

COURTESY TRANSLATION

January 18, 2016

BY EMAIL: Hunter.Tootoo@parl.gc.ca
AND BY FAX: 613-947-7081

The Honourable Hunter Tootoo, P.C., M.P.
Minister of Fisheries and Oceans Canada
200 Kent St.
Ottawa, Ontario K1A 0E6

Re: Environmental assessment of the Labrador-Island Transmission Link Project,
CEAR no. 10-03-51746

Dear Minister,

Introduction

The Innu of Ekuanitshit would first of all like to extend our congratulations to you on being named Minister of Fisheries and Oceans.

As you may know, the Innu of the Québec-Labrador Peninsula have been neighbours to the Inuit of Nunavik and Labrador since time immemorial. You can therefore imagine the optimism we feel now that an Aboriginal hunter occupies a position such as yours, which is crucial for the environment and the survival of our peoples.

Unfortunately, we are obliged to inform you about a procedure adopted by your department that has prevented any useful consultation of our community concerning the effects of a major project, a procedure that has betrayed the promises made during its environmental assessment.

Moreover, we believe this is a problem that goes far beyond this single project and constitutes a significant failure by the Department of Fisheries and Oceans (DFO) to base its actions on respect, co-operation, and partnership with Aboriginal peoples and recognition of their rights.

The project and its environmental assessment

The project in question involves the construction and operation by Nalcor Energy of the transmission line required to transmit the hydro-electric power to be produced by the

generating station currently under construction at Muskrat Falls in Labrador. The transmission line will be about 400 km long in Labrador alone, crossing the peninsula in a southeasterly direction before crossing the Strait of Belle-Isle with the use of submarine power cables in order to reach the Island of Newfoundland.

The Innu of Ekuanitshit participated actively in the comprehensive study of the project, conducted under the old *Canadian Environmental Assessment Act* (“CEAA”), since their traditional territory is partly in Labrador, even though the reserve that the Department of Indian Affairs created for them is in Québec.

Moreover, the project’s comprehensive study report (“CSR”) prepared by the Canadian Environmental Assessment Agency concluded that, even taking mitigation measures into account, the transmission line is likely to cause significant adverse environmental effects on the Red Wine Mountain Herd of woodland caribou, a species the Innu have always harvested.

Finally, the project has a significant effect on the Atlantic salmon fished by the Innu when it spawns in the rivers of the Lower North Shore in Québec because, during its migration, the salmon goes through the Strait of Belle-Isle where Nalcor will install three submarine power cables on the seabed over a distance of 35 kilometers, in 2016.

After having received the CSR, your predecessor decided that the significant adverse environmental effects the project is likely to cause are nevertheless “justified in the circumstances.” In her capacity as a responsible authority under CEAA, she decided on November 26, 2013, to “exercise any power or perform any duty or function that would permit the project to be carried out [as a] whole.”

DFO prevented any useful consultation after the assessment

The Comprehensive Study Report

The consultation framework that the Government of Canada imposed on us unilaterally for this project principally concerned the environmental assessment process, but also provided for the possibility that Aboriginal groups would be consulted further “during the regulatory approval phase.”

The CSR clearly provided at section 5.2.3 that the regulatory approval phase would “consist of federal authorizations, approvals or permits related to impacts on fish and fish habitat.”

The CSR also promised that Nalcor would “develop and implement a fish habitat compensation plan to offset impacts predicted to occur as a result of the Project

(pursuant to the Fisheries Act [section 35(2)])” and that “Aboriginal groups” would “be consulted by DFO on compensation/offsetting measures during the regulatory phase.”

The absence of any permit for this project

In August and September 2014, our lawyers wrote to the Regional Director General of DFO for the Northwest Atlantic in order to find out how he would ensure the implementation of the mitigation and follow-up measures described in the CSR.

Our concerns extended beyond the protection of fish habitat: they concerned Nalcor’s preparation of a mitigation and monitoring plan for endangered species that would be in conformity with the Government of Canada’s responsibilities under the *Species at Risk Act* (SARA), especially with respect to caribou.

We were therefore dismayed to receive a response on October 15, 2014, in which the Regional Director General stated that the project did not “require any regulatory approval or authorization from Fisheries and Oceans Canada,” not even after an entire construction season.

You should note that as of October 31, 2015, Nalcor had cleared 1,850 hectares in Labrador for the transmission line’s right-of-way and for access roads, but apparently without DFO having issued a single permit.

The policy of avoiding permits

Further research revealed to us that DFO has developed the habit of sending proponents “letters of advice” and “statements of operation” that allow it to avoid issuing the permits required under section 35 of the *Fisheries Act*. As a result, if the plan for the works or undertakings proposed by the proponent seem to avoid permanent alteration to, or destruction of, fish habitat, that is enough for DFO to refrain from issuing any permit; no subsequent monitoring report is required.

The DFO does not consult Aboriginal peoples before issuing these letters of advice and statements of operation, since it believes that no basis for consultation remains after it has concluded there will be no harmful effects on fish habitat. Obviously, in that case, DFO also fails to decide whether the proponent’s plans allow for the accommodation of Aboriginal interests.

We believe this approach excludes Aboriginal people through a ruse that is far from admirable: while DFO considers the decision to grant a permit clearly to be the trigger for the duty to consult, it has decided to refrain from granting any permit, on the pretext that the adverse effects on fish habitat that would require a permit to be issued can be

avoided through the work proposed by the proponent. However, Aboriginal people are never consulted on this work in particular, nor on the affected fish habitat in general.

In fact, it defies the imagination that a project on the scale of a 400-kilometer transmission line could be built by clearing 1,850 hectares in the boreal forest of Labrador without any permanent alteration to, or destruction of, fish habitat.

The consequences for this project

DFO never informed us of its letters of advice to Nalcor before we raised the issue.

Even afterwards, for the largest part of the transmission line right-of-way in Labrador, your regional office has simply described the letters as concerning “temporary stream crossings and water withdrawal for transmission line construction,” a phrase so general as to describe almost nothing at all.

When our lawyers underlined that the environmental assessment had been based on the assumption that DFO would be called upon to issue permits about which we would be consulted, the Acting Regional Director simply continued to repeat, in her most recent letter, that the work did not require a permit and that without a permit, no consultation was required.

DFO’s approach is particularly ill-advised for this project because ever since the environmental assessment, Nalcor has declared that it could leave out mitigation measures mentioned in its environmental impact statement, if it decided that these measures were not practical or feasible, either technically or economically: Information Request No. CEAA-16. This approach was confirmed in Nalcor’s Environmental Protection Plan.

More particularly, Nalcor clearly explained that if the mitigation measures were not included in any permit, it reserves the right to decide on its own as to their technical or economic feasibility, without consulting DFO. The result is that Nalcor is not bound by any DFO guidance document (such as, for example, the *Guidelines for Protection of Freshwater Fish Habitat in Newfoundland and Labrador* issued in 1998).

In other words, if no permit is issued, there is no guarantee that the mitigation measures promised during the environmental assessment and that are under DFO’s jurisdiction will actually be implemented by Nalcor. To the extent that it is possible to characterize environmental assessment as consultation, our participation in this earlier phase would therefore be rendered meaningless, without our having been able to participate in any other way.

The incompatibility of the process and your mandate

We note from your mandate letter that Prime Minister Trudeau indicated that “Canadians need to have faith in their government’s honesty and willingness to listen.”

It is not honest to promise a consultation on permits during the environmental assessment while DFO had no intention to issue any; to decide in secret that these permits are not needed amounts to refusing to listen to Canadians.

In your mandate letter, the Prime Minister added that “[n]o relationship is more important to [him] and to Canada than the one with Indigenous People” and that this relationship must be “nation-to-nation” and “based on recognition of rights, respect, co-operation, and partnership.”

Your department has avoided the consultation that was promised through a ruse consisting of agreeing with the proponent that its work could avoid the permanent alteration to, or destruction of fish habitat that would require a permit. However, your department has not determined whether Aboriginal groups share this conclusion and does not even inform them of the letters of advice and statements of operation issued to the proponent instead of permits. This approach shows no trace of respect, co-operation, or partnership.

The specific priorities set for you by the Prime Minister include:

- Use scientific evidence and the precautionary principle... when making decisions affecting fish stocks and ecosystem management.
- ...to immediately review Canada’s environmental assessment processes and introduce new, fair processes that will:
 - restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, while also working with provinces and territories to avoid duplication;
 - ensure that decisions are based on science, facts, and evidence, and serve the public interest;
 - provide ways for Canadians to express their views and opportunities for experts to meaningfully participate....

To claim that a project on the scale of a 400-kilometer transmission line can be built through the boreal forest of Labrador without any permanent alteration to, or destruction of fish habitat does not respect the precautionary principle in the management of this crucial resource.

To count on the promises made by a proponent that has already refused to implement DFO's guidance documents unless their terms are part of a permit does nothing to restore robust oversight of fish habitat, an area that is clearly under federal jurisdiction.

To count on the work-plans the proponent proposes but without requiring any monitoring report does not amount to ensuring that decisions are based on facts and evidence or that they serve the public interest.

Conducting this dubious process without public disclosure deprives Canadians of the means to express their views about the protection of fish habitat.

Steps required for the future

We would remind you that we never accepted that environmental assessment constitutes consultation and accommodation of the Innu. We would note in that regard that your predecessors never mentioned the Innu in the decisions they made in response to the environmental assessment of the transmission line or the Muskrat Falls generating station that depends on the line and they never delegated anyone to meet with us and take our concerns into consideration.

Since the consultation framework that the Government of Canada imposed on us unilaterally for this project nevertheless relied on the environmental assessment process as its principal activity and since the comprehensive study report provided that we would be consulted on the permits that were the triggers for the assessment by DFO, we insist that the process should at least be coherent and transparent.

Your department must immediately disclose to the public all of the letters of advice or statements of operation issued to Nalcor Energy for its transmission-line project between Labrador and the Island of Newfoundland, as well as the reasoning that could have allowed DFO to conclude that the clearing of thousands of hectares in the boreal forest could at no time lead to the permanent alteration to, or destruction of fish habitat.

We also insist on being informed, in the future, as soon as DFO receives a plan for work or undertakings that is proposed by the proponent and that your officials believe could eliminate the need to issue a permit, a step that should occur well in advance of any letter of advice or statement of operation being issued to the proponent.

This issue will become even more important in 2016, when Nalcor plans to install three submarine power cables over a distance of 35 km in the Strait of Belle-Isle, in the middle of the migration route used by the Atlantic salmon that the Innu harvest in the rivers of the Lower North Shore of Québec. The loss of marine habitat for fish and the disturbance of marine mammals during construction were effects the proponent admitted to during the environmental assessment, as well as exposure of fish to electric

fields and electromagnetic fields (EMF) from the submarine cables and shoreline electrodes.

More generally, we believe that your department must stop evading its duty to consult when it agrees with the proponent that its work could avoid the permanent alteration to, or destruction of fish habitat, which would require a permit. Your department must determine whether Aboriginal groups share this conclusion and it must do so well in advance of issuing a letter of advice or statement of operation to the proponent. This would initiate an approach based on respect, co-operation, and partnership, to use the Prime Minister's key words.

Yours sincerely,

c.c.:

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