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We write with respect to your letter of November 9, 2022 (Reference 393629).

Introduction and Malahat Nation Position

Malahat Nation opposes the request to designate the "Bamberton Projects" as a reviewable project under Section 11 of the *Environmental Assessment Act 2018* (**the "Act"**). Malahat's position is that such a designation is (1) contrary to the Act's provisions and principles; (2) contrary to the public interest; and (3) not factually merited. As we explain further below, designating this long-standing project as reviewable would result in unnecessary delays and excessive costs, all of which will become barriers to reconciliation with Malahat Nation and counter to Malahat's constitutionally protected rights.

Malahat, through its corporate entities, has filed two separate applications for the expansion of existing projects that are fully in compliance with the existing regulations and laws. The Saanich Inlet Protection Society (**the "Society"**) ignores this and essentially asks the Minister to speculate on whether or how Malahat and its companies may apply for future operations under future legislative regimes. In a particularly offensive submission, the Society held itself out as the protector of Indigenous cultural interests and rights when in fact it seeks to undermine the well-being of one of the very Indigenous Nations it purports to protect.

Background of the Bamberton Lands

The proposed project expansions are located within the Bamberton Lands which are industrially zoned fee simple lands held by a number of companies that are beneficially owned by the Malahat Nation and controlled by the Malahat Nation. These lands are in the traditional territory of the Malahat Nation and are subject to Malahat Nation's Aboriginal rights, including title, and Douglas Treaty rights,[1] all of which are protected by Section 35 of the ***Constitution Act, 1982***. Aboriginal title, in particular, protects Malahat's right to decide how to use our lands and benefit from them economically. Any government interference with the exercise of that right is an infringement of our Aboriginal title that must be justified.

Industrial use of the Bamberton Lands in the Past

Some form of quarry has operated on the Bamberton Lands for many decades. There are current authorizations for the existing quarry as well as for existing foreshore facilities to enable shipping of aggregate and other materials to and from the site. These facilities are all vital to the economic viability of the Bamberton Lands as a whole, Malahat Nation's economic, cultural and social well-being, and the economy of the Cowichan Valley Regional District and its citizens.

Malahat Nation Acquires the Bamberton Lands

[1] We do not accept that the Douglas Treaties resulted in a surrender or cession of any Aboriginal title. And, even if that were the case, the Bamberton Lands are not included in the lands purported to have been in the Saanich Douglas Treaties.

The Malahat Nation has long prioritized reacquiring control of the Bamberton Lands, first through ownership and ultimately brought under our jurisdiction. These lands are a core part of our vision to restore some small part of the lands that were taken from us through colonization and, in particular, the granting of a huge part of our land to the Esquimalt and Nanaimo (E&N) Railway Company to facilitate the building of the now defunct E&N Railway. As a result of this grant, we have had to watch as private land owners, businesses and forestry companies directly benefited from our lands while most in our community struggled in poverty.

The fact that so much of our territory is held in fee simple has also affected our treaty discussions. The Federal and Provincial governments will only consider including fee simple lands in future treaty settlement if Malahat acquires lands in a willing seller/willing buyer transaction. Despite this practical limit on a potential treaty settlement, Malahat Nation entered the BC Treaty Process (originally as part of the Hul'qumi'num Treaty Group, now as part of the Te'mexw Treaty Association). We have actively engaged in good faith treaty negotiations for over twenty-five years. In that period of time the Crown has only been able to identify limited lands to offer in treaty negotiations. Those lands, while helpful, do not have the same immediate cultural, economic, or symbolic value as the Bamberton Lands. It is doubtful that these other lands alone would be enough to persuade our members to enter into a modern day treaty.

In the mid-2010s a unique opportunity arose for Malahat Nation to acquire the Bamberton Lands (by acquiring the various companies holding the lands) from their previous owners. This came at a significant cost to our Nation, which we financed through the First Nations Finance Authority. Two years later the Provincial government – in the interest of keeping the Bamberton Lands available for treaty purposes – acquired a significant portion of the Bamberton Lands from Malahat and now holds these lands to become treaty settlement lands (if a treaty is ultimately ratified). Without this acquisition, it is doubtful that Malahat would have been able to retain these lands and it would likely have brought an end to the treaty negotiations for Malahat.

The acquisition of the Bamberton Lands has also been a source of pride for our Nation. It has enabled us to begin the process of decolonization in the most concrete way possible – by recovering land at the core of our territory. This has enabled us to develop a vision of long-term sustainable stewardship. We are able to identify lands that need to be protected and also lands that can be sustainability developed. It has enabled us to improve our community well-being by creating jobs and allowing revenue to flow into the Nation for vitally needed housing and other infrastructure. It has also allowed us to support the regional economy as we have been able to work with and strengthen some of our region's most important employers and sources of economic activity.

The Bamberton Lands Operations are Essential to our Nation's success

It should be noted that these transactions and the benefits flowing from them are entirely dependent upon the continuation of quarry activity at the Bamberton Lands. There is no other source of revenue to support our very substantial debt payments, which will continue to burden Malahat unless a modern day treaty enables us to significantly reduce the debt associated with these lands and create other economic opportunities on these lands.

We have continued to operate this facility in full compliance despite significant delays in the treaty process and the provincial permitting process. Since the treaty process is taking an inordinate amount of time, we need to ensure that these projects can continue to support Malahat's ability to hold this land until treaty negotiations conclude.

The pending applications to continue and extend the existing operations is crucial to Malahat's continued success. If the quarry operations are disrupted or stopped the Nation will have to default on its loan facility and the First Nations Finance Authority will be obliged to exercise its security rights. Further, this will create such a significant debt overhang for the Nation that it is unlikely it would be able to continue in the treaty process.

It is also important to note that Malahat intends that this land become a part of its treaty settlement lands and become entirely integrated into our nation re-building efforts. We expect that over time this land will be used for a wide variety of purposes including residential, recreational, industrial, commercial, and tourism activities, based on the needs and direction of the Nation. We are committed to the long-term well-being of our community and lands which we have stewarded since time immemorial.

To be blunt, much the Society's letter consists of speculation and insinuation that are unsupported by the evidence. It is even speculative to assume that the quarry operation will experience future expansion in the manner suggested in their correspondence. Should Malahat achieve a modern day treaty it will be entering into a new political, economic and cultural era, reclaiming governance and land management authorities over these lands, and we will be evaluating all of our options at that time.

Request Does Not Meet the Statutory Requirements of Section 11

As you noted in the Nov 9th letter, the various Bamberton applications do not meet the requirements for a s. 35 regional assessment under the *Act*.

Section 11 sets out a number of conditions or requirements before the Minister may designate an activity as a "reviewable project". First what is designated must be a "project". However, as is shown in the Society's own filed materials, there are a number of related but distinct operations involved here. The quarry is one operation and while it utilizes the dock and marine facilities outlined in the foreshore lease expansion they are not the same project. The foreshore lease and the quarry are different projects as the foreshore lease and related facilities serve a number of different industrial uses and not exclusively the quarry. The Management Plan identifies the infrastructure expected to be built and for the most part the Society speculates about other usages. As noted in the management plan, (page 60 of the Society's submissions) "[n]o riparian encroachment is anticipated to occur from continued use of the site and/or expansion of the tenure area." To the extent that there may be future projects or works, these of course will have to comply with the relevant regulatory regimes, based on the factual, not speculative scope. While it is convenient for the Society to aggregate two projects, this clearly is contrary to the scheme of s. 11 which focuses on the environmental assessment of a project.

Second, even if the Minister could bundle several distinct projects, s. 11(1) provides that an "eligible project" is one that "is not substantially started." Unlike s. 18(5) under the old EAA (which was considered in ***Taku River Tlingit First Nation v. British Columbia (Minister of Environment)*, 2014 BCSC 1278**) the relevant time for assessing whether or not a project has been substantially started is not the issuance of a certificate, but requires looking at the project as a whole and asking whether or not it has been substantially started. In this case the Society is asking for the project as a whole – including its long-existing facilities – to be assessed. Without a doubt this work is "substantially started" and has been underway for decades as this is an active mine site.

The proposed extensions merely continue that work. Similarly, there is an existing dock and related facility in place at the site and the proposed tenure expansion will not change the physical facilities at

the site or result in new construction, but will result in the continuation of what is there now using the same facilities and access.

As highlighted in **Taku River Tlingit First Nation v. British Columbia (Minister of Environment), 2014 BCSC 1278** the focus of the "substantially started" analysis is on physical work done at the site. In this case there is ample evidence of physical work and the expenditure of monies at the site. The dock facilities are built and currently operational. The quarry with its associated infrastructure is existing and currently in use – the Companies' intend this as a continuation of its work. Reclamation work is underway and soil is being used on the site and so, again, this is ongoing work which has clearly been substantially started.

Fundamentally, the legislature in enacting s. 11 designed it as a tool to allow for the designation of genuinely new projects for environmental assessments but not as a tool to require the environmental assessment of existing facilities. This is not to say that environmental assessments of expansions of existing facilities cannot occur, but these have been provided for by regulations providing thresholds for the assessment of "modifications" of existing facilities (see Part 3 REVIEWABLE PROJECTS REGULATION, B.C. Reg. 243/2019), in which neither the quarry expansion nor foreshore lease expansion exceed.

With respect to ***Friends of Davie Bay v. Province of British Columbia*, 2012 BCCA 293,** that was a case concerning a proposed new gravel pit where it was alleged that the quarry facilities had been overbuilt and were intended to support a larger project than the one that was applied for (see para. 37). As a result, a request was made for the Minister to exercise their discretion to designate the project as reviewable and the Minister declined. The Friends of Davie Bay alleged this created a loophole in the environmental assessment regime as applicants could design projects so as to fall beneath the threshold. The Court of Appeal pointed at the power to designate as an answer to this concern, but did so in the context of a project that had not been substantially started (ie: a new project). The Court of Appeal did not conclude that once a project was in operation the Minister could avoid the threshold set in the regulation concerning what modifications to an existing mine would trigger an environmental assessment by using s. 11. It is worth noting that the Environmental Assessment Act underwent a significant overhaul in 2018 – after the Davie Bay case – and the legislature did not extend s. 11 to modifications of existing projects (as opposed to new projects that had not been substantially started).

Note that this does not mean that the proponents are free to misuse the modification process to avoid the thresholds provided for in s. 10 of the Regulations. The application to modify the quarry's operations still has to be considered and approved by the government. If it is apparent that a proponent is engaged in gamesmanship in order to avoid an assessment by artificially phasing an application the Minister considering the application can take that into account in deciding whether or not to approve it. In this case however, the quarry application explains the process of phasing and how it is linked to geological formation of the site and the process of obtaining better evidence about each phase as certain geological limits of each bench are reached (see the Section 2.0 of the quarry application). There is no evidence of gamesmanship on the part of the proponent or Malahat and so no basis (beyond the Society's own speculation) to support any suggestion of misconduct.

No Reliable Evidence of Adverse Environmental Impacts

In the various applications made by the Malahat Investment Corporation for the quarry extension and foreshore tenure expansion the applicant provided evidence that there would be minimal or no significant environmental effects. If the Minister is of the view s. 11 applies at all to a project that has substantially started, this consideration is relevant to the s. 11 decision as the Minister under s. 11(4) must consider whether "the potential effects of the eligible project will be equivalent to or greater than

the potential effects of projects in that category that are reviewable projects" (where the project is one provided for in the Reviewable Project Regulation).

In this case there is no evidence that the modification would cause environmental effects equivalent to or greater than those associated with a project described in s. 10 of the Regulation. In this respect it is worth noting a number of reasons why this is reasonable:

1. The modification to the quarry will use existing road access;

2. The modification to the quarry will use existing water access;

3. The modification to the quarry will use existing quarry facilities at the site;

4. The modification to the quarry is in the vicinity of an existing industrial site and within industrially zoned lands;

5. The modification to the foreshore lease does not require the building of new docks;

6. The modification to the foreshore lease does not require the building of new in-water facilities of any kind.

What the Society largely resorts to in an effort to create the impression that there will be environmental effects that would merit an intervention under s. 11 is speculation about development that might come, including:

1. Speculation about a future housing development (which is impossible under existing zoning);

2. Speculation about the use and disposition of contaminated soil;

3. Speculation about the course of future development of the site; and

4. Speculation about the effects on cultural heritage.

With respect to the first and the last matters, it is worth noting that the project that Malahat members were commenting on (as quoted by the Society) was substantially greater than the proposed modification to the existing quarry. That project involved building several hundred houses, expanding Oliphant Lake, building new road infrastructure, building new sewage and water infrastructure and moving many thousands of people on to the land. Further, this all would have been done without the consent of Malahat, without Malahat control over the design or density, and without economic benefit to Malahat. It is patronizing in the extreme for the Society to purport to speak out to protect Malahat's cultural heritage. This is a manifestation of colonial attitudes and approaches, which are further exacerbated by the Society's attempt to pit the interests of one Indigenous Nation against another. This is the antithesis of reconciliation.

Even in respect of some matters which might, on their face, give rise to some concern, the Society's speculation is flimsy. In reading their materials it is clear what their real concerns are; namely, potential effects on the real estate industry and tourism industry in the Brentwood Bay area. In this respect they provide no evidence. It is also worth noting though that the real estate industry and the tourism industry in Brentwood Bay grew and thrived for the decades during which there was largescale industrial activity at Bamberton. Absent some evidence that would suggest that this modification of a relatively small

quarry is going to result in a dramatically different viewscape, the weight of the environmental impact considerations under s. 11(4) should favour rejecting the designation request.

The Designation Would Not be in the Public Interest

Section 11(6) of the *Act* makes it clear that the Minister may only exercise the power to designate a project as reviewable if the "minister is satisfied that the designation is in the public interest." In this case the designation would clearly be contrary to the public interest in that:

1. It would be contrary to the express policy of the *Act* and Regulations that modifications to existing mines should only trigger environmental assessments if certain thresholds are met (which they are not in this case);

2. There is no evidence supporting the assertions and speculation about significant environmental impacts;

3. The designation would impose significant costs on an Indigenous enterprises and Nation;

4. The designation would likely infringe the Aboriginal Title of the Malahat and, in particular, (1) their right to decide what happens to the lands; and (2) the right to benefit economically from the lands;

5. It would threaten the economic viability of Malahat's acquisition of the Bamberton Lands for treaty purposes;

6. It would threaten the viability of Malahat's involvement in the treaty process;

7. It would undermine Malahat's attempts to advance reconciliation through a balanced approach to protection of habitat and economic development;

8. There are existing regulatory mechanisms to manage concerns about transportation of contaminated soil;

9. There are existing regulatory mechanisms to address speculative future development or facility construction;

10. The negative aspects of a designation decision are not outweighed by the speculative positive effects; and

11. The totality of the submissions suggest that an environmental assessment would be unlikely to result in any significant change to the management of the project.

Conclusion

The Minister should reject this request to designate the projects as reviewable under Section 11 or the *Act* because of the following reasons (any one of which would be sufficient to deny):

1. It does not meet statutory requirements of s. 11 in that (1) the proposed modification is substantially started and (2) the Minister is being asked to designate a number of different projects rather than a single project;

2. The information before the Minister shows that the likely environmental effects are not equal to or greater than those associated with a project satisfying the requirements of s. 10 and are in fact negligible;

3. The designation would not be in the public interest, and, in particular be contrary to the strong interest of Canada and British Columbia in advancing reconciliation.