

January 22, 2021

Executive Committee
c/o Laura Cabott, Chair of the Board
Yukon Environmental and Socio-Economic Assessment Board
200 – 309 Strickland Street
Whitehorse, YT, Y1A 6L2

VIA EMAIL: laura.cabott@yesab.ca

Referral for Reconsideration of the Executive Committee’s Screening Report and Recommendation for the Kudz Ze Kayah Project (YESAB File No. 2017-0083)

Dear Executive Committee,

Pursuant to s. 76(1)(b) of the *Yukon Environmental and Socio-economic Act* (YESAA), Fisheries and Oceans Canada and Natural Resources Canada, being the Federal Decision Bodies (FDBs) for the Kudz Ze Kayah Project (KZK Project), are writing to refer the Screening Report and Recommendation back to the Executive Committee for reconsideration. FDBs have outlined the reasons for the referral back below, to assist the Executive Committee with their reconsideration.

The Executive Committee has recommended that the project be allowed to proceed without a review under YESAA, subject to the implementation of specified terms and conditions. The Screening Report and Recommendation identifies that the project will have, or is likely to have, significant adverse environmental or socio-economic effects, but that these can be eliminated, controlled or mitigated by the recommended terms and conditions.

FDBs acknowledge the significant amount of work carried out to date by the Executive Committee and the Board’s support staff throughout the KZK Project screening and in preparing the assessment Screening Report and Recommendation.

As is outlined in further detail below, FDBs are referring the Screening Report and Recommendation back to the Executive Committee for further work in the following specific reasons:

- 1: Insufficient explanation of the supporting analysis as to why the recommended mitigation measures sufficiently eliminate, control or mitigate the associated significant adverse effects.
- 2: Insufficient explanation regarding how First Nation interests, including from a rights perspective, were considered within the analysis presented in the Screening Report and Recommendation.

The FDBs are of the view that the Report and Recommendation would benefit from a focused reconsideration process within the parameters set by YESAA and the *Rules for Screenings Conducted by the Executive Committee* (the Rules). FDBs have noted the timelines that are applicable to the process under YESAA and the Rules, and look forward to a revised Report and Recommendation in the next month and a half to two months, after which FDBs will be required to ensure they have met consultation requirements and make a decision by early May 2021 under the statutory requirements.

Role of the federal decision bodies

As you are aware, at this stage of the YESAA process, the FDBs had to determine whether to accept the recommendation and issue a decision document, or refer the recommendation back to the Executive Committee for further reconsideration¹. In reviewing the Screening Report and Recommendation received for the KZK Project, the FDBs have given full and fair consideration to the scientific information, traditional knowledge and other information that is provided with the recommendation.² The FDBs have also consulted with Liard First Nation and Ross River Dena Council as required by s. 74(2) of YESAA.

Federal decision body review process

FDBs began their review of the Screening Report and Recommendation for the KZK Project upon receipt of the Report from the Executive Committee on October 21, 2020. As part of the FDB review, and in keeping with our consultation obligations under common-law and s. 74(2) of YESAA, potentially affected First Nations were invited to share their views of the Screening Report and Recommendation with FDBs such that their views could be considered by FDBs within their decision-making process.

FDBs invited views from Liard First Nation (LFN) and Ross River Dena Council (RRDC) in Yukon, Dease River First Nation and Kwadacha First Nation in British Columbia, as well as Dehcho First Nations and Naha Dehe Dene Band in the Northwest Territories.

How consultation informed the decision to refer the Screening Report and Recommendation back for reconsideration

RRDC and LFN provided views in response. RRDC has indicated that their community has been facing on-going challenges due to the COVID-19 pandemic, and this has impeded their ability to engage in the necessary meetings and discussions at the community level. RRDC also indicated the importance of further discussions with BMC, Canada and the Government of Yukon regarding how specific terms and conditions contained in the Screening Report and Recommendation are to be fulfilled, particularly considering that the KZK Project is in the heart of caribou country. LFN has indicated that they do not support the recommendation. They are of

¹ S. 76(1), YESAA.

² S. 74(1), YESAA.

the view that there is no evidence that the proposed terms and conditions will mitigate the adverse effects “on the Kaska right to hunt the Finlayson Caribou Herd.”

The FDBs have considered these comments in considering whether to accept the Screening Report and Recommendation or refer the Screening Report and Recommendation back for reconsideration.

Areas requiring enhancement to improve the analytical basis for the Recommendation

1: Insufficient explanation of the supporting analysis as to why the recommended mitigation measures sufficiently eliminate, control or mitigate the associated significant adverse effects

The Screening Report and Recommendation does not sufficiently articulate how conclusions were reached in the consideration of impact mitigation. For a number of key issues the Executive Committee has not clearly outlined how the recommended terms and conditions were arrived at and why the Executive Committee believes recommended terms and conditions will be effective to mitigate the significant adverse effects identified. This explanation, particularly in the case of potential significant adverse effects, is critical information for decision bodies to understand what mitigation is being put forward and why (see examples provided in Annex A).

To enable FDBs to better understand the rationale supporting the recommendation, including the identified terms and conditions, we request that the Executive Committee more clearly identify the following in their Screening Report and Recommendation:

- An explanation of how the Executive Committee assessed impact mitigation in developing their recommended terms and conditions under s. 58(1)(b) of YESAA.
- An explanation in the case of each Valued Environmental and Socio-Economic Component (VESEC) the process used to identify recommended terms and conditions. For example, why was each term and condition selected? How individually or collectively does the Executive Committee see them working to reduce or otherwise mitigate potentially significant adverse effects?
- An explanation of how any knowledge or information gaps have impacted the analysis. For example, how did the Executive Committee assess the level of certainty or risk associated with each VESEC as a result of any knowledge or information gaps, including the analysis of Proponent mitigations, significance determination, and recommended terms and conditions?
- An explanation, as per Reason 2 below, as to how First Nation interests, including from a rights perspective, has informed this analysis.

These key questions above specifically apply to those VESECs where there has been a determination of significant adverse effects, including Water Resources (Water Quality, Aquatic Life), Wildlife (Caribou), Traditional Land Use, Economy (Impacts of Mine Closure), and Human Health and Safety (Personal Safety). Examples are provided in the annex to demonstrate these key questions on two VESECs.

2: Insufficient explanation regarding how First Nation interests, including from a rights perspective, were considered within the analysis presented in the Screening Report and Recommendation

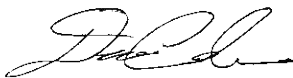
The Screening Report and Recommendation does not expressly delineate whether and how First Nation interests, including from a rights perspective, have been considered within the assessment (see examples provided in Annex B).

The FDBs request that the Executive Committee more clearly identify:

- How the consideration of s. 42(1)(g) and (g.1) of YESAA have informed the assessment of each VESEC where it has been determined that there could be significant adverse effects, including any related Traditional Knowledge;
- Whether and how any asserted Aboriginal rights have informed or guided the choice of each of these VESECs;
- Whether and how asserted Aboriginal rights have been considered in determining the significance of the likely adverse effects of the project on identified VESECs; and,
- In the context of any proposed mitigation measures, whether and how the above has informed the identification of the specific terms and conditions.

Thank-you for your consideration of these important matters. The FDBs look forward to working with all parties and participants in tackling next steps.

Sincerely,



David Carter, Regional Manager
Fish and Fish Habitat Protection Program
Ecosystem Management Branch
Fisheries and Oceans Canada



Rinaldo Jeanty, Director General
Explosives Safety and Security Branch
Lands and Minerals Sector
Natural Resources Canada

c.c. Keith Maguire, Director, Major Projects Yukon, Government of Yukon

Allan Nixon, Vice-President of External Affairs, BMC Minerals (No. 1) Ltd.

Chief Stephen Charlie and Council, Liard First Nation

Travis Stewart, Land and Resources Director, Liard First Nation

Chief Jack Caesar and Council, Ross River Dena Council

Lisa Dyer, Director General, Northern Projects Management Office, Canadian Northern Economic Development Agency

Dionne Savill, Regional Director General, Yukon Regional Office, Crown-Indigenous Relations and Northern Affairs Canada

Saul Schneider, Regional Director, Pacific and Yukon Region, Environment and Climate Change Canada

Brenda Woo, Regional Manager, Environmental Health Program, Health Canada

Anita Champagne Gudmundson, Regional Manager, Environmental Programs, Prairie and Northern Region, Transport Canada

Annex A

Examples of analytical gaps related to impact mitigation:

- In the case of traditional land use, how does the Executive Committee consider Recommended Mitigations #12 to #15 to effectively eliminate, control, or mitigate significant adverse effects to traditional harvesting, and Traditional Knowledge transmission and cultural continuity? How do the acknowledged gaps in the traditional land use information and first-hand Traditional Knowledge affect the Executive Committee's analysis?
- In the case of the Finlayson Caribou Herd, how does the Executive Committee consider Recommended Mitigations #10 and #11 to effectively eliminate, control, or mitigate a reduction or downward pressure on the already-declining population?

Annex B

Examples of analytical gaps related to First Nation interests:

- In keeping with the application of YESAB's 2018 Information Bulletin on the *Consideration of Aboriginal and Final Agreement Rights in YESAB Assessments*, Section 1.2 of the Screening Report and Recommendation notes "*Aboriginal rights and title are considered as contextual factors when characterizing project effects and determining the significance for these for the purposes of environmental assessment,*" (p. 21) but how the Executive Committee has done so is not explicit within the analysis presented in the Screening Report and Recommendation.
- It is not always clear whether and how First Nation interests, including from a rights perspective, have informed the selection, assessment and/or significance determination of individual VESECs. For example, the consideration of established or asserted Aboriginal rights and title is not included in the list of contextual factors that inform the threshold of significance in Section 1.4 (p. 23) of the Screening Report and Recommendation. It is also not clear whether and how First Nation interests, including from a rights perspective, have informed the assessment of impact mitigation and/or selection of the identified terms and conditions.
- The Executive Committee acknowledges that very little primary data on Traditional Land Use had been made available to them. The Executive Committee further notes that the assessment would have benefitted from additional first-hand accounts of potential Project effects and information from the LFN and RRDC to further clarify the important values and traditional land uses associated with the area. In light of this acknowledgement, it is even more important for FDBs to understand how the Executive

Committee has assessed and considered the interests of First Nations as required by s. 42(1)(g.1) of YESAA.

The following two subject matter examples are shared to further illustrate why the FDBs require further information regarding the above noted bullets:

- **Fish and Fish Habitat:** The EC has determined that the Project could have significant adverse effects on fish and fish habitat in Geona and Finlayson Creeks given significant adverse effects predicted for water quality in these waterbodies. LFN and RRDC have both raised concern about loss of these waterbodies as fishing grounds. The FDBs would like to better understand whether and how this information has informed the recommendation.
- **Caribou:** The EC determined that the Project is likely to further reduce the already declining population of the Finlayson Caribou Herd (FCH), which is considered a significant adverse effect and puts the sustainability of the herd at risk. Both LFN and RRDC have expressed concern over the Project's impact to caribou and their harvesting rights. The EC recommended two measures and two monitoring programs to mitigate the significant adverse effects. FDBs would like to better understand whether and how this information has informed the selection of these terms and conditions.