

File No.: 4709
VIA EMAIL *Original to follow*
ministre-minister@ec.gc.ca

November 18, 2022

Environment and Climate Change
Government of Canada
House of Commons
Ottawa, ON K1A 0A6

**ATTENTION: THE HONOURABLE STEVEN GUILBEAULT, P.C., M.P.
MINISTER OF ENVIRONMENT AND CLIMATE CHANGE**

Dear Minister:

Re: Request for Designation under the *Impact Assessment Act* of Premier Tech Horticulture Ltd. Clearwater Peat Harvest Project (the “Clearwater Project”)

We are counsel for the O’Chiese First Nation (“O’Chiese”) with respect to the above noted matter.

We write to request the Clearwater Project be designated by regulations made under s.109(b) of the *Impact Assessment Act* (the “IAA”),¹ due to the high importance of wetlands, specifically fen, in Canada. In the event that the Government of Canada is not prepared to designate the Clearwater Project by way of regulations, we write to request that the Minister exercise his discretion to designate the Clearwater Project under s. 9(1) of the IAA.²

History of O’Chiese First Nation

O’Chiese operates under its own distinct set of legal principles and laws that have been in place since time immemorial. O’Chiese First Nation is bound by *Kaa-Ke-Chi-Ko-Moo-Nan*, O’Chiese’s Great Binding Law, which sets out how O’Chiese cares for the lands and resources that have been provided by the Creator, how O’Chiese citizens live and dwell alongside humans and how O’Chiese teaches future generations.

¹ SC 2019, c. 28, s 1, s 109(b) [“IAA”].

² SC 2019, c. 28, s 1, s 9(1) [“IAA”].

The O'Chiese people are of Saulteaux and Cree ancestry and O'Chiese is the only Anishinabek Nation in Alberta. O'Chiese adhered to Treaty No. 6 on May 13, 1950. Treaty No. 6 recognizes the Inherent and Treaty rights of O'Chiese. O'Chiese is also an "band" as defined under s. 2(1) the *Indian Act*.³

O'Chiese have inhabited the lands surrounding Rocky Mountain House for generations. Their historic and continued current use of the lands for the exercise of their Inherent and Treaty rights are integral to their culture and identity. The exercise of rights by the O'Chiese over their lands include, trapping, hunting, gathering food plants and berries, gathering medicinal plants and berries, ceremonies and seasonal camping. The exercise of these rights are central to the transmission of knowledge from one generation to the next.

The Indian reserves set aside under the terms of Treaty 6 for O'Chiese First Nation include O'Chiese I.R. 203 ("Main Reserve") which is approximately 48 kilometers northwest of Rocky Mountain House, Alberta and O'Chiese I.R. 203A ("Cemetery Reserve"), which is located approximately 20 kilometers southwest of Rocky Mountain House, Alberta.

Treaty No. 6 rights include the rights of O'Chiese to hunt and fish on all unoccupied Crown lands within the Province of Alberta. Treaty No. 6 in no way diminished the Inherent rights of O'Chiese to function as it has since time immemorial. Furthermore, section 12 of *Constitution Act, 1930 (Natural Resources Transfer Act)* acknowledges and confirms the right of O'Chiese to "hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on other lands to which the Indians may have right of access."⁴

These Inherent and Treaty rights of O'Chiese First Nation are protected by s. 35 of the *Constitution Act, 1982*.⁵

Premier Tech's Clearwater Peat Harvesting Project

Premier Tech Horticulture Ltd. ("Premier Tech") is the Proponent of the proposed Clearwater Project. The Clearwater Project is located approximately 10 km NW of the Town of Caroline, Alberta and 26 km SW of Rocky Mountain House, Alberta.

Premier Tech is seeking *Public Lands Act*⁶ and *Water Act*⁷ approvals to construct and operate the Clearwater Project. The Surface Material Lease area proposed is 323 ha in size with 139.5 ha of harvestable fields. Phase 1 of the Project will include clearing and drainage of approximately 135.9 ha of peatland for horticultural purposes with a total Project footprint of 155.5 ha including harvest sections, access roads, harvest roads, sedimentation

³ RSC 1985, c 1-5, s 2(1).

⁴ *The British North America Act, 1930*, 20-21 Geo. V, c. 26 (UK), Part 2; *An Act respecting the Transfer of the Natural Resources of Alberta*, SA 1930, c 21, s 12.

⁵ *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11.

⁶ RSA 2000, c P-40.

⁷ RSA 2000, c W-3.

ponds, and drainage ditches. The Clearwater Project is located entirely within Crown Land. Premier Tech describes the area as “vacant public land”.

Premier Tech anticipates the Clearwater Project life cycle to be approximately 21 years with field preparation expected to start as early as November 2022 and harvesting to commence in June 2023. On July 5, 2022, Premier Tech provided O’Chiese First Nation with the following documents herein referred to collectively as Premier Tech’s Impact Assessment (“IA”) for the Clearwater Project:

1. *Biophysical Report and Peat Development and Operations Plan – 2022 Update*
2. *Wetland Assessment and Impact Report – 2022*
3. *Update Conservation and Reclamation Plan – 2022 Update*

Designating the Clearwater Project by Regulations

The Clearwater Project ought to be designated by regulations under s. 109(b) because of the high importance of wetlands in Canada. S. 109(b) of the IAA states that the Governor in Council may make regulations:

109 (b) designating a physical activity or class of physical activities and specifying which physical activity or class of physical activities may be designated by the Minister under paragraph 112(1)(a.2).⁸

The Physical Activities Regulations (the “**Project List**”) describes designated projects for which a federal impact assessment may add value, over and above other federal regulatory oversight mechanisms. The project types included on the Project List are those that are determined to have the greatest potential adverse and complex effects in areas of federal jurisdiction relation to the environment.⁹

The Clearwater Project is a plan to take-up 323 hectares, consisting of multiple phases, for the purposes of harvesting peat. Peat harvesting is a non-renewable activity with peat regeneration anticipated to take up to thousands of years. The disturbance and destruction of any wetlands for the purpose of peat harvesting will have adverse effects in areas of federal jurisdiction to the environment and need to be included in the Project List. Additionally, these activities will directly impact the Government of Canada’s climate change goals.

According to Canada’s 2030 Emission Reduction Plan,¹⁰ a sector-by-sector path for Canada to reach net-zero emissions by 2050 are outlined which includes nature-based solutions. The Government of Canada has stated that they will invest \$780 to the Nature Smart Climate Solutions Fund to deliver additional emission reductions and to support

⁸ SC 2019, c. 28, s 1, s 109(b) [“IAA”].

⁹ Operational Guide: Designating a Project under the IAA: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/designating-project-impact-assessment-act.html>

¹⁰2030 Emissions Reduction Plan; <https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/climate-plan-overview/emissions-reduction-2030/sector-overview.html#sector9>

projects that conserve, restore and enhance wetlands, peatlands, and grasslands to store and capture carbon.¹¹ Wetlands, which include peatlands, store large amounts of carbon and play a key role in regulating greenhouse gases and buffering the impacts of climate change. Peatlands such as fens, bogs and swamps are especially efficient at storing carbon due to the high amount of organic soil found within them. The Clearwater Project will be working against these proposed nature-based solutions and will ultimately reduce the amount of carbon that is being stored and captured.

In the Federal Actions for a Clean Growth Economy report,¹² it states that enhancing “carbon sinks”, is essential for helping Canada reach its climate goals. Further, it emphasizes the importance of expanding protected areas and parks, and other conservation measures that will store carbon and foster adaptation to climate change.¹³ The harmful physical activities of peat harvesting will remove these “carbon sinks”, resulting in adverse impacts to the environment, and directly impacting the Government of Canada’s climate change goals. It is imperative that the Clearwater Project is included as a designated project.

Minister Discretion to Designate the Clearwater Project

In the event that the Clearwater Project is not included as a designated project, we submit that the Minister ought to exercise his discretion to designate Clearwater Project for the following reasons:

- a) The Clearwater Project will cause adverse effects within federal jurisdiction;
- b) The Clearwater Projects will adversely impact the O’Chiese’s Inherent Aboriginal and Treaty rights, which rights are affirmed and protected under s. 35 of the *Constitution Act, 1982*; and
- c) The provincial assessment and regulatory processes are an inadequate substitute for the *IAA* process.

a) Adverse effects within federal jurisdiction

S. 2 of the *IAA* defines “effects within federal jurisdiction” to include physical activities that:

- (b) a change to the environment that would occur
 - (i) on federal lands,
 - (ii) in a province other than the one where the physical activity or the designated project is being carried out, or
 - (iii) outside Canada

¹¹ Ibid.

¹² Federal Actions for a Clean Growth Economy: Delivering on the Pan-Canadian Framework on Clean Growth and Climate Change, p. 6:

<https://www.canada.ca/content/dam/themes/environment/documents/weather1/20170119-en.pdf>

¹³ Ibid. p. 3

- (c) with respect to the Indigenous peoples of Canada, an impact — occurring in Canada and resulting from any change to the environment — on
- (i) physical and cultural heritage,
 - (ii) the current use of lands and resources for traditional purposes, or
 - (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance;
- (d) any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada;¹⁴

Premier Tech refused to provide O'Chiese financial capacity for involvement in the consultation process for this Project. O'Chiese completed an initial review of the Clearwater Project information, which was done without any meaningful consultation or capacity funding from Premier Tech. This review was sent to Premier Tech on November 4, 2022. O'Chiese anticipates that at a minimum, the proposed Clearwater Project will cause:

- i. Negative changes in access to lands for the exercise of O'Chiese Inherent and Treaty rights;
- ii. Restriction of activities related to the exercise of O'Chiese Inherent and Treaty rights and way-of-life on, and in vicinity to, the Clearwater Project lands;
- iii. Creation of landscape conditions that are incompatible with O'Chiese's Natural Laws and requirements for the exercise of Inherent and Treaty rights;
- iv. Creation of barriers (physical and non-physical) that are a detriment to O'Chiese's Inherent and Treaty rights and interfere with O'Chiese Natural Laws;
- v. Avoidance of the Clearwater Project site and vicinity by O'Chiese First Nation members exercising their Inherent and Treaty rights or conducting cultural activities critical to their well-being and livelihood due to contamination, aesthetic and biophysical impacts, or fear of being charged or harassed;

O'Chiese also has concerns with the Clearwater Project impacts, both project specific and cumulative, to the environment and biophysical components of the Clearwater Project area. Premier Tech's activities within the Clearwater Project area will result in changes to soil, water, wetlands, watersheds, medicines, vegetation and other components of the environment critical to O'Chiese's Inherent and Treaty rights and Natural Laws.

Further to the physical and biophysical concerns above, O'Chiese has concerns regarding cultural landscapes. The Clearwater Project is located just 6 kilometers away from the nearest cultural heritage, which includes one confirmed gravesite and the location of an O'Chiese cemetery.¹⁵ Unmarked gravesites continue to be identified by O'Chiese throughout Alberta and it is of the utmost importance that the Clearwater Project area does not interfere with this ongoing process. Should this designation be granted, O'Chiese

¹⁴ IAA, supra note xx, s 2.

¹⁵ Email from Laura Golebiowski, Indigenous Consultation Advisor, Alberta Culture and Status of Women Heritage Division, on October 7, 2022 a

is willing to participate in a process that will allow more information to be shared as it is discovered by O'Chiese, in a private and confidential manner.

b) Impacts on rights protected under s. 35 of the Constitution Act, 1982

The impacts under federal jurisdiction above, in the view of O'Chiese are an impact on its Inherent Aboriginal and Treaty rights protected under s. 35 of the *Constitution Act, 1982*.

If the Clearwater Project is approved O'Chiese will permanently lose access to the Crown Land and it will no longer be available for the exercise of Inherent and Treaty rights. Taking up Crown land is a direct adverse impact on the Inherent and Treaty rights of O'Chiese First Nation.

Projects such as this continue to be approved within O'Chiese consultation area without proper assessment or understanding of the threshold in which to assess impacts to rights. Until the Government of Alberta is able to identify the actual amount of land available to freely practice Inherent and Treaty rights and whether that amount is sufficient for the meaningful exercise of rights, Projects continue to be approved, and continue to diminish the ability for O'Chiese to carry on its way of life as was promised in the Treaty. If this step is not completed, the Government of Alberta will not be able to fully understand or manage how an additional Project will contribute to infringement on Inherent and Treaty rights through cumulative effects.

Premier Tech continues to request site specific areas where there are concerns about impacts and O'Chiese continues to reiterate that the current use of land is too narrow of a metric to understand the full scope of impacts from a proposed project on Section 35 rights. There is a current lack of consideration of cumulative effects within the Clearwater Project area and no direction for how it is being considered in relation to other project approvals. The Clearwater Project must consider cumulative effects to Inherent and Treaty rights resulting from all activities on Crown lands, or other lands to which O'Chiese has a right of access.

c) The provincial assessment and regulatory processes are an inadequate substitute for the IAA process

Premier Tech first filed its original Development Plan with Alberta Parks and Environment ("AEP") in 2010.¹⁶ A pause in Premier Tech's development of its Environmental Assessment ("EA") occurred to allow Alberta to finalize its peat harvesting guidelines, Guide to Surface Materials Lease Information Requirements for Peat Operations, 2017. From 2017 – 2022 Premier Tech has updated its EA, and responded to various Supplemental Information Requests ("SIR").

Despite Premier Tech's interest in the Clearwater Project since 2010, O'Chiese was only first contacted by Premier Tech in July 2022. O'Chiese was not involved in Premier Tech's

¹⁶ Premier Tech Horticulture. 2010. Part A: Preliminary Peat Development Plan, SML 090026, Clearwater Bog Project. Prepared for: Alberta Sustainable Resource Development

original assessment of the Clearwater Project, nor was O'Chiese contacted by Premier Tech, the Aboriginal Consultation Office ("ACO") or AEP when Premier Tech conducted its IA starting in 2017.

O'Chiese has made their concerns known to the ACO as well as AEP, however, requests for engagement with the Government of Alberta have had little success, with no response from either party to date, despite the Clearwater Project being assessed as requiring Level 3- Extensive Consultation by the ACO.

Although O'Chiese is concerned with the process for consultation and engagement that has occurred to date, they recognize that it is vital to continue to participate in this process to ensure that there is record of the attempts to engage in good faith and to ensure impacts to O'Chiese are identified. O'Chiese also recognizes that although the ACO and AEP play an important role in this process, the Government of Canada has a significant role to play in order to address the gaps in the Government of Alberta's regulatory review process.

While the Impact Assessment Agency of Canada identifies methodology for assessing impacts to Indigenous rights for designated projects,¹⁷ Premier Tech's IA only identifies seven Valued Components ("VC") to be assessed, none of which focus specifically on the impacts to Indigenous rights.¹⁸ The closest related VC would be "Social, Cultural and Land, and Resource Use" which generalizes hunting and land use activities and fails to consider the potential impacts to constitutionally protected Section 35 rights. There is also no acknowledgment or mention of Indigenous Nations or rights within the "Rationale" for any VC/Key Indicator. For example, the rationale given for the Aquatic Resources VC was "regulatory requirement" and "potential public concern."¹⁹ It is concerning that O'Chiese First Nation was not consulted to identify any VC suitable for assessing Project impacts to constitutionally protected Section 35 rights

Further, the Alberta Wetland Policy is an insufficient guide for how Indigenous groups should be involved in relation to destruction of wetlands. The Alberta Wetland Policy states that wetlands are "a highly valued resource to many First Nation and Metis peoples, whom they provide myriad cultural and traditional uses"²⁰; however, the Policy is silent on how Indigenous groups are to be consulted when wetlands in Alberta are being destroyed. The Alberta Wetland Policy also states that it is estimated that Alberta has lost two third of its wetlands in the White Area (settled area), with loss continuing to happen and although the

¹⁷ Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-assessment-potential-impacts-rights-indigenous-peoples.html>

¹⁸ Table 2.2-2 of Premier Tech's Biophysical Report and Peat Development and Operations Plan – 2022, identifies the seven value components that "were deemed to have the greatest relevance in terms of value and sensitivity, and which are likely to be affected by the Project" are: (1) Aquatic Resources, (2) Terrain and Soils, (3) Wildlife, (4) Vegetation and Wetlands, (5) Hydrology, (6) Water Quality, and (7) Social, Cultural and Land and Resource use.

¹⁹ Table 2.2-2 of Premier Tech's Biophysical Report and Peat Development and Operations Plan – 2022

²⁰ Alberta Wetland Policy 2013, p. 4 : <https://open.alberta.ca/dataset/5250f98b-2e1e-43e7-947f-62c14747e3b3/resource/43677a60-3503-4509-acfd-6918e8b8ec0a/download/6249018-2013-alberta-wetland-policy-2013-09.pdf>

province is aware of wetland losses in the Green Area (crown lands), the losses are “not yet fully understood.”²¹ The lack of knowledge around how the destruction of wetlands on Crown lands will affect Indigenous groups, the province of Alberta, and Canada as a whole is deeply concerning and requires there to be federal designation of this Project.

Conclusion

We request the Clearwater Project be designated under s.109(b) of the IAA. It is imperative that the physical activities of peat harvesting are federally protected and regulated. The disturbance and destruction of any wetlands for the purpose of peat harvesting is detrimental and directly impacts the Government of Canada’s climate change goals.

In the event that this is not done, we assert that the Clearwater Project should be designated in an order made by the Minister under s. 9(1) of the IAA. Projects such as this continue to be approved within O’Chiese First Nation’s consultation area without proper assessment or understanding of the threshold in which to assess impacts to rights. Until the Government of Alberta is able to identify the actual amount of land available to freely practice Inherent and Treaty rights and whether that amount is sufficient for the meaningful exercise of rights, Projects continue to be approved, and continue to diminish the ability for O’Chiese First Nation to carry on its way of life as was promised in the Treaty. If this step is not completed, the Government of Alberta will not be able to fully understand or manage how an additional Project will contribute to infringement on Inherent and Treaty rights through cumulative effects.

Through federal designation, O’Chiese’s goal is to undertake meaningful consultation with the Impact Assessment Agency of Canada and engage with Premier Tech to avoid, minimize, or accommodate potential impacts from the Clearwater Project on O’Chiese First Nation rights recognized and affirmed by Section 35 of the *Constitution Act*, 1982.

Yours truly,

Rae and Company

<Original signed by>

✓ Brooke Barrett
BAB/ces

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²¹ Ibid. p. 5

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