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July 7, 2023

**VIA EMAIL**

File No. 1265-070

Moraine Power Generation Project  
Impact Assessment Agency of Canada  
9700 Jasper Avenue, Suite 1145  
Edmonton, Alberta T5J 4C3  
[Moraine@iaac-aeic.gc.ca](mailto:Moraine@iaac-aeic.gc.ca)

To whom it may concern:

**Re: Initial Project Description – Moraine Power Generation Project**

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We write on behalf of Whitefish (Goodfish) Lake First Nation #128 (“**WLFN #128**”) in respect of the application by Moraine Initiatives Limited (“**Moraine**”) for its proposed natural gas-fired power generation facility with integrated carbon dioxide capture (the “**Project**”). Specifically, we are providing comments on the proposed Project’s Initial Project Description (“**IPD**”).

The Project is situated on WLFN #128’s traditional territory (please see Appendix A) and has the potential to impact the resources upon which WLFN #128 relies for the exercise of their Treaty rights and related cultural practices, the health and safety of community members, and the integrity of the environment upon which WLFN #128 relies for its way of life. WLFN #128 has not been provided with funding to undertake a review of the IPD, therefore this letter in no way represents a thorough technical evaluation of the Project’s impacts.

**About WLFN #128**

WLFN #128 is a First Nation with Aboriginal and Treaty rights protected by s. 35 of the *Constitution Act, 1982* and a signatory of Treaty 6. WLFN #128 is located in Alberta with reserve land approximately 220 km northeast of Edmonton. The total population of WLFN #128 is approximately 2,378 with approximately 1,778 members living on reserve. WLFN #128 has carried out its way of life within its traditional territory for centuries. This way of life predates the signing of Treaty 6 and the creation of Canada and Alberta. Treaty 6 assured WLFN #128 that it would be able to hunt, fish and trap and maintain its traditional way of life “as before the Treaty.”



As a signatory to Treaty 6, WLFN #128 holds Treaty rights within and directly adjacent to the Project area. Through Treaty 6, signed in 1876, the Crown solemnly promised that WLFN #128 could maintain its way of life and its people would be free to hunt, trap, fish, and harvest throughout their traditional territory as they had done before entering the Treaty. The Crown also promised that descendants of WLFN #128 would be entitled to access lands and waters to exercise their Treaty rights to hunt, trap, and fish throughout their traditional territory. In addition to these rights, WLFN #128 also has rights to carry out activities incidental to the exercise of express Treaty 6 rights, such as the right to access areas for harvesting and the right to use camping areas and so on. The Crown must ensure that the potential effects on WLFN #128's Treaty rights are adequately assessed, and any impacts addressed with particular focus on avoiding Treaty infringement.

### **The Project's Impacts on WLFN #128**

In a preliminary assessment, WLFN #128 has identified that the Project has the potential to cause adverse impacts to WLFN #128's Treaty and Aboriginal rights and associated cultural practices. WLFN #128 is already facing the cumulative impacts of development within its territory and is concerned about the potential impacts of this Project on its rights given the nature of the activities, the overlap of the Project location with areas of importance to WLFN #128 for the continued exercise of its rights and culture, and the reality that WLFN #128 relies on the integrity of the area to support habitats, vegetation, and traditional resources which are required for its continued exercise of rights.

WLFN has historically exercised its Treaty rights and related activities within the Project area and because of the Project, will face significant negative impacts on its ability to continue doing so. The IPD states that the proposed Project area traverses areas of high historical resource potential. Fish habitat will be negatively affected. Fish will die. Migratory bird habitat will be lost. Air emissions may extend to Indigenous lands in the area. The Project area overlaps with known areas where Indigenous groups practice hunting, fishing, trapping, traditional plant uses, and cultural transmission. While Moraine has indicated in the IPD that there may be positive socioeconomic effects (like employment opportunities) for Indigenous groups, there are also direct impacts to individuals as a result of the Project, including health impacts from air quality and noise changes.

WLFN #128 members continue their ancestral traditions of hunting, fishing, trapping, and gathering across their traditional territory, including in the Project area, which is a particularly highly used area for exercising Treaty and Aboriginal rights. The Project's adverse impacts on wildlife habitat, migratory birds, and fish and fish habitat will further impede WLFN #128's ability to carry out their hunting and fishing rights. As stated in the IPD, there are numerous environmentally sensitive habitats within the Project region including Migratory Bird Nesting Zone B5 and a Key Wildlife Biodiversity Zone – an



important ungulate winter range. WLFN #128 members rely heavily on ungulate game species including elk, moose, bighorn sheep, and deer.

WLFN #128 members have a rich and enduring traditional economy that forms a fundamental component of their life and is rooted in fundamental Treaty promises made by the Crown. Although bison are no longer widely available to hunt, WLFN members continue to hunt moose, deer, and elk for subsistence purposes. This is a practice that WLFN #128 members have carried out within their traditional territory for centuries, long before they were “members” of an “Indian band” confined to reserve lands and predating the signing of Treaty 6 and the formation of Canada and Alberta. WLFN #128 Aboriginal rights flow from these practices they have exercised for centuries.

These impacts on Treaty rights will be long-term or permanent as the area will be inaccessible until reclamation is complete. There is no guarantee that reclamation will restore the plants and animals necessary to practice Treaty harvesting rights. The continuation of oil and gas operations, in conjunction with increased waste production and a long operating life, will prolong existing direct and adverse effects on WLFN #128’s ability to exercise its Treaty rights and related activities within and adjacent to the Project area. Further, increased activity means additional and prolonged effects, including wildlife habitat fragmentation, wildlife avoidance of the area, lack of access for WLFN members, access for non-WLFN members, and noise and traffic, among other things. The duration of impacts creates risk that the impacts will become permanent.

### **Cumulative Impacts**

The rich and enduring traditional economy and the practice of WLFN #128’s Aboriginal and Treaty rights as described above is under constant threat from industrial development and the taking-up of lands by the Crown in right of Canada and Alberta. A significant taking-up of land has occurred due to traditional oil and gas development and now, through activities such as the Project, WLFN #128 is seeing a further taking-up of lands for industry right next to WLFN #128 reserve lands and within WLFN’s Treaty harvesting areas. This is compounded by other industry in the area such as forestry, and the emergence of carbon capture projects, such as that proposed in conjunction with this Project. These compounding effects further risk the safety and security of WLFN #128 territory for exercising Treaty rights and continuing the Nation’s way of life. The taking up of lands within WLFN #128 traditional territory for, and loss of available crown land due to, oil and gas, forestry, agriculture, and municipal development has constrained WLFN #128’s ability to exercise their Treaty rights and cultural practices. The IPD specifically states that the Project may contribute to the ongoing cumulative effects of development in this area.

The existing cumulative effects of development should inform how the Project is assessed. Canadian courts have recognized that “historical context is essential to a

proper understanding of the seriousness of the potential impacts”<sup>1</sup> – meaning that, as the Supreme Court of Canada has stated – it is “impossible to understand the seriousness of the impact of a project on s. 35 rights without considering the larger context”.<sup>2</sup> This inquiry is about recognizing the “existing state of affairs” and addressing the consequences of what *may result* from the project.<sup>3</sup> Canadian courts have further highlighted that the consultation process is not concerned with environmental effects *per se*, but rather focuses on the impact to the right.<sup>4</sup> The cumulative effects of development have serious detrimental impacts on WLFN #128 members’ ability to exercise their rights.

### **Consultation with WLFN #128**

WLFN #128 is concerned about the potential impacts of this proposed Project on its traditional territory and seeks to fully understand the potential impacts. WLFN #128 expects that before moving forward with a proposal in its traditional territory, that Applicants and the Crown will meaningfully and directly engage WLFN #128 in consultation to fulfil the Crown’s duty to consult. For instance, Moraine has held a meeting with Indigenous groups as a collective but has not taken the time to engage directly with WLFN #128 to understand its way of life, and the conditions necessary for WLFN #128 members to continue this way of life and exercise their Treaty and Aboriginal rights.

While some funding may be available through IAAC for participation in this process, meaningful consultation requires sufficient funding to review the material in detail, conduct traditional land use studies of the impacted area, and engage meaningfully with the proponent. The Supreme Court of Canada has indicated that a lack of participant funding can contribute to a finding that the duty to consult has not been met.<sup>5</sup>

### **Conclusion**

In order for WLFN #128 to meaningfully participate and respond to the consultation request, WLFN #128 must (1) review available traditional land use information to identify uses in the area, and (2) conduct a site visit to identify specific sites within the proposed area that may be affected. Without the ability to gather and analyse this information, requiring time and resources, WLFN #128 cannot provide a meaningful assessment of impacts to rights from the proposed Project.

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<sup>1</sup> *West Moberly First Nations v BC (Chief Inspector of Mines)*, [2011 BCCA 247](#) at para 117.

<sup>2</sup> *Chippewas of the Thames v Enbridge Pipelines Inc.*, [2017 SCC 41](#) at para 42.

<sup>3</sup> *Chippewas of the Thames*, citing *West Moberly*, at para 119.

<sup>4</sup> *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, [2017 SCC 40](#) at para 45.

<sup>5</sup> *Tsilhqot’in Nation v British Columbia*, [2007 BCSC 1700](#) at para 1138, affirmed in 2012 BCCA 285, but not on this point.



WLFN #128 looks forward to a meaningful response and continued discussions about these issues as part of ongoing consultation on the proposed Project.

Sincerely,  
**JFK Law LLP**

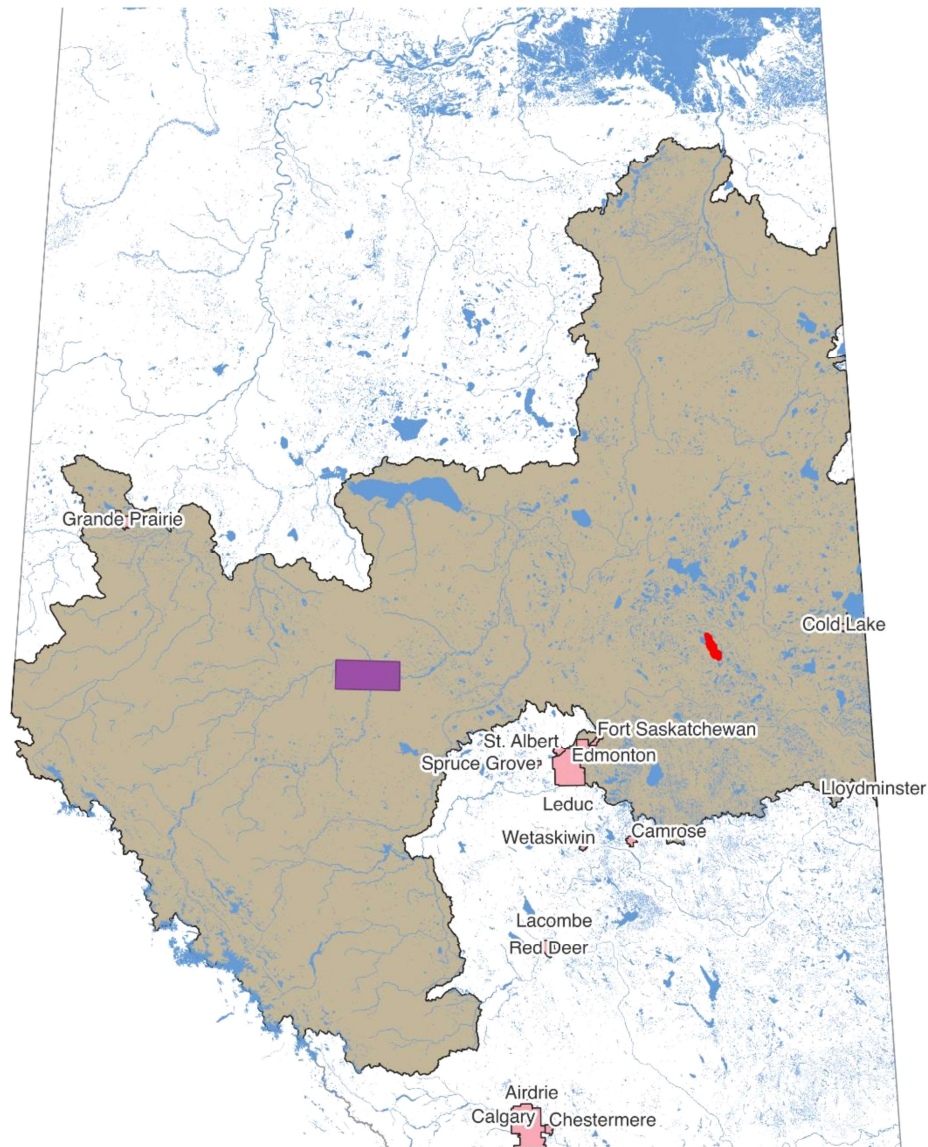
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
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## APPENDIX A

### Moraine Power Project Location in Whitefish Lake First Nation Traditional Territory Map



Moraine Power Project Location in Whitefish Lake First Nation Traditional Territory

-  Town
-  City
-  Whitefish Lake First Nation 128 Reserve
-  Moraine Power Generation Project
-  Base Waterbody Polygon
-  Whitefish Lake First Nation Traditional Territory Map June 1, 2023

Map depicts project location within current traditional land use base of Whitefish Lake First Nation (the traditional territory). Scale is approximately 1:4,000,000 NAD 1983 UTM Zone 11 July 6, 2023

0 100 200 300 km

