

August 10, 2021

Mackenzie Valley Land and Water Board
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SENT ELECTRONICALLY ONLY

By Way Of: awheeler@mvlwb.com
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RE: CANADIAN ZINC CORPORATION – PRAIRIE CREEK MINING AND MILLING SITE – WATER LICENCE AND LAND USE PERMIT – MV2021D0005 MV2021L2-0004 REQUEST FOR AN EXTENSION FOR ACHO DENE KOE FIRST NATION TO PROVIDE ADDITIONAL COMMENTS

Acho Dene Koe First Nation writes in follow up to the proposed Canadian Zinc Corporation applications to the Mackenzie Valley Land and Water Board for Water Licence and Land Use Permit – MV2021D0005 MV2021L2-0004, and in follow up to our July 15, 2021, submission.

In 2010, an Environmental Assessment (EA 0809-002) was conducted on the Canadian Zinc Corporation Prairie Creek Mine development. Our position at that time was in support of the development and operation of the Canadian Zinc Corporation Prairie Creek Mine if it is carried out in compliance with all applicable regulations and laws, in an environmentally responsible manner, and so long as the Canadian Zinc Corporation was willing to work with Acho Dene Koe First Nation to ensure economic benefits for our community.

Eleven years later, the Canadian Zinc Corporation has applied to the Mackenzie Valley Land and Water Board for new Type A Land Use and Water Licence authorizations to accommodate proposed mine expansion activities.

In our initial submission dated July 15, 2021, we stated that at that time, we did not believe an environmental assessment would be necessary. However, based on the nature of new information learned and its potential impacts on Acho Dene Koe First Nation, we retract our position, and request further time to determine whether an environmental assessment is required. We realize this request is extraordinary, but believe it is justifiable in the circumstances.

Request and Rationale for an Extension

Section 125 of the Mackenzie Valley Resource Management Act outlines that the primary objective of the preliminary screen process is to determine if a proposed development might have a significant impact on the environment or might be a cause public concern. Under the Act, a key guiding principle is to ensure that the process has regard to “the importance of conservation to the well-being and way of life of Aboriginal People of Canada as defined by section 35 of the Constitution Act.”¹

¹ [M-0.2.pdf \(justice.gc.ca\)](#)

Since providing our initial submission on July 15, 2021, we have thoroughly reviewed the Canadian Zinc Corporation responses to our comments and have reviewed new information the Canadian Zinc Corporation uploaded to the Mackenzie Valley Land and Water Board Online Review System (ORS) on July 31, 2021.

As a result of our review, we assert that the substance of the initial Environmental Assessment no longer adequately conveys the impacts of this project on the environment and Acho Dene Koe First Nation's cultural, social, and economic well-being. As a result, we urge the Mackenzie Valley Land and Water Board to consider the following concerns and deficiencies when considering whether to grant Acho Dene Koe First Nation additional time to determine whether an environmental assessment is required for MV2021D0005 MV2021L2-0004:

1. Acho Dene Koe takes significant issue with how the Canadian Zinc Corporation has characterized engagement with Acho Dene Koe First Nation.

Over the past two (2) years, Acho Dene Koe First Nation has been working in earnest with the Canadian Zinc Corporation to advance bilateral negotiations that would adequately accommodate Acho Dene Koe First Nation for the impacts of the Canadian Zinc Corporation's Prairie Creek Mine and associated operations on the Treaty and Aboriginal rights of Acho Dene Koe First Nation.

The Canadian Zinc Corporation routinely points to ongoing strategic negotiations and discussions with Acho Dene Koe First Nation, yet we have experienced a pattern of increased challenging and questionable behaviour from the Canadian Zinc Corporation and are not certain whether Acho Dene Koe First Nation's interests can be adequately accommodated through this bilateral process.

2. Acho Dene Koe First Nation has serious concerns with how the Canadian Zinc Corporation is considering impacts to Acho Dene Koe First Nation. In The Canadian Zinc Corporation's most recent responses to the Mackenzie Valley Land and Water Board, the Canadian Zinc Corporation quotes previous decisions by the Mackenzie Valley Land and Water Board, including:

- *"While the Board believes ADKFN's request that CZN's Engagement Plan acknowledge potential impacts to ADKFN's rights and interests beyond the transportation route may be valid when considering the ASR, the request is outside the scope of the current Applications."*²
- *"The Board indicated that ADKFN's request that CZN's Engagement Plan acknowledge potential impacts to ADKFN's rights and interests beyond the transportation route may be valid when considering the ASR, but that the request was outside the scope of the mineral exploration Applications."*³

Our Indigenous government vehemently disagrees with these statements and the application of previous decision rationales to the authorizations at hand. The Canadian Zinc Corporation's continued efforts to narrow its view of impacts to Acho Dene Koe First Nation is unacceptable and poses significant risks to fully understanding and assessing the impacts of these authorizations on Acho Dene Koe First Nation's Treaty and Aboriginal rights.

As a result, Acho Dene Koe First Nation requires additional time to respond to these issues.

² [Review Comment \(yk.com\)](#)

³ [Review Comment \(yk.com\)](#)

The issues that Acho Dene Koe First Nation raised for this authorization (see Acho Dene Koe First Nation submission July 15, 2021)⁴, as well as under other authorizations related to this project, have not been adequately addressed through the regulatory process.

Our concerns are valid and reasonable regarding engagement by the Canadian Zinc Corporation with Acho Dene Koe First Nation, the potential for adverse ecological and human health concerns in the downstream watershed, the lack of foresight regarding climate change and the potential for a catastrophic event at the mine site, and the long-term legacy impacts post closure, are routinely dismissed by the Canadian Zinc Corporation. We require additional time to be able to prepare a response that ensures our concerns are adequately addressed and our interests meaningfully accommodated

3. In addition, the Canadian Zinc Corporation continuously minimizes Acho Dene Koe First Nation's concerns due to the position of other First Nations that are participating in the regulatory process.

In The Canadian Zinc Corporation's most recent response, the Canadian Zinc Corporation continues to use other First Nation's perspectives to rationalize its own inaction. Acho Dene Koe First Nation continues to maintain that our community must not be compared to other First Nations and must be engaged with the respect and recognition as an independent Nation with unique knowledge, use and impacts. Other First Nations engaged in the regulatory process for this authorization have come to bilateral arrangements with The Canadian Zinc Corporation and therefore have mutually agreeable understanding with The Canadian Zinc Corporation for this project.

Acho Dene Koe First Nation does not.

4. The Canadian Zinc Corporation has provided updated information that was uploaded to the Mackenzie Valley Land and Water Board website on July 31, 2021, regarding estimated haul traffic associated with the expanded mine plans. Upon review, Acho Dene Koe First Nation has serious concerns regarding the technical assessments and findings provided by the Canadian Zinc Corporation.

Overall, the Canadian Zinc Corporation characterizes the increase in volume as minor and that the revised daily haul numbers are immaterial in terms of an effects assessment on wildlife and air quality.⁵ However, Acho Dene Koe First Nation has not been meaningfully engaged in these assessments and our Indigenous Knowledge has not been considered. Acho Dene Koe First Nation requires additional time to prepare responses that meaningfully address these issues.

The proposed activities would increase traffic along the Northwest Territories Highway 7/British Columbia Provincial Highway 77 corridor by approximately 25%, significantly increasing noise and vibration disturbance. This will have direct adverse impacts on the 38 Acho Dene Koe First Nation member owned cabins found within 500 m of the corridor, as well as the spiritual connectedness to the land, which may be actively avoided by our members.

Although The Canadian Zinc Corporation indicates that these documents were prepared for future All-Season Road applications, we assert that the current applications directly enable an increased hauling scenario.

As a result, the full scope of direct and indirect impacts because of these authorizations must be fully considered at this stage. We require additional time and capacity to engage

⁴ [Review Comment \(yk.com\)](#)

⁵ [Microsoft Word - Memo re Haul Traffic - Expanded Project Feb 2 2021](#)

our membership, technical support and collect Indigenous Knowledge to meaningfully understand and assess the impacts of estimated haul traffic.

5. While the previous Environmental Assessment did perform an assessment of social-economic impacts on communities surrounding the mine site, we find this analysis inadequate for addressing the increased environmental, social, and economic impacts of hauling through our territory, as the analysis primarily focused on impacts to infrastructure and road safety. Given the significant increase in hauling described above, Acho Dene Koe First Nation has serious concerns the full range of impacts is not being adequately assessed.

We require additional time to meaningfully understand and assess the social-economic impacts to decide on the need for an additional Environmental Assessment.

6. Both the previous Environmental Assessment and the application currently before the Mackenzie Valley Land and Water Board has several gaps in knowledge preventing an adequate understanding and mitigation of impacts from this project. In their submissions to the Board the Canadian Zinc Corporation has repeatedly described their willingness to work with Acho Dene Koe First Nation in incorporating Indigenous Knowledge into their project. We do not believe this is an accurate portrayal of the relationship between The Canadian Zinc Corporation and Acho Dene Koe First Nation as our ability to offer Indigenous Knowledge is impaired by the lack of support offered by The Canadian Zinc Corporation.

We are not in a position to collect and provide Indigenous Knowledge specific to this project without capacity support to conduct an Indigenous Knowledge and Land Use Study, and until this study is completed, we assert that there is the potential for significant adverse impacts from this project to the rights and interests of Acho Dene Koe First Nation.

Significant Concerns with Mackenzie Valley Land and Water Board's Ability to Uphold Consultation Obligations

If the Board proceeds with its final decision on the environmental assessment, Acho Dene Koe First Nation is not confident that the Mackenzie Valley Land and Water Board will adequately assess and address the impacts to Acho Dene Koe First Nation's Treaty and Aboriginal rights and interests.

This concern is further exacerbated considering clarification from the Land and Water Boards on November 5, 2020, regarding Crown reliance on board processes to satisfy consultation obligations. Based on Acho Dene Koe First Nation's experience, the Mackenzie Valley Land and Water Board process is an overwhelmingly technical exercise that does not adequately uphold the Crown's duty to consult.

Based on the expectations the Government of Northwest Territories holds for itself in its Approach to Consultation document ⁶ we see some immediate deficiencies in the Board's process that inherently puts Acho Dene Koe First Nation's rights at risk:

- Pre-Consultation Assessment: The Mackenzie Valley Land and Water Board does not make a tailored pre-consultation assessment for each Indigenous group that may be potentially impacted by a decision. This step is critical to discharging the Crown's Duty to Consult and determining what level of consultation is required to adequately assess and address project impacts.
- Tailor-Made Consultation Process Appropriate to the Specific Circumstance: The Mackenzie Valley Land and Water Board does not consult with each Indigenous group to determine specific information, communication, and timing needs that an Indigenous

⁶ [Microsoft Word - 2007-08 - GNWT Government-Wide Approach.doc](#)

group requires to meaningfully participate in the process. Indigenous groups must adhere to the Mackenzie Valley Land and Water Board's strict process and guidelines for providing consultation information to the Board.

- Formal Consultation and Potential Accommodation: There is no two-way, iterative dialogue between Indigenous groups and the Board to share information, perspectives and collaboratively come to avoidance, mitigation, and accommodation measures. The Board's process is linear with very little opportunity to respond or challenge proponent or Board responses after initial comments are submitted.

The lack of adequate consultation and accommodation of Acho Dene Koe First Nation's rights through the regulatory process is a serious concern.

In Acho Dene Koe First Nation's view, steps taken within or outside of the regulatory process do not meet the legal thresholds established by the courts.

The Northwest Territories Supreme Court in *Re Paulette*⁷ cast doubt on whether Treaty 11 extinguished Aboriginal title within the boundaries of Treaty 11. In this case, a group of Treaty 11 Chiefs sought to file a caveat that claimed an interest in lands within the boundary of Treaty 11 by way of Aboriginal title. The Court held that there "is sufficient doubt on the facts that aboriginal title was extinguished" and allowed the Chief's claim for title to be registered. The Court concluded that "there was either a failure in the meeting of the minds or that the treaties were mere "peace" treaties and did not effectively terminate Indian title – certainly to the extent it covered what is normally referred to as surface rights – the use of the land for hunting, trapping and fishing."⁸ As a result, the Court cast doubt on whether the Treaty 11 surrender clause extinguished Aboriginal title at all.⁹

The Court also found that there was doubt that Treaty 11 extinguished the signatories' Aboriginal rights. The Court acknowledged that the terms of Treaty 11 indicated that the signatories did cede, release, surrender and yield up "all their rights, titles and privileges whatsoever, to the land. However, the Court heard evidence of the Treaty 11 Commissioner's report to his Deputy Superintendent General, Department of Indian Affairs, which stated:

They were very apt in asking questions, and here, as in all the other posts where the treaty was signed, the questions asked, and difficulties encountered were much the same. The Indians seemed afraid for one thing that their liberty to hunt, trap and fish would be taken away or curtailed, but were assured by me that this would not be the case (emphasis added).

The Court also found that there was evidence that signatories' Aboriginal rights were not surrendered in the witness' testimony:

Throughout the hearings before me there was a common thread in the testimony – that the Indians were repeatedly assured they were not to be deprived of their hunting, fishing, and trapping rights. To me, hearing the witness at first hand as I did, many of whom were there at the signing, some of them having been directly involved in the treaty making, it is almost unbelievable that the Government party could have ever returned

⁷ *Re Paulette et al and Registrar of Titles (No 2)*, 42 DLR (3d) 8 ["*Paulette*"].

⁸ *Re Paulette*, pg. 33.

⁹ Although the NWT Supreme Court decision to allow the caveat was overturned by the Supreme Court of Canada, the Court's findings in respect to Aboriginal rights and title were not overturned. The Federal Court in *Liidlii Kue First Nation v Canada*, [2000] 4 CNLR 123 (FC TD) held that the Territorial Appeal court and the Supreme Court of Canada did not overturn the NWT Supreme Court's finding with respect to the possible invalidity of Treaty 11. In addition, no subsequent court has ruled on evidence regarding the validity of Treaty 11 and explicitly found against the finding of the NWT Supreme Court in *Paulette* that Treaty 11 may not have extinguished its signatories' Aboriginal rights and title.

from their efforts with any impression but that they had given an assurance in perpetuity to the Indians in the territories and that their traditional use of the lands was not affected.

The witness' testimony and the Treaty Commissioner's assurances made to Treaty 11 signatories was clearly at odds with the surrender clause of the written treaty. As a result, the Court found that "assuring the Indians that "their liberty to hunt, trap, and fish" was not to be taken away or curtailed was in effect a form of declaration by the Government of continuing aboriginal rights of the Indians."¹⁰ The Court concluded that there was doubt that Treaty 11 terminated Aboriginal rights.

The Supreme Court of Canada in *Haida and Taku* has made it clear that meaningful consultation and accommodation at the strategic level has an important role to play in achieving the ultimate constitutional goal of reconciliation and should not be supplanted by delegation to operational levels. A determination on the environmental assessment is a strategic level decision.

A decision by the Board to proceed the environmental assessment, considering the information Acho Dene Koe First Nation is now sharing, is serious. The Mackenzie Valley Land and Water Board's decision could threaten Acho Dene Koe First Nation's ability to participate in decision-making process that would have an impact upon its Aboriginal and Treaty rights, including access to land, its exercise of hunting and fishing rights. In these circumstances, Acho Dene Koe First Nation has demonstrated that the Board's decision will adversely impact Acho Dene Koe First Nation ability to affect this decision.

In this case, Acho Dene Koe First Nation has established Treaty rights and strong assertion for Aboriginal rights and title. Acho Dene Koe First Nation's Treaty and Aboriginal rights will be affected by the Board's decision with respect to the requirement for an environmental assessment and Acho Dene Koe First Nation's ability to manage and mitigate risks.

In this case, the Crown's had delegated its duty to consult and accommodate Acho Dene Koe First Nation to the Board. The Board's duties are elevated in this context, and as such, the Board should take the necessary steps to provide Acho Dene Koe First Nation with additional time and a sufficient opportunity to make further submissions on the environmental assessment.

Closing

In closing, we are asking for an extension of the review period to respond to be able to prepare responses to the issues identified above, and to ensure that the regulatory process ensures Acho Dene Koe First Nation is properly consulted and accommodated on these significant matters.

We thank the Mackenzie Valley Land and Water Board for its consideration of this submission.

Based on email correspondence from Board staff, we understand that this submission will be presented to the Board outside of the established reviewer comment period. However, as outlined in Section 2.5 of the Mackenzie Valley Environmental Impact Review Board's Environmental Impact Assessment Guidelines, "[p]ublic involvement must occur before the submission is made and up until when the preliminary screener reaches a decision". As a result, we ask the Board to fulfil its responsibility to include the concerns outlined in this letter as part of its preliminary screening decision and timelines associated with it.

¹⁰ *Re Paulette*, pg. 33.

If you have any questions concerning our response, I will ask that you email our Lands Office at lands@adkfirstnation.ca

Thank you.

Yours truly,

ACHO DENE KOE FIRST NATION

Sent on behalf of Sub Chief Brenda Berreault

Boyd Clark

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Advisor/Band Manager Acting

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