



GUNN METIS LOCAL NO. 55

Preserving Our Past...Ensuring Our Future

Gunn Métis Local No. 55

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via email: RobbTrend@ceaa-acee.gc.ca

Robb Trend Coal Mine Expansion Project
Canadian Environmental Assessment Agency
160 Elgin Street, 22nd Floor
Place Bell Canada
Ottawa, Ontario K1A 0H3

Dear Mr. Maracle,

Re: Comments on Terms of Reference

Thank you for the opportunity to comment on the draft Joint Panel Agreement and Terms of Reference. Once the draft is revised we request a redlined copy of the changes, along with an explanation of why any of our proposed changes have not been incorporated.

We highlight the following for your consideration

- The need to require incorporation of the Aboriginal perspective into the assessment as well as for Panel members to have the necessary background and experience to appropriately interpret traditional knowledge;
- The need for explicit and detailed requirements and guidance for assessing impacts to Aboriginal Rights as well as socio-economic impacts in relation to Aboriginal people;
- That the assessment of effects and impacts must not be confined by the narrow definitions and mandate of the *Canadian Environmental Assessment Act, 2012*; and
- That the Agreement and TOR should reflect the current statutory regime in Alberta and provide clarity on which applications will in fact be

considered by the Joint Review Panel, sitting as the Alberta Energy Regulator.

Sincerely,

<original signed by>

Tracy L. Friedel, PhD
Vice-President, Gunn Métis Local Council 55
Chair, Community & Industry Relations Committee
Email: tracy.friedel@ubc.ca

Encl: GML comments on the draft Joint Review Panel Agreement and Terms of Reference re the proposed Robb Trend Coal Mine Expansion.

1. Whereas –

Please acknowledge the constitutional dimension of the Panel’s work and add the following text:

Whereas the Minister of the Environment, Canada, and the AER have constitutional obligations to discharge their statutory responsibilities constitutionally, having regard to section 91(24) of the Constitution Act, 1867 and section 35(1) of the Constitution Act, 1982

2. Whereas – re approvals clause

It is our understanding that each of Alberta and Canada intend to rely upon this Joint Review Panel process as part of their consultation efforts with the Gunn Métis Local. Aboriginal groups are entitled to clarity in consultation processes, particularly to have knowledge of the precise conduct that is contemplated by government. Alberta has a duty to provide notice of the decisions at issue in this proceeding.¹ That duty is not met by the current text of “*may include approvals from the AER pursuant to the Environmental Protection and Enhancement Act (EPEA) and the Water Act*”.

We are well aware that the Regulator itself bears no responsibility to assess nor pronounce on the adequacy of consultation. Our understanding is, however, that although it is the Regulator who will issue any provincial authorizations sought in relation the Project, pursuant to Energy Ministerial Order 105/2014 and Environment and Sustainable Resource Development Ministerial Order 53/2014 (the “Ministerial Order”) Alberta retains responsibility for assessing the adequacy of Crown consultation in respect of energy applications prior to such decisions being made. GML suggests that Alberta must be certain as to what conduct it is contemplating in relation to the Project.

We further note that it will be impossible for the Regulator to discharge its duty to “consider potential adverse impacts of energy applications on existing rights of aboriginal peoples as recognized and affirmed under Part II of the Constitution Act, 1982 within its statutory authority under REDA,” and to discharge its duty pursuant to section 6 a) of the Ministerial Order, to require that the proponent of the energy application include information about potential adverse impacts of the proposed energy resource activity, if the Regulator is not yet certain what precise energy resource activities will be the subject of this proceeding.

In addition to the illegality of relying upon a process as consultation for as yet unnamed Crown conduct, and the impossibility for the Regulator to comply with the Ministerial Order given the current uncertainty as to which applications will be the subject of this Joint Panel Review, it is impractical to expect Aboriginal interveners such as Gunn Métis Local to be able to design and prepare an intervention if there is no certainty as to what precisely the scope of the applications and information before the Panel will be, nor what the scope is of the potential mitigations via terms and conditions on various permits and authorizations.

¹ *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 at para. 43.

GML suggests that if the Regulator and Canada are not yet certain of which applications will be the subject of this proceeding, then it would appear that the parties are simply not ready to make a Joint Review Panel Agreement or appoint a Joint Review Panel.

Finally, GML suggests that it is a matter of efficiency for all concerned to avoid duplicate proceedings in relation to the same Project. That is the rationale behind having a joint provincial-federal proceeding. For that reason alone, the *EPEA*, *Public Land Act*, and *Water Act* applications should be subject to this proceeding. CVRI has in fact submitted applications under the *Coal Conservation Act*, *EPEA* and the *Water Act* in one proceeding in relation to its proposed Yellowhead Tower II mine, it would make sense to adopt the same approach in relation to this Project.

GML requests disclosure from CEAA, the Regulator and/or ACO of any communications with CVRI or any subsidiary thereof regarding the timing and submissions of applications required, that fall within the Regulator’s jurisdiction, in order for CVRI to progress the Project.

3. Definition – “environmental effect” Agreement at 2

The phrase “environmental effects” plays a key role throughout the Agreement and the TOR and must be carefully defined in order to capture all potential effects and impacts of the Project. Currently the Agreement does not include a definition of environmental effect for the purposes of the Joint Review Panel, which incorporates the Regulator’s mandate under *REDA*. Environmental effect is defined solely with reference to *CEAA 2012*, section 5. However, section 5 restricts consideration of effects to those within federal jurisdiction. This is nonsensical given the broad powers bestowed upon the regulator as it discharges provincial decision making authority. A Panel review conducted on the basis of *CEAA 2012* alone is not capable of effecting protection for GML’s section 35 rights and will not be capable of delivering a process nor decisions that are consistent with the *Constitution Act, 1982*.

An assessment based on the *CEAA 2012* definition of environmental effects will assess only a small subset of the effects and impacts that are likely to occur, that must be considered under Alberta’s legislation, and that have been assessed by past Joint Review Panels. It is unnecessary to define environmental effects solely in terms of *CEAA 2012* for the purposes of the federal minister of the environment, that minister is already bound by that statute. The Panel will also sit in its capacity as a division of the Alberta Energy Regulator which has obligations and powers in relation to the Project under several statutes including the *Constitution Act 1982*, the *Environmental Protection and Enhancement Act*, the *Responsible Energy Development Act*, the *Water Act*, the *Coal Conservation Act*, and the *Public Lands Act*. Pursuant to section 2(b)(ii) of *REDA*, the Regulator’s mandate is to regulate, inter alia, the protection of the environment. Environment is defined broadly in *REDA*, and surely an “assessment of the environmental effects of the project. . . in a manner consistent with the requirements of . . . *REDA*, the *Coal Conservation Act*, *EPEA*. . .”² requires a definition of environmental effects that extends beyond those identified in section 5 of *CEAA 2012*. The definition of environmental

² Terms of Reference at ‘A1, Part II – Scope of the Environmental Assessment of the Project’.

effects used in the Agreement should be inclusive of all effects that may flow from the Project. We note the effort in Part V, section 20 to differentiate between "significant adverse environmental effect" for the purposes of the federal government, and "significant adverse effect" for the purposes of the provincial decision maker. However this is the only part of the Agreement and ToR where the phrase appears. GML encourages the regulators to use a definition that provides consistency between the JRPA, ToR, and the statutory mandate of the Panel, and proposes that the following definition of environmental effect replace the current definition:

"environmental effect" means:

- a. *Any change that the project may cause in the environment*
- b. *Any direct, indirect or cumulative effect of any change referred to in paragraph (a) including such changes as described by Aboriginal traditional knowledge, on*
 - i. *Health and socio-economic conditions, including effects on navigation;*
 - ii. *Physical and cultural heritage;*
 - iii. *Use of lands and resources for traditional purposes by Aboriginal persons;*
 - iv. *Any structure, site or thing that is of historical, archaeological, paleaontological or architectural significant*
- c. *any change to the Project that may be caused by the environment whether any such change or effect occurs within or outside of Canada.*

Alternatively, if the drafters of the Agreement are unwilling to adopt the proposed definition of "environmental effect", then GML suggests that the term "environmental effect" be replaced with the term "environmental impact" or "adverse effect", defined broadly per suggestion above, in the following locations:

- Page 2 (definition of mitigation)
- Page 3 (definition of report)
- Page 3 (section 3.3)
- Page A1 (Scope of the Environmental Assessment)
- Page A2 (Aboriginal Rights and Interests)
- Page A4 (Accidents and Malfunctions)
- Page A4 (F: Additional Information Available for Consideration)

4. Definition – add "Aboriginal Perspective"

"Aboriginal Perspective" includes Aboriginal views respecting the ecological, cultural, environmental, social or other resources and conditions needed to exercise Aboriginal Rights and maintain culture in a preferred and meaningful way, taking into account Traditional Knowledge, cultural practices and values; holistic perspective of the land and resources; experiences with past projects and future intended uses of the land.

5. Definition – add “Aboriginal Rights”

“Aboriginal Rights” means the exercise of activities, practices, customs, and traditions protected by section 35 of the Constitution Act, 1982 including activities, practices, customs, and traditions that facilitate the traditional livelihood of Aboriginal members and/or the continuity of Aboriginal culture, beliefs and Traditional Knowledge, and include Aboriginal title.

6. Definition – add “culture” and “cultural heritage”

“culture and “cultural heritage”, including as that term is used in section 5 of CEEA 2012, means both tangible and intangible aspects of the practices, kinship and communal networks, representations, relationships, expressions, knowledge, skills, and beliefs – as well as the instruments, objects, artefacts and cultural spaces associated with same – that Aboriginal groups recognize as part of their identity as belonging to their Aboriginal group, and for greater certainty, includes the modes by which cultural heritage is lived, transmitted and preserved.

7. Definition – change “cumulative effect”

“cumulative effect” means changes to the environment caused by all past, present and reasonably foreseeable future projects and human activities and includes the potential social, cultural, health, economic and environmental impacts of these projects and activities on Aboriginal people and on Aboriginal Rights”.

8. Definition – add “impact”

“Impacts” mean the potential direct, indirect and cumulative adverse impacts of the Project, as broadly interpreted from the Aboriginal Perspective, taking into account Traditional Knowledge, on Aboriginal Rights, interests, traditional uses, culture and socio-economic conditions of Aboriginal groups and for greater certainty

- a. Include both site-specific and non-site specific Impacts;*
- b. are not limited to residual impacts; and*
- c. are not limited to effects on the physical environment.*

9. Definition – change “mitigation”

“mitigation” means, in respect of the Project, the elimination, reduction or control of the adverse effects and/or Impacts of the Project through technologically feasible measures with verified and measureable success, taking into account the Aboriginal Perspective and Traditional Knowledge, and includes restitution for any damage to the environment or Aboriginal Rights or culture or cultural heritage caused by such effects through replacement, restoration, compensation or any other means

10. Definition – change “Report”

See comment 2 above regarding the illegality and inappropriateness of uncertainty in the agreement regarding which applications will be the subject of this Joint Panel Review.

11. Definition – add “Traditional Knowledge”

“Traditional Knowledge” includes culturally-based literary, artistic or scientific works; performances; scientific discoveries; value systems; systems of land and resource use; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. “Culturally-based” refers to knowledge systems, creations, innovations, and cultural expressions which have emerged from the cultural relationship of Aboriginal group members to its traditional lands over time; they are generally regarded as pertaining to the members’ traditional lands; and are constantly formulated and reformulated in relationship with the changing ecological, economic and sociocultural environment. Categories of traditional knowledge could include: agricultural knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; knowledge related to cultural sites, ecological sites, and sacred sites; knowledge related to land and resource use and practices; knowledge related to customs and traditions integral to the distinctive aboriginal culture; ‘expressions of folklore’ in the form of music, dance, song, handicrafts, designs, place names, stories and artwork; elements of languages, such as names, geographical indications and symbols; and moveable cultural properties, and for greater certainty includes the oral history of members.

12. Definitions – add “Traditional Use”

“traditional uses” means all activities carried by Aboriginal peoples on land and water, other than Aboriginal Rights, which have cultural significance to Aboriginal peoples.

13. Constitution of the Joint Review Panel, JRPA section 3.3

Members should have knowledge or experience relevant to the anticipated impacts of the project on Aboriginal Rights, cultures, and cultural heritage. Ideally, JRP member(s) would have a high level of knowledge/experience relevant to anticipated effects and impacts not only from a Western philosophical perspective, but also as seen through an Indigenous lens. Part II (p. A2) of the ToR makes clear that that community and Aboriginal Traditional Knowledge will be taken into account, and Part III (also on p. A2) highlights that Aboriginal rights and interests are paramount in considering this project. Yet, how is it possible to fulfill this mandate if member(s) of the JRP lack the ability to interpret Aboriginal traditional knowledge information appropriately (e.g. holistically)? We do recognize that in Stage 1, point 10, the JRP can obtain expert advice, incl. presumably related to Aboriginal traditional knowledge, but the point being there is a far greater likelihood that this information will be understood in appropriate ways if the JRP member(s) themselves are up to speed on the matter of Indigenous knowledge and ways of knowing.

14. Secretariat: Section 4.1

Technical support staff provided by the secretariat to advise Panel members on subjects within the ToR should be subject to the same requirements as experts retained under section 6.3: their names, credentials, and any documents obtained or created by them and submitted to the Panel should be disclosed on the public registry. Technical staff advising the Panel on subjects within the ToR should also be subject to the requirement of section 3.3: be unbiased and free from any conflict of interest relative to the project and have knowledge or experience relevant to the anticipated effects and impacts of the Project. Finally, at least some of the technical staff should have knowledge or experience relevant to the anticipated impacts of the project on Indigenous knowledge, Aboriginal Rights, cultures, and cultural heritage. Ideally, some technical staff members would have a high level of knowledge/experience relevant to anticipated effects and impacts not only from a Western philosophical perspective, but also as seen through an Indigenous lens to ensure that the Aboriginal Traditional Knowledge presented to the Panel is understood in appropriate ways.

15. ToR – Part 1 Scope of Project

See comment 2 above regarding avoiding uncertainty in the JRPA and ToR. With respect to this sentence “Applications to commence mining operations will be made in future to the AER and other regulatory agencies” please be specific about which applications will be the subject of this Joint Review Panel proceeding, and which applications will be delayed.

16. ToR – Part II – Scope of the Environmental Assessment of the Project

Re: “in a manner consistent with the requirements of . . . EPEA if applicable” see comment 2 above regarding the necessity of certainty as to which applications will be before the Panel in this proceeding.

Due to the narrow definition of environmental effects found in section 5 of *CEAA 2012*, sections 19(1) and 19(3) *CEAA 2012* are limited to a subset of the direct, indirect and cumulative effects likely to occur from the Project. The definition of environmental effects should be amended, as described in section 1 above, and the phrases “per section 19(1) of *CEAA 2012*” and “as provided in section 19(3) of *CEAA 2012*” should be removed.

Regarding mitigation, the assessment should be limited to a consideration of mitigation that is technically and economically feasible, *with verified and measurable success in reducing effects and impacts*.

The ToR should reflect the law in relation to impacts on Aboriginal Rights. To be clear, there is nothing in the case law regarding adverse impacts on Aboriginal people requiring them to show that their rights will be significantly affected before there is a requirement to address those concerns. Significance is not the threshold in relation to impacts to Aboriginal Rights, and the ToR should not suggest otherwise.

17. ToR - Part III – Scope of the Factors

A. Aboriginal Rights and Interests

It is troubling that the consideration of the information provided by Aboriginal groups is contemplated as optional, particularly as Canada and Alberta intend to rely upon this process as consultation. GML suggests that the entire first portion of this section, up to the beginning of the sentence “The Joint Review Panel shall not make any determinations as to: . . .” be deleted and replaced with the following.

The Joint Review Panel shall consider and incorporate into its assessment:

-Evidence concerning any potential project effects and impacts to asserted or established Aboriginal rights presented by participants, such as:

- o Any potential effects on uses of lands and resources by Aboriginal groups for traditional purposes;*
- o Any effects (including the effects related to increased access and fragmentation of habitat) on hunting, fishing, trapping, cultural and other traditional uses of the land (e.g. collection of medicinal plants, use of sacred sites), as well as related effects on lifestyle, culture, health and quality of life of Aboriginal persons;*
- o Any effects of alterations to access into areas used by Aboriginal persons for traditional uses;*
- o Any adverse effects of the project on the ability of future generations to pursue traditional activities or lifestyle;*
- o Social cultural and health impacts to Aboriginal peoples*
- o Any effects of the project on heritage and archaeological resources in the project area that are of importance or concern to Aboriginal groups;*

-The methods and measures proposed to manage, mitigate and compensate to an acceptable level, from the Aboriginal perspective, any identified impacts on asserted or established Aboriginal rights, interests, and culture.

The ToR should also include a detailed guide of the specific factors to be considered, per Appendix 2 to the Submission of the Mikisew Cree First Nation to the Joint Review Panel considering the Frontier Oil Sands Mine:

<http://www.ceaa-acee.gc.ca/050/documents/p65505/99133E.pdf>

18. ToR – Part III – Scope of the Factors

B. Cumulative Effects

Cumulative effects must be defined broadly, per comment 16 above. GML further recommends specificity regarding the key valued components to be considered, and suggests that the ToR include the following non-exclusive list of key valued components:

- water quality and quantity, including any potential effects on Aboriginal navigation;*
- air quality and greenhouse gas emissions, including from the transport and use of the produced coal;*
- fragmentation affecting the exercise of Aboriginal rights;*

- *Any impacts on Aboriginal peoples' ability to access areas they use for the exercise of Aboriginal Rights, traditional uses or culture;*
- *asserted or established Aboriginal Rights and interests;*
- *wildlife and wildlife habitat for valued species including: federally and provincially listed species at risk, and migratory birds; and valued vegetation communities and wetlands.*

19. TOR- Part III – Scope of the Factors

C. Accidents and Malfunctions

Plans, measures and systems to be considered by the Panel must be proven and have a verifiable and successful track record in circumstances analogous to what could occur at this Project.

GML suggests that the Panel should consider the demonstrated and proven abilities or preparedness, including fiscal preparedness, of each of the Proponent and relevant government agencies to respond to and manage the consequences of any accident or malfunction. For example in British Columbia, we understand that the reclamation bond posted by Imperial for its Mount Polley Mine is being used to fund some clean up of the tailings breach disaster that occurred in August 2014. This would be an unacceptable solution for GML, who assert Aboriginal rights, including title, to the Project area and areas downstream. The Panel should consider the proven fiscal ability of the Proponent to post both appropriate reclamation bonds and *in addition* to post sufficient security to manage the consequences of a catastrophic event. This is particularly important during a prolonged price slump for coal, and in an era when many countries around the world, including China and Canada, are taking steps to curb greenhouse gas emissions, which could affect global demand for coal, which in turn could affect the value of CVRI's reserves.

20. TOR Part III – Scope of the Factors

Capacity of Renewable Resources: the following should be added to those factors considered by the Panel.

Renewable resources are resources such as fish, wildlife, trees, water quality and quantity and airshed which are replaced or replenished, on an ongoing basis, either naturally or by human actions.

The Joint Review Panel shall consider the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future. The following points should be addressed:

- *a description of the renewable resources that may be affected by the project;*
a brief description of the project's environmental effects on the renewable resource;
- *an indication as to the way in which the capacity of this resource was measured or evaluated;*

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- *an indication of the temporal and geographic boundaries used to assess the capacity of the affected resource;*
- *a description of any other appropriate mitigation measures;*
- *a determination of the significance of the residual effects on the renewable resource and its capacity to meet the needs of current and future generations;*
- *an identification of the risks and uncertainties that remain and the description of the next steps, if any, that will be required to address this effect.*

21. TOR – Part V Process

Adequate Time Periods

GML submits that specific minimum 60 day notice and comment periods must be included in each of paragraphs 6, 8, 13. 30 days is not adequate time for interveners to secure lay and expert witnesses. GML is in a different position than a proponent, as for the most part its witnesses are not employees or long term contractors who can be directed to attend hearing on short notice. Most of GMLs potential witnesses have other employment or contractual commitments. A 30 day notice period may prejudice GML’s ability to secure witnesses and put forward evidence.

Joint Review Panel Report (para. 20)

The issue of justification of adverse impacts and effects on GML and its lands, waters, Aboriginal Rights, and culture is critical. GML’s ability to address this matter will be prejudiced without clear ToR regarding the type of evidence that the Panel will consider, and the test it will employ to make conclusions about the justifiability of any significant adverse effect. Again we note that the Panel sitting as the AER, should go through a justification analysis in relation to all adverse effects on GML Aboriginal rights, whether or not they are deemed to be significant.