

November 14, 2019

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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

Attention: Tracy Utting, Acting Panel Manager

Dear Madam:

**Re: Benga Mining Limited (“Benga”)
CEAA Reference 80101
Grassy Mountain Coal Project (“Project”)
Response to CPAWS Comments**

The public comment period was initiated by the Joint Review Panel (“JRP”) on September 9, 2019, and closed on October 24, 2019.¹ On October 31, 2019, we provided Benga’s response to the JRP in respect of the comments received and requested that the JRP proceed to a hearing on the basis that it has sufficient information before it.²

We also advised the JRP that the Canadian Parks and Wilderness Society Southern Alberta Chapter (“CPAWS”) submission (the “CPAWS Submission”)³ raises certain procedural matters for which we would provide the JRP a response in early November.

We submit this letter providing Benga’s response to the CPAWS Submission in respect of the procedural matters raised therein.

Response to Procedural Matter #1

The CPAWS Submission states that “the [JRP] has previously requested a single, comprehensive, easily read response that compiles all the information generated for the Environmental Impact Assessment [...] Whether Benga has provided a direct answer to this request was not clear.”

First, we note that this request is very broad and does not identify any specific information that is difficult to locate in the materials filed by Benga. In fact, CPAWS acknowledges that it does not even take a position as to whether Benga complied with the JRP’s request on the basis that this “was not clear.” For this reason alone, the JRP should dismiss CPAWS’ request.

¹ Registry No. 253.

² Registry No. 291.

³ Registry No. 284.

Benga notes that the JRP issued five rounds of IRs to Benga in respect of the Project between March 21, 2019 and May 14, 2019.⁴ Each of these IRs stated that it “would be helpful to the Panel and the other participants, for Benga to present the information in a single, comprehensive, easily read response that compiles both the information presented to date and any newly requested information.”⁵ We also note that these IRs recommended “that Benga wait to provide responses to this package, and all forthcoming additional requests until all such requests (packages) have been issued.”⁶

Benga has attempted to comply with the JRP’s requests in its responses by providing the information requested in a manner that “compiles both the information presented to date and any newly requested information.” However, Benga disagrees with CPAWS’s apparent suggestion that it was intended for Benga to redraft and resubmit an entirely new EIA after having received the JRP IRs. To do so would be unnecessarily duplicative and inefficient. This duplication and inefficiency is not only contrary to principles of regulatory efficiency, it is also contrary to the mandates of both the Alberta Energy Regulator (“AER”)⁷ and the Impact Assessment Agency (“IAA”).⁸ Requiring a new EIA after every IR process would render the efficiencies sought in the IR process entirely redundant.

In any event, Benga has submitted its Tenth Addendum and the Registry includes a concise summary of all the information filed by Benga to date with direct links to each section.⁹ The information is organized in a thoughtful and logical manner. Taking into account that CPAWS has not identified any specific concerns with the manner in which the information is presented, CPAWS’ request should be denied.

Response to Procedural Matter #2

The CPAWS Submission requests the JRP provide 45 days notice between Benga’s final submission deadline and the participant submission deadline. The CPAWS Submission suggests providing 90 days notice between when the hearing is called and when it begins.

First, CPAWS has mischaracterized the process. The application and EIA submitted by Benga constitute Benga’s Application. As Benga is the applicant in this proceeding, it is Benga that has the final right of reply prior to the hearing. This is the process that other joint review panels have followed. In addition, this allows interveners to review Benga’s reply evidence in advance of the hearing. If this were not the case, Benga would introduce its reply evidence once the hearing commenced through its witnesses and this would deprive interveners of the opportunity to review the reply evidence in advance.

⁴ Registry No. 195, 202, 205, 212 and 215.

⁵ Registry No. 195, 202, 205, 212 and 215.

⁶ Registry No. 195, 202, 205 and 212.

⁷ *Responsible Energy Development Act*, SA 2012, c R-17.3 [REDA], s 2(1).

⁸ *Impact Assessment Act*, SC 2019, c 28, s 1 [IAA], s 6(1)(b.1).

⁹ <https://iaac-aeic.gc.ca/050/evaluations/document/115577?culture=en-CA>

Second, we disagree that CPAWS cannot begin preparing its submissions to the JRP. The fact that CPAWS is actively engaged in this process suggests that CPAWS has already identified some sort of specific concern with the Project. If this is not the case, and CPAWS simply intervenes in every proposed project subject to review, then we submit CPAWS's submissions should be given little if any weight. Assuming CPAWS has identified specific concerns with the Project, it can and should begin preparing its submissions on those concerns now. Benga has filed, at the direction of regulators, extensive information regarding the Project. CPAWS should not idly wait for the issuance of a notice of hearing and then complain that it requires more time.

We submit that CPAWS has not raised any credible reasons why the 45 day notice period contemplated in the JRP's Terms of Reference is insufficient and the CPAWS' request should be denied. In our view, the notice period is sufficient and provides sufficient time, in advance of the hearing, for CPAWS and other interveners to file submissions and evidence and for Benga to file its reply submissions and evidence.

Response to Procedural Matter #3

The CPAWS Submission requests that the JRP establish a procedure for participants to make formal requests to Benga and Benga be required to provide certain data or information relied on by Benga in its EIA.

First, Benga has not received a request from CPAWS for any data or similar information. If CPAWS intends on making such a request, it should do so as soon as possible. There is nothing preventing CPAWS from making a request directly to Benga without the JRP's involvement. In fact, this is the process that has been followed in the past and is encouraged. In the event that CPAWS and Benga disagree on whether the information or data requested is relevant or probative, either party may approach the JRP to resolve the issue. This is the process contemplated in the *Alberta Energy Regulator Rules of Practice and Procedure* ("AER Rules"), which are adopted in the JRP's Terms of Reference.¹⁰

If CPAWS is of the view that it would like to test certain information, it can request that information directly from Benga. It has not done so to date. Therefore, there is no reason to establish a separate process above what is already contemplated in the AER Rules and CPAWS' request should be denied.

Response to Procedural Matter #4

The CPAWS Submission requests the JRP establish rules for cross-examination in advance of the hearing and further requests that the JRP require witnesses to be cross-examined individually as they would be in standard adjudicative processes. The CPAWS Submission asserts that hearing panels not subject to individual cross-examination undercuts the usefulness of cross-examination for participants.

This request, if granted, would impose inappropriate practices on the JRP, would result in significant and material process inefficiencies, would fetter the JRP's discretionary power, and would be contrary to principles of procedural fairness.

¹⁰ AR 99/2013 [AER Rules].

We begin by noting that, subject to certain limitations, the JRP is the master of its own procedure and the JRP is not bound by the manners and traditions of courts.¹¹ The JRP may benefit from adopting certain processes of courts, but to simply adopt judicial customs as a matter of course may lead to difficult operations and implementation. Simply put, the JRP is not a court and does not serve the same function as a court.¹² Therefore, although a “standard adjudicative process” may require a witness to be cross-examined individually, it is plain to see that public hearings for major projects are not standard adjudicative processes and they do require different practices.

The very fact that the JRP may require different practices than those of a court is expressly acknowledged in the AER Rules. The AER Rules provide that the AER (read: JRP) may permit or require evidence to be given by some or all of the witnesses sitting as one or more witness panels at any time so determined. A witness panel may confer among themselves unless otherwise directed by the AER (read: JRP). Where a question is directed to a specific member of a witness panel and that member is unable to answer the question, the AER (read: JRP) may permit another member of the witness panel to answer the question.¹³

Thus, while panels of witnesses are not common in court proceedings, they are very common before tribunals.¹⁴ Panels of witnesses are used where a whole subject matter (i.e., the Project) is to be spoken to and where there are a number of persons either sharing responsibility for the subject or where each of them has some expertise or knowledge, but each does not know or deal with the whole subject. We note that certain commentary has suggested that if counsel calling evidence wishes to use a witness panel, the witness panel should be accepted by a tribunal.¹⁵

The use of witness panels is intended to assist in an efficient and effect presentation and questioning of the information submitted. It would undoubtedly be more efficient to have all witnesses on hand, sworn or affirmed, and available to answer questions, than it would be to question each individual witness, some of whom may not be able to provide a complete response to a question posed. The CPAWS Submission asserts that such a process deprives a participants ability to test Benga’s submissions.

To the contrary, we submit that seating a witness panel aids the JRP and all participants by ensuring that a full response can be provided in the moment. The credibility of a witness and the submissions of Benga are of course open to challenge in the hearing. However, the overall purpose of the hearing and goal of the JRP is to obtain the best evidence in making its determination. We submit that seating a witness panel is the established best practice to aid in this objective. As long as the JRP adopts the same practice for all parties, which has historically been the case, there is no unfairness in

¹¹ *Prasad v Canada*, [1989] 1 SCR 560; see also Macaulay and Sprague, *Practice and Procedure Before Administrative Tribunals*, loose-leaf, 2018 – Rel. 4 (Scarborough: Carswell, 2018) [Macaulay and Sprague] at 9-1 to 9-2.

¹² Macaulay and Sprague at 9-2.

¹³ AER Rules, s 23.

¹⁴ Macaulay and Sprague at 12-112.120.

¹⁵ Macaulay and Sprague at 12-112.121 and 35-24.

allowing the seating of a witness panel. We submit that CPAWS' request should be denied.

In conclusion, we again submit that the JRP has more than sufficient information to proceed to a hearing and we further request that the JRP dismiss the CPAWS Submission addressing procedural matters as noted above.

Yours truly,

<Original signed by>

Martin Ignasiak

c. Gary Houston
Mike Bartlett