Reply Submissions

Regarding the s. 18(5) determination as to whether the Jumbo Glacier Resort Project has been substantially started

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1. Introduction

These submissions are made on behalf of the Jumbo Creek Conservation Society and Wildsight (the "Societies") regarding the s. 18(5) substantially started determination for the proposed Jumbo Glacier Resort (the "Project").

This is the Societies' the second set of submissions on this issue. The Societies' primary submissions, dated November 10, 2014 (the "Primary Submissions"), were provided to the EAO and Minister of Environment directly. The Primary Submissions were also adopted by the Ktunaxa Nation Council (the "KNC") as part of its submissions.

These submissions respond to the submissions of the Shuswap Indian Band (the "SIB") and Glacier Resorts Ltd. (the "Proponent"). The primary responses of the Societies, which will be addressed below, are:

1) It would be unlawful to consider a subset of the Project, such as a single phase, as the basis for the substantially started determination. However, even if the consideration could be limited to "Phase One", the Project would still not be substantially started.

2) The Societies take issue with whether the matters cited by the Proponent as engendering delay were outside their control. But ultimately, those matters are not relevant to the determination under s. 18(5). Such matters are relevant for extensions of time to start a project under s. 18(4), which the Proponent has already received.

3) The amount of money spent to date by the Proponent is to be given little weight under s. 18(5).[1] In any event, the amount spent by the Proponent to

[1] As detailed below, the only monetary expenditures that can be considered are those expenditures directly tied to physical construction at the site or directly tied to activities that may have adverse effects.

date is insufficient to demonstrate a substantial start to the Project when compared to the overall cost of the Project.

4) Construction done in violation of Certificate's[2] pre-construction conditions should be excluded from consideration.

[2] Environmental Assessment Certificate TD04-01 (the "Certificate")

2. General comments

Neither the SIB nor the Proponent have considered, discussed, or analyzed the *Taku River Tlingit First Nation v British Columbia (Minister of Environment)* 2014 BCSC 1278 ("*Taku*") decision. The *Taku* decision is binding on the Minister of Environment (the "Minister"). The decision makes it clear that much of the Proponent's evidence is to be given little or no weight. *Taku* makes clear that the primary focus ought to be on permanent physical activities at the project site; bureaucratic activities such as permitting processes and land use planning are of little consequence.[3]

The SIB submission expresses an opinion about the state of the Project, but there is no discussion, evidence, or analysis given in support of that opinion. The Societies will not provide any further response to the SIB submission.

The majority of the Proponent's submissions focus on delays in starting construction of the Project. While these delays may have been relevant to a certificate extension request, they are irrelevant to determining whether the Project has been substantially started.

Further, the Proponent's submissions often make it impossible to determine who (if anyone) is at fault for any given 'delay'. For example, the Proponent appears to blame government for the Proponent's failure to get proper zoning amendments prior to its attempt to install a platter lift on Farnham Glacier. The Proponent is a sophisticated party and cannot lay blame for its failure to undertake due diligence at the feet of others.

Given the short timeframe for preparing submissions, only four days, the Societies cannot address each aspect of the Proponent's submissions in detail.

[3] See especially *Taku* at paragraphs 34-39.

This is particularly true regarding the Proponent's numerous assertions about processes and steps that have 'delayed' construction.

Under s. 18(5), the Proponent must demonstrate that the Project is substantially started. The Proponent has not demonstrated that the Project has been substantially started and could not do so in this case because of the lack of construction on the Project.

3. The opening phase is not a lawful basis from which to determine whether the Project is substantially started

Considering a subset of Project components to establish that the Project has been substantially started would be unlawful. However, even if that approach were lawful, it is clear that Phase One has not been substantially started. The Proponent suggests that the substantially started determination ought to be made on a comparison with the "main project elements required for a project opening", the "first stage of the opening phase", a "minimum opening phase", *et cetera*. For a s. 18(5) determination, the Project is the Project as approved. Using a subset of Project components for the s. 18(5) determination would be a flagrant violation of the legislative intent of requiring a substantial start to the Project within the allocated timeframe.

The Proponent made the choice to seek legal approval for full build-out in the environmental assessment process. The Proponent could have sought approval for an opening phase only, with expansions applied for later. But where the Proponent wants to obtain legal rights to construct the full project, it must substantially start the full project.

Pursuant to the statutory definition of "project", the Project consists only of <u>activities</u> that may cause adverse effects and the construction, operation, modification, dismantling, and abandonment of <u>physical works</u>. Thus, as noted in the Societies' main submissions, <u>activity</u> that cannot have adverse effects does not meet the definition of "project" and cannot be considered as part of the Project.

The Environmental Assessment Office's (the "EAO") November 17, 2014 letter to Bill Green indicates that the report to the Minister will consider factors including "Activity such as the Master Development Plan and agreement process, and other permitting activity that is required….", "Other permitting activity where construction has not taken place…", and "Financial efforts related to all the

above." Activities relating to planning, permitting, and financing thereof are irrelevant to the extent that that they do not fall within the *Act*'s definition of "project". As set out in more detail in the Primary Submissions, the only activity that the decision maker may consider in a s. 18(5) determination is activity "that has or may have adverse effects". The Societies submit that the Master Development Plan, the agreement process, *et cetera* have no potential to create adverse effects and must not be considered in determining whether the Project has been substantially started.

4. Delay is irrelevant in the consideration of whether the Project has been substantially started

Delay cannot be considered in determining whether the project has been substantially started because that would be inconsistent with the scheme of the *Act*. Through s. 18 of the *Act,* the legislature has set an absolute limit of 10 years for substantially starting projects. The Proponent argues that the work done to date is substantial given the amount of delay the Proponent has dealt with in developing the Project. Thus, effectively, the Proponent is attempting to shrink what is required for a substantial start through a delay argument.

Subsection 18(1) of the *Act* requires that environmental assessment certificates have a three to five year deadline for substantially starting a project. Upon application under s. 18(2) and pursuant to subsection 18(4), the Minister may, on one occasion only, extend the deadline for not more than five years. These provisions thus establish an absolute threshold of 10 years for substantially starting a project. These provisions indicate that delay is to be dealt with in a s. 18(2) application. Thus, delay is relevant to a deadline extension for substantially starting a project but not to the question of whether a project is substantially started.

A significant portion of the Proponent's submissions focus on delays associated with pre-construction processes surrounding the development of the Project. These delays are not relevant for determining whether the Project has been substantially started pursuant to s. 18(5).

In its submissions, the Proponent argues that the lengthy pre-construction processes mitigate how much construction must be done to achieve a substantial start. To the best of the Societies' knowledge, the Proponent never submitted an application for zoning bylaw amendment to the Regional District of East Kootenay or to anyone else. Rather, the Proponent simply waited for government

to walk it through the necessary zoning and permitting processes. The failure to make applications to government is entirely the Proponent’s fault.

The Proponent’s submissions do not allow a meaningful analysis of what steps, if any, the Proponent took to mitigate any delay. In any event, delay is irrelevant to the determination of whether the Project has been substantially started.

5. Monetary expenditure is irrelevant to the substantially started determination and is, in any event, insubstantial as measured against the expenditures required for the Project

As noted in our original submissions and in the above section on project scope, the substantially started determination must be made in regard to the project as approved. We again emphasize that the primary focus must be on permanent alteration of the physical environment and that the money spent on project planning *et cetera* is not a relevant consideration.[4] We submit the following in response to the Proponent's emphasis on various future 'starting' phases of the Project and on the money they have spent to date and not because we think these expenditures are a relevant consideration.

Phase One of the Project is estimated to require a total investment of $80 million.[5] Phases Two and Three of the Project are estimated to bring the total investment up from $80 million to approximately $450 million.[6] The Proponent estimates that they have spent approximately $2.4 million since the Certificate was issued.[7]

Some jurisdictions in the United States of America have developed guidance on using costs spent as a measure of whether a project is substantially started. While outside the environmental assessment context, these examples provide guidance on what might constitute a reasonable "substantial start" to a development if costs were to be given weight in the s. 18(5) determination.

In the State of Maine, Frye Island Land Use Ordinances define "Substantial Start" as "Completion of fifty percent (50%) or more of a permitted structure measured

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[4] Again, unless it is tied directly to the physical alteration of the environment.

[5] Jumbo Glacier Resort Project Assessment Report, August 2004, Environmental Assessment Office (the "Assessment Report") at page 75.

[6] Assessment Report 3.20.1 at page 75. The total $450 million figure is also set out in the Master Plan Table 7.10 at page 7-33.

[7] Proponent's submissions at pages 28-29.

as a percentage of the total cost to construct...."[8] In the case of subdivisions, something more akin to the Project than a single structure, Harpswell, Maine defines "substantial start" as follows:

> In the case of a subdivision, substantial start means completion of no less than thirty (30) percent of the costs of proposed improvements within a subdivision…[9]

Generally, a substantial start to a project, when measured as a percentage of project costs needs to be substantial – more in the range of 30% to 50% of total project costs. In the context of the *Act*, the amount spent is a secondary consideration at most. Nevertheless, even if they could be considered, the Proponent's reported actual expenditures would need to be far higher to establish that a substantial start to the Project has been achieved.

The Proponent does not provide sufficient information about costs to compare the amount spent on each project improvement to the total expected costs of those improvements. Thus, as a percentage of total cost, it is impossible to determine the degree to which any building has been substantially started.

Since the issuance of the Certificate, the Proponent reports expenditures of approximately $2.4 million. Compared only to Phase One,[10] the expenditures are nowhere near 30% of the costs of the phase: $2.4 million of $80 million is only 3% of the projected costs. Most importantly, however, when properly compared to the Project as approved, the expenditures to date are five one thousandths of the expected Project costs, or in other words, one half of one percent of the expected Project costs. There is no reasonable way to conclude that the expenditure of $2.4 million represents a substantial start to the Project.

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[8] Town of Frye Island, Land Use Ordinances, Effective Date: October 11, 2008 at Article I. Zoning Ordinance, § 101-I-2 Definitions.

[9] Harpswell Maine Code Enforcement Frequently Asked Questions under "How long is my permit valid for?"

[10] To reiterate, focus on single phase is unlawful, but the Proponent would not even meet that lesser test.

6. Significant non-compliance

It is imperative that the Minister's attention be brought to the fact that the Proponent did not bother fulfilling its pre-construction obligations set out in the Certificate prior to beginning construction on the Project. Such apparent disregard for the Certificate's requirements and the law must have significant consequences. The EAO's November 17, 2014 letter to Bill Green does not indicate that the Proponent's non-compliance with pre-construction obligations will be addressed in the report. This would set a procedurally and legally unacceptable precedent by indicating to project proponents that they need not abide by the law, environmental assessment certificate conditions, or their own commitments when undertaking projects in BC.

In addition to the serious non-compliance issues raised in the Primary Submissions, the Societies are also deeply troubled by the Proponent's and the Minister's apparent disregard of the Proponent's duty to prepare a fire protection plan before commencing construction (Proponent Commitment #40). As noted in our October 2, 2014 letter, Commitment #40 is a pre-construction commitment – meaning that the fire protection plan was required to be in place before construction begins. The Minister's November 20, 2014 response states:

> Condition 40 was not assessed through the administrative inspection as Glacier Resorts Ltd is currently not doing the construction that would require a fire protection plan. The purpose of the fire protection plan, among other things, is to protect human safety and the forestry resource through the design of the community and associated roads to ensure emergency vehicular access. Glacier Resorts Ltd <u>intends to submit the fire protection plan prior to any subdivision applications</u>, as required by the Ministry of Forests, Lands and Natural Resource Operations (FLNR). (Emphasis added)

Commitment #40[11] is not a pre-subdivision commitment, it specifically states that the Proponent has committed "to complete a Fire Protection Plan to the Minister of Forests' standards **prior to commencing construction**…." Construction has commenced and there is no fire protection plan. The failure to prepare the fire protection plan prior to construction exemplifies the Proponent's rush to construction and its apparent disregard of its legal duties. The Minister's refusal to take this issue seriously undermines the public's confidence in the environmental assessment process. This has significant impacts beyond the Project: a failure to meaningfully enforce certificate conditions will further erode public trust in the environmental assessment processes unfolding in BC.

[11] Referred to as a condition in the Minister's November 20, 2014 letter.

7. Water well report

The testing of Well WPN 37717 indicates that the water supply at the proposed Project site currently fails to meet the quality and quantity requirements for Phase One of the Project.

The Proponent claims, at page 9 of their submissions, that a "well to provide potable water to the resort has been drilled and tested". This statement appears inconsistent with the October 27, 2014 Summary Report on Testing of WPN 37717 (the "Well Report"). The Well Report states that the "well was drilled and installed to investigate the potential of using groundwater as a source of potable water" for the Project. Unless there are multiple drilled wells, it appears that the drilled well is a test well and not a potable water well.

The test results from the Well Report indicate that the water is not currently suitable for drinking and will not provide sufficient water for Phase One. The Well Report states that water turbidity might be exceeding the upper limit allowed by Health Canada and that the water exceeds the upper limit for concentration of lead.[12] Thus, based on the Well Report, the current well appears inadequate for providing potable water to the Project.

At page 17, the Proponent claims that a test well was drilled and that the "first well was successful and proved ample groundwater for the opening phase of the resort…." The Well Report indicates otherwise. The well is only capable of producing water at 1.8 litres per second. The industry standard for resort developments is 230 litres/bed/day.[13] Phase One is planned to have 1,446 bed units.[14] Thus, Phase One requires 332,580 litres of water per day.[15] At 1.8 litres

[12] Well Report, Executive Summary
[13] Design Guidelines for Rural Residential Community Water Systems 2012
[14] Master Plan at 4-86
[15] (230)*(1446) = 332,580

per second, the well has a long term capacity of 155,520 litres per day[16] – approximately half of the amount of water needed for Phase One.

In summary, the Well Report indicates that, as of the deadline for substantially starting the Project, the water quality and quantity were insufficient for development of even Phase One of the Project.

[16] (1.8)*(60 seconds)*(60 minutes)*(24 hours) = 155,520 litres per day. Long term capacity of 1.8L/s set out in the Well Report Executive Summary.

8. Conclusion

We submit that the Project has not been "substantially started" in any reasonable sense of the phrase, and in particular not as that phrase is meant under the *Act*. In reply to the Proponent's submissions, the Societies submit that the Project must be considered in its entirety and that it would be unlawful to make the substantially started determination on the basis of a subset of the Project's components. It would also be unlawful to use delay to effectively modify what is meant by substantially started – delay is not relevant to a s. 18(5) determination. Financial expenditure is similarly of little relevance in considering whether or not a project has been substantially started.

As noted above, the Societies consider the Proponent's construction to date to have been undertaken in violation of the Certificate's conditions. In addition to the non-compliance identified in the EAO's compliance audit and raised in the Societies' Primary Submissions, the Minister's November 20, 2014 letter further indicates that Commitment #40 has not been fulfilled. The failure to abide by the Certificate's conditions ought to be considered in determining what will be accounted for in the substantially started determination. The Societies submit that the only proper course of action is to exclude from consideration any construction done in violation of the Certificate conditions (and concomitantly, in violation of the law).

The Societies submit that there is no lawful way to conclude that the Project has been substantially started for the reasons set out in the Societies' Primary Submissions and in this reply.