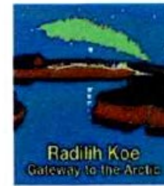

August 20, 2024

Sahtu Land and Water Board
Box 1, Fort Good Hope, NT, X0E 0H0

RE: Norman Wells Goose Island to Bear Island Flowline Replacement New Type A Land Use Permit and Type B Water Licence (S24A-005/S24L1-002)

The K'ahsho Got'ine Committee ("KGC") submits the following additional comments on behalf of the K'ahsho Got'ine of Fort Good Hope in respect of Imperial Oil Northwest Territories Ltd.'s ("Imperial") applications for a Type A Land Use Permit and Type B Water Licence for the Line 490 Replacement Project ("Applications"). The attached submissions supplement our July 7, 2024 submissions and provide additional information on the K'ahsho Got'ine perspective on the duty to consult and the preliminary screening for an environmental assessment.

The K'ahsho Got'ine Committee consists of the Fort Good Hope Métis Nation Local #54 Land Corporation, the Fort Good Hope Dene Community Council, the Fort Good Hope Renewable Resources Council, the K'ahsho Development Foundation and the Yamoga Lands Corporation. Each member of the K'ahsho Got'ine Committee plays a key role in representing the K'ahsho Got'ine of Fort Good Hope and protecting our inherent Indigenous Rights and our Sahtu Dene and Métis Comprehensive Land Claim Agreement Rights ("K'ahsho Got'ine Rights").

Sincerely,

Chief Collin Pierrot
Fort Good Hope Dene
Community Council

Edwin Erutse
Yamoga Lands
Corporation

Aurora McNeely
Fort Good Hope Métis
Nation Local #54 Land
Corporation

Bonny Kakfwi
Fort Good Hope Renewable
Resources Council

Darcy Edgi
K'ahsho Got'ine
Foundation

I. DUTY TO CONSULT

The Sahtu Land and Water Board's ("Board") Online Review System states that the Crown relies on the Board's process as "the primary means to fulfill its duty to consult with Indigenous peoples" in relation to Imperial's application for a Type A Land Use Permit and a Type B Water Licence for the Line 490 Replacement Project.

The following section reviews the scope of the Crown's duty to consult with the K'ahsho Got'ine with respect to the Applications, assesses the adequacy of the Board's processes as a means to fulfill the duty to consult, and responds to Imperial's assertions about the duty to consult in its July 30, 2024 letter to the Board.[1]

(i) Scope of the Duty to Consult

The scope of the Crown's duty to consult and accommodate the K'ahsho Got'ine with respect to the Applications, and the contemplated work therein, is on the high end of the spectrum. The duty to consult is informed by (i) the strength of the K'ahsho Got'ine's claim to their K'ahsho Got'ine Rights and (ii) the seriousness of potential adverse impacts of the Applications on K'ahsho Got'ine Rights.[2]

The K'ahsho Got'ine's strength of claim to K'ahsho Got'ine Rights is strong. Pursuant to the *Sahtu Dene and Métis Comprehensive Land Claim Agreement*, the K'ahsho Got'ine have established treaty rights, including a right to the substantially unaltered quality of water in the Mackenzie River and a right to harvest and benefit from the full enjoyment of all species of wildlife within the settlement area.[3] As work proposed in the Applications is contemplated on and under the Mackenzie River, the risk of serious and adverse impacts on K'ahsho Got'ine Rights resulting from the proposed work is very high. Any spill in or contamination of the Mackenzie River that may occur during the construction and operation of the project proposed in the Applications would seriously impact the K'ahsho Got'ine Rights set out above.

Previous impacts from spills from Imperial's operations at the Norman Wells oilfield on K'ahsho Got'ine Rights were shared by K'ahsho Got'ine Rights holders during the Oral Indigenous Knowledge Sessions held by the Canada Energy Regulator in Fort Good Hope in May 2024. Twyla Edgi Masuzumi commented that:

> "[…] there was a spill that happened in Norman Wells where all of us had to pull our nets because we were scared what was going into the fish, and I've been seeing lately that there's more of these little white things that are coming on the guts. Like the guts are getting like so much little white lumps and stuff on their guts, and I'm seeing more of it happening lately. So it kind of makes me scared to work on fish and to feed

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[1] Letter from Imperial to the Board, July 30, 2024, Re: Norman Wells Goose to Bear Island Flowline Replacement - New Type A Land Use Permit and Type B Water Licence (S24A-005/S24L1-002) Applications Goose to Bear Island Flowline Replacement Project at < chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://registry.mvlwb.ca/Documents/S24A-005/S24A-005%20-%20IOL%20to%20SLWB%20-%20Letter%20of%20Comment%20re%20KGC%20Communication%20-%20July30_24.pdf>.

[2] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para 68.

[3] *Sahtu Dene and Metis Comprehensive Land Claim Agreement*, 20.1.8 and 13.4.1.

my kids that. And it makes me sad that I have to restrict my kids Dene-Béré [Dene foods] because of things that are happening in the water."[4]

In summary, the scope of the Crown's duty to consult and accommodate the K'ahsho Got'ine with respect to the Applications, and the contemplated work therein, is on the high end of the spectrum because the K'ahsho Got'ine have a strong claim to K'ahsho Got'ine Rights and the potential adverse impacts of the Applications on such rights is serious.

In circumstances where Indigenous peoples rights are established under treaty, such as K'ahsho Got'ine Rights established under the *Sahtu Dene and Métis Comprehensive Land Claim Agreement*, the Crown must clearly identify potential mitigation, accommodation and/or justification measures to address potential impacts or infringements on K'ahsho Got'ine Rights prior to making a decision regarding the Applications.[5]

(ii) <u>Adequacy of the Board's Processes to Fulfill the Duty to Consult</u>

The Crown, including any delegates, has a duty to consult any and all potentially impacted Indigenous peoples, including K'ahsho Got'ine, regarding the Applications and the work contemplated therein. As set out above, the scope of the duty to consult K'ahsho Got'ine in respect of the Applications is on high end of the spectrum of the duty to consult. As such, this obligation requires that the Crown or its delegate:

- provide meaningful and accessible information about the Applications to support the K'ahsho Got'ine's assessment of the Applications;
- ensure the K'ahsho Got'ine are meaningfully included in the Board's decision-making process; and
- provide sufficient capacity funding to the K'ahsho Got'ine to enable its meaningful participation in the decision, including an adequate assessment of potential impacts of the Applications on the exercise of K'ahsho Got'ine Rights.[6]

The Crown's consultation obligations also require the Crown to ensure that proponents and impacted rights holders, where possible, are able to "reach a mutual understanding on the core issues — the potential impact on treaty rights, and possible accommodations".

The KGC submits that the Board's processes are not set out to fulfill its the duty to consult with regard to the Applications for the following reasons:

1. As set out above, meaningful consultation requires the Crown provide sufficient funding to enable the KGC's participation in this regulatory process. No funding has been provided to date to the KGC despite its numerous funding requests to the Crown, the Board, and Imperial, including in its letter to the Board dated July 17, 2024.

2. The Board has limited authority to accommodate any infringement of K'ahsho Got'ine Rights. In the Board's July 23, 2024 letter to the KGC, the Board indicated that many of the KGC's

[4] Canada Energy Regulator, Hearing OH-001-2023, Oral Indigenous Knowledge Hearing, Volume 2 at page 174-175.
[5] R. v. Sparrow, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075; R. v. Badger, [1996] 1 SCR 771, 1996 CanLII 236 (SCC).
[6] See *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 at paras 47-49.

recommendations or requested accommodations “are beyond the Board’s authority under legislation,” including the KGC’s request for sustained funding to respond to ongoing filings. The Board further indicated that it “does not necessarily have the authority to address all issues that arise through consultation.” As such, the Board’s processes cannot meaningfully fulfill the Crown’s duty to consult the K’ahsho Got’ine with respect to the Applications.

In light of the above, the KGC expects the Crown to initiate an independent consultation and accommodation process with the K’ahsho Got’ine prior to discharging its duty to consult with respect to the Applications.

(iii) <u>Response to Imperial’s July 30, 2024 Letter</u>

In its July 30, 2024 letter to Board, Imperial made several comments about the adequacy of consultation set out in the Boards consultation process. The KGC disagrees with many of Imperial’s assertions on consultation, including Imperial’s assertion that the scope of the duty to consult, in this case, is on the lower end of the spectrum and the assertion that the Board’s regulatory processes are sufficient to fulfill the Crown’s duty to consult. The KGC disagrees with this comment for the reasons set out above.

Imperial also highlighted previous capacity funding provided to the KGC, including funds provided by Imperial to cover the cost on an in-person community meeting in Fort Good Hope on October 12, 2023, and the $40,000 in participant funding provided to each of the KGC entities for participation in the Canada Energy Regulator’s ongoing hearing.[7] The KGC submits that the funding provided to date has been wholly insufficient to allow for meaningful and informed consultation and to “ensure a level playing field” as required by the Courts.[8] The lack of funding provided to the KGC with regards to the Applications has prevented KGC from engaging technical experts and community members to conduct an assessment of the Applications and provide KGC with an informed understanding of the work contemplated therein. As such, the funding sources have not met the requirements for the fulfillment of the duty to consult.

II. PRELIMINARY SCREENING FOR ENVIRONMENTAL ASSESSMENT

The Board is conducting a preliminary screening for the Line 490 Replacement Project to determine whether to refer the project to the Mackenzie Valley Environmental Impact Review Board for an environmental assessment. On its Online Review System, the Board welcomed comments and recommendations from the public to support the Board in its preliminary screening process. The KGC has prepared the following submissions for that purpose.

The KGC submits that the Line 490 Replacement Project requires an environmental assessment under the *Mackenzie Valley Resource Management Act*, SC 1998, c 25 (the “*Act*”).

Under section 125(1)(a) of the *Act*, if a regulator that conducts a preliminary screening of a proposal (such as the Board), determines that the proposed development “<u>*might*</u> have a significant adverse impact on

[7] Canada Energy Regulator’s hearing regarding Imperial Oil Resources Ltd.’s applications for Variance of Operations Authorization – OA-1210-001 and application for Line 490 Replacement Activities – OH-001-2023.

[8] *Enge (North Slave Metis Alliance) v. Mandeville*, 2013 NWTSC 33 at para 269, quoting *Platinex Inc. v. Kitchen Uhmaykoosib Inninuwug First Nation*, 2007 CanLII 20790 (ON SC) at para 27.

the environment[9] or ***might*** be a cause of public concern," it must refer the proposal to the Mackenzie Valley Environmental Impact Review Board for an environmental assessment, unless the project is subject to an exemption.

With regards to the Applications, the KGC submits that the project requires an environmental assessment under section 125(1)(a) of the *Act* because it ***might*** have a significant adverse impact on the environment, ***might*** be a cause of significant public concern, and is not subject to an exemption under section 125(1)(a) of the *Act*. Further details are set out below:

(i) Significant Adverse Impact to the Environment and Cause of Significant Public Concern

The project *might* have a significant adverse impact on the environment. The project contemplates the replacement of the Line 490 flowline corridor between Goose and Bear Islands on the Mackenzie River. If completed, the Line 490 flowline corridor will carry crude oil, produced gas, and produced water. If released, these contaminants would spill into the Mackenzie River and could cause significant adverse impacts to the environment. Imperial acknowledges that a flowline spill could cause significant adverse impacts on the environment in its Spill Contingency and Response Plan,[10] which states that "crude oil is a major source of pollution and degradation." The Spill Contingency and Response Plan also identifies a flowline failure as "the worst-case scenario."[11] The KGC is seeking an environmental assessment of the Line 490 Replacement Project to assess potential adverse environmental impacts from the construction and operations of the project and to ensure the protection of the environment throughout the project.

The project is also a cause of significant public and K'ahsho Got'ine concern. K'ahsho Got'ine are stewards of our lands and, as such, have always expressed concern about the impact of the Norman Wells operations on our lands and the exercise of our K'ahsho Got'ine Rights. K'ahsho Got'ine have also specifically expressed significant concerns about the Line 490 Replacement Project and its potential impacts on the Mackenzie River. This concern was heightened following the breach of the Line 490 flowline corridor on July 27, 2022, which spilled 55 cubic meters of produced water into the Mackenzie River. This concern was shared by many rights bearing K'ahsho Got'ine during the Oral Indigenous Knowledge Sessions held by the Canada Energy Regulator in Fort Good Hope in May 2024. Darcy Edgi stated:

> "I'm just worried about my people and the water and our safe drinking water basically and our animals. And for me, I don't support your new line at all, you know. I'm scared of you guys, you know."[12]

These concerns were reiterated by Danny Masuzumi when he stated that:

> "So for thinking about Line [490] replacement, I feel that, you know, there should be an independent study or independent water monitors, an environmental assessment

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[9] "environment" means the components of the Earth and includes (a) land, water and air, including all layers of the atmosphere, (b) all organic and inorganic matter and living organisms; and (c) the interacting natural systems that include components referred to in paragraphs (a) and (b). Section 2 of the *Act*.
[10] Norman Wells Operations: Spill Contingency and Response Plan (SCARP), May 2024.
[11] Norman Wells Operations: Spill Contingency and Response Plan (SCARP), May 2024.
[12] Canada Energy Regulator Hearing OH-001-2023, Oral Indigenous Knowledge Hearing, Volume 2 at page 192.

> done, and even an environmental water assessment. You have to do an assessment of the water."[13]

Further details on K'ahsho Got'ine concerns regarding the Line 490 Replacement Project are set out in our letter to the Board dated July 17, 2024.

(ii) Exemptions

Imperial has expressed its position[14] that the Line 490 Replacement Project may be exempt from a preliminary screening or environmental assessment pursuant to section 157.1 of the *Act*, which states that "Part 5 does not apply in respect of any licence, permit or other authorization related to an undertaking that is the subject of a licence or permit issued before June 22, 1984, except a licence, permit or other authorization for abandonment, decommissioning or other significant alteration of the project." The expansion of the Norman Wells Operations (the "Norman Wells Expansion Project" which is the current Operations) was approved in 1980. As such, Imperial argues that the Operations effectively 'grandfathered in' by section 157.1 and are thus not subject to Part 5 unless abandonment, decommissioning, or significant alterations occur.

The KGC respectfully disagrees with Imperial's position and submits that section 157.1 of the *Act* does not apply to the Applications because the Norman Wells Expansion Project only received an ***interim*** certificate of fitness and production operations approval on October 18, 1983. The Project did not receive final approval until February 27, 1985, after the applicable date of grandfathering (June 22, 1984). This position is clearly shared by the Board and the Canada Energy Regulator as they have already initiated a preliminary screening process in respect of the Applications under Part 5 of the *Act*.

The KGC also submits that the Applications are exempt from being 'grandfathered in' because the Applications are for "a licence, permit or other authorization for abandonment, decommissioning or other significant alteration of the project" which is not subject to the grandfathering provisions under section 157.1 of the *Act*.

The changes in the environmental conditions surrounding the Norman Wells Operations constitute a "significant alteration" since the Operations last received an environmental assessment in 1980, received regulatory approval in 1985, and since a preliminary screening process was completed with regard to the Operations on April 28, 1999. Climate change and increased development within the Mackenzie River basin and its tributaries have caused significant and cumulative impacts to the quality of the water, quantity and flow of the water, and fish and wildlife populations in the Mackenzie River. In 2022, for example, unprecedented riverbed scouring in the Mackenzie River resulted in the breach of Line 490 flowline corridor on July 27, 2022.[15] This unprecedented riverbed scouring demonstrates the increased risk of the changes to the environment on the potential impacts of the Norman Wells Operations and the

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[13] Canada Energy Regulator Hearing OH-001-2023, Oral Indigenous Knowledge Hearing, Volume 2 at page 196.

[14] Canada Energy Regulator Hearing OH-001-202, Line 490 Corridor Replacement Activities (Application), February 2024, section 1.4.4, page 15 and Imperial to Canada Energy Regulator Re. Line 490 Replacement, also known as the Norman Wells Goose to Bear Island Flowline Replacement Activities, January 15, 2024 at page 7.

[15] Canada Energy Regulator Hearing OH-001-2023, C29626-3 Attachment 1 – Line 490 Incident Investigation Report – A8Y1Q6 at < https://apps.cer-rec.gc.ca/REGDOCS/File/Download/4452659> .

proposed Line 490 Replacement Project on the integrity of the environment in and along the Mackenzie River. These environmental changes clearly amount to a "significant alteration" for which an environmental assessment may be triggered under the *Act.*

The Line 490 Replacement Project itself would also amounts to a significant alteration in the environment. Horizontal directional drilling was not considered at the time the Norman Wells Expansion Project was first approved in the 1980s or during the preliminary screening conducted in 1999. These approvals have therefore not contemplated the risks and impacts associated with this new technology on the environment.

The KGC submits that these significant alterations are exempt from the grandfathering provisions under section 157.1 of the *Act* and for this reason the Applications must be evaluated by way of an environmental assessment.

(iii) <u>KGC's Further Position – An Environmental Assessment may be conducted despite an exemption due to "special environmental concern"</u>

In the event that a regulatory exemption does apply to the Applications, section 25.3.4(b) of the *Sahtu Dene and Métis Comprehensive Land Claim Agreement* further authorizes the Mackenzie Valley Environmental Impact Review Board to conduct an environmental assessment of a project despite any regulatory exemption if there is "special environmental concern by reason of […] cumulative effects or otherwise":

> 25.3.3(b) "Legislation shall provide that a development proposal which would otherwise be exempt from assessment may be assessed if, in the opinion of the Review Board, it is considered to be of special environmental concern by reason of its cumulative effects or otherwise."

Section 25.3.3(b) is not explicitly affirmed in the *Act*, but the language of that section requires that it be affirmed in legislation because the term "shall" is used and is prescriptive. In addition, the *Sahtu Dene and Métis Comprehensive Land Claim Agreement* prevails to the extent of any inconsistency with legislation.[16] The content of section 25.3.3(b) therefore prevails to the extent of the failure of the *Act* to include such provisions. As such, the KGC relies on section 25.3.3(b) and argues that it authorizes an environmental assessment for the Applications because there is "special environmental concern by reason of… cumulative effects." The K'ahsho Got'ine expressed their environmental concern of cumulative effects of Imperial's operations along the Mackenzie River in the Oral Indigenous Knowledge Sessions held by the Canada Energy Regulator in Fort Good Hope in May 2024. Joseph Tobac stated:

> "I feel that I am already living with the impacts of damage to the river. Herring was plentiful in the past, but there are no herring around today. I have not seen any

[16] Section 3.1.22 "Where there is any inconsistency or conflict between the settlement legislation or this agreement and the provisions of any law, the settlement legislation or this agreement, as the case may be, shall prevail to the extent of the inconsistency or conflict."

herring come out of the Mackenzie River in my lifetime. I hear stories of the river full of herring."[17]

For the reasons set out above, these cumulative effects must be evaluated through an environmental assessment pursuant to section 25.3.3(b).

(iv) Principles Grounding the K'ahsho Got'ine's Request for an Environmental Assessment: Free Prior and Informed Consent

The K'ahsho Got'ine are stewards of our lands and have ultimate decision-making authority within our territory, including decision-making authority over proposed developments. This decision-making authority is affirmed by the principles of Free Prior and Informed Consent documented in the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*). Canada and the Government of the Northwest Territories have committed to implementing UNDRIP in legislation. This commitment requires that the government and government actors obtain the K'ahsho Got'ine's free, prior and informed consent prior to approving development, including the Line 490 Replacement Project, on our lands. The K'ahsho Got'ine submit that we cannot provide ***informed*** consent for the reasons set out above and will not provide consent to the Line 490 Replacement Project without a thorough assessment of the impacts of the impacts to the environment and our K'ahsho Got'ine Rights.

[17] Canada Energy Regulator, Imperial Oil Resources N.W.T. Limited Variance Application for Operations Authorization OA 1210-001 and Application for Line 490 Replacement Activities Hearing OH-001-2023, Oral Indigenous Knowledge Hearing, Volume 1 at page 33.