



**KTUNAXA
NATION**

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August 13, 2021

Sent Via Email

The Honourable George Heyman
Minister of Environment and Climate Change Strategy
Government of British Columbia
Email: ENV.minister@gov.bc.ca

And to:

The Honourable Jonathan Wilkinson, Minister
Minister of Environment and Climate Change Canada
Government of Canada
Email: EC.Ministre-Minister.EC@Canada.ca

Dear Honourable Ministers Heyman and Wilkinson:

Re: Suspension of coal mine environmental assessments in Qukin ʔamakʔis

The Lands and Resources Council and Nation Chair of the Ktunaxa Nation Council (the “KNC”), write on behalf of the Ktunaxa Nation to urgently request a suspension of Provincial and Federal environmental assessments of new coal mines and coal mine expansions within Qukin ʔamakʔis (Raven’s Land – also known as the Elk Valley) - a region within ʔamakʔis Ktunaxa (Ktunaxa homelands).

Current impacts to Ktunaxa title, rights and cultural practices from existing mining operations have exceeded acceptable levels and existing regulatory regimes and measures to mitigate and reduce those impacts have proved to be largely ineffective in their implementation. We will no longer accept the “business as usual” approach to coal mining and the authorizations of it which will further compromise the severely impacted ecosystems in ʔamakʔis Ktunaxa upon which our rights and cultural practices depend.

We call on you to uphold the honour of the Crown, and fulfill your legal and constitutional duties to our Nation, by ordering a suspension of current environmental assessments for all new coal mines and coal mine expansions proposed for Qukin ʔamakʔis.¹

¹ These include North Coal’s Michel Coal Project; NWP Coal’s Crown Mountain Project; Teck Coal’s Fording River Expansion; Centermount Coal’s Bingay Main Coal Project, and Montem Resource’s Tent Mountain Project.

ʔak̓s̓q̓nuk

ʔaq̓am

Lower Kootenay

Tobacco Plains

We are deeply concerned that the current understanding of impacts related to legacy impacts and existing operations are uncertain, and that the capacity of Qukin ʔamakʔis to continue to support the meaningful exercise of Ktunaxa title, rights and cultural practices may be irrevocably compromised.

The health of ʔamakʔis Ktunaxa is directly related to the health of our Nation and our citizens who rely on the ʔamak ɕ wuʔu (land and water) to sustain themselves culturally, socially and economically. Ktunaxa laws and customs require us to act as stewards of our ʔamak ɕ wuʔu, so that they will continue to support a healthy and thriving Ktunaxa community and culture for seven generations into the future. This is best summarized by a Ktunaxa phrase that describes our relationship with the land - Yaqat Hankatitiki na ʔamak (our people care for the land, the land cares for our people).

Our laws also teach us that water is sacred, and that ʔa·kxamis qapi qapsin (all living things) are connected and must be respected. Unfortunately, a legacy of major coal mines in Qukin ʔamakʔis, approved without our consent, now threatens our ability to uphold our responsibilities as Indigenous title holders and caretakers of this area within ʔamakʔis Ktunaxa. Cumulative effects and water quality impacts in particular, have exceeded the carrying capacity of the environment, and are continuing to worsen. Details of our concerns are summarized in the attachment to this letter.

A recent BC Supreme Court decision found that the Province had failed to uphold its obligations under Treaty 8, by subjecting treaty rights to “death by a thousand cuts” by the Province’s continued approval of new developments without consequential and enforceable means of managing the cumulative effects of past development.²

We fear that this same situation is being repeated in Qukin ʔamakʔis through the Province and Canada continuing to assess and approve new mines, which will directly impact our title and rights, without adequately addressing the impacts of legacy and current operations. We cannot stand by and allow this to happen, and must uphold our stewardship responsibilities to our lands, our people, and future generations of Ktunaxa citizens.

Both of your governments have shown leadership in committing to fully implement the *United Nations Declaration on the Rights of Indigenous Peoples*, including through legislative means. Articles 26 and 32 of the *Declaration* confirm the rights of Indigenous peoples to our traditional territories, and the duty of your governments to obtain the free, prior and informed consent of Indigenous peoples prior to approving any activities in our territories, particularly in connection with the exploitation of minerals and water.

We are prepared to work with your governments to assess whether the approval of new coal mines and mine expansions is compatible with our laws, and the continued

² *Yahey v. British Columbia*, 2021 BCSC 1287

protection of our rights and culture. However, we cannot do so under current conditions, where we face an onslaught of new development and conditions which exceed acceptable thresholds and legal requirements due to existing development.

We therefore call on you to suspend the environmental/impact assessments of all new coal mine and coal mine expansion projects in Qukin ʔamakʔis.

Following this, our governments can focus our collective resources on the critically important matters of better understanding and managing existing impacts, and healing the damage already done to our ʔamak ɕ wuʔu. Only once we have this baseline understanding in place can we then meaningfully consider whether further development in Qukin ʔamakʔis is compatible with Ktunaxa title, rights and stewardship obligations, and your governments' duties and obligations to our Nation.

Sincerely,

<Original signed by>

Kathryn Teneese,
Chair, Ktunaxa Nation Council

<Original signed by>

Sandra Luke,
Chair, Yaqaṇ nukʔiy Representative
KNC Lands Sector Council

<Original signed by>

Avery Gravelle
Yaqit ʔa·knuqʔiʔit Representative
KNC Lands Sector Council

<Original signed by>

Jason Andrew
ʔaqam Representative
KNC Lands Sector Council

<Original signed by>

Lillian Rose
ʔakisqṇuk Representative
KNC Lands Sector Council

Cc

The Honourable Bruce Ralston, Minister of Energy, Mines and Petroleum Resources,
Government of British Columbia

The Honourable Katrine Conroy, Minister of Forests, Lands, Natural Resource
Operations and Rural Development, Government of British Columbia

Robin Sheremeta, Senior Vice President, Coal, Teck Resources Ltd.

John Pumphrey, President, North Coal Ltd.

Mike Allen, General Manager, NWP Coal Canada Ltd.

Evita Qian, Vice President, Centerpoint Resources Inc.

Peter Doyle, Managing Director/Chief Executive Officer, Montem Resources Ltd.

Summary of Ktunaxa Concerns Regarding Coal Mining in Qukin ʔamakʔis

The following is supplemental information intended as background and to provide additional detail related to KNC's perspectives on coal mining in Qukin ʔamakʔis and our rationale for requesting the suspension of Provincial and Federal environmental assessments of new coal mines and coal mine expansions within Qukin ʔamakʔis. It should not, however, be interpreted as an exhaustive recount of the history and concerns that the Ktunaxa Nation have on this important topic.

Water Quality

Background

Through engagement on Teck Coal's (Teck) Line Creek Dry Creek Phase II Environmental Assessment (EA) in 2009-2012, KNC voiced, and submitted on numerous occasions, concerns with the lack of cumulative effects mitigation and water quality management (including the effectiveness of proposed measures). These concerns were not exclusive to KNC, and led to a pause in the EA in the fall of 2010 and summer 2012, as well the development of a Ministerial Order.

In April 2013, Ministerial Order M113 was issued for an Area Based Management Plan (ABMP) that required Teck to stabilize and progressively reduce water quality contamination in the Elk Valley. In response to the Order, Teck developed the Elk Valley Water Quality Plan (EVWQP) which was submitted in July 2014 and accepted by BC ENV (as policy) in November 2014. The *Environmental Management Act* Permit 107517 was issued the next day, which included a schedule for water treatment mitigations, specific water quality limits to demonstrate the achievement of stabilization and reduction of mine related water quality contaminants, and is the primary legal instrument for regulating water quality contamination in the Elk Valley.

The permit also included a number of sections drafted to address critical gaps in the EVWQP that had been identified by the KNC and BC through the engagement process during the development of the EVWQP. The conditions included in Permit 107517 were developed after extensive engagement with the KNC, and were intended, in part, to mitigate and accommodate for impacts to Ktunaxa title and rights from Provincially approved coal mines. It should be noted that the Elk Valley was, and remains, the only area in BC that has an ABMP – a testament to the extent and magnitude of impacts in Ktunaxa homelands.

Current Situation

After nearly seven years of implementing their plan, Teck is not in compliance with the valley wide permit (specifically, not meeting the mitigation schedule and water quality

limits), and the latest Implementation Plan Adjustment (the 2019 IPA) does not demonstrate Teck achieving compliance in the near term or future.

Following the mitigation schedule outlined in the valley wide permit and the EVWQP is critical and was the foundational basis for the approval of the last three Environmental Assessment Certificates (EACs) issued for coal mines in the Elk Valley (i.e., Line Creek Operation's Phase II, Fording Operation's Swift and Elkview Operation's Baldy Ridge Extension Project). The Province approved these projects based on the assumed ability of the ABMP/EVWQP to manage water quality impacts.

Over the past few years we have been witness to the failure of adaptive management to mitigate water quality impacts in a timely manner and an inability to respond to accelerated contamination – by both the permit holder (Teck) and the Province. Accountability for mitigating impacts is deferred to the ABMP/valley permit without appropriate regulatory oversight – the most current mitigation plan was not approved by the Province and the announcement by Teck months after releasing it that it would no longer build Active Water Treatment Facilities (AWTF) but would move to an unproven technology triggered no regulatory action.

The second (and final) AWTF is more than two years delayed and still does not have a clear commissioning or operational date. The 47 million liters a day of water treatment that is currently required under the permit's mitigation schedule is not being achieved, the volume of water being treated is closer to 18 million liters a day, an improvement from 7.5 million that persisted from the end of 2019 until this spring, but still falls short of the mitigation required. The current situation reflects that the location, capacity, and timing of mitigations, in addition to confidence in their effectiveness, is highly uncertain.

Emerging science and updated understanding of risk

Teck's newest Regional Water Quality Model (RWQM; March 2021) retains uncertainties from the 2017 RWQM which continues to underestimate receiving environment risk and mitigation needs. The 2017 RWQM applied a load removal mechanism that removed approximately 25% of the total load of selenium throughout the designated area (with 5-40% removal being applied at certain nodes). Through the review of the 2017 RWQM and the 2019 IPA, Teck committed to several monitoring programs to resolve and validate this modelling assumption.

While there has been considerable work done, the uncertainties remain in the 2021 RWQM, and the ability for KNC to assess future WQ projections with certainty or comfort is very low. This model is the basis for mitigation of existing operations and all future EA's in Quikin ?amak?is – the failure to resolve uncertainties (i.e. quantifying the load of mine related contaminants) does not support mitigation planning or informed decision making due to proponents only presenting plans for approximately 75% of the impacts, and without contingencies. As decision makers, if more time is needed for

critical information to be collected, then decisions will wait until they can be informed by the necessary information.

Through the KNC-BC development of the Kooconusa Selenium Water Quality Objective recent scientific evidence indicates that in order to protect fish and Ktunaxa cultural practice and health, selenium water quality concentrations will need more stringent limits and additional mitigation. The acceptance letter issued by the Province in 2014 on the ABMP/EVWQP laid out conditions related to striving for continuous improvement of water quality to be protective of human health and the timely implementation of the selenium target for Kooconusa.

Considering the conditions that the Province committed to and this new science, it is clear to us that there is a need to understand current impacts and how to reach protective water quality limits as an immediate first step. This must happen before any further developments are considered which would add to what appears to be an already over-allocated system.

Cumulative Effects

Background

Significant physical anthropogenic impacts to terrestrial and aquatic habitats have occurred in Qukin ʔamakʔis, and the loss of species and habitat has had a lasting impact on Ktunaxa rights and title. Sectors that have damaged and further threaten both species and habitats in Qukin ʔamakʔis include coal mining, forestry, transportation, agriculture, urban development, and recreation. Due to concerns raised by the KNC, the development of an Elk Valley Cumulative Effects Management Framework (CEMF) was a resulting condition of the Line Creek Phase II EAC in 2013. In January 2015, the Province assumed leadership of the group.

In December 2018, the CEMF Working Group published a report titled: “Elk Valley Cumulative Effects Assessment and Management Report”. The conclusions of the report showed that the present-day condition of the five valued components (VCs) were all within the high to moderate hazard range. An analysis was also completed to evaluate the cumulative response of all VCs and the results showed the highest hazard for all VCs is currently located in watersheds where mining has occurred and along the valley bottoms.³

The report also concluded that although the study was foundational for which to work from, it emphasized that much is still required to ensure the Elk Valley CEMF is successful over the long-term. One area of improvement includes a known shortfall of

only having five VCs (although recently BC and KNC have agreed to adding high elevation grasslands), which does not represent the full suite of values and drivers on the landscape.³

High road density and human access were two of the leading contributors to negative cumulative impacts. In July 2020, there were an estimated 6,790km of roads in the Elk Valley. Approximately 88% of these roads do not have a legal obligation by government or industry for removal. Assessments conducted found that 91% and 38% of watersheds are ranked high hazard for road density near streams and steep slopes respectively. Furthermore, 88% of the sub basin watersheds exceed recommended levels for grizzly bear.⁴

Because road density was repeatedly identified as a risk to all five VCs, in 2018 the CEMF Working Group established a road rehabilitation sub-committee to implement CEMF species' Expert Team management recommendations to reduce road densities in the Elk Valley. Through the road rehab sub-committee, the KNC and BC are working together to rehabilitate Elk Valley roads, but face legislative and regulatory barriers which seriously hinders progress.

Consequently, less than 50 km of roads have been rehabilitated during the two years of implementation. Although increasing road density was clearly identified as a significant threat to all five VCs, approximately 300km of new roads were built from 2015-2019.⁴ Thus, the pace of road development is approximately 2.6 times the rate of road removal – in the *best case scenario*. This is simply unsustainable for the ecosystems, and is not acceptable.

Current Situation

In practice we have not seen significant progress since the 2018 report, and have yet to observe meaningful implementation and governance of CEMF. The understanding of existing thresholds and the use of CEMF to inform decision making remains inadequate. Objective setting for the VC's under the CEMF has only recently been advanced – and even once objectives are set, we question how recommended benchmarks will be achieved when a) no regulatory mechanism exists for enforcement (ie. resource road density restrictions and removal requirements), or b) regulations are not adhered to when they do exist (ie. Old Growth Management Areas).

³ Elk Valley Cumulative Effects Management Framework Working Group. Elk Valley Cumulative Effects Assessment and Management Report (December 2018). online: [final_elk_valley_ceam_12122018.pdf \(gov.bc.ca\)](https://www.gov.bc.ca/ceam/12122018.pdf)

⁴ Elk Valley Cumulative Effects Management Framework. Enhancing Wildlife and Ecosystem Health with Road Rehabilitation. Online: [CEMF_ElkValleyInfographics_RoadRestoration_V03.ai \(gov.bc.ca\)](https://www.gov.bc.ca/ceam/ElkValleyInfographics/RoadRestoration_V03.ai)

In the fall of 2019, KNC was notified of significant declines of two genetically pure Westslope Cutthroat Trout (WCT) populations in Qukin ʔamakʔis. September 2019 monitoring results from the Upper Fording River indicated an approximate 90% decline in adults and 74% decline in juveniles. Westslope Cutthroat are a VC under the CEMF, listed a Species of Special Concern under the Canadian Species at Risk Act (SARA), and provincially blue-listed.

The evaluation of cause for the decline has yet to be concluded, but the causes in the Upper Fording River are pointing towards harsh winter ice conditions compounded by low water quantity (which includes effects from mine water use) and poor habitat availability. The population crash of a VC after the creation of CEMF demonstrates a failure in the framework. This is not acceptable. The WCT Recovery Plan needs to address root causes of these population crashes and this situation should act as a lesson to be learned from to avoid the same outcome for other VCs – a more precautionary approach to land stewardship is needed.

KNC would also like to see stronger governance of CEMF – with the primary focus on understanding and managing impacts vs. seeking consensus with regulated parties. The December 2018 report noted that, “This report reflects ongoing discourse among the diverse stakeholders regarding land use and management in the Elk Valley.” This highlights the important distinction between governments and stakeholders (including proponents) where it must be emphasized that the vision, governance and regulation of land stewardship is not the role of proponents.

KNC believes the reliance on consensus with stakeholders in a highly impacted landscape has resulted in less management action and delays in CEMF implementation. We as governments cannot rely solely on the goodwill of proponents to reduce their impacts – we must make CEMF a statutory, legally binding process with direct connections to permitting processes.

The approval of new developments after Line Creek Phase II (i.e., Fording Operation’s Swift, Elkview Operation’s Baldy Ridge Extension Project and Greenhills Operation’s Cougar Pit Expansion) and considerations of additional projects while cumulative effects management tools remain under development is alarming. The Province has not demonstrated an ability to adhere to, or fulfill, the intentions of CEMF (as well as the ABMP and EVWQP), yet relies on these instruments as justification for approving developments.

Despite more than seven years of engagement, we are concerned that the Elk Valley CEMF is the type of ineffective cumulative effects management process that has previously been rejected by the court as inadequate (as determined in *Yahey v. B.C.*). Overall, the lack of meaningful progress on CEMF (i.e. leading to changes in decision-making, regulations, and permitting conditions) suggests that proponents’ priorities and

developments, and decisions around them, are a higher priority than characterizing and adequately mitigating cumulative impacts within Qukin ʔamakʔis.

Government-to-Government Initiatives and Industry Agreements

The KNC and Ktunaxa communities are actively engaged with BC and Teck on several stewardship initiatives in the Elk Valley regarding impacts from existing coal mines. KNC has engaged with both the province and mine proponents under agreements in good faith, and has invested tremendous amounts of staff and leadership time and resources to respond to these external needs. These initiatives and agreements, however, set out processes for engagement and should not be relied upon (or be perceived) to deliver specific results or outcomes, or to infer that the Ktunaxa has permanently ‘signed on’ to any specific current or future operations.

Furthermore, we would emphasize that none of these agreements limit or derogate from the Ktunaxa Nation’s rights, including the inherent right of self-government, nor do they pre-determine the decisions that the Ktunaxa Nation may make on new and ongoing developments in the Elk Valley.

We would also remind both BC and Canada that much of the development and damage present in Qukin ʔamakʔis has occurred without Ktunaxa consent. Both BC and Canada have expressed a commitment to fully implement the *UN Declaration on the Rights of Indigenous Peoples*, through respective Provincial and Federal legislation, and are obliged to recognize the Ktunaxa Nation’s right to self-determination and our right to establish priorities, strategies, and be decision makers on any development or use of our lands and resources. We, as the Ktunaxa Nation, hold stewardship responsibility for Qukin ʔamakʔis and future development can only go forward with our free, prior and informed consent.

Canada’s *Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples* and BC’s *Draft Principles that guide the Province of BC’s Relationship with Indigenous Peoples* both reference the responsibility of your respective governments to change operating practices and processes in order to recognize our rights – suspending these Environmental Assessments, as we are requesting, presents a significant opportunity for your governments to put your words into action.

Proposed New Coal Mines/Expansions

Currently, there are five coal mines undergoing a federal and/or provincial EA; all located in very close proximity to one another and to operating mines (see Figure 1: Page 18). Under the current regulatory framework, these projects are being assessed individually.

A brief summary of the projects, and KNC's involvement, is provided below:

- North Coal Ltd.'s Michel Coal project, a proposed greenfield, open pit, coking coal mine, is located 15 km southeast of Sparwood in the Michel Creek watershed. The project has an anticipated 24-year life of mine with an annual production rate of 2 million tonnes/year. KNC has been actively engaged with the proponent as well as with BC and Canada since 2016.
- NWP Coal Canada Ltd.'s Crown Mountain project, a proposed greenfield, open pit coking coal mine located 12 km east of Sparwood in the Alexander Creek watershed. The project has an anticipated 16-year life of mine with an annual production rate of 3.7 million tonnes/year. KNC has been actively engaged with the proponent, BC and Canada since 2019.
- Teck Coal's Fording River Extension (FRX) project a proposed greenfield, open pit mine expansion of Fording River Operations in the Kilmarnock and Chauncey Creek drainage.

The project anticipates a 40 – 50+ year life of mine with an annual production rate of 8 – 9 million tonnes/year. KNC has been engaged with the proponent, BC and Canada on this project since late 2019.

- Centermount Coal Ltd's, Bingay Main Coal project, a proposed green field, open pit coking coal mine located 21 km north of Elkford and located in the Upper Elk River watershed. The project has an anticipated 20-year life of mine with an annual production rate of 1 – 2 million tonnes/year. KNC was engaged with BC and Canada on this project however, the proponent has not been actively involved in the EA process since 2018.
- Montem Resources Ltd.'s Tent Mountain Mine project, a proposed brown field redevelopment and green field expansion, open pit coking coal mine located in the Crowsnest Pass and overlapping both the BC and Alberta border. The existing sediment pond is a source of loadings to the Michel Creek drainage (a tributary of the Elk River). The project has an anticipated 14-year life of mine with an annual production rate of 1 – 2 million tonnes/year. KNC are in the process of determining engagement with both regulators and proponent and it was recently federally designated.

Figure 1 (Page 18) shows the approximate locations of proposed and existing coal mines. Despite the heavily concentrated industry pressure on the Elk Valley due to current and legacy impacts, the Ktunaxa Nation is now being asked to contemplate five additional mines. The addition of 5 new coal mines would result in an increase in the total mine footprint in the area by approximately 12,000 ha, which would be on top of the existing 25,000 ha that has already been permitted by the province. This ongoing practice of approving mines further fragments ?amak?is Ktunaxa, alienates Ktuanxa from the land,

and impacts Ktunaxa title, rights, and interests. Nowhere else in Canada is such intense coal mining pressure applied to a land base.

Fragmented EA frameworks and Inadequate Information Base

There is also significant divergence in the EA processes/requirements that apply to the five proposed projects. All five projects are being assessed both Federally and Provincially; however, three (Michel Coal, Crown Mountain and Bingay) are under the old EA regimes, and two are under the new acts (FRX and Tent Mountain). KNC questions why these Projects continue to be assessed in isolation under different processes and to different requirements.

Regardless of the process that applies, KNC notes that all five projects are proceeding through the respective regulatory process based on information that does not,

- reflect current environmental conditions,
- address the shortcomings in achieving compliance with the ABMP/EVWQP/Permit 107517,
- take into account future conditions based on new science, and
- without a robust CEMF to inform decisions.

KNC is committed to a full, rigorous and transparent EA process, but does not agree with these assessments proceeding based on the current status of the Elk Valley. For example, of notable significance, the Michel Coal and Crown Mountain projects are not informed by the most up to date water quality predictions – which was submitted to BC ENV by Teck in March 2021, as it is deemed “propriety information”. Therefore, these new proponents are basing the impact assessment of their project (i.e. their respective models and predictions) on incomplete data and without a clear understanding of the modelling assumptions and risks being applied in the valley.

In addition to this, neither of these projects are currently required to evaluate their projects based on the draft BC/KNC Koocanusa Selenium Water Quality Objective, which is the site specific selenium limit to protect the most sensitive uses of the waterbody – which include the protection of all fish and Ktunaxa diet – and which is currently permitted at a limit more than double the objective concentration.

The exceedance of the objective indicates to us that at this time, there is no assimilative capacity left for new operations while still protecting all fish species and Ktunaxa cultural practice of sukıt̓ ʔiknala (eating well). In addition, recent discussions around the ABMP with the Province have indicated there is a need for an updated and government owned ABMP. It is assumed that such a process would take considerable time and would be critical to any decision made on the future of coal mining in Qukin ʔamakʔis.

Following emerging science is emerging regulations, which need to be considered for new coal mines. Since 2017, Environment and Climate Change Canada has been

engaging the KNC to set water quality limits under the proposed *Coal Mining Effluent Regulation*. Recognizing that water quality is central in the significance determination of these projects, it is unwise and a waste of resources for all of our governments to proceed with the assessment of these projects, in any shape or form, in the absence of these critical tools.

Another challenge in the assessment and evaluation of these proposed coal mines, is the evaluation of indigenous nations of their rights and title through the drafting of the Section of the EA report that assesses impacts to Indigenous rights. Through this work, a determination of impacts on the rights of the Nation is intended to be addressed. Under the current situation, assessment information and effects determinations are provided to KNC by the proponent. Although KNC has the option to conduct our own baseline and impact assessment through an indigenous led assessment, doing this for five mine EAs at the same time is not feasible given our resources.

This “professional reliance model” to determine potential effects of a project on the environment (and the conditions associated with Ktunaxa rights) is gathered and assessed by qualified professionals whom have been hired by the proponent to meet the objective of an approved development project. This introduces an inherent bias to a predetermined outcome (data interpretation being provided that supports a project being approved). KNC is then pigeonholed into using this information to draft this section of the EA application. This is challenging for many reasons, but particularly in the case of Michel Coal, Crown Mountain and Bingay, trying to reconcile the differences between the projections built on top of underestimated data ultimately compromises leadership decisions due to inaccurate portrayals on the current state of the region.

Provincial Oversight

BC is responsible for industry’s compliance to provincial environmental regulations and KNC is losing confidence in the Province’s ability to uphold their mandate to protect the environment. As noted in the 2016 BC Auditor General’s report:

The impacts of an ineffective regulatory regime are increased risks to the environment and the potential for deterioration of the province’s water systems, loss of wildlife habitat, and damage to culturally significant areas and values. In recent years, this risk has become a reality and resulted in actual environmental damage, such as the Mount Polley mine site and in the Elk Valley.⁵

⁵ Carol Bellringer (Auditor General of British Columbia), Audit of Compliance and Enforcement in the Mining Sector, (May 2016) at p8, online (pdf): *BC Auditor* [OAGBC Mining Report FINAL.pdf](https://www.bcauditor.com/OAGBC_Mining_Report_FINAL.pdf) ([bcauditor.com](https://www.bcauditor.com))

The KNC is extremely concerned that the Province has not fulfilled its regulatory obligations to ensure follow through and compliance with environmental assessment certificate (EAC) conditions, permit conditions, and cumulative effects management plans. The absence of regulatory implementation of these initiatives reflects one-sided action which allows industry to advance, while falling short on enforcing environmental improvements.

We have seen a vicious cycle in the lack of substantial compliance monitoring and oversight once resource development and expansion permits have been approved. The 2016 Auditor general report emphasized this point saying: “the extent and magnitude of the existing impacts have largely been the result of regulators defaulting their compliance and enforcement obligations onto the proponent.” The current practice of proponents dictating the terms and the timelines of which mitigation programs are demonstrated, confirms the concern the KNC has with the current regulatory approach and the failure of the government to effectively achieve regulatory obligations.

This concern is reinforced by the propensity of both BC and proponents to defer addressing substantive KNC concerns to an ever-delayed time in the future. Our concern is based on our understanding that the Elk Valley is seriously out of balance in terms of Ktunaxa natural law and it appears that more has been taken than needed. In a letter to Teck dated December 16, 2020, KNC staff requested a number of performance measures and information needs to inform the KNC decision on the FRX Readiness Decision as we have reason to believe the project may cause “extraordinarily adverse effects” to Ktunaxa rights as affirmed by Section 35 of the *Constitution Act, 1982*.

The requests were all relevant to inform the Readiness Decision, including the “termination” option outlined in the new BC EA process. Responses from both Teck and BC to this letter prioritized Teck’s schedule over Ktunaxa self governance by deferring KNC’s concerns into the future – either later in the EA process or by diverting them laterally to other initiatives.

We fundamentally disagree with this approach and reiterate our need to receive the requested items needed to inform our decision making. We emphasize to you, government to government, to honor information requirements or requests made by KNC in order to inform our decision making and to realize the joint decision making processes your governments have committed to implementing.

Some of these items are joint initiatives and/or require KNC engagement and we acknowledge that meaningful engagement and mitigations take time. However, before further development is considered there is the need to give back to the land and waters, and to restore the balance as is aligned with Ktunaxa natural law and taking only what is needed, it is important that these initiatives are completed prior to new projects being contemplated.

Federal Oversight

On July 16, 2021, the University of Victoria's Environmental Law Centre published a submission titled: *Request for an Inquiry into Regulatory Negligence: Canada's Failure to Control Elk Valley Coal Mine Pollution*. We support the determination within the inquiry that 'an investigation is warranted into the regulatory negligence of Environment and Climate Change Canada and Fisheries and Oceans (DFO) to meet the targets set out in the Federal Sustainable Development Strategy'. We also agree that there has been a long standing failure to use the Fisheries Act and other federal powers (ie. species at risk, migratory birds, transboundary waters, and the significantly delayed proposed *Coal Mining Effluent Regulations*) and instead relying on provincial measures.⁶

Other provincial regulators such as the Alberta Energy Regulator (AER) are validating the same types of concerns that the KNC has been raising on coal mine development for years. Recently the Grassy Coal mine project in Alberta was rejected as the result of the Joint Review Panel's (JRP) decision that the project is not in the public interest.

Operating in its capacity as the AER and mandated by the Minister of Environment and Climate Change, the JRP's decision was informed by a lack of confidence in the quality and validity of the information provided by the proponent particularly around proposed mitigation measures, as well as evidence provided by the KNC regarding coal mining in the Elk Valley.

The JRP characterized the Grassy proponent's assessment of the effectiveness of proposed mitigation measures as "overly optimistic and not supported by the evidence provided." As a result, the JRP was "not confident about the technical and economic feasibility" of the proponent's mitigation measures.

The JRP concluded:

We cannot defer important matters or decisions to a later stage of the regulatory process. Our terms of reference require us to assess the environmental effects of the project, including the significance of effects, and, in our capacity as the Alberta Energy Regulator, determine whether the project is in the public interest. We find that the proponents reliance on future adaptive management meant that in some cases it did not provide important details regarding proposed mitigation measures. We also find that the proponents proposed adaptive management approach and plans were not sufficiently

⁶ Jesse Langelier et. al (University of Victoria; Environmental Law Centre), Request for an Inquiry into Regulatory Negligence: Canada's Failure to Control Elk Valley Coal mine Pollution, (July 2021) online (pdf): [Wildsight-Elk-Valley-Submission-2021July16.pdf \(uvic.ca\)](#)

*developed or detailed to make us confident that anticipated or unanticipated project effects would be effectively mitigated through adaptive management.*⁷

Elements of this statement can be directly applied to our experience in the Elk Valley. Proponents consistently overestimate the effectiveness of mitigation measures, and approval is provided based on those unreliable assumptions. Once the project is operational, experience demonstrates that impacts are more intense, and faster to appear, than anticipated in assessments.

Teck's experience with the Line Creek Operations II (LCO II) project perfectly illustrates this problem. The project was approved based on an explicit, unconditional commitment to manage selenium contamination to Dry Creek through an active water treatment facility (AWTF) to be operational by 2022 (EAC condition #9).

Nearly a decade after that commitment was first made, and one short year away from the operational target of 2022, an AWTF has not been built, and Teck has resiled from any commitment to build one. Compliance action from the province requires the date to come and go before enforcement actions are initiated – while environmental harm has already been demonstrated and is expected for years to come.

The JRP cited concern regarding selenium contamination and treatment options and the risks associated with calcite deposition in its analysis of water quality impacts. Evidence presented by KNC during the EA application review phase on terrestrial impacts, aquatic habitat and cumulative effects in the Elk Valley were also repeatedly cited by the JRP. The panel made repeated reference to the experience of coal mining practices in the Elk Valley as being a reason for expressing concern on the validity of the proponent's approach to impact mitigation. Of particular significance to us, is that the Grassy project is less than half the size of the FRX project, which is only one out of five coal mine EA's currently being considered within Qukin ʔamakʔis.

KNC submitted a letter to Fisheries and Oceans Canada (February 25, 2020) among other provincial and federal agencies, requesting a 'Call To Action' on significant declines of genetically pure qustit' (Westlope cutthroat trout (WCT)) populations in Qukin ʔamakʔis. The Ktunaxa Nation expressed deep concerns with the significant declines of two genetically pure WCT populations in Qukin ʔamakʔis. Management of WCT in BC is the joint responsibility of Parks Canada Agency, DFO and BC. DFO, Environment and Climate Change Canada, and BC's Ministry of Environment and Climate Change holds the authority for environmental protection and enforcement of legislation in BC.

⁷ Report of the Joint Review Panel (2021 ABAER 010, CEAA Reference No. 80101), Benga Mining Limited Grassy Mountain Coal Project (June 17, 2021) at pviii, online (pdf): [139408E.pdf \(iaac-aeic.gc.ca\)](#)

DFO largely deferred to both Minister Heyman and Minister Wilkinson to address KNC concerns about water quality and the role it played in the decline of the qustit' populations. We still do not know what specific actions DFO will undertake to ensure that no further damage is done to these culturally important populations so that they recover and become viable populations for generations to come.

Summary and Next Steps

The Ktunaxa Nation remain steadfast in our stewardship responsibilities to the land and are asserting that we will determine the future of Qukin ?amak?is. In order to make confident and informed decisions on new coal mining developments, we first must understand the impacts associated with legacy and existing operations and have confidence that they are being managed at a level that is acceptable to the Ktunaxa Nation and ultimately protective of ?a·kxam̓is q̓api qapsin (all living things) and sustaining Ktunaxa being Ktunaxa on the land for generations to come. As a first step, we request that BC and Canada uphold their fiduciary duty to Ktunaxa Nation, as well as their commitments and obligations under the *UN Declaration*, and suspend all current processes related to new coal mine developments.

Once this has happened, our governments can focus our collective resources on the more important matters of understanding the existing and ever-emergent current situation and, establishing a common and comprehensive information baseline to manage existing impacts and “reconcile with the land”. Only from this basis, can proposed land-use activity be considered.

Given the deficiencies and fragmented nature of the regulatory regime, we have also directed our staff to work with both the federal and provincial governments to assess other stewardship options which remains to be further explored. We would like to encourage continued collaboration on ongoing initiatives, with open hearts, in addition to innovative thinking in the shared interest of healing the land and righting the wrongs of the past. By doing so, we achieve the necessary government to government relationships based on respect and recognition of Ktunaxa title and rights.

