



Tuesday, May 24, 2011

Marathon Platinum Group Metals and Copper Mine Project
Canadian Environmental Assessment Agency
Colette Spagnuolo, Panel Manager
160 Elgin Street, 22nd floor
Place Bell Canada
Ottawa ON K1A 0H3

Dear Ms. Colette Spagnuolo:

RE: Guidelines for the Preparation of the Environmental Impact Statement for the Marathon Platinum Group Metals and Copper Mine Project

We thank the Canadian Environmental Assessment Agency for providing the opportunity to comment on the Guidelines for the Preparation of the Environmental Impact Statement.

Marathon PGM Corporation, owned by Stillwater Canada, has proposed a plan to mine a base metal-copper deposit and build a \$385 million mine and mill. The proposed platinum, palladium and copper open pit mine would span approximately 1,000 hectares, roughly the same size of the Town of Marathon. The mine site is 10 kilometres northeast of the Town of Marathon in Ontario, Canada. The site is part of the Great Lakes Basin and is approximately 20 kilometres from the north shore of Lake Superior.

The mining corporation projects that approximately 68,612 tonnes of mine rock will be produced daily during the 11.5-year project, for a total of 288 million tonnes. Annual tailings production is projected to be 5.3 million cubic metres, which would be dumped into the Marathon-area waterways. The ecosystem would be permanently damaged if tailings are dumped there.

The legislation that would permit the destruction of the local ecosystem is the Schedule 2 exemption, a loophole in the Metal Mining Effluent Regulation (MMER) of the federal Fisheries Act. Schedule 2 allows metal mining corporations to use lakes and rivers as toxic dump sites. Once added to Schedule 2, healthy freshwater lakes lose all environmental protections.

Originally Bamoos Lake, known as the “North Option,” was slated for destruction as a tailings impoundment area. However, on July 5, 2010, Marathon PGM withdrew this option for consideration but has decided to pursue the “South Option.”

The "South Option" involves the loss of 44 ponds and 30 streams. One of the estimated twelve dams required for this option would be approximately 89 meters high – the height of a 27 story building - and half a kilometre wide. Located near Marathon, Ontario, these streams and ponds face destruction through the same Schedule 2 exemption of the federal Fisheries Act that would have destroyed Bamoos Lake.

The destruction of the Marathon-area waterways does not offset saving Bamoos Lake from destruction.

The Council of Canadians – an organization with 25 years of experience in working with communities to protect water resources – is concerned about the impacts on the Marathon-area waterways and will be raising concerns throughout the independent review process.

Impacts of climate change

It is critical that the Environmental Impact Statement (EIS) take into account the effects of climate change.

In September 2010, Statistics Canada reported that the amount of renewable water sources in Canada fell 8.5% from 1971 to 2004, an equivalent of 1.4 million Olympic-size swimming pools.

Lake Superior is not only the largest, deepest and coldest of the five lakes but also the most vulnerable. Cameron Davis, the senior adviser to the U.S. EPA on the Great Lakes has noted that "Total ice cover on the lake has shrunk by about 20 percent over the past 37 years." The ice is critical for keeping the water from evaporating which regulates the natural cycles of the Great Lakes. Last year, Lake Superior reached its highest temperature. Jay Austin, a professor of physics at the University of Minnesota, Duluth's Large Lakes Observatory studied several buoys measuring the lake's temperature and warned that the waters were "some 15 degrees warmer than they would normally be at this time of year."

Warmer weather exacerbates threats to the Great Lakes Basin. James Kitchell, a professor of zoology at the University of Wisconsin, Madison's Center for Limnology, said that the sea lamprey, an invasive species in the Great Lakes, "feed faster, grow bigger and lay more eggs" in warmer weather. Marc Gaden, a spokesman for the Great Lakes Fishery Commission warned, "The creatures will also become adults faster and require more frequent extermination."

We recommend that the Guidelines for the Preparation of the Environmental Impact Statement include a section on examining the effects that climate change has on the Great Lakes and their connecting waterways.

The Council of Canadians has serious concerns about how climate change will impact the amount of clean water in the Great Lakes Basin. We are also concerned that polluting Marathon-area waterways is short-sighted and irresponsible given that the Great Lakes is under threat.

The Precautionary Principle

The Council of Canadians recommends that the Guidelines for the Preparation of the Environmental Impact Statement require the application of the “precautionary principle” to the Marathon Platinum Group Metals and Copper Mine Project. Principle 15 of the 1992 Rio Declaration on Environmental and Development gives a general description of this principle: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” The “precautionary principle” is recognized by over 20 international treaties and agreements.

The “precautionary principle” outlines several considerations for decisions affecting the environment and human health. International legal expert Jon M. Van Dyke states that this principle “accords respect to ecosystems and living creatures for their own sake, without requiring that they prove themselves to be useful or to have marketplace value. It rejects the idea that risks and costs can be transferred from one region to another, or from this generation to future ones.”

Water as a Commons and a Public Trust

We request that the Guidelines for the Preparation of the Environmental Impact Statement include that the EIS be conducted under a framework of water as a commons and a public trust. The notion of the commons is an ancient concept. As seen in many traditional societies, the commons is based on the notion that what belonged to one belonged to all. Many indigenous societies to this day cannot conceive of denying a person or a family basic access to food, air, land, water and livelihood. We see the notion of the commons reflected in many modern societies through public education, public health care and social security for all members of the community. Since adopting the Universal Declaration of Human Rights in 1948, governments are obliged to protect the human rights, cultural diversity and food security of their citizens.

On May 7, 2011 in Traverse City, participants of the Saving the Great Lakes Forever Conference endorsed the Grand Traverse Declaration which recognizes the Great Lakes as a Commons and a Public Trust.

As noted in the Declaration “We declare and reaffirm that the waters of the Great Lakes Basin, including groundwater, are a commons held by the states, provinces, tribes, and first nations within the Great Lakes Basin as a high and solemn public trust for every person and living thing in the Basin, as beneficiaries of this trust, and that the principles of water as commons and public trust are ancient with deep roots in our cultures and legal heritage; and that this

commons and public trust continue in perpetuity for future generations for those who depend on the integrity, flow, and health of these waters.”

As noted in Maude Barlow’s report *Our Great Lakes Commons*, a Great Lakes Basin Commons would reject the view that the primary function of the Great Lakes is to promote the interests of industry and the powerful and give them preferential access to the Lakes’ bounties.

Barlow adds, “The Public Trust Doctrine underpins in law the universal notion of the Commons that certain natural resources, particularly air, water and the oceans, are central to our very existence and considered to be the property of the public, which cannot be denied access.”

“The Public Trust Doctrine was first codified in 529 A.D. as Codex Justinianus, after the emperor of that period who said, “By the laws of nature, these things are common to all mankind: the air, running water, the sea and consequently the shores of the sea.” This “common law” was repeated many ways and in many jurisdictions, including the Magna Carta, and has been a powerful legislative tool in many countries to provide for public access to seashores, lakeshores and fisheries. U.S. courts have referred to the Public Trust Doctrine as a “high, solemn and perpetual duty”³³ and held that the states hold title to the lands under navigable waters “in trust for the people of the State.” The Public Trust Doctrine has been used in recent decades to protect both the right of public access to water and water itself.”

The public trust doctrine is well recognized in US law and is an emerging concept in Canadian law. According to Polis’ report *The Public Trust and a Modern BC Water Act*, Canadian cases and legislation have recognized the public’s right to water ways such as:

- Recognition of the right of the public to use rivers – in *Attorney General v. Harrison* (1866), 12 Gr. 466 (Ontario)
- Recognition of the right of the public use of the ocean – in *R. v. Sun Diamond*, (1984) 1 F.C. 3 (T.D) (British Columbia)
- Recognition of the need to protect the public trust – in *Environmental Rights Act*, Section 6 (Northwest Territories), 1990
- Resources are common heritage and government is the trustee of the public trust – in *Yukon Environment Act*, preamble, s. 6-7 (Yukon), 1992
- Recognized public rights in the environment that may found claim for compensation due to damage by private actors – in *BC v. Canadian Forest Products* (2004) SCC 38 (Supreme Court of Canada)

We believe that application of a commons and public trust framework is imperative to a sound and legitimate EIS.

Free, Prior and Informed Consent of Indigenous Peoples

We note that the draft guidelines includes recognition of “Traditional and local knowledge” as well as the section on “Aboriginal Considerations.”

However, we assert that the Guidelines for the Preparation of the Environmental Impact Statement should include a section on free, prior and informed consent of Indigenous Peoples.

The UN Declaration on the Rights of Indigenous People, which Canada endorsed last November, requires free, prior and informed consent to any decisions affecting indigenous lands and resources. Article 32 states:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

The draft guidelines need to adopt stronger language to ensure that the consent of Indigenous communities such as the Ojibways of the Pic River First Nation and Red Sky Métis Independent Nation is obtained.

The Rights of Nature

An important concept to apply to this project is the notion of the rights of nature. In 2008, Ecuador incorporated the rights of nature in their Constitution. The chapter on the rights of nature notes that “ Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution.” Article 3 outlines “The State will apply precaution and restriction measures in all the activities that can lead to the extinction of species, the destruction of the ecosystems or the permanent alteration of the natural cycles.”

In 2010, 35, 000 people adopted the Declaration on the Rights of Mother Earth at the World People’s Conference on Climate Change and the Rights of Mother Earth, in Bolivia. On April 12, 2011, the Bolivian government submitted the Declaration to the United Nations for consideration. Bolivia also recently passed the world’s first Law of Mother Earth.

Our modern consumer society is having catastrophic effects on our natural environment. Demand for consumer goods is driving the destruction of our natural ecosystems.

In the book *The Rights of Nature: The case for a Universal Declaration on the rights of Mother Earth*, produced by the Council of Canadians, Global Exchange and Fundacion Pachamama, Maude Barlow notes “Unlimited growth assumes unlimited resources and this is the genesis of the crisis. From fish in the sea, and old growth forests and wetlands, to oil, clean air and water, we are plundering our planet’s natural resources. Quite simply, to feed the increasing demands of our consumer-based capitalist system, humans have seen nature as a great resource for our personal convenience and profit, not as a living ecosystem from which all life springs. So we have built our economic and development policies based on a human-centric model and assumed either that nature would never fail to provide or that, where it does fail, technology will save the day.”

Integral to the notion of the rights of nature is the concept of ‘living well.’ Modern societies have reached a point where we destroy our natural environment to produce material goods that we do not need. Rather than live to acquire more material goods, we need to learn to ‘live well.’ “Living Well’ includes meeting our fundamental needs such as water, sanitation, housing and knowledge and being satisfied with what we have.

While sustainable development is noted in the draft guidelines and is an important goal, we request a report on what the platinum, palladium and copper will be used for. In determining whether the destruction of 44 ponds and 30 streams, we urge the CEAA to examine critically the material goods that will be produced from the platinum, palladium and copper. As an important step to implement the concepts of the rights of nature and ‘living well,’ we need to examine how we can use already mined materials to meet our needs rather than harming ecosystems to develop unmined materials.

We thank the Canadian Environmental Assessment Agency for this opportunity to provide input in the Marathon Platinum Group Metals and Copper Mine Project.

We note that our participation in the process is not an endorsement of Schedule 2. As part of the Sandy Pond Alliance, the Council of Canadians is working to render illegal the possibility for mining companies to apply for permission to destroy any waterways in Canada under Schedule 2.

About the Council of Canadians

The Council of Canadians is a public interest advocacy organization that promotes environmental, social and trade justice in Canada and abroad. With over 70 chapters across the country, the council works at the community level to support local struggles to protect the environment and the public interest.

The Council of Canadian's national water campaign calls for a national water policy that recognizes water as a human right and a public resource at all levels of government in Canada.