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Pays Plat First Nation Written Submissions

1.0 Executive Summary

These written submissions outline the concerns that Pays Plat First Nation ("PPFN") has with both the Hearing Procedures and the Project. PPFN is committed to working cooperatively with the Panel, Proponent, and Participants to advance this Project in an environmentally informed manner. As such, these written submissions will also propose cooperative solutions to move forward.

To this effect, PPFN invites the Panel, Proponent, Participants, and the public to participate in the screening of the film 'After the Last River'. This powerful film showcases the immense responsibility that all parties in the Hearing bear in this process. It is our hope that the Hearing proceeds with everyone having been reminded of the tremendous responsibility we all share.

The people of Pays Plat have occupied their traditional lands on the central north shore of Lake Superior since time immemorial. Their legacy as hunters, fishers, trappers, and gatherers originates in this region. Both their legacy, as well as their deep connection with PPFN traditional lands, will be materially and irrevocably impacted by the Project.

These activities are not merely tangential to collective lived experience of the people of Pays Plat. Rather, they are solemn, constitutionally-protected promises that have been consistently affirmed by the executive, the legislature, and the judiciary.

PPFN Indigenous Rights are outlined in section 5 of these submissions, which will be accompanied by a brief commentary as to the legal framework governing their treatment. Of note, a report outlining the specific connection that PPFN has with the Areas of Concern will be presented for the Panel's consideration pending the confidentiality of the Report as requested in section 4.

Additionally, PPFN will explain and evidence its concerns relating to the sufficiency of data in a number of areas, including – but certainly not limited to, the aquatic baseline used in studying the water quality of several Areas of Concern, the fisheries offsetting plan, the cumulative effects of the Project, the potential for tailings dam and water treatment failures, and the reasonable expectation for a dramatically larger project footprint.

The sufficiency concerns as outlined in section 7 of these submissions will be followed in section 9 with a series of proposed conditions which offer cooperative solutions for this Project to proceed in an environmentally informed manner.

With regard to the Project proceeding in a culturally informed manner, these written submissions will also propose modifications to the Hearing Procedures (CIAR 956) to

address PPFN's well-communicated concerns regarding the Project proceeding under the *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52 ("2012 legislation") rather than the *Impact Assessment Act*, SC 2019, c 28, s 1 ("2019 legislation"). The written submissions for this procedural motion can be found in section 3 of these submissions.

2.0 Background

2.1 Pays Plat First Nation

Pays Plat First Nation ("PPFN"), known as Pawgwasheeng in Ojibway meaning 'where the water is shallow', is a vibrant community currently located on the central north shore of Lake Superior some 125 kilometres west of the Town of Marathon. PPFN has been inhabited since time immemorial and has consistently exercised its Indigenous Rights over its traditionally occupied lands, which extend westerly from the Nipigon River, north to Highway 11, and east to the Marathon area up to the boundaries of Pic River First Nation.

PPFN was not consulted regarding the Robinson-Superior Treaty and was unilaterally allotted a single square mile of reserve land to live on. Since then, PPFN has had numerous developments imposed upon its traditional lands and its allotted reserve.

Rights of ways for the highway and hydro lines cut across the community, and since the early 1990's the community has been involved in a land claim to deal with this issue. An Agreement-in-Principle was signed in 2009 on adding lands to the reserve, and is currently being drafted.

2.2 Marathon PGM Project

Mineral exploration on or around the traditional lands of PPFN began nearly a century ago, and during that time a number of studies were conducted. In 2010 Marathon PGM Corp. submitted the Marathon PGM-Cu Project ("the Project") to the Federal Ministry of the Environment who in turn referred the project to the Joint Review Panel ("the Panel") for assessment because the project was likely to cause significant adverse environmental effects.

In 2012 Stillwater Canada Inc. – the new Proponent of the Project, submitted an Environmental Impact Statement to the Panel which in turn was deemed insufficient. In 2014 Stillwater Canada Inc. requested an indefinite suspension of the Environmental Assessment process. The Project was thereafter suspended, and the Panel disbanded.

On July 13, 2020, Generation PGM – the new Proponent of the Project, requested a resumption of the Environment Assessment process. On April 19, 2021, an Environmental Impact Statement Addendum (CIAR 727) was submitted, and a comment period followed. On December 07, 2021, the Panel deemed the information provided sufficient to proceed to a hearing (CIAR 957).

3.0 Procedural Motion

The Panel has made it clear that this Environmental Assessment process was re-convened under the 2012 Environmental Assessment Act. In turn, Pays Plat First Nation ("PPFN") has communicated its objections to the process being governed by the old legislation rather than the 2019 Impact Assessment Act (CIAR 730).

In bringing this procedural motion PPFN is proposing two additions to the Public Hearing Procedures (CIAR 956) which may mitigate some of its concerns:

First, sections of the preamble of the 2019 legislation be incorporated as an aspect of the purpose of the Panel.

Second, elements from the Indigenous Traditional Knowledge section of the 2019 legislation be added to the Panel Procedures.

3.1 Authority of the Panel

These changes, while significant, fall well within the Panels authority. Drawing on section 1(c) of the Panel Procedures (CIAR 956):

> (c) The Panel has the discretion to change these procedures if they are satisfied that the objectives of the public hearing can be better achieved by taking a different approach. Where the Panel proposes to change the hearing procedures, participants will, where possible, be given notice and the opportunity for input. The Panel has the right to address any issues of non-compliance with these procedures.

The Terms of Reference for the Panel (CIAR 730) also notes in article 5.1 that the review will be conducted in a manner that discharges the requirements set out in the 2012 legislation. Drawing on that same legislation:

> ***32 (1)*** *Subject to sections 33 and 34, if the Minister is of the opinion that a process for assessing the environmental effects of designated projects that is followed by*

> *the government of a province — or any agency or body that is established under an Act of the legislature of a province — that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project would be an appropriate substitute, the Minister must, on request of the province, approve the substitution of that process for an environmental assessment.*

3.2 Objectives of the Public Hearing

The Terms of Reference, as the foundational procedural document for this Hearing, directs us to the requirements of the 2012 legislation. Looking at section 4(1)(d) of the 2012 legislation:

> ***4 (1)*** *The purposes of this Act are*
> *...*
> ***(d)*** *to promote communication and cooperation with aboriginal peoples with respect to environmental assessments*
> *...*

This intent is reflected in Appendix A of the Terms of Reference:

2.4. The Joint Review Panel is mandated to invite information from Indigenous groups related to the nature and scope of potential or established Aboriginal and Treaty rights in the area of the Project, as well as information on the potential adverse Environmental Effects that the Project may have on potential or established Aboriginal and Treaty rights.

2.5. The Joint Review Panel will accept:

(a) information presented by Indigenous persons or groups regarding the location, extent and exercise of potential or established Aboriginal or Treaty rights that may be affected by the project; and

(b) information presented by participants in the review panel process that relates to any potential adverse Environmental Effects of the Project on potential or

established Aboriginal or Treaty rights and related interests. Information received by the Review Panel may also be relevant to its assessment of the Environmental Effects of the Project, including those Environmental Effects that might adversely impact potential or established Aboriginal or Treaty rights. Relevant information could include but is not limited to:

i. impacts on uses of lands and resources by Indigenous peoples;
ii. impacts on hunting, marine, riverine and terrestrial harvesting including fishing, gathering and other traditional uses of land (e.g., use of sacred sites) in addition to related effects on lifestyle, culture, health, socio-economic conditions and quality of life of Indigenous peoples;
iii. alterations to access to areas used by Indigenous peoples for traditional and cultural purposes; and
iv. the ability of future generations to pursue traditional activities or lifestyle; and

(d) information presented by participants in the review panel process concerning measures proposed to mitigate and/or avoid any identified adverse impacts on potential or established Aboriginal or Treaty rights and interests.

Consequently, the proposed changes fall within the objectives of the Hearing and would enhance the existing procedures by incorporating the spirit of the reconciliation as it is reflected in the 2019 legislation.

3.3 Legislative Direction

There are some compelling reasons for incorporating the spirit of the 2019 legislation into the Hearing before us today.

Most importantly, the 2019 legislation represents an acknowledgement of direction from both the executive branch of government, as well as the judiciary.

The executive and legislative branches of government have clearly demonstrated their intention to incorporate a range of rights and commitments to Indigenous communities into long neglected facets of society. A great many of these commitments draw from Truth and Reconciliation Commission established by Prime Minister Stephen Harper, and the subsequent Final Report and Calls to Action in 2015:

> *45. We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown. The proclamation would include, but not be limited to, the following commitments:*

> *i. Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius.*
>
> *ii. Adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.*
>
> *iii. Renew or establish Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.*
>
> *51. We call upon the Government of Canada, as an obligation of its fiduciary responsibility, to develop a policy of transparency by publishing legal opinions it develops and upon which it acts or intends to act, in regard to the scope and extent of Aboriginal and Treaty rights*[1]

There is an abundance of comments from the executive demonstrating the intent to reform systems to advance the notion of reconciliation. Looking at February 14, 2018 remarks by Prime Minister Justin Trudeau in the House of Commons:

> *…*
> *Reforms are needed to ensure that – among other things – Indigenous Peoples might once again have confidence in a system that has failed them all too often in the past.*
> *…*
> *It's clear, Mr. Speaker, that Indigenous Peoples and all Canadians know it is past time for change.*
> *At the same time, some view our government's commitments with some degree of scepticism – and if you look at how things have been handled in the past, it's hard to say that that scepticism is misplaced.*
> *After all, it's not like we are the first government to recognize the need for change, and promise that we'd do things differently.*
> *…*

The same sentiments are echoes some three years later in a June 21, 2021, statement from Prime Minister Justin Trudeau:

> *…*

[1] Truth and Reconciliation Commission of Canada, *Calls to Action* (2012) <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf>

> *"Saying sorry for these tragedies is not enough. We need to right past wrongs and address ongoing challenges, and we can only accomplish this with action. That is why the Government of Canada has been working in partnership with Indigenous peoples, provinces, and territories to implement the Truth and Reconciliation Commission's Calls to Action. Seventy-six of the report's 94 Calls to Action fall under the sole or shared responsibility of the federal government and over 80 per cent of them have been completed or are well underway, and it is our priority to complete those Calls to Action.*
>
> *…*
>
> *"It is the responsibility of the Government of Canada to make significant change within our federal institutions. We must continue to review our laws and policies to see how we can improve outcomes for Indigenous peoples and for all Canadians, and rebuild or develop laws and policies accordingly in partnership with Indigenous peoples.*
>
> *…*

Indeed, the 2019 Impact Assessment Act is just one of many Canadian laws and policies that has been reviewed and amended to further this mandate. However, this mandate requires continuing effort, not just from the executive and legislative branches of government, but also from the administrative elements of government.

3.4 Supreme Court of Canada Caselaw

The emphasis on reconciliation is not just echoed by the executive and legislative branches of government, but is also well-evidenced by the judiciary. There is a compelling and binding string of Supreme Court of Canada caselaw that post-dates the 2012 legislation under which this Hearing is proceeding:

> *[The Province of Ontario] must exercise its powers in conformity with the honour of the Crown, and is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests. These duties bind the Crown.* ***When a government — be it the federal or a provincial government — exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question*** *[emphasis added]* [2]

> *… s. 35 of the Constitution Act, 1982 imposes limits on how both the federal and provincial governments can deal with land under Aboriginal title. Neither level of government is permitted to legislate in a way that results in a meaningful diminution of an Aboriginal or treaty right, unless such an infringement is justified*

[2] *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 at 50.

> *in the broader public interest and is consistent with the Crown's fiduciary duty owed to the Aboriginal group. The result is to protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society.* [3]

This precise sentiment is echoed by the Court some four years later, and aptly demonstrates the consistency of the caselaw:

> *The honour of the Crown is a foundational principle of Aboriginal law and governs the relationship between the Crown and Aboriginal peoples. It arises from "the Crown's assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people" and goes back to the Royal Proclamation of 1763 (Haida Nation, at para. 32; Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 66). It recognizes that the tension between the Crown's assertion of sovereignty and the pre-existing sovereignty, rights and occupation of Aboriginal peoples creates a special relationship that requires that the Crown act honourably in its dealings with Aboriginal peoples (Manitoba Metis, at para. 67; B. Slattery, "Aboriginal Rights and the Honour of the Crown" (2005), 29 S.C.L.R. (2d) 433, at p. 436).* [4]

3.5 Preamble of 2019 Legislation

This advancement of this legislative and judicial intent is aptly seen in the preamble of the 2019 legislation:

> *...*
> *Whereas the Government of Canada recognizes that impact assessments provide an effective means of integrating scientific information and Indigenous knowledge into decision-making processes related to designated projects;*
> *...*
> *Whereas the Government of Canada is committed, in the course of exercising its powers and performing its duties and functions in relation to impact, regional and strategic assessments, to ensuring respect for the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982, and to fostering reconciliation and working in partnership with them;*
> *...*

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[3] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at 139.
[4] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at 21.

> *Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples;*

The recognition of Indigenous rights is also seen in section 3:

> *For greater certainty, nothing in this Act is to be construed as abrogating or derogating from the protection provided for the rights of the Indigenous peoples of Canada by the recognition and affirmation of those rights in section 35 of the Constitution Act, 1982.*

Demonstrably, an overarching theme throughout the new Impact Assessment Act is a focus on Indigenous peoples to ensure their rights, culture, and traditional knowledge are considered at the various stages of an impact assessment. This legislation broadens project reviews from assessments focused heavily on environmental effects to consideration of a wider range of effects, including more consultation with Indigenous peoples throughout all stages of the impact assessment process.

Consequently, PPFN is requesting that the Panel incorporate the above-mentioned excerpts of the 2019 legislation's preamble into the Hearing Procedures.

3.6 Indigenous Traditional Knowledge

The 2012 legislation, the Panel Terms of Reference, and the preamble of the 2019 legislation make mention of recognizing Indigenous knowledge. However, the difference in the confidentiality of that knowledge is drastically different between the two regimes.

PPFN is requesting that certain aspects of the 2019 legislation be incorporated into the Panel procedures in order to better protect Indigenous knowledge and allow First Nations a greater degree of control over the knowledge they provide to the Panel.

This proposed change is not without precedent in the Hearing Procedures (CIAR 956). Section 12 has a process that allows for confidentiality of specifically identified information:

12. Confidential Information

(a) If any Participant requests that their information be kept confidential, the Panel will decide whether to grant the request, having regard to the powers of the Panel as set out in the section 45 of the *Canadian Environmental Assessment Act, 2012* and the Final Procedure for Requesting Confidentiality (CIAR #212).

(b) The Panel's decision and reason for its decision will be posted to the public registry.

Unfortunately, article 2.9 of the Terms of Reference (CIAR 730) makes it clear that all information is by default public unless the confidentiality provisions of the 2012 legislation apply:

2.9. All information obtained by the Joint Review Panel for the environmental assessment of the Project shall be made publicly available, unless the Joint Review Panel determines that sections 45(4) or 45(5) of CEAA 2012 apply to the information provided by a participant.

A brief examination of sections 45(4) and 45(5) of the 2012 legislation shows that the focus is on whether a specific harm is occurred. Absolutely no mention is made of Indigenous knowledge:

> ***45 (4)*** *If a review panel is satisfied that the disclosure of evidence, records or other things would cause specific, direct and substantial harm to a witness, the evidence, records or things are privileged and must not, without the witness's authorization, knowingly be or be permitted to be communicated, disclosed or made available by any person who has obtained the evidence, records or other things under this Act.*
>
> ***45 (5)*** *If a review panel is satisfied that the disclosure of evidence, records or other things would cause specific harm to the environment, the evidence, records or things are privileged and must not, without the review panel's authorization, knowingly be or be permitted to be communicated, disclosed or made available by any person who has obtained the evidence, records or other things under this Act.*

In stark contrast to the 2012 legislation, and in reflection of the executive and judicial emphasis on reconciliation, the 2019 legislation makes explicit mention of Indigenous knowledge and has an appropriately higher standard in its treatment:

> ***119 (1)*** *Any Indigenous knowledge that is provided to the Minister, the Agency, a committee referred to in section 92, 93 or 95 or a review panel under this Act in confidence is confidential and must not knowingly be, or be permitted to be, disclosed without written consent.*

> ***(2)*** *Despite subsection (1), the Indigenous knowledge referred to in that subsection may be disclosed if*
>
> - ***(a)*** *it is publicly available;*
> - ***(b)*** *the disclosure is necessary for the purposes of procedural fairness and natural justice or for use in legal proceedings; or*
> - ***(c)*** *the disclosure is authorized in the prescribed circumstances.*
>
> ***(2.1)*** *Before disclosing Indigenous knowledge under paragraph 2(b) for the purposes of procedural fairness and natural justice, the Minister, the Agency, the committee or the review panel, as the case may be, must consult the person or entity who provided the Indigenous knowledge and the person or entity to whom it is proposed to be disclosed about the scope of the proposed disclosure and potential conditions under subsection (3).*
>
> ***(3)*** *The Minister, the Agency, the committee or the review panel, as the case may be, may, having regard to the consultation referred to in subsection (2.1), impose conditions with respect to the disclosure of Indigenous knowledge by any person or entity to whom it is disclosed under paragraph (2)(b) for the purposes of procedural fairness and natural justice.*
>
> ***(4)*** *The person or entity referred to in subsection (3) must comply with any conditions imposed under that subsection.*

Importantly, in the 2019 legislation the point of departure for Indigenous knowledge is its confidentiality, and the consultation if disclosure is necessary. This point of departure is significant, in part because it recognizes First Nation control over Indigenous knowledge and serves to preserve its integrity for future generation.

By adopting these provisions into the Hearing Procedures, the Panel is empowering participating First Nations to provide Indigenous traditional knowledge to the process without diluting its integrity by making it publicly available.

It is important to give First Nations the choice to keep Traditional Knowledge confidential without having to demonstrate a specific harm. Truly, respect for Indigenous knowledge includes understanding that Indigenous peoples have inherent rights and jurisdiction over Indigenous Knowledge.[5] The requested amendments to the Hearing Procedures works towards precisely that.

[5] Wong C, Ballegooyen K, Ignace L, Johnson MJ(G), and Swanson H. 2020. Towards reconciliation: 10 Calls to Action to natural scientists working in Canada.

3.7 Additional Rationale for Amendments

PPFN submits that the executive, legislative, and judicial directives provided above well-justify an amendment to the Hearing Procedures to incorporate a more informed recognition of Indigenous Rights and more robust protection of Indigenous Traditional Knowledge. Nonetheless, there are also a series of important practical concerns that are addressed by the proposed amendments.

Paramount, the effective participation of First Nations in the Hearing will inevitably involve Indigenous Traditional Knowledge – especially Traditional Ecological Knowledge. As it stands, all submissions to the Panel are public unless specifically requested otherwise. Traditional Ecological Knowledge in the public domain may be exploited for unwanted commercial purposes to the detriment of band members who, in good faith, provided their knowledge and experience for the benefit of the assessment process.

Additionally, the Traditional Ecological Knowledge provided to the panel may disclose specific locations where First Nation band members hunt, fish, and gather. The public disclosure of this knowledge will result in a decrease of band member enjoyment of these traditional activities. Once the general public learns of the information and locations of these traditional activities, they will be able to freely use and exploit it to the detriment of First Nation band members.

Last, but especially relevant considering the current social climate, bringing Traditional Ecological Knowledge into the public domain allows important traditional sites to be subject to anti-Indigenous activities. The prevalence of anti-Indigenous activities in Canada is well-documented, and it is a real concern that the introduction of traditional sites to the public forum will lead to anti-indigenous graffiti and other acts of vandalism.[6]

3.8 Conclusion

In sum, while PPFN acknowledges that the Hearing will be proceeding under the 2012 legislation, PPFN nonetheless requests that key aspects of the 2019 legislation be read into the Hearing Procedures to reflect the clear executive, legislative, and judicial direction that underlies the 2019 Act. The proposed amendments are well within the jurisdiction and authority of the Panel, and will not drastically alter the conduct of the Hearing.

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[6] https://www.macleans.ca/news/canada/this-racist-graffiti-leaves-a-hateful-impression-even-if-its-removed/

Even a cursory reading makes it clear that an overarching theme throughout the new *Impact Assessment Act* is a focus on Indigenous peoples to ensure their rights, culture, and traditional knowledge are considered at the various stages of an impact assessment. The legislative changes manifested in the 2019 legislation reflect the common law requirements with regard to Indigenous consultation and accommodation developed by a series of Court decisions and executive commitments that have occurred since 2012.

Read collectively, there is a clear mandate to increase the consideration of a wider range of effects, including more consultation with Indigenous peoples throughout all stages of the impact assessment process. The *Impact Assessment Act* was modified by Parliament to require the recognition and affirmation of the Aboriginal Rights of participating Indigenous Peoples– including the Right to Consultation. This requirement is reflected throughout the *Impact Assessment Act* - least of all in s 3.

Consequently, PPFN is requesting that the following excerpts from the 2019 legislation be incorporated into or otherwise added to the Hearing Procedures:

> *...*
> *Whereas the Government of Canada recognizes that impact assessments provide an effective means of integrating scientific information and Indigenous knowledge into decision-making processes related to designated projects;*
> *...*
> *Whereas the Government of Canada is committed, in the course of exercising its powers and performing its duties and functions in relation to impact, regional and strategic assessments, to ensuring respect for the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982, and to fostering reconciliation and working in partnership with them;*
> *...*
> *Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples;*
> *...*
> ***119 (1)** Any Indigenous knowledge that is provided to the Minister, the Agency, a committee referred to in section 92, 93 or 95 or a review panel under this Act in confidence is confidential and must not knowingly be, or be permitted to be, disclosed without written consent.*
>
> ***(2)** Despite subsection (1), the Indigenous knowledge referred to in that subsection may be disclosed if*
> - ***(a)** it is publicly available;*
> - ***(b)** the disclosure is necessary for the purposes of procedural fairness and natural justice or for use in legal proceedings; or*

- ***(c)*** *the disclosure is authorized in the prescribed circumstances.*

(2.1) *Before disclosing Indigenous knowledge under paragraph 2(b) for the purposes of procedural fairness and natural justice, the Minister, the Agency, the committee or the review panel, as the case may be, must consult the person or entity who provided the Indigenous knowledge and the person or entity to whom it is proposed to be disclosed about the scope of the proposed disclosure and potential conditions under subsection (3).*

(3) *The Minister, the Agency, the committee or the review panel, as the case may be, may, having regard to the consultation referred to in subsection (2.1), impose conditions with respect to the disclosure of Indigenous knowledge by any person or entity to whom it is disclosed under paragraph (2)(b) for the purposes of procedural fairness and natural justice.*

(4) *The person or entity referred to in subsection (3) must comply with any conditions imposed under that subsection.*

The Hearing Procedures as they stand currently necessitate a detailed written request for confidentiality of specific documents or information. These requests require, among other things, that the First Nations 'clearly identify … [the] harm the participant or the environment would suffer should the information or documents not be held confidential.' (CIAR 212).

Respectfully, considering the well evidenced evolution regarding the treatment of Indigenous Traditional Knowledge, the clear and substantial harm that public disclosure of this knowledge poses, and the key role that Traditional Indigenous Knowledge – particularly Traditional Ecological Knowledge, will play in the Hearing process, the default for this knowledge should be confidentiality as outlined in the 2019 legislation.

4.0 Confidentiality Motion

Pays Plat First Nation ("PPFN") is requesting that the Report titled "Pays Plat First Nation's Presence on Angler Creek – A Historical Summary" be kept confidential pursuant to section 2 of the Final Procedures for Requesting Confidentiality (CIAR 212):

2.0 Procedure for Requesting Confidentiality

2.1 Any participant intending to submit to the Panel information or documents which the participant wishes to keep confidential must make a request in writing to the Panel.

2.2 A request for confidentiality should be made as early as possible, and prior to or concurrent with submitting the information or documents for which the participant is requesting confidentiality. Notwithstanding, the Panel shall retain discretion to consider requests made at any time.

2.3 The request must clearly identify the following:

- which information or documents the participant wishes to keep confidential;
- the nature of the information or documents the participant wishes to keep confidential;
- from whom the participant wishes to keep the information or documents confidential;
- whether the participant making the request is also requesting that the Panel modify the Hearing Procedures to allow for the presentation of information at the hearing in such a way as to keep the information confidential (for example, by the Panel holding an *in camera* session); and
- the grounds on which the request is made, including an explanation of what harm the participant or the environment would suffer should the information or documents not be held confidential.

For clarity, this report – dated January 2022, was created by CE Strategies following extensive research and community interviews, and consequently contains a great deal of sensitive information which may harm PPFN if made public.

Although PPFN was granted a confidentiality order for its traditional knowledge in 2012, and despite the archaic underpinning of this confidentiality procedure, PPFN is nonetheless requesting that the entirety of the report be kept private and confidential, and be viewed solely by the Panel as further evidence of PPFN's submissions regarding Angler Creek, Hare Lake, and the surrounding area.

4.1 Grounds of the Request

The report is a relatively detailed summary of PPFN's historical, cultural, and traditional connection to the Angler Creek area. It establishes PPFN presence in the area – both historical and current, and integrates historical and current land-use alongside PPFN's documented concerns to present a solid basis for the preservation of Angler Creek.

The Report was created using a combination of collected traditional knowledge, oral histories, genealogical records, and secondary sources. Many direct quotes are included in the report, and PPFN Traditional Knowledge – especially Traditional Ecological Knowledge, forms an integral aspect of the findings.

PPFN is requesting that the Report not be uploaded to the Registry or otherwise be made public because specific genealogies of current Band Members are explicitly mentioned. The release of this sensitive information to the public would offend the privacy rights of

these Band Members, and would have an impact on the reputation of PPFN leadership. The harm that could occur as a result of a breach of privacy has the potential to be far-reaching for both the specific Band Members, as well as the community as a whole.

Additionally, the public release of the Traditional Ecological Knowledge contained in the report has a real risk of that knowledge being exploited for unwanted purposes to the detriment of band members who, in good faith, provided their knowledge and experience for the benefit of the assessment process.

The public disclosure of traditional hunting, fishing, and gathering sites will dilute the use and enjoyment that PPFN Band Members – both current and future, benefit from. The potential for commercial exploitation is real and stands beside the serious risk of individual exploitation of these traditional sites.

Additionally, bringing the Traditional Knowledge contained in the Report into the public domain will allow important traditional sites to be subject to anti-Indigenous activities. The prevalence of anti-Indigenous activities in Canada is well-documented, and it is a real concern that the introduction of PPFN's traditional sites to the public forum will lead to anti-indigenous graffiti and other acts of vandalism such as has already been seen in British Columbia.

In making this request, PPFN is not seeking any modifications to the Panel procedures. Our written submissions summarize the findings of the report without identifying the specific members of the community who contributed to the Report. Instead, we would be submitting the Report for the purpose of providing the Panel with further evidence of PPFN claims.

4.2 Conclusion

In conclusion, PPFN is requesting that the Report titled "Pays Plat First Nation's Presence on Angler Creek – A Historical Summary" be kept confidential and solely for the Panel's purview.

While no amendments to the Hearing Procedures are being requested in regards to this Report, it will nonetheless provide the Panel with useful information evidencing the deep traditional, cultural, and historical connection that PPFN has with Angler Creek, Hare Lake, and the surrounding area.

5.0 Pays Plat First Nation Indigenous Rights

The people of Pays Plat have occupied their traditional lands on the central north shore of Lake Superior centra since time immemorial. Their legacy as hunters, fishers, trappers, and gatherers originates in this region. Community elders recall their lives in relation to the land and water, and how they would go *"swimming in the Rivers, Lakes in Robinson Superior specifically Pays Plat River, Lake Superior and Pic River…"* They remember *"how clean and pristine the water was…"* These activities are not merely tangential to collective lived experience of the people of Pays Plat, rather in our submission, they are the rights promised in section 35.

The *Constitution Act, 1982* acknowledges and protects Aboriginal Rights from infringement by Federal and Provincial law. This protection pursuant to s.35 of the encompasses the Aboriginal Rights of Pays Plat First Nation members to hunt, fish, and gather in their traditional territory. Additionally, Pays Plat First Nation has Treaty Rights flowing from the Government of Canada's perception of Pays Plat First Nation as a signatory to the Robinson Superior Treaty of 1850.

For ease of reference, these two sources of rights applicable to Pays Plat First Nation are referred to collectively throughout these submissions as *rights* and *rights practices*. Distinctions are made hereinafter only as necessary.

Pays Plat First Nation has maintained that it is not a signatory to the Robinson Superior treaty, and that no community representatives were present at the signing of the treaty in 1850. In spite of Pays Plat First Nation's position and the lack of evidence to call it in to question, Canada and Ontario have maintained that Pays Plat First Nation has adhered to the provisions of the Robinson Superior treaty by having received a one square mile Reserve, intersected without their consent by a railway, highway, and two powerlines, and having taken paltry annuity payments for a period of time.

PPFN has filed an Aboriginal Title Claim to the project area in the Ontario Superior Court of Justice that remains unresolved (CV-07-022). In accordance with principles stated by the Supreme Court of Canada in *Haida Nation v British Columbia (Minister of Forests),* and affirmed in *Ktunaxa v British Columbia (Forests, Lands and Natural Resource Operations),* projects in an area that is subject to a strong *prima facie* Unextinguished Aboriginal Title claim requires the highest level of consultation and accommodation throughout all stages of the project.[7]

[7] *Haida Nation v British Columbia (Minister of Forests),* [2004] 3 SCR 511 at paras 25, 27 as cited in *Ktunaxa v British Columbia (Forests, Lands and Natural Resource Operations),* [2017] 2 SCR 386 at para 78.

In the context of the proposed Marathon Palladium Project, Pays Plat First Nation maintains their investment in ensuring that their Aboriginal Rights are not disturbed, or if necessary, disturbed to the least extent possible.

These submissions, in turn, aim to do the following:

1. Survey the jurisprudential and legislative foundation for Pays Plat First Nation's rights assertion in light of the proposed Marathon Palladium Project;

2. Characterize the rights practices of Pays Plat First Nation; and

3. Highlight areas of specific concern of the proposed project from a rights perspective.

5.1 Legal Framework

Aboriginal Rights have their legislative source in the *Royal Proclamation* which acknowledges that Indians have special rights of land usage:

> *And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid* [8]

Thereafter in section 35(1) of the *Constitution Act, 1982,* the existing aboriginal and treaty rights of Canada's aboriginal people were "*recognized and affirmed*".

Since then, carving out the content of these rights has been a task left primarily to the courts. The colonial origins of the deemed "rights" leaves Indigenous parties with the burden of asserting and proving the existence of their Aboriginal or treaty rights. This is yet another exercise of such, as this judicial or semi-judicial panel is being asked to respect Pays Plat First Nation's rights with respect to culture and land. What follows here is an overview of the legal framework upholding Pays Plat First Nation's rights with respect to the proposed Marathon Palladium Project.

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[8] *The Royal Proclamation, 1763*, R.S.C. 1985, app ii, no. 1 at para 16.

5.1.1 Consultation

The unproven nature of Pays Plat First Nation's Aboriginal claim regarding rights does not disentitle them from consultation pursuant to the jurisprudence:

> *The constitutional guarantee of s. 35 of the Constitution Act, 1982 is not confined to treaty rights or to proven or settled Aboriginal rights and title claims. Section 35 also protects the potential rights embedded in as-yet unproven Aboriginal claims and, pending the determination of such claims through negotiations or otherwise, may require the Crown to consult and accommodate Aboriginal interests…*[9]

In this process, the panel's gatekeeping role is clear. However, in our submission, the panel also is also a guardian to the cultural matrix of Pays Plat First Nation, a role which involves monitoring, and as necessary, providing direction on the consultation process. Of late, consultation has been characterized as a "*matter of substance*", rather than a matter of form.[10] Correspondingly, the request of Pays Plat First Nation to the panel today is twofold: first, to consider the nature of the rights practices of Pays Plat First Nation, including their integral role in the collective identity of the First Nation and that of the individuals therein, and secondly, to compare the rights practices of Pays Plat First Nation to the proponent's consultation and mitigation efforts.

5.1.2 Guiding Legislation

The 2012 *Canadian Environmental Assessment Act,* which governs this process, provides at section 4(1)(d) that its purpose is "*to promote communication and cooperation with aboriginal peoples with respect to environmental assessments"*. While scant mention is made of Indigenous rights throughout the legislation, it nonetheless acknowledges the importance of taking into account the impact that the Project would impose on Indigenous peoples.

Section 19(3) of the Act provides specifically that "*[t]he environmental assessment of a designated project may take into account community knowledge and Aboriginal traditional knowledge"*. Moreover, the Act explicitly provides at section 105(g) that the Agency's object is to "*engage in consultation with Aboriginal peoples on policy issues related to this Act*".

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[9] *Haida Nation v British Columbia (Minister of Forests),* [2004] 3 SCR 511 at paras 25, 27, 43, 44, and 36 as cited in *Ktunaxa v British Columbia (Forests, Lands and Natural Resource Operations),* [2017] 2 SCR 386 at para 78 and 79.

[10] *Ginoogaming First Nation v Her Majesty the Queen in Right of Ontario et al*., [2021] ONSC 5866 at paras. 48-49.

Consultation in the context of the Marathon Palladium Project is no small task. Through these submissions, and through their tireless involvement in this process, the people of Pays Plat are sharing their position in all of this: how they interact with the lands and waters of their homeland, what they fear they might lose through this project, and what it is they still need answers to.

5.2 Aboriginal Rights Practices of Pays Plat First Nation

In Pays Plat, the shared relationship between humans and the land remains one of stewardship. Though originally, subsistence-based needs, rather than economic activities, dictated how the land was used and managed. A community member explains: *"My wife's people and ancestors respected the land, respected the water and respected what they took, and only took what they needed to survive".* Activities impacting upon the land and the waters were traditionally carried out by the people of Pays Plat with priority consideration of the generations to come. Today, preserving the land for future generations remains front of mind for Pays Plat First Nation when making decisions.

5.2.1 Rights Practices

The rights practices of Pays Plat First Nation are diverse. The people of Pays Plat are fishers, hunters, trappers, and foragers. The shallow waters of Lake Superior near Pays Plat provide a variety of fish. The surrounding land is home to a moose population long hunted by community members. Traplines are still valued, and passed down family lines. Wild blueberries are ever coveted.

Nevertheless, any contemporary attempt at characterizing the rights practices of a First Nation reveals the obvious truth that things have changed. Pays Plat First Nation is no exception to this rule. Like the rest of the population, the people of Pays Plat have changed how they live their lives. By virtue of the Crown's treaty endeavor, a small reserve now sits upon the traditional territory and serves as a hub for the exercise of traditional activities, or rights, by the people of Pays Plat. Today, the community is fueled by local businesses and centralized services as well as by fishing nets and traplines. However, participation in the mainstream economy does not undermine the Aboriginal Rights belonging to the people of Pays Plat, or their *sui generis* [11] nature.

Moreover, participation in activities pursuant to their rights by the people of Pays Plat is everchanging. While assimilation pressures have made it challenging for younger generations to find time to trap and hunt with the ancestral frequency, many still fish and

[11] *R v Van der Peet*, [1996] 2 SCR 507.

pick blueberries in the summers. The younger generations are honouring the land and their ancestry in their own way. A community member explains that honour can take many forms:

> *"In order to protect our lands, animals, and water, we honor it daily. Whether that honors comes from putting ones tobacco down, or from hunting, fishing, trapping, or even dancing on the land. The land is a part of our daily ceremony..."*

Pays Plat First Nation's efforts to preserve and promote a traditional way of life, including their participation in this process, demonstrates as commitment to saving their lands, water, trees, and plants, as this is their culture. Accordingly, we submit that any observed changes in the rights practices of younger generations should be regarded not as an indication of abandonment, but as evidence of the enduring importance of rights practices to the people of Pays Plat.

> *"These lands need to be unmolested because it is sustaining a community and the economy there that is based on natural resources. If the reserves were looked at as a business, then we have already had a stake in the resources that are available to use and we need to be consulted if another business is trying to use our resources."*

5.3 Conclusion

The midst of this process may seem an odd time to speak of reconciliation. Certainly, there is no expectation by Pays Plat First Nation that reconciliation will emerge as an outcome of these proceedings. Today, Aboriginal law acknowledges that reconciliation is not "*a legal remedy in the usual sense*",[12] but a *"process flowing from rights guaranteed by s. 35(1) of the Constitution Act, 1982".*[13]

Making assumptions about the relative importance of a rights practice by an external party is indeed a graceless exercise. However, the people of Pays Plat remain steadfast in their belief that their rights are not up for negotiation, that consultation is necessary, and that their outstanding concerns regarding the Project be addressed by the Panel as conditions to the Project proceeding.

To conclude, Pays Plat First Nation has bought into this process. They have shown their hand to the parties with control over it. Respectfully, it is our submission that what the Minister, Agency, federal authorities, and Proponent do with this information, brought

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[12] *Haida Nation v British Columbia (Minister of Forests),* [2004] 3 SCR 511 at para 32.
[13] *Ibid.*

willingly and trustfully forward by the people of Pays Plat, will reveal their commitment to fulfilling their constitutional and legislative obligations, and their intention to proceed in the spirit of reconciliation.

6.0 Impact on Indigenous Rights

Respectfully, it is submitted that the resulting and accumulated impacts of the Marathon Palladium Project pose the risk of infringement upon the rights of Pays Plat First Nation members as follows:

6.1 Fauna

a) Elimination of hunting and fishing within a significant area the mine footprint, and the area and roads extending out from the mine;

b) Decreased access to country foods as a result of toxin bioaccumulation in culturally significant food species including moose, beaver, rabbit, northern pike, yellow perch, walleye, lake trout, brook trout, and steelhead.

c) Detrimental impacts upon fur harvesting activities, including loss of access, infringement on trap lines, and species disturbance from mine activities;

d) Loss of caribou habitat, including the nursery and winter use areas in the Category 1 High Use Area;

e) Decreased connectivity between caribou ranges, in particular within the Lake Superior Coastal Range.

6.2 Fish

a) Elimination or destruction of the sturgeon foraging area in the Pic River riverbank in the event of a washout of the Camp 19 road;

b) Decreased diversity and quantity of fish species in Hare Lake;

c) Contamination of fish habitat through decreased groundwater and surface water quality as a result of seepage from mine facilities;

d) Loss of access to Bamoos Lake as a fishing location;

e) Dewatering of 5-6 streams which are documented to have several species of migratory salmonids, rainbow trout, coaster brook trout, pink salmon, chinook salmon, and coho salmon. These streams provide exceptional rearing capacity for the migratory fish. The quantity of fish loss is unknown as a result of the lack of data.

6.3 Water

a) Migration of contaminants into Lake Superior, and whether long term, gradual accumulation, or once in a hundred-year weather event compromises the tailings dam and water treatment facility;

b) Further degradation of the Jackfish Bay Area of Concern in Recovery;

c) Reduced water quality in the Pic River from acid generation and runoff from the walls of the pit lakes;

d) Elimination of water from Lake Superior tributaries;

e) Pollution of Lake Superior and its tributaries with mine effluent resulting in decreased water quality and the potential for increased contaminated sediments;

f) Further degradation of Jackfish Bay's water quality through increased mercury effluents;

g) Decreased water quality in Hare Lake from discharge of treated effluent, including mining by-products and metal processing chemicals;

h) Increased nuisance algal blooms in Hare Lake due to artificially elevated phosphorous levels from its use as a flotation chemical in the process plant;

i) Possible degradation of the Area of Concern Peninsula Harbour.

6.4 Land

a) Loss of access to traditional lands due to proposed upgrades to the Camp 19 road;

b) Elimination of historic and presently used ceremonial sites for Pays Plat First Nation members;

c) Stigmatization and avoidance of the project site as a result of noise and light emanating from the mine;

d) Overcrowding of the remaining hunting and fishing areas available to Pays Plat First Nation members as a result of use Pays Plat First Nation members and members of neighbouring First Nations;

e) Further crowding of the Pays Plat First Nation traditional territory by non-Indigenous hunters, fishers, and recreators displaced by the mine and mine activities; and

f) Visual impairment of the Lake Superior skyline by waste rock piles and deforestation.

7.0 Sufficiency Concerns

Several participating parties in the process – including PPFN, have expressed concern surrounding the timeline proposed by the Panel for the Hearing. PPFN is nonetheless committed to working with the Proponent to progress the Project in an environmentally informed manner.

From the December 07, 2021 announcement of the Hearing to the February 22, 2022 deadline for written submissions, the Proponent has submitted additional data relating to caribou, fisheries offset, water quality and modelling, and hydrology. This left the parties with 77 days to read, review, and respond to the new information.

While we understand the Hearing is to proceed, we wish to identify a few areas of data which could improve the overall impact of the Project. We have examined the various Requests for Information, the corresponding responses from the Proponent, and our previously communicated concerns (CIAR 894) and wish to bring to the Panel's attention a few areas of concern that have yet to have been addressed:

7.1 Aquatic Baseline

The EIS Guidelines for the project state that the adequacy of the baseline "*shall be evaluated based on, but not limited to, such factors as … adequacy of sampling effort, across all seasons and over multiple years; and distribution of sampling effort both temporally and geographically for different habitat types within each water body.*" Thus, a crucial requirement for the Aquatic Baseline was to design a sampling strategy that

included an adequate sampling effort to examine the geographic and temporal variation of fish populations in the Local Study Area.

The Aquatic Baseline has three main deficiencies that affect its ability to characterize the spatial and temporal variation in the aquatic communities: it lacks an explicit sampling design and strategy, employs a minimum sampling effort, and lacks an updated description of ecological parameters for the aquatic communities. The lack of an explicit sampling design resulted in a minimum sampling effort in the surveys of the aquatic communities. The Aquatic Environment Baseline Report Update indicates that the baseline studies included "*multi-year, multi-season surveys of aquatic habitats and communities in the study area*" and that only minor additional information was identified as required to supplement the studies published in 2007, 2009, 2012, and 2013. Implicitly, this conclusion is based on the premise that the current information adequately describes the aquatic habitat to be impacted during the development of the Project. For this premise to be true, it must be possible to infer the status of the fish communities in 2021 or later.

Let's consider the fish community in Hare Lake, for instance. First, the Proponent must estimate with a degree of certainty its diversity and the abundance and age structure of each population. Fish surveys in Hare Lake *ad hoc* to this Project were conducted in 2009, 2011, and 2013. Some methodological differences between the 2009 and 2011 surveys may account for unexplained variation in the diversity of fish and their abundance. For example, in 2009, using a seine net resulted in the capture of 60 logperch individuals. In 2011, a seine net was not used, but 21 logperch individuals were trapped using a Nordic net, resulting in a relative abundance of roughly one-third of that observed in 2009.

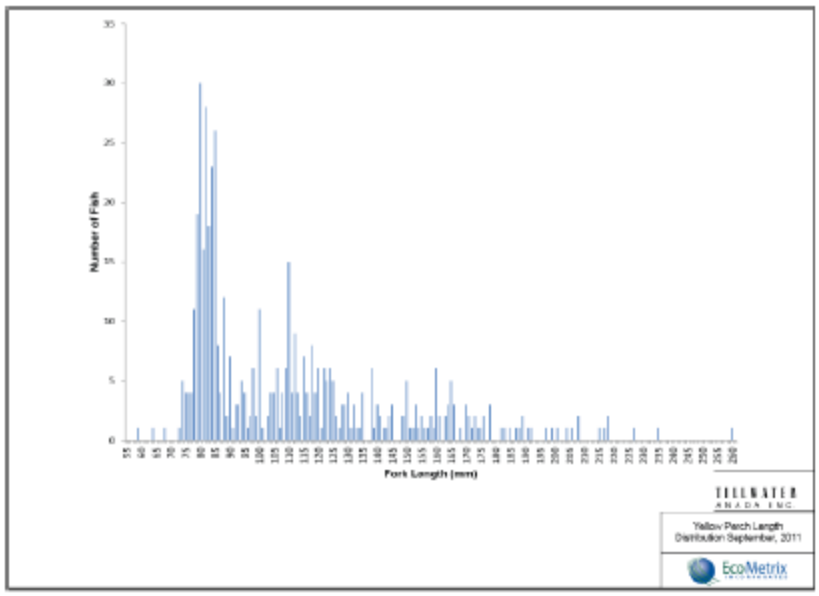
In contrast, the relative abundance of spottail shiner in 2009 was approximately two-thirds of that observed in 2011 when Nordic nets were introduced in the sampling. Was the variation in logperch and spottail shiner abundances due to natural change between years or sampling error introduced by using different techniques? Further, what would be the expected abundance of these species in 2021 or later? This example illustrates how the lack of methodological planning can introduce unaccounted sources of error in estimating ecological parameters. Most importantly, it shows that the information contained in the Aquatic Baseline is insufficient to assess the potential adverse effects of the Project on fish populations.

Yellow perch and spottail shiner were the most abundant fish species in Hare Lake. The length of individuals captured in 2011 and 2013 was recorded to examine the age structure of their populations. The length-frequency histograms included in the Aquatic Baseline showed a change between years in the age structure of both populations. In 2011, the

yellow perch population was dominated by the abundant young-of-the-year (YOY), with smaller proportions of presumed 1+ and 2+ classes fish.

In contrast, in 2013, the age class 1+ was arguably as abundant as the YOY. The histograms also showed an apparent decrease in the abundance of YOY in 2013. For spottail shiner, changes between years in the age structure of the population are more evident. In 2011, two discrete age classes were observed, 1+ and YOY, the former being the most abundant, while the presence of 2+ fish is uncertain. In 2013, a multimodal distribution was observed, with YOY being described as the most abundant, followed by 1+ and 2+ fish. These results illustrate the dynamic nature of the fish populations in Hare Lake.

Figure 2. Histogram of the length of yellow perch from Hare Lake in 2011 (top) and 2013 (bottom) (Ecometrix, 2020).



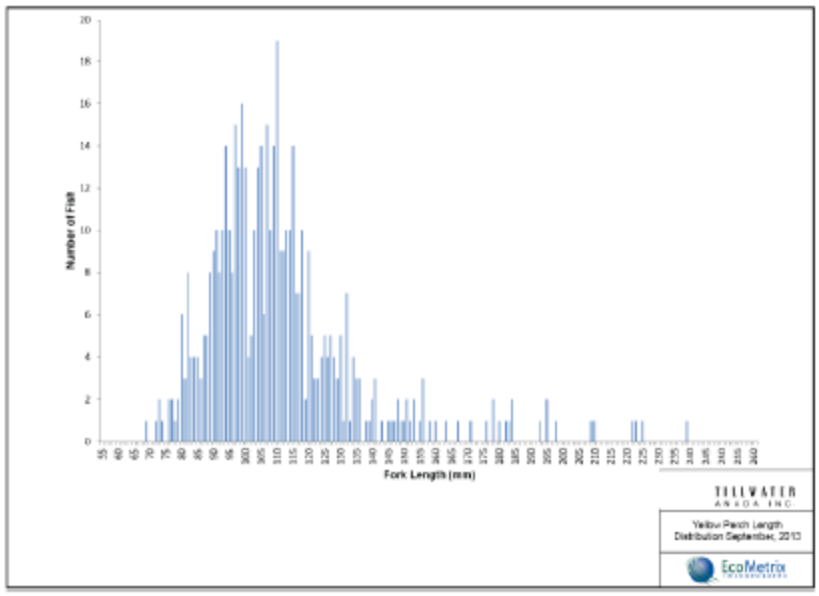
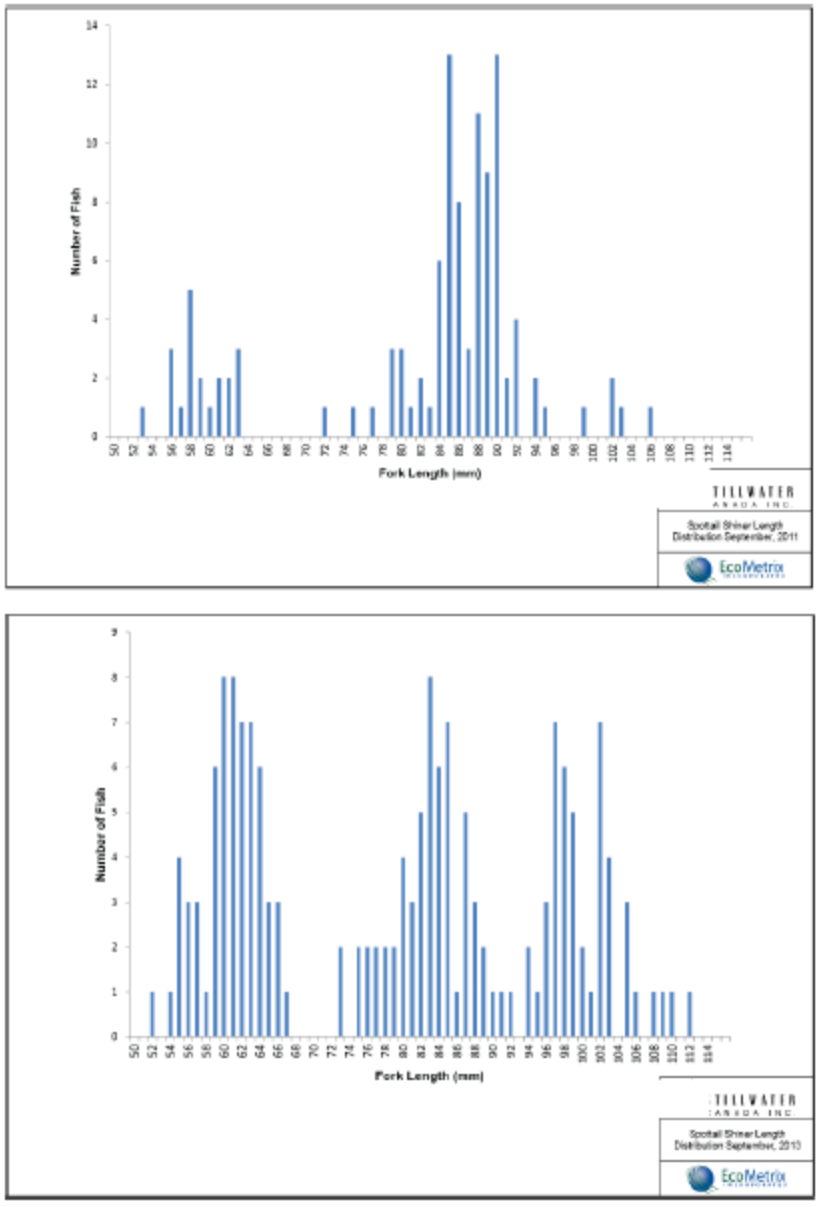


Figure 3. Histogram of the length of spottail shiner from Hare Lake in 2011 (top) and 2013 (bottom) (Ecometrix, 2020).



It is essential to understand the range and causes of variation in fish population parameters to assess the potential adverse effects of the Project. However, the Aquatic Baseline lacks profound interpretations of the observed changes in the age structure of the populations, raising critical questions. For example, what could explain the changes between years in the age structure of the populations? Could the rarity of 2+ spottail shiner in 2011 be a consequence of high YOY mortality in 2009? Alternatively, could the differences be the result of methodological changes or varying efforts between surveys?

Because none of these questions are addressed, it is impossible to make inferences about temporal changes in the abundance of each age class. Crucially, the minimal temporal replication (n = 2), the high variation observed between years, and the lack of interpretation of the results make it impossible to infer the age structure of the populations in 2021 or later. Thus, the effects of the Project cannot be adequately assessed because the current status of the receiving fish populations in Hare Lake is unknown.

7.3 Fisheries Offsetting Plan

As noted in the Pinchin review of the EIS Addendum (CIAR 894), the objective of a Fish Offsetting Plan is to support the conservation of fish and their habitat by "*counterbalancing the residual death of fish and/or harmful alteration, disruption or destruction of fish habitat resulting from carrying on works, undertakings or activities authorized under the Fisheries Act.*" Here, we argue that the Fisheries Offsetting Plan presented by the Proponent is insufficient to achieve the objectives set in the federal policy due to four major flaws: 1) The plan assumes that the productivity of the habitat to be destroyed and created are equivalent. 2) The plan lacks adequate measures of success because the baseline data is deficient. 3) The plan does not account for time lags in the restoration of productivity. 4) The measures proposed in the plan may result in extensive winter mortality of salvaged fish.

One approach to achieving the objectives of an Offsetting Plan is to provide in-kind compensation for the habitat destroyed. In this approach, the fish habitat that is impacted is replaced by the same quantity and quality. However, in-kind replacement is subject to uncertainty in the outcome and a time lag between the adverse effects and the implementation of measures. Thus, it must be emphasized that additional offsetting measures are required to account for uncertainty and time lags. A review of projects showed that success in maintaining the productivity of ecosystems is linked to using multipliers to determine the amount of offsetting measures to be implemented (CIAR 894).

The Fisheries Offsetting Plan presented by the Proponent establishes a false equivalency between the amount of habitat to be destroyed and created. In other words, the plan assumes

that the habitats destroyed and created are functionally the same, resulting in no net loss of fish productivity. However, using the habitat area as a currency representing the amount to be compensated is widely discredited because it ignores the ecological differences between habitats differing in type, location, time, or ecological context. This false equivalency of habitat is the biggest drawback of in-kind habitat replacement as it assumes that the new habitat will fully replace the functionality of the removed habitat.

The flawed equivalency of habitats in the plan is further compounded by the deficiencies of the supporting studies: the baseline in productivity against which no net loss should be measured is unknown. The aquatic baseline is inadequate, with minimal or no temporal replication, undescribed natural variation in fish productivity, and a large temporal gap between the studies and the proposed activities. Implicitly, the EIS Addendum and the Fish Offsetting Plan assume that the baseline conditions are fixed at the time of the development of the Project, ignoring the dynamic nature of the ecosystems. For example, the fish studies conducted at Hare Lake showed a three-fold change in the catch-per-unit effort between samplings undertaken in 2011 and 2013. No additional fish studies were conducted after those years. If we assume that the Project will be developed in 2022, What is the expected fish productivity in Hare Lake in 2022 against which the no net loss principle should be measured? It is a fact that a benchmark for fish productivity cannot be determined. Then, the logical truth is that it is impossible to evaluate the success of the Offsetting Plan.

The measures proposed in the plan may result in extensive mortality of salvaged fish due to a lack of overwintering habitat. The plan proposes to offset an area of 20.21 hectares. The most significant contribution to that total offset area is made by the measure to colonize several fishless lakes (15.45 ha). However, the baseline studies show that these lakes lack overwintering habitat due to low levels of dissolved oxygen below the ice cover *(see table below).* To our knowledge, the proponent has not updated the information presented in the baseline studies. Thus, our best understanding to date indicates that these fishless lakes are inadequate to offset the loss of habitat causes elsewhere in the project area, and they should not receive further consideration.

Lake	**Area (ha)**	**Baseline Characterization of Habitat** (CIAR 983)
Lake 1	3.23	Isolated, with limited availability of summer habitat due to oxygen depletion (Ecometrix 2012). Severe effect level of contaminants in sediments.
Lake 2	1.34	Isolated, with limited overwintering habitat (Ecometrix 2020). Severe effect level of contaminants in sediments

Lake 3	2.02	pH 5.07 (NAR 2006) and 4.1 – 4.7 (Golder 2009), inadequate to support fish communities. Dissolved oxygen (1.17 mg/L) and pH (5.0) in winter create conditions unsuitable for fish overwintering (Golder 2009). Severe effect level of contaminants in sediments.
Lake 12	1.34	Dissolved oxygen in the winter was 0.7 mg/L (TrueGrit 2009). Unsuitable to support fish overwintering. Severe effect level of contaminants in sediments.
Lake 22	1.38	Dissolved oxygen 0.4 – 0.6 mg/L in winter (TrueGrit 2009), making the lake unlikely to support fish overwintering. Severe effect level of contaminants in sediments.
Malpa Lake	3.28	Dissolved oxygen below PWQO at depth > 2m. Severe effect level of contaminants in sediments.
Terru Lake	0.67	"*May not be deep enough to allow for winter survival.*" Early baseline studies showed acidic pH.

Offsetting measures also include activities to "enhance the habitat and increase community diversity" in Lake 8. Our current understanding of the habitat in Lake 8 indicates that overwintering of fish may not be possible, due to low availability of oxygen. If habitat enhancement measures are implemented, dissolved oxygen during winter may increase to levels suitable to fish. However, the success is uncertain, and it could only be evaluated by reassessing Lake 8 during the winter months.

In addition to concerns about habitat suitability, water levels in Lake 8 are maintained by a beaver dam. Should the dam fail, as it is often the case, water levels in Lake 8 may drop below what is suitable for maintaining self-sustaining fish populations. While it is not up to the proponent to intervene with the natural ecosystem dynamics, the failure of the beaver dam would eliminate the offset measures, causing a net loss of fish productivity.

Given the unsuitability of the habitat, the uncertainty of success, and the fluctuating nature of the system, the habitat enhancement of Lake 8 should not be considered an appropriate offsetting measure.

When the contribution of the colonization of fishless lakes and the enhancement of Lake 8 are removed from the Offsetting Plan, the resulting total area of measures is 4.76 ha. However, it should be noted that 4.0 ha of the total area are represented by an ex-situ offsetting measure, the "Shipyard Road Fish Habitat Creation and Enhancement." While this measure may align with some regional fisheries objectives, it does not contribute to offset the loss of resources to local rightsholders and stakeholders, given the distance to the area of the Project.

7.5 Cumulative Effects

The *Canadian Environmental Assessment Act* (2012) and the EIS Guidelines require that the Proponent consider any cumulative effects resulting from the interaction of the Project with past, present, and future physical activities. Thus, the Proponent shall analyze the cumulative effects on valued ecosystem components by considering additive, synergistic, induced, and other forms of interactions along the pathways of effects.

The gravest problems in the environmental assessment of this project are the lack of understanding of the ecological scale at which the effects should be measured and the inadequate identification of the recipients of the effects. The ecological processes that threaten the conservation of biodiversity operate at the population level. Thus, understanding the combined effects of multiple developments requires quantifying how they influence the vital rates of populations. Logically, then, cumulative effects occur at scales that are population-specific, and the use of a single scale of analysis for all species is inadequate. Consequently, because the spatial scales of analysis may be either smaller or larger than the scale of populations, the cumulative effects will be, at best, overestimated. Logically, the worst-case scenario implies underestimating the cumulative effects on the recipient populations and, should the Project be developed, reduce their likelihood of survival.

Several specific deficiencies are found throughout the assessment, in addition to the inadequate ecological framing. First, the methodology implicitly assumes that the nature of the interactions between the effects of all the activities is additive. While this may be true in some instances, other effects may interact in a synergistic nature or respond to thresholds, and, in that case, the cumulative effects could be underestimated. Further, the assessment reveals some conceptual misunderstanding around cumulative effects and their ecological impacts. In several instances, it is argued that because the project-specific effects are much smaller than the effects of other activities, the cumulative effects must be insignificant. This conceptual error also gravely ignores that ecological thresholds may be surpassed even when the contribution of a new activity is of minor magnitude compared to the existing ones. Finally, the assessment justifies the "sustainability" of the Project based on the fact that "*cumulative change in wildlife habitat … is not materially different than that represented by commercial timber harvesting alone.*" Regardless of the credibility of the claim, the supporting evidence is erroneous, as the ecological effects of habitat transformation and habitat destruction are materially different.

As noted in the Pinchin review of the EIS Addendum (CIAR 894), the EIS Addendum does not evaluate potential cumulative effects on Areas of Concern in Lake Superior. For instance, human activities have resulted in mercury accumulation (Hg) in terrestrial and

aquatic ecosystems. Studies have demonstrated that forestry operations can increase the concentrations and loads of Hg to surface waters by mobilizing it from the soil. Clearing, grubbing, and stripping of vegetation, topsoil, and other organic material during the activities of the Project may result in the release and mobilization of Hg from the soil into adjacent watersheds. A recent study showed that bays in the Great Lakes receiving riverine inputs have high mercury concentrations, leading to consumption restrictions. Peninsula Harbour (Marathon) and Jackfish Bay (near Terrace Bay), which are part of the Regional Study Area for the Project, were declared as Areas of Concern in the past due to high levels of contaminants in the water, including mercury.

The circulation of waters along the north shore of Lake Superior follows a general westerly direction. This pattern means that effluents entering Lake Superior at the mouth of Hare Creek will reach the Jackfish Bay Area of Concern in Recovery. Jackfish Bay was designated as an Area of Concern due to the degradation of the water quality and environmental health caused by the effluents from the pulp and paper mill in Terrace Bay. The degradation resulted in low water quality, contamination of sediment, and fish and fish habitat destruction, among other consequences. Although environmental health has improved significantly, the potential for cumulative effects due to the proposed mining development will threaten the recovery of Jackfish Bay. Considering these concerns, the EIS Addendum must adequately assess the levels of contaminants resulting from the combined effect of the Project and past, present, and future physical activities.

7.6 Tailings Dam and Water Treatment Failures

PPFN is glad to be working closely with PGM on their tailings dam and water treatment plant construction design. To this effect, we have been assured that the dam constructed at the PGM site will be a downstream dam, which has mitigated a number of our concerns. However, we do have some outstanding items of note that we wish to bring to the Panel's attention.

Paramount, we wish the Panel to ask – and consider, what the mitigation and remediation techniques will be in the event of a failure. Considering the impact that climate change has had on 1 in 50, 1 in 100, and 1 in 500-year extreme storm events, will the water treatment facility be able to handle excess water? Will the dam be modified to accept more tailings? And most relevantly, how will PPFN be compensated for the irreparable loss of their traditional land in the event of a catastrophic failure?

There have been over 63 major tailings dam failures reported worldwide over the past 50 years. While these failures have been attributed to a number of factors, research has shown that there is a demonstrable upward trend in high-consequence tailings dam disasters.[14]

The results of these failures are catastrophic to the environment. In Canada, one of the most infamous disasters occurred at the Mount Polley Mine in British Columbia. On August 4, 2014, after a tailings dam failure, approximately 17 million cubic meters of water and 8 million cubic meters of tailings/materials were released from the tailings dam. This effluent was introduced to lakes and streams that served as drinking water and fish spawning grounds. This image of the disaster speaks for itself:

Figure 1 - https://www.cbc.ca/news/canada/british-columbia/discipline-engineers-mount-polley-mine-waste-quesnel-lake-1.6137265

The incident at Mount Polley Mine was far from an isolated failure. In June of 2015 the Lac Des Iles in Northern Ontario was forced to discharge its tailing pond water into the environment without treatment due to excess water from a rain event.

Water with high levels of suspended solids, aluminum, and iron was released without treatment. This was particularly impactful to the nearby Gull Bay First Nation, which was never consulted regarding the release of untreated water on or around their traditional lands.

If such an incident were to take place at the Marathon PGM site, it would mean irreversible damage to PPFN traditional territory. As these submissions have already made clear, Lake Superior is a sacred living entity, and PPFN has protected her since time immemorial.

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[14] J.R. Owen et al, "Catastrophic tailing dam failures and disaster risk disclosure" (2020) 42 Intl J of Disaster Risk Reduction <https://www.sciencedirect.com/science/article/pii/S2212420919306648?via%3Dihub>

We utilize not only Lake Superior, but many of the surrounding lakes, rivers, creeks and lands to perform our cultural ways of fishing, gathering and hunting. To lose these waters and lands due to a tailings or water treatment failure would be life altering.

It is our intention to work closely with Marathon PGM to ensure that both the tailing pond and water treatment facilities are designed using the most modern applications, but we also wish the Panel to consider these concerns as a part of the Hearing process.

7.7 Footprint

The Project Description presented in the EIS Addendum is incomplete, and it contradicts existing documentation prepared by the Proponent. Generation PGM introduces the Marathon Deposit as the unique component of the Project while excluding four additional deposits and explorations. Generation PGM argues that the other deposits (Geordie and Sally), and explorations (Boyer and Four Dams), are in the early stages of study and that their development is uncertain.

However, there is a noteworthy depth and breadth of technical data presented in the 2020 Amended Technical Report (CIAR 1034) which is cited as a source of information and data for the 2021 Feasibility Study (CIAR 741).

The comments pertaining to the potential of the Geordie and Sally deposits suggests that the Proponent has a ***reasonable expectation of developing***, at the very least, an additional two deposits:

> *In addition to the Marathon Deposit, the Property hosts other PGM deposits/mineralization in four additional areas - Geordie, Sally, Boyer and Four Dams (*CIAR 741 at *10)*
>
> *On August 19, 2019 Gen Mining announced that it had begun 12,000 m exploration drilling program on the Marathon PGM-Cu Property. Two drills and crews were mobilized and drilling commenced August 15th. The program is designed to test several high-priority sites along a strike length of more than 40 km.*
>
> *The following areas were the targets for the 2019 drilling program:*
>
> - *3,000 m testing the West Feeder Zone near the Main Zone;*
> - *1,000 m of confirmation/infill drilling on the Marathon Deposit;*
> - *2,700 m exploration drilling on two Geordie Deposit offsets;*
> - *2,600 m of greenfield exploration drilling on the Boyer Area; and*
> - *2,700 m of drilling for the source of the extremely high-grade samples and massive sulphides at the Sally Deposit.* (CIAR 741 at *11-12)*

> *The resulting pit constrained Mineral Resource Estimates for the Geordie and Sally Deposits, at an NSR CDN$15/t cut-off, as of the effective date of this Technical Report, are tabulated in Table 1.4 and 1.5, respectively. P&E considers the mineralization of Geordie and Sally to be potentially amenable to open pit economic extraction.* (CIAR 741 at *22)*

In fact, both the 2020 Amended Technical Report and the 2021 Feasibility Study go on to recommend the further exploration of the Sally and Geordie deposits owing to their potential:

> *It is P&E's opinion that the Marathon Property has significant potential to increase Mineral Resources. The Geordie Deposit has a recent updated Mineral Resource Estimate, and the Sally Deposit has a recent initial Mineral Resource Estimate, and further exploration on both Deposits is warranted.* (CIAR 1034 at *383)*

> *The following are the recommendations and initiatives as generally outlined by the QPs:*
> *…*
> *Explore and further define the known resources of Geordie and Sally to determine if additional material could supplement the LOM plan production profile*. (CIAR 741 at 26-4).

Unfortunately, despite the promising data and significant potential, neither deposit was incorporated into the mine plan in the report, and as the environmental impact assessment process continued, neither deposit has formed a significant aspect of the ongoing conversations:

> *Based on the QA/QC program, the data is sufficiently reliable to support the Mineral Resource Estimates generated for three Deposits on the Property (Marathon, Geordie and Sally)… Neither the Geordie nor Sally Mineral Resource Estimates were incorporated into the mine plan reported in this Technical Report.* (CIAR 741 at *377-378)*

Considering the data on the potential of these deposits, it is concerning that there is absolutely no information relating to the impact that these additional deposits would have on the Project as a whole.

The additional sites are on different watersheds and will substantially increase the effluent and size of tailing dams at the Marathon site. This is already an area of concern, as previously addressed in these submissions. The incorporation of these additional sites makes this a much larger project with a much larger environmental impact.

The potential for an increased Project footprint also makes PPFN concerns regarding the cumulative impact of the Project more pressing. A larger Project footprint could have a significant impact on the cumulative effects of the Project on PPFN Areas of Concern. This in turn goes back to the baseline water quality study methodologies, and the necessity of a

more robust fish offsetting plan. Clearly, an increased Project footprint would have a cascading impact on existing concerns.

PPFN would suggest that even if the deposits are in the early stages of study, and even if their development is uncertain, the sheer potential they represent indicates a reasonable prospect of development. Consequently, the potential impact of the inclusion of these additional sites should be considered in this environmental impact assessment process.

8.0 After the Last River – Documentary Screening

Prior to concluding these written submissions, PPFN invites the Panel, Proponent, Hearing Participants, and the public to watch the powerful film 'After the Last River'.

Filmed over five years, After the Last River is a point of view documentary that follows the remote community of Attawapiskat as it deals with the impact of a diamond mine on its traditional territory. Through interviews with executives and government, and day-in-the-life footage of the community, the film connects personal stories from the First Nation to industry agendas and government policies. The result is a powerful narrative that paints a "*…complex portrait of a territory that is an imperilled homeland to some and a profitable new frontier for others*".[15]

PPFN feels that the film showcases the immense responsibility that all parties in the Hearing have in this process. Moving forward, the Project must balance the considerable economic benefits the with the serious consequences that the Project may have. While PPFN acknowledges and appreciates that the Proponent has been actively engaging and consulting with First Nation Participants, we are nonetheless committed to advocating for the environment.

From March 10th to the 12th a public screening of After the Last River will be made available at https://vimeo.com/165953649 with the password 'ALR2022_PPFN'.

We invite everyone to experience the film and proceed with the Hearing having been reminded of the tremendous responsibility we all share.

9.0 Conclusion & Recommended Conditions on Project

In conclusion, PPFN is committed to working cooperatively with the Proponent to progress this Project in an environmentally informed manner. To that effect, in light of the serious sufficiency concerns that Pays Plat First Nation ("PPFN") – among other participants in

[15] https://www.afterthelastrivermovie.com/the-film

the process, have shared with the Panel, PPFN is proposing a few conditions for the Project that may mitigate some of these concerns, pursuant to article 3.1 of the Appendix of the Terms of Reference (CIAR 730):

> 3.19. If the report of the Joint Review Panel recommends that the Project be given approval to proceed by the provincial Minister of the Environment, the Joint Review Panel may also recommend any conditions necessary to carry out the Project in a manner that provides for the protection, conservation and wise management of the Environment. The Joint Review Panel shall provide reasons for its recommendations in the report.

The people of Pays Plat have occupied their traditional lands on the central north shore of Lake Superior centra since time immemorial. Their legacy as hunters, fishers, trappers, and gatherers originates in this region. These activities are not merely tangential to collective lived experience of the people of Pays Plat, rather in our submission, they are the rights promised in section 35 of the *Constitution Act, 1982*.

The *Constitution Act, 1982* acknowledges and protects Aboriginal Rights from infringement by Federal and Provincial law. This protection pursuant to s.35 of the encompasses the Aboriginal Rights of Pays Plat First Nation members to hunt, fish, and gather in their traditional territory. Additionally, Pays Plat First Nation has Treaty Rights flowing from the Government of Canada's perception of Pays Plat First Nation as a signatory to the Robinson Superior Treaty of 1850.

Further, the 2012 *Canadian Environmental Assessment Act* which governs this process provides at section 4(1)(d) that its purpose is "*to promote communication and cooperation with aboriginal peoples with respect to environmental assessments"*. Section 19(3) of the Act notes that "*[t]he environmental assessment of a designated project may take into account community knowledge and Aboriginal traditional knowledge".*

These written submissions have well-demonstrated that PPFN has a meaningful and culturally significant connection to Hare Lake, Angler Creek, and the surrounding area. This connection will be impacted by the Project.

Hare Lake represents a bastion of PPFN Traditional Knowledge. Generations of PPFN Band Members have fished, hunted, and trapped in vicinity of the Lake. Traditional Knowledge relating to the area has been passed down through countless years, leaving Band Members with a profound connection to Hare Lake.

Similarly, a substantial portion of PPFN Band Members have a grandparent who was born at Angler Creek, which was once a permanent Indigenous community a few kilometers from the site where the Mine effluence will be discharged into Lake Superior.

Suffice to say, the area around Hare Lake and Angler Creek are part of PPFN history and culture.

To this effect, PPFN has concerns relating to the future water quality of both bodies of water, and the corresponding impact this will have on their Indigenous Rights. PPFN worries about the cumulative impact the Project have on the fishing, trapping, and hunting of future generations of PPFN Band Members.

The following proposed conditions work to address the sufficiency concerns that PPFN has outlined, both in our previous review (CIAR 894), as well as in these submissions:

9.1 Environmental Monitoring

As a condition to the project, PPFN wishes to work closely with PGM in the environmental monitoring of their traditional territories. Specifically, PPFN wishes for the Proponent to train and hire PPFN community members to independently monitor water and soil, and conduct sediment sampling on impacted areas of PPFN traditional territory, particularly Hare Creek, Angler Creek, and related outlets to Lake Superior.

7.2 Continued Baseline Studies & Fisheries Offsetting Plan

PPFN wishes to work alongside the Proponent to generate updated baseline for the waterbodies that will be negatively impacted by the project. The goal of these studies will be to:

i. Gather more information on fish and benthic communities;
ii. Quantify productivity measures in the waterbodies that will be impacted by tailings of the Project;
iii. Characterize the availability of wintering habitats in each recipient lake identified in the offsetting plan;
iv. Inform monitoring goals.

Integral to this condition is the prioritization of i*n situ* offsetting measures over *ex situ* measures.

7.3 Incorporation of Additional Deposits

Considering the promising data and significant potential of Geordie and Sally deposits, and the reasonable prospect of their development as a part of this Project, PPFN wishes to work

alongside the Proponent in assessing the impact an increased Project footprint will have on fisheries, waterways, and other Areas of Concern on our traditional territories.