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December 6, 2019

Martin Ignasiak
<contact information removed>

Toronto

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Grassy Mountain Coal Project Joint Review Panel
Impact Assessment Agency of Canada
160 Elgin Street, 22nd Floor
Place Bell Canada
Ottawa, ON K1A0H3

Vancouver

New York

Attention: Alex Bolton, Chair, Joint Review Panel

Dear Mr. Bolton:

**Re: Benga Mining Limited (“Benga”)
CEAA Reference 80101
Grassy Mountain Coal Project (“Project”)
Response to Information Request (“IR”) Package #6**

We represent Benga in the above-referenced proceeding for the Project. We are writing in response to the letter from the Joint Review Panel (“JRP”), which was received by us on November 28, 2019¹ and which advised that following the review of Addendum 9 and 10, public comments received, and sufficiency comments received, further information is required from Benga before proceeding to a hearing. The letter requested that Benga provide a timeline for submission of responses to IR Package #6 by December 6, 2019.

As requested, this letter provides Benga’s estimated timeline for submission of responses to IR Package #6. In addition, in this letter Benga advises the JRP of certain scheduling risks and also expresses concern regarding two of the IRs contained within IR Package #6.

Estimated Timeline for Submission

Benga hereby advises the JRP that it will submit full and thorough responses to IR Package #6 by **February 28, 2020**.

¹ Registry No. 295.

Scheduling Requirements and Material Risks Arising

The EIS Guidelines² require Benga to describe the Project's anticipated schedule. Benga has provided the JRP with Project scheduling details as well as updates when requested.³ The importance of the Project's pre-construction and construction requirements cannot be understated. There are practical and well-known field requirements, seasonal conditions, and seasonal restrictions in place that limit the timeframe for commencing and completing pre-construction and construction activities that we believe bear reminding. As a result of these requirements and restrictions, a 2 or 3 month delay in receiving regulatory approvals will extend the Project construction timeframes disproportionately delaying the Project, and the resulting benefits to local communities and Indigenous groups.

In order for Benga to be able to initiate construction of the Project in the winter of 2020/2021, regulatory permits, if the Project is approved, must be issued early in Q4 2020. This means the JRP's Decision Report must be issued no later than mid Q3, 2020, thereby providing sufficient time for the issuance of the required regulatory approvals. Any delays beyond this will create a significant and material risk that the limited pre-construction and construction activity window will be missed and the Project will result in significant delays.

Benga is prohibited from commencing vegetation clearing and other construction activities in known nesting areas and treed areas through the migratory bird breeding window (mid April to mid August). Consequently, to safely construct the infrastructure corridor, mine infrastructure, open pit development, and water management infrastructure, Benga must make full use of the winter season following the issuance of regulatory approvals to complete clearing and site preparation prior to the commencement of the bird nesting window. If Benga is unable to make use of the winter season for site preparation activities, construction of the project will be materially delayed and in addition, subsequent site preparation and construction activities will be considerably less efficient.

This delay will impact the benefits that will accrue to the local, regional, provincial and Indigenous communities. This is regrettable and we are of the view that further delay in proceeding to a public hearing can and should be avoided to the greatest extent possible.

The Requests in IR 6.6 are Inappropriate

Benga agrees with the JRP that the physical and cultural heritage is not only associated with an individual physical site, but also with the experience lived by Indigenous peoples in those areas, and the importance of the landscape as a whole. However, Benga disagrees

² Registry No. 11.

³ Registry Nos. 42, 55, 70, 228, 251.

that it is either qualified or the appropriate party to give evidence regarding the effects of the Project on the intangible aspects of cultural heritage, including but not limited to cultural and spiritual practices, ceremonies, and intergenerational transfer of language, knowledge, and culture, as is requested in IR 6.6. Requiring Benga to tell the JRP how, in its view, the Project may affect Indigenous cultural and spiritual practices, ceremonies, and intergenerational transfer of language, knowledge, and culture, amounts to a form of cultural misappropriation.

Benga has been consulting and engaging with Indigenous groups that may be affected by the Project since 2013. In addition, in accordance with the First Nations Consultation Plan approved December 15, 2014, and the supplemented Plan included in the EIS, Benga has consulted and engaged with potentially affected Aboriginal groups identified by the Alberta Aboriginal Consultation Office (“ACO”) during the pre-application and application review phases of this process. The entirety of these processes to date and the outcomes that have arisen are well-evidenced in Benga’s Addendum 9.⁴ In addition, Benga notes that its consultation and engagement efforts remain ongoing and are proceeding positively such that agreements with six of the seven Treaty 7 Nations are in place and others are anticipated that will effectively mitigate any outstanding concerns held by the respective Indigenous groups.

Benga neither purports to nor proposes to speak for Indigenous communities. An assessment of the effects noted above and requested by the JRP, were it to be conducted by Benga, would be improper, inappropriate, and potentially harmful to principles of reconciliation and mutual respect. As such, Benga requests that the JRP not require Benga conduct the assessments requested in IR 6.6. Benga is of the view that the JRP ought to instead rely on the extensive information provided to date by Benga in conjunction with, and informed by, any information that may be provided by Indigenous communities throughout the review process. Benga is of the view that this process will more accurately and respectfully inform the JRP of potential Project effects on Indigenous communities from their own lived experiences and in their own words.

The Request in IR 6.2 is Unwarranted and Inconsistent with the Regulatory Regime

Benga is of the view that the response provided to IR 3.4 in Addendum 10⁵ contains a full and complete response to the information requested and, more importantly, required by the JRP to conduct its review and proceed to a public hearing. As noted in Addendum 10, Table 3.4-1 provides the conditions of the associated Public Land Standing Report, consent and notification status for the land reservations within the proposed disposition boundaries

⁴ Registry No. 185.

⁵ Registry No. 251.

as well as consent letters obtained to date by Benga. In addition, Table 3.4-2 provides the surface dispositions and associated conflicts within the surface dispositions required for the Project as well as letters and evidence of notification that have been provided to various disposition holders.

Benga is of the view that, although the response provided to IR 3.4 in Addendum 10 may indicate that certain consents remain outstanding and that, consequently, only notifications provided to certain disposition holders are available to be provided to the JRP at this time, it is inconsistent with Alberta's regulatory regime to insist that Benga obtain all consents at this time. First, this would lead to an absolute absurdity whereby any disposition holder on Crown land could thwart the advancement of the Project before the JRP, and the Alberta Cabinet, has made a public interest decision.

Second, if the Project is approved, and in the unlikely event that Benga is unable to obtain consent for access to lands, private or Crown, the Surface Rights Board may grant a Right of Entry Order pursuant to the *Surface Rights Act*.⁶ The Right of Entry Order granted would provide Benga all rights to the surface to operate the Project that are required except for an outright certificate of title or rights to surface substances themselves.⁷ This expressly includes vacant Crown land or Crown lands held under a disposition.⁸ In the unlikely event that matters of compensation were the cause for Benga not obtaining consent for access to lands, private or Crown, it is the Surface Rights Board that is authorized to establish proceedings to resolve the dispute.

The legislative regime in Alberta is clear in that Benga is not required to obtain all consents prior to a public interest determination being made. We note that this has long been the standard practice for mining development in Alberta and is enshrined in the *Surface Rights Act*. Therefore, we request that the JRP confirm Benga is not required to provide consents for all dispositions. If there is specific information regarding land dispositions that the JRP seeks at this time, other than consents, we ask that the JRP clarify specifically what information is being sought since IR 6.2(b) is general in nature.

Conclusion

For the reasons stated above, we respectfully request that the JRP reconsider and rescind IRs 6.2 and 6.6.

⁶ RSA 2000, c S-24, ss 12 and 15

⁷ RSA 2000, c S-24, ss 16

⁸ RSA 2000, c S-24, s 17

The Project has been under review for approximately 4.5 years. In this time, Benga has expended significant resources and expense to further the Project so that its benefits may accrue to local, regional, provincial and Indigenous communities. In addition, Benga has provided all requests for additional information in a timely manner and assisted all parties by providing updates and concordances when necessary.

We note that Benga submitted its updated Addendum 10 on August 30, 2019. The JRP posted Addendum 10 to the registry on September 9, 2019 and initiated a 45-day public comment period. The JRP then reviewed all comments received as of October 31, 2019 and on November 28, 2019 the JRP issued IR Package #6. Therefore, the sufficiency determination process leading to IR Package #6 took approximately 3 months. We submit that the next public comment period ought to proceed in a timelier manner.

As stated at the outset, Benga will provide a full and thorough response to the remaining IRs in Package #6 on **February 28, 2020**. With respect to addressing the scheduling risks identified above, Benga notes that all interested parties are now fully aware of when Benga will be filing its responses. Therefore, we submit that a short public comment period is warranted and that it should commence immediately on **March 1, 2020**.

Benga looks forward to continuing to work with the JRP and all parties to ensure that the JRP has all the necessary and relevant information before it to make a public interest decision with respect to the Project.

Yours truly,
<Original signed by>

Martin Ignasiak