase I operations are reduced to the low end of the range they have proposed and where Phase II operations are increased to the top of their proposed area range.

In this process the proponent holds great power over which information it submits to the Agency. As it relates to the footprint of both the Phase I and Expansion Phase operations the Agency bases its determination almost entirely off the material submitted to it by the proponent. While the proponent may not agree with the Agency's interpretation of the materials it submits, the Agency has discretion to lawfully interpret the proponent's materials differently than the proponent. Absent anything else, the use of a range of potential outcomes is not an error in law.

Additionally, the proximity of the potential expansion to the threshold under the Regulations is a relevant factor on a decision to designate the project. When developing its recommendation to the Minister, a relevant factor for the Agency to consider is whether or not "the project or its expansion(s) is near a threshold set in the Project List".[18]

6. Impacts to Indigenous Rights and Title warrant designation of the Expansion Phase

The Applicants understand that on June 30th, 2020 the Stoney Nakoda Nations ("Stoney Nakoda") submitted a letter in support of the Designation Requests to the Agency. In their letter the Stoney Nakoda detail their ongoing court action claiming Aboriginal rights and title as well

[18] "Operational Guide: Designating a Project under the Impact Assessment Act", online: https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/designating-project-impact-assessment-act.html

as the direct adverse effects arising from Phase I and the Expansion Phase. As the Stoney Nakoda summarize in their letter:

> *"Stoney Nakoda has at no point been consulted on any aspect of the existing Vista Mine nor the Expansion Phase. This is despite the fact that the Vista Mine and Expansion Phase are located entirely in the traditional territory of Stoney Nakoda which is the subject of the Title Claim, and that the Stoney Nakoda have expressed serious concerns about direct and adverse impacts."*[19]

The provincial Aboriginal Consultation Office has determined that no consultation with any Indigenous community is required in relation to the VTUM.[20] In its May 29, 2020 letter Coalspur notes that it has not been directed to consult with Stoney Nakoda in regards to the Expansion Phase. The likely adverse impacts from the project on Stoney Nakoda's rights and title engage the honour of the crown and the requirement for the federal and provincial governments to adequately fulfill their duty to consult. The federal government cannot rely on the province to satisfy the duty to consult when there is undisputed evidence before it that consultation will not be undertaken.[21]

In the Minister's decision on December 20, 2019, it was acknowledged that the Phase II expansion may result in adverse effects on the rights of Indigenous peoples of Canada and that there are Indigenous concerns regarding the effects of the project. Minister Wilkinson, however, concluded that the *Fisheries Act* application process and the provincial assessment and regulatory processes "provide mechanism for consultation with Indigenous peoples, including addressing potential adverse effects and concerns raised by Indigenous peoples."

Stoney Nakoda's letter demonstrates this is simply not the case. Stoney Nakoda have a number of serious concerns about direct and adverse impacts of the Expansion Phase that extend far beyond the focused matters addressed in a *Fisheries Act* permit. Yet at no point have they been consulted on any aspect of the existing mine or the Expansion Phase. There is no planned consultation required by Alberta for the VTUM. While the proponent has committed to "discussing" the Expansion Phase with Stoney Nakoda "if they raise any issues specific to Coalspur's activities," there is no guarantee that this will happen or that the province will ensure that it does. It also indicates that Coalspur has no intention of proactively engaging in consultation with Stoney Nakoda. Further, Coalspur's erroneous statement that the project is located within Treaty 7 raises questions regarding the thoroughness of their consideration of the nature of the potentially impacted First Nations and Métis.

As stated by the B.C. Supreme Court in *Coastal First Nations v British Columbia (Environment),* 2016 BCSC 34, in the environmental context neither the provincial or federal government can

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[19] Letter from Sara Louden, Rae and Company (Counsel to Stoney Nakoda Nations) to Honourable Jonathan Wilkinson MP Minister of Environment and Climate Change, Impact Assessment Agency of Canada, Attn. Shelly Boss (30 June 2020) Support of Requests for Designation under the Impact Assessment Act of Coalspur Mine (operations) Ltd.'s Vista Coal Mine Expansion.

[20] Coalspur Mines Ltd., "Coalspur Response to IAA Letter re Requests for Designation" (29 May 2020), online: https://registrydocumentsprd.blob.core.windows.net/commentsblob/project-80731/comment-47491/Coalspur%20Response%20to%20IAA%20Letter%20re%20Requests%20for%20Designation.pdf at 5.

[21] See *Coastal First Nations v British Columbia (Environment),* 2016 BCSC 34 at paras 195-213.

discharge their duty to consult Indigenous nations through reliance on insufficient consultation by the other government:

> [W]here action is required on the part of the Crown in right of the Province or federal government, or has been undertaken by either – the manifestation of the honour of the Crown, such as the duty to consult and accommodate First Nations, is clearly divisible by whichever Crown holds the constitutional authority to act … where environmental jurisdictions overlap, each jurisdiction must maintain and discharge its duty to consult and accommodate.[22]

The federal government cannot discharge this constitutional duty through reliance on a deficient provincial process that has denied Stoney Nakoda *any* consultation rights in relation to both the Expansion Phase and Phase I. By all indications since the Minister's December 20, 2019 decision, the province has failed to adequately consult the Stoney Nakoda regarding the Expansion Phase, along with the previous failure to consult for Phase I. Further consultation is critical for this constitutional duty to be met, which could be fulfilled through the impact assessment process.

7. Specific Responses to Information Requests

The Applicants also wish to address a number of points made by Coalspur in response to specific Information Requests by the Agency.

a. Information Request 1

In response to Information Request 1, Coalspur states that the increase in capacity from the VTUM "will not result in any changes to components of Phase I or Phase II." Coalspur has not explained why how this increase in annual production (1 million tonnes of raw coal a year) will be handled by its processing facility and the implications of this new capacity on waste generation. This is particularly pertinent and important for the Agency to understand given Coalspur's existing water/cleaning capacity shortages.[23]

b. Information Request 2

In response to Information Request 2, Coalspur cites from information it submitted to the AER in its VTUM application. It states that previous iterations of the Vista Project were found to have no significant environmental impacts. While it is unclear which iterations of the Vista Project or which regulatory decisions Coalsur is referring to, the Phase I approval by the AER found that the project would have adverse effects on the environment, including "aspects of the mine plan and the size of the end-pit lake, the effect on unique landscape features, the effect on certain

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[22] *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34 at para 196.

[23] Coalspur's refuse processing facilities located in Phase I, intended to also serve Phase II, have proved insufficient to manage waste produced from Phase I. In an application to the AER dated November 5, 2019, Coalspur indicated that its Coal Preparation Plant was already at capacity given that it had underestimated the amount of refuse that it would generate by a factor of two: See "Application by Coalspur Mines Ltd. to the Alberta Energy Regulator for amendments to licenses granted to the Vista Coal Mine" (5 November 2019), online: https://dds.aer.ca/iar_query/ApplicationAttachments.aspx?AppNumber=1925597 at 3.

segments of wildlife and fish, and the effect on water quality." While it approved the project on the basis that those effect could be managed through conditions and monitoring or mitigation, it made no determination that those impacts were not significant.[24]

c. Information Request 6

In response to Information Request 6, Coalspur draws attention to the observable impacts of the VTUM:

> "The Underground Test will not impact the public or any Indigenous group's traditional activities because its footprint is located entirely within the boundaries of the existing Phase I Vista Project Mine Permit (C 2011-5D). The fact is that an interested observer standing at the fence-line of the existing Phase I would likely be unable to observe any changes as a result of the Underground Test unless he or she had previous experience or expertise with underground mining infrastructure."

While it is unclear, Coalspur appears to insinuate that visual impacts are somehow determinative of effects, a proposition that undermines the core tenets of impact assessment. While it is all but certain that said interested observer would make note of an extra 3 million tonnes of raw coal being extracted, an "eye test" is no substitute for scientific information and Indigenous knowledge. Increasing the production capacity of the mine through underground expansion increases the adverse environmental impacts of the project – greenhouse gas emissions through increased production, impacts to water, fish and fish habitat, traffic activity in the area, along with other potential impacts whether this hypothetical observer makes note of those effects or not.

As has been identified by Environment and Climate Chance Canada ("ECCC") in submissions to the Agency on June 8, 2020, there are numerous potential impacts on areas of federal jurisdiction arising from this project beyond visual impact.[25] ECCC specifically noted the potential for negative impacts to water quality through these underground operations: "Effects to surface water quantity and quality resulting from may occur as the result of the interaction between groundwater-surface water due to underground mining and dewatering."[26]

Coalspur has further stated that it will be modifying the Life of Mine Water Management Plan, Groundwater Management Plan and Source Water Supply Plan "to *minimize* any impacts from the Underground Test."[27] This appears to indicate that Coalspur is not only aware will there be impacts from the underground mine, but also that those impacts cannot be fully avoided, only mitigated.

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[24] Alberta Energy Regulator Decision on McLeod River Coal Field, dated February 27, 2014, Para: accessed online at https://www.aer.ca/documents/decisions/2014/2014-ABAER-004.pdf

[25] Link to ECCC submissions: https://registrydocumentsprd.blob.core.windows.net/commentsblob/project-80731/comment-47521/20200608_CoalspurUndergroundTestMine_FAARCoverletterFinal.pdf.

[26] ECCC submissions at page 4.

[27] Coalspur Mines Ltd., "Coalspur Response to IAA Letter re Requests for Designation" (29 May 2020), online: https://registrydocumentsprd.blob.core.windows.net/commentsblob/project-80731/comment-47491/Coalspur%20Response%20to%20IAA%20Letter%20re%20Requests%20for%20Designation.pdf at 6.

d. Information Request 7

In response to Information Request 7, Coalspur refers to the VTUM as "an exploratory underground mine which will test various safety and production methods to determine the feasibility of developing additional underground coal mines with the areas Coalspur has leased." The Applicants do not dispute what Coalspur is saying. However, in addition to this purpose, the VTUM itself will produce a significant amount of coal. In the Applicants' May 29, 2020 letter they cited to Coalspur's Notice of Application which stated that the annual capacity of the mine would be 635,000 tonnes/year, however, based on the information provided to the Agency by the Alberta Energy Regulator, it is worth noting that the VTUM will extract over 3 million tonnes of raw coal over a three year period, which means that the raw coal extracted from the VTUM is roughly 1 million tonnes a year.[28] This is by no means a small expansion and appears to be consistent with Coalspur's stated goal of increasing the annual capacity of the Vista mine to 20 million tonnes/year.

8. Outstanding Economic Questions

In addition to the matters raised in the Designation Request, the Agency and the Minister must also consider the economic implications of the market for thermal coal in determining whether the potential adverse effects can be adequately mitigated. Through its membership in the Powering Past Coal Alliance, Canada is actively working to shift the world away from unabated coal-fired electricity. This includes a phase out of unabated coal-fired electricity in EU and OECD (including South Korea and Japan) countries by 2030 and globally by 2050.[29]

If the Powering Past Coal Alliance's efforts are to be realized, there will be serious questions about the viability of the market for thermal coal in the coming years and decades. The Applicants understand that the Vista Project is Coalspur's only operation. In order to maintain Coalspur's proposed mitigation, reclamation and remediation needed to address any potential adverse effects arising from a project of this magnitude and scope, Coalspur will require a viable market and cash flows from the sale of this commodity. Assessment of market viability in relation to long-term adverse effects is particularly important where the project is likely to require remediation after operations cease, as with the Expansion Phase.

An impact assessment is necessary to consider this foreseeable issue relating to whether any proposed mitigation is economically feasible.[30]

9. Conclusion

There are a number of new issues in relation to this expansion that have not been previously considered by the Minister or the Agency. The additional expansion through the VTUM would

[28] Alberta Energy Regulator, "Proposed Expansion Activities of the Vista Coal Mine Project" June 10, 2020, Submissions to Impact Assessment Agency, online: <https://registrydocumentsprd.blob.core.windows.net/commentsblob/project-80731/comment-47520/Response%20to%20IAAC%20Coalspur%20Underground-%20June%2010%202020.pdf> at p 1.
[29] Powering Past Coal Alliance, "Our Mission" available online: <https://poweringpastcoal.org/about>
[30] *IAA*, s 22(1)b

allow project splitting, which should not be permitted by the Agency or the Minister. The Agency should designate the Expansion Phase as a listed project and subject it to an impact assessment.

In the alternative, none of the submissions made by Coalspur prevent the Minister from exercising his discretion to designate the Expansion Phase under s.9(1) of the *IAA*. The designation request from the Louis Bull Tribe and further submissions by the Stoney Nakoda have demonstrated the likelihood of impacts to Indigenous rights and title, which must be addressed prior to approval of this further expansion. In order to fulfill the purpose behind the *IAA* and *Regulations*, it is essential for the Minister and Agency to consider the Expansion Phase in its entirety and determine the need for federal assessment.

Sincerely,

<Original signed by>

Anna McIntosh
Barrister & Solicitor