

June 17, 2024

BY EMAIL

The Hon. Steven Guilbeault
Minister of Environment and Climate Change
200 Sacré-Coeur Boulevard
Gatineau QC K1A 0H3

Dear Minister Guilbeault:

**RE: IMPACT ASSESSMENT OF GREAT BEAR GOLD PROJECT – REFERRAL TO
REVIEW PANEL [REFERENCE NUMBER 85832]**

Please be advised that we are co-counsel for Asubpeeschoseewagong Anishinabek (“ANA” or “Grassy Narrows First Nation”) in relation to the above-noted designated project.

On behalf of ANA, we hereby request that you refer the impact assessment of the Great Bear Gold Project to a review panel pursuant to section 36 of the *Impact Assessment Act (IAA)*. This review panel should be an independent panel composed of experts and respected people mutually agreeable to ANA and Canada.

For the reasons set out below, our client’s requested referral of the impact assessment to a review panel is in the public interest, facilitates protection of ANA’s Aboriginal, treaty, and inherent rights, and supports ensuring that the adverse effects of the project upon matters of federal jurisdiction will be assessed, mitigated and prevented in a more credible, participatory, and accountable manner.

Please be advised that ANA’s preliminary comments on the draft Tailored Impact Statement Guidelines and the proposed Indigenous Engagement and Partnership Plan for this project have been provided to the Impact Assessment Agency of Canada (“Agency”) under separate cover.

Please note that ANA does not consent to the Great Bear Gold Project and ANA reserves the right to file further submissions regarding this referral request as additional information, new documentation and/or technical capacity becomes available to ANA.

This request for Ministerial referral to a review panel should be read in conjunction with all the previous comments, letters, and other communications sent from ANA to your Ministry and/or the Impact Assessment Agency of Canada to date, including expert reports by Dr. Carignan, Dr. Podur, Dr. Mergler, Dr. Willow, Dr. Morin, Dr. Branfireun and the reports and scientific literature on mercury and Grassy Narrows that have been shared with Crown or are publicly available.

BACKGROUND

As noted in ANA's letter to the Agency, proponent, and Ontario government dated March 6, 2024 (attached), our client remains deeply concerned about, and continues to strongly object to, this proposed project.

The overall context for ANA's opposition to the Great Bear Gold Project is provided by the significant adverse environmental, socio-economic, and human health impacts that the ANA community has suffered – and still suffers – due to industrial resource-based activities undertaken in, around, and upstream of our client's territory without ANA consent, meaningful consultation and accommodation with ANA, and often without prior notice to ANA.

The ANA letter also states that the designated project, if approved, would be sited within ANA's traditional use area and cause adverse impacts to the local environment, water quality, fish and wildlife, species at risk, migratory birds, and the downstream ANA community:

The Great Bear Gold Project falls within the area that Grassy Narrows people have historically and currently use for the exercise of our rights and way of life. It is also upstream from our community. Pollutants in the water and impacts on the surrounding land, fish and wildlife will have a direct impact upon us and could also exacerbate mercury contamination in our waterways.

ANA has repeatedly and clearly communicated with the Crown and the mining industry that our people are in crisis, the environment which supports us is severely impacted, our health is failing. The cumulative impacts continue to significantly interfere with our treaty, Aboriginal and inherent rights.

The Great Bear Gold Project will have an impact upon areas that Canada claims as within federal jurisdiction, such as species at risk, fisheries, waterways and Indigenous peoples (page 2).

Notably, the proponent's Detailed Project Description (January 2024) indicates that the following factors were used to identify Indigenous communities that should be engaged in the impact assessment process:

- Proximity to the Project, including known historic and current Indigenous traditional land use and occupation, location of Reserve lands
- Potential for their interest to be affected Project activities
- Past or current interest in similar projects or developments in the region
- Guidance from government agencies, such as the provincial Ministry of Mines (page 9) .

Applying these factors in this case, the Detailed Project Description correctly lists ANA as an Indigenous community to be engaged in the assessment process since ANA is interested in, or may

be “materially affected” by, the Great Bear Gold Project (page 9). Accordingly, ANA has the requisite standing and constitutionally protected rights to request referral of the impact assessment to a review panel under the *IAA*. Notably, ANA is the first community downstream of the project site, and is already subject to extreme cumulative impacts, and therefore ANA is acutely, and uniquely, at risk from this Project.

REASONS FOR REFERRAL TO REVIEW PANEL

(i) The *IAA* Test for Referral to a Review Panel

Section 36(1) of the *IAA* empowers you to refer an impact assessment to a review panel if you opine that it is in the public interest to do so. This referral must generally occur no later than 45 days after the Notice of Commencement of an impact assessment has been posted online.

Section 36(2) of the *IAA* outlines the mandatory factors to be considered when making the public interest determination about referring an impact assessment to a review panel:

36(2). The Minister’s determination regarding whether the referral of the impact assessment of the designated project to a review panel is in the public interest must include a consideration of the following factors:

- (a) the extent to which the effects within federal jurisdiction or the direct or incidental effects that the carrying out of the designated project may cause are adverse;
- (b) public concerns related to those effects;
- (c) opportunities for cooperation with any jurisdiction that has powers, duties or functions in relation to an assessment of the environmental effects of the designated project or any part of it; and
- (d) any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*.

We are aware that the federal government has recently proposed various amendments to the *IAA* in response to the 2023 ruling by the Supreme Court of Canada that aspects of the legislation are unconstitutional for division-of-powers reasons.

However, aside from some minor changes in certain upfront definitions (e.g., “adverse effects within federal jurisdiction” and “direct or incidental adverse effects”), no specific amendments have been proposed to date in relation to your statutory discretion under section 36 of the *IAA*. Therefore, your referral authority under this provision remains fully intact and should be exercised in this case, as discussed below.

(ii) Applying the IAA Test to the Great Bear Gold Project

For the purposes of this referral request, ANA's submissions focus on three public interest factors listed in section 36(2)(a), (c) and (d) of the IAA.

Adverse Effects on Matters of Federal Jurisdiction

The current IAA definition of "effects within federal jurisdiction" is generally limited to fisheries, aquatic species at risk, migratory birds, and Indigenous physical/cultural heritage, Indigenous land/resource uses for traditional purposes, Indigenous structures/sites of historical/archaeological significance, and changes to the health, social or economic interests of the Indigenous peoples of Canada (section 2 of the IAA). The proposed amendment to this definition presently being considered by Parliament essentially repeats the same listed items but inserts the qualifier that these effects must be "adverse", which is further defined as a "non-negligible adverse change."

Regardless of whether the current or amended definition is applied in this case, it is indisputable that the Great Bear Gold Project, if approved, has considerable potential to cause significant (non-negligible) adverse impacts upon most or all the above-noted items within federal jurisdiction.

For example, as noted in the attached ANA letter, the Great Bear Gold Project site falls within Grassy Narrows' Interim Area of Interest for Mining. Accordingly, the project will likely cause negative impacts on the lands and resources (e.g. moose, caribou, wolverine, walleye, wild rice, medicines, etc.) which were traditionally used – and are still being used today – by ANA members for hunting, fishing, trapping, and other harvesting activities or spiritual practices in the vicinity of the project and generally throughout the English River watershed.

ANA is also concerned that the proposed forest/vegetation clearing, other destructive disturbances, and industrial-scale activities associated with the project (e.g., surface water takings, aquifer dewatering, wastewater discharges, waste rock and tailings storage, etc.) may cause localized and downstream water pollution problems and exacerbate the well-documented health impacts of the mercury and methylmercury known to be present in the watercourses (and bioaccumulating in fish) within ANA territory. This is particularly true because sulfate will be present in wastewater discharges, which leads to an increase in mercury methylation in the receiving bodies of water.

Similarly, ANA is alarmed by the potential adverse impacts on groundwater, surface water, and aquatic ecosystems arising from metal leaching and acidic drainage from the 1 million tonnes of waste rock that will be excavated during advance exploration and stored in perpetuity on-site either above-ground or below-ground, and by the far larger mass of tailings that will be generated during mining and stored on-site in perpetuity if the project is approved.

ANA's preliminary submission to the Impact Assessment Agency of Canada about this project elaborates in greater detail on the likely adverse impacts in areas of federal jurisdiction from this Project including on species at risk and on the rights, health, wellbeing, and livelihood of Grassy Narrows people.

By any objective standard, these and other effects upon matters of federal jurisdiction are profound, significant and deleterious in nature. Accordingly, ANA submits that it is imperative to ensure that such impacts are properly identified and assessed in an open, accessible and rigorous manner, which is best achieved by referring the impact assessment to a review panel.

Opportunities for Inter-Jurisdictional Cooperation

Ontario's *Environmental Assessment Act (EAA)* does not automatically apply to mining projects in the province. In addition, the Ontario government has taken no steps to date to designate the Great Bear Gold Project as an undertaking that requires a Comprehensive EA under Part II.3 of the *EAA*.

Accordingly, referral of the impact assessment to a review panel in this case poses no constraints on, and has no negative implications for, inter-jurisdictional cooperation with Ontario for the purposes of evaluating impacts under the *IAA* and *EAA*. For example, since the Great Bear Gold Project is not currently subject to Part II.3 of the *EAA*, there is no opportunity for ANA to request that the matter be referred to the Ontario Land Tribunal for a public hearing and decision.

However, if Ontario decides to designate the Great Bear Gold Project, then referral to a review panel under the *IAA* preserves the opportunity to integrate the two assessments pursuant to the joint review panel provisions of the *IAA* (section 39) and the harmonization provisions of the *EAA* (section 3.1) to ensure that risks of adverse impacts to all relevant areas of purported federal and provincial jurisdiction are assessed comprehensively in a holistic and participatory manner.

ANA also notes that the Great Bear Gold Project requires various provincial permits, licences, and approvals (e.g., Permit to Take Water, Environmental Compliance Approval (Sewage), etc.,). However, none of these permits considers the Project as whole in its full context, which further illustrates the need for inter-jurisdictional coordination and cooperation between the federal and provincial governments.

Adverse Effects on Section 35 Rights

As described in the attached ANA letter, ANA is an Anishinaabe First Nation with traditional territory in what is now called northwestern Ontario and the ANA people have cared for and lived on these lands for countless generations.

As noted above, ANA people hunt, trap, fish and practice their Anishinaabe way of life throughout this territory to provide for themselves, their families and their community. This territory is the foundation of who Grassy Narrows people are as Anishinaabe people, who follow the teachings of the Elders to be responsible for the territory and to *Manaachitootaa Aki* (protect the land).

The ANA community has an inherent right to self-determination and law-making powers, as conferred upon ANA by the Creator. In addition to these inherent rights, ANA exercises Aboriginal rights and established Treaty 3 rights which are protected by section 35 of the *Constitution Act, 1982*.

In 1873, the Anishinaabe adhered to Treaty 3. The Treaty 3 Commissioner promised the Anishinaabe that the Treaty would protect their harvesting practices forever, which would allow ANA people to hunt, fish, trap, gather, and harvest throughout the Territory as they had before “as long as the sun shone and the waters flowed.” At no time did the Anishinaabe agree to the erosion, impairment, or termination of their harvesting rights within the traditional territory beyond the Dawson route.

Accordingly, the attached ANA letter states that the intrusive, large-scale, and complex nature of the Great Bear Gold Project poses sizeable risks to, and impacts upon, the community’s Treaty 3 rights:

The Great Bear Gold project is a massive one, with great risks to Grassy Narrows and that can have a major impact on many aspects of Grassy Narrows’ relationship with the Crown including our Treaty, the honour of the Crown, fiduciary duties, outstanding obligations, unmet duties, and reconciliation.

In these circumstances, referral of the impact assessment to a review panel will provide an important forum for ANA to pursue and present their concerns, lay and opinion evidence, and communal perspectives on the project’s impacts on Aboriginal, treaty, and inherent rights.

Granting ANA’s requested referral would also be consistent with the current *IAA* preamble and the federal government’s mandate under section 6 of the *IAA* (and the proposed amendments thereto) which invoke the *United Nations Declaration of the Rights of Indigenous Peoples*, require respect for Aboriginal/treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, and emphasize reconciliation with the Indigenous peoples of Canada.

ANA hastens to add that the referral to a review panel does not, in and of itself, remedy the continuing failure of the Crown to meaningfully notify, consult, and accommodate ANA, and gain ANA’s free, prior, and informed consent, in relation to the Great Bear Gold Project.

On this point, ANA maintains its position that honourable, sincere and timely government-to-government engagement must occur in relation to the Great Bear Gold Project (including the threshold question of whether the project can proceed at all). Moreover, the Crown’s duty to consult cannot be delegated to the proponent in the impact assessment process, regardless of whether the ANA referral request is granted.

Part of the mandate of the review panel should be assess and to make recommendations to the Minister on whether, or not, ANA’s free, prior, and informed consent for the project has been obtained and on whether allowing the project to proceed would be consistent with the *United Nations Declarations of the Rights of Indigenous Peoples*.

(iii) Past Practice regarding Referral of Mining Projects

Under the *IAA* and its predecessor legislation (i.e., *Canadian Environmental Assessment Act, 2012* and *Canadian Environmental Assessment Act, 1992*), there are several precedents where

assessments of mining projects throughout Canada have been referred to independent review panels, including the following proposed mines:

- Marathon Platinum Group Metals and Copper Mine Project (Ontario)
- Suncor Base Mine Extension Project (Alberta)
- Rose Lithium – Tantalum Mine Project and the James Bay Lithium Mine Project (Quebec)
- Grassy Mountain Coal Project (Alberta)
- Robb Trend Coal Mine Expansion Project (Alberta)
- Frontier Oil Sands Mine Project (Alberta)
- Jackpine Mine Expansion Project (Alberta)
- Pierre River Mine Project (Alberta)
- Prosperity Gold-Copper Mine Project (British Columbia)

Given the well-documented adverse environmental effects of major mine projects, this referral track record is reasonable, intelligible, and justifiable to ensure that robust assessments of mining impacts on areas of federal jurisdiction are carried out by review panels.

In relation to the above-noted Marathon mining project in northwestern Ontario, ANA notes that the proposal referred to the review panel in that case included three open pits, an ore processing plant, tailings and mine rock storage facilities, site access roads, a power transmission line, explosives factory and magazines, water management facilities, ancillary mine infrastructure, associated activities, and an estimated lifespan of 11.5 years.

In comparison, as indicated in the Detailed Project Description (pages 15 to 29), the components of the Great Bear Gold Project are substantially similar to the Marathon proposal in terms of size, scale, infrastructure, and potential environmental impacts. However, the Great Bear Gold Project includes not only three new open pits but also features an underground mine, storage of 1 million tonnes of waste rock arising from advanced exploration, extensive water-takings from surface water and groundwater resources, discharges of treated effluent to the Chukuni River, and an overall lifespan of approximately 25 years. In addition, the Great Bear Gold Project is proposed to take place in an area with extreme pre-existing, current, and planned cumulative impacts to land and water from industrial activities which have resulted in horrific and well-documented impacts to the health and wellbeing of Grassy Narrows people. If the Marathon mine project warranted a review panel referral, then the Great Bear Gold Project clearly does as well for the site-specific reasons outlined above.

More generally, ANA notes that Ministerial decisions to refer mining and non-mining projects to review panel hearings have been typically based on various considerations, including: (a) potential adverse environmental effects to fish and fish habitat, aquatic species at risk, and migratory birds; (b) potential impacts on the rights of Indigenous peoples; (c) general public concern; and (d) the opportunity to cooperate with provincial governments. In ANA's view, these considerations are directly relevant and fully applicable in relation to the Great Bear Gold Project.

The plight of Grassy Narrows, and the threat of additional impacts to Grassy Narrows from mining activities, are one of the most notorious matters of general public concern in Canada as evidenced by the hundreds of prominent news media reports and thousands of public letters addressing this matter in recent years. Accordingly, there is no compelling policy reason or evidence-based rationale to depart from the well-established federal practice of referring mining project impact assessments to review panel hearings. Indeed, the Great Bear Gold Project is at least as worthy, if not more, of a review panel hearing, than the precedent projects listed above.

(iv) Public Interest Benefits of Referral to a Review Panel

At present, the forthcoming impact assessment of the Great Bear Gold Project will be conducted by the Agency unless the matter is referred to a review panel.

With all due respect to the Agency's institutional experience in environmental assessment, ANA submits that it would be preferable, from the public interest perspective, to appoint and empower an independent review panel in relation to the Great Bear Gold Project.

First, as a matter of law, the members appointed to the review panel must be "unbiased and free from any conflict of interest relative to the designated project" and must "have knowledge or experience relevant to the designated project's anticipated effects or have knowledge of the interests and concerns of the Indigenous peoples of Canada that are relevant to the assessment" (section 41 of the *IAA*, emphasis added). These important qualifications do not expressly apply to Agency officials conducting impact assessments (see sections 153 to 165 of the *IAA*). All of Canada will be watching this impact assessment process, and the persons carrying out this impact assessment must be, and must be universally perceived to be, unbiased and expert in the relevant subject matter.

Second, review panels are obligated under the *IAA* to hold public hearings that offer "the public an opportunity to participate meaningfully, in the manner that the review panel considers appropriate and within the time period that it specifies, in the impact assessment" (section 51(1)(c) of the *IAA*). The public hearings held by review panels may be flexible or informal, but they must be generally consistent with "the rules of procedural fairness and natural justice" (section 54 of the *IAA*). Again, this latter statutory provision does not expressly apply to Agency-led impact assessments.

Third, the public hearings held by review panels provide more extensive participatory opportunities for Indigenous communities such as ANA to present factual, technical and scientific evidence about the designated project and the factors listed in section 22 of the *IAA*. Similarly, review panel hearings enable Indigenous communities such as ANA to test or respond to the

evidence offered by proponents and government ministries or agencies in relation to the impact assessment. As correctly noted by a leading commentator:

The most important opportunity for public involvement in federal environmental assessment is a panel review triggered by the Minister of Environment.¹

Fourth, the hearing process (including full public disclosure of information, ability to summons witnesses, etc.) will greatly assist in ensuring the accuracy, reliability, and soundness of the review panel's report to the Minister (section 51(1)(e) of the *IAA*). These procedural mechanisms, in turn, will help to ensure credible, transparent, and informed decision-making under sections 60 to 65 of the *IAA*.

For the foregoing reasons, ANA submits that a review panel hearing is the preferable procedure for gathering information, generating recommendations, and making decisions under the *IAA* about the adverse effects of the Great Bear Gold Project on matters of federal jurisdiction. Put another way, ANA believes that participating in a review panel hearing is far superior to merely reviewing and commenting on documents posted on the Registry (or participating in non-public workshops or meetings) in an Agency-led impact assessment.

FORMAT OF THE REVIEW PANEL

Due to the extreme and unique circumstance of Grassy Narrows, and of the risks posed to Grassy Narrows by the Great Bear Gold Project, the review panel should:

- 1) be jointly selected together with Grassy Narrows such that all review panel members have Grassy Narrows' free, prior, and informed, consent.
- 2) have the review panel members' scope, process, and timeline set in a way that gains Grassy Narrows' free, prior, and informed consent.
- 3) include within their scope an assessment of whether Grassy Narrows' free, prior and informed consent for the Project has been obtained, and of whether approval of the Project would be consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*.

CONCLUSION AND REQUESTED ORDER

In the circumstances of this case, ANA concludes that referring this matter to a review panel will provide a more effective, efficient, and equitable process for conducting the impact assessment required for this designated project under the *IAA*. Given the project's location, size, scale, design/operations, and direct, indirect, and cumulative adverse effects on matters of federal jurisdiction as well as on ANA's aboriginal, treaty, and inherent rights, referral of the impact assessment to a review panel is both warranted and appropriate from the public interest perspective.

¹ Rod Northey, *Guide to the Canadian Environmental Assessment Act (2019 ed.)* (Toronto: Lexis Nexis), page 587.

Accordingly, ANA requests that you refer the impact assessment of the Great Bear Gold Project to a review panel at the earliest opportunity. Once this referral is made under the *IAA*, our client requests a meaningful partnership in jointly appointing review panel members and in the establishment of the terms of reference for the review panel.

Please feel free to contact the undersigned if you require additional information about this referral request, and we look forward to your reply.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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