



200 – 2006 West 10<sup>th</sup> Avenue  
Vancouver, BC V6J 2B3  
www.wcel.org  
tel: 604.684.7378  
fax: 604.684.1312  
toll free: 1.800.330.WCEL (in BC)  
email: admin@wcel.org

BY EMAIL

February 22, 2012

**Livain Michaud, Panel Manager**  
**Canadian Environmental Assessment Agency**  
160 Elgin Street, 22nd Floor  
Ottawa ON K1A 0H3  
NewProsperityReview@ceaa-acee.gc.ca

Dear Mr. Michaud:

**RE: Comments on the draft Terms of Reference for  
the Proposed New Prosperity Gold-Copper Mine Project  
CEAA Registry #11-05-63928**

Thank you for the opportunity to comment on the *Draft Terms of Reference* (“TOR”) for the proposed New Prosperity Gold-Copper Mine Project (the “Project”).

Our comments focus on two areas of concern: (1) the role of First Nations and Indigenous peoples in this assessment and in environmental assessment more generally; (2) the arbitrary and unfairly restricted timelines proposed in the draft TOR.

### **(1) Role of First Nations and Indigenous Peoples in this Assessment and in Environmental Assessment Generally**

We do not represent any First Nations who are involved in the environmental assessment process for the Project.

The proposed process lacks a mechanism for First Nations to participate as decision makers in relation to projects taking place in their territories. Ultimately, we believe that the environmental assessment process must be negotiated directly with First Nations who will be affected by the Project, and in particular, it should be re-built from the ground up to allow for First Nations to exercise a fair degree of decision making authority within their traditional territories. The environmental assessment process needs to be reformed dramatically to allow for a participatory and fair process such that Aboriginal rights-holders are involved in a timely way, have the ability to exercise authority flowing from their inherent governance rights within the decision making process. The environmental assessment process must also provide Aboriginal groups with sufficient and reliable funding capacity to engage in the process in a meaningful way – currently many Nations are overwhelmed by the number of proposed

developments, or re-proposed developments, in their territories and do not have the capacity to properly respond.

In relation to the TOR specifically, we note that the TOR makes it clear that the panel is not to make any conclusions in relation to the nature and scope of Aboriginal title or rights, the scope of the duty to consult and any necessary accommodation, and other related matters. However, the TOR states that the panel will receive information on the nature and scope of Aboriginal title and rights, and potential adverse impacts or infringements from this Project on those rights. The TOR do not set out in detail how the Crown, as represented by the federal government, intends to deal with this information. The process that the Crown uses to consider these impacts, to consult and potentially to develop accommodations in relation to such impacts, and to make decisions in relation to the Project, should itself be the subject of consultation with affected First Nations.<sup>1</sup>

On the selection of members who will sit on the review panel, currently section 4.1 of the TOR states that “After consulting with the responsible authorities, the Minister of the Environment will appoint members of the Panel, including the Chairperson.” We submit that First Nations should be involved in an ongoing dialogue about candidates and recommendations. This goes beyond suggesting panelists for consideration and establishes a process where First Nations can make or influence recommendations to the Minister.

The previous panel found that the Prosperity project would have devastating impacts on Aboriginal culture, heritage, traditional activities, Aboriginal rights and Aboriginal title. For this reason, we submit that, in addition to other required expertise, each panel member should be required to have extensive experience and familiarity with Aboriginal concerns, traditional knowledge and use, culture and heritage.

## **(2) Arbitrary and Unfair Time Restrictions**

The proposed timelines set out for the environmental assessment and for its component stages are arbitrary, impede public participation, restrict the Panel's ability to fully consider all relevant information, and the periods for consultation and consultation are generally too short to allow for the thoughtful review and consideration that we submit is necessary for defensible decision making.

Moreover, there is significant uncertainty in relation to the time the proponent has to complete stages of the process and the panel is given unrestricted discretion to change timelines without notice, both of which could frustrate the process for all involved.

Undermining public participation, which is a key purpose listed in section 4 of the *Canadian Environmental Assessment Act* (CEAA), and limiting the panel's ability to hear and consider all the information that it must (section 34 of CEAA), increases the likelihood that the Panel will conduct an environmental assessment that inadequately considers the factors mandated under the TOR and CEAA.

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<sup>1</sup> See for example *Ministry of Environment et al. v. Dene Tha' First Nation*, 2006 FC 1354 at para 110, aff'd 2008 FCA 20, in which the court suggests that the duty to consult and accommodate on a project of this nature is triggered at a very early stage, when the agencies involved make their initial decisions about process design and that they will proceed by way of a Review Panel.

In the November 7, 2011 news release<sup>2</sup> from the Canadian Environmental Assessment Agency, it states:

The Minister indicated that the time for the Agency to complete these activities and for the panel to conduct its review, including holding public hearings and preparing its report, is to be no more than 12 months, in total. This timeline is consistent with the prescribed timeline for a comprehensive study.

We do not believe that the arbitrary “no more than 12 months” time limit that the federal government has sought to impose upon the Panel is fair and we submit that rushed processes for environmental assessment inhibit full consideration of the relevant legal, technical and scientific information and thus result in poor decision making that does not achieve long term sustainability goals.

In particular, we have the following concerns with the time limitations proposed in the TOR:

- 1) The 30 day comment period on the draft TOR and the draft Environmental Impact Statement (EIS) is not consistent with the arguably less complex projects that are undergoing comprehensive study, such as the proposed Ajax Copper Gold Mine, where the public has been given 60 days to comment on that project’s draft Application Information Requirements / Environmental Impact Statement Guidelines document.<sup>3</sup>
- 2) We note that this is a review panel process and therefore we do not understand how comparing its length to that of a comprehensive study environmental assessment process (per the above referenced media release) achieves 'consistency' of process or timelines.
- 3) The panel itself is given only 30 days to determine if the EIS is sufficient, and the public is given only 15 days to comment on responses to deficiencies submitted by the proponent (sections 4.13 and 4.15) before the panel is given just another 15 days to consider those comments and determine if the EIS's deficiencies have been sufficiently addressed (section 4.16). This rushed timeline for reviewing highly technical and scientific information is unrealistic, does not allow for full consideration of all information from the proponent or from the public and First Nations, and thus has the potential to contribute to poor and ill-informed decision making.
- 4) The 25 day notice of the start of public hearing is unfairly short. The proposed short notice will deprive the public, environmental groups, Aboriginal representatives, and the responsible authorities and potentially the proponent of the opportunity to prepare to participate meaningfully in the hearing. These groups are actively involved in other matters, including other resource development referrals and consultations, and must have adequate notice in order to schedule participation in the hearing process for the Project. Moreover, there is no requirement as to when the panel will issue procedures for the conduct of the public hearing (section 4.18); we recommend that these procedures should be issued at the time of the announcement of the public hearing.

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<sup>2</sup> See CEAA Registry site: <http://www.ceaa.gc.ca/050/document-eng.cfm?document=53081>

<sup>3</sup> See CEAA Registry site: <http://www.ceaa.gc.ca/050/document-eng.cfm?document=53713>

- 5) We believe that the directed 30 day timeframe for the hearing (section 4.21) is directly contrary to the mandate of the panel to “provide for a full examination of the matters determined by the Panel to be relevant, and encourage public input and participation in the environmental assessment process” (section 4.18) and to have the public hearing “provide the Proponent, the public, Aboriginal persons and groups, government authorities and other interested parties with an opportunity to present their views on the Project and to question information that has been provided by other participants” (section 4.19).
- 6) Significantly, while there are strict and specific time limits on public participation and comment opportunities, on the Review Panel's activities, and in some cases on the Agency's activities (e.g. review of the EIS in section 4.7), there does not appear to be any time limits placed on the proponent in relation to preparing the EIS or revising the EIS in response to deficiencies and questions (e.g. section 4.8). In addition, the time it takes for the proponent to respond to identified deficiencies in the EIS is excluded from time restrictions (section 4.10).
- 7) Whereas the public's timelines for comment and participation are firm, the President of the Agency need only 'use best efforts' to meet a 14 calendar day time limit (section 4.2), and there is no provision for penalty or re-dress if the President does not meet this time limitation.
- 8) The panel retains discretion to modify any timelines set out in sections 4.12 through 6.8. The panel has to give notice to the Minister and public of this, but no advance notice is required. This introduces another layer of uncertainty to the process for all parties involved, including the proponent.

To address the above concerns, we recommend setting realistic and longer timelines in the final TOR for the Agency, panel, public and First Nations, *and* the proponent so that all parties have certainty about how long each stage of the environmental assessment will likely take. We recommend that if timelines are set for participation and for the panel, then similar – but also realistic – timelines should be specified for the proponent-led stages of the process such as preparation of the EIS and response to deficiencies in the EIS. As an example of a realistic timeline, and to maintain consistency with the recently finalized Terms of Reference for the proposed Site C Clean Energy Project, we recommend that the Panel provide 90 days notice of the start of the public hearing and that hearing procedures be issued either simultaneously or within 60 days prior to the start of the hearing.

Yours truly,

**WEST COAST ENVIRONMENTAL LAW ASSOCIATION**



Rachel S. Forbes  
Staff Lawyer  
rachel\_forbes@wcel.org