

Placing Transparency and Sustainability at the Forefront of the Marathon Palladium Project Through Adequate Environmental Monitoring

Sara Libman, J.D., B.A. (Hons.)
Lawyer / Partner, LIBMAN LAW LLP

On Behalf of Citizens for Responsible Industry in Northwestern Ontario

Miigwetch to Biigtigong Anishinaabek for sharing their unceded traditional territory with us today.

About CRINO



Citizens for Responsible Industry in Northwestern Ontario (CRINO) is a grassroots community group situated in Marathon, Ontario, focused on maintaining a healthy and prosperous community on Lake Superior's North Shore.

CRINO is not opposed to the Marathon Palladium Project, as it brings the promise of economic growth to the region. CRINO is concerned about the project's environmental impacts on the land and water. Advocating for responsible industrial practices extends to advocating for ecologically-sound practices that will protect the health of humans and the natural environment in both the short-term and the long-term.

Key Reference Documents from the Public Record

CRINO Submissions During Public Comment Period:

- Responsibility, Accountability, and Transparency are Vital to Safeguard the Well-Being of Community Members and the Natural Environment (Reference # 873)

The Proponent's Responses to Information Requests from Reference #875:

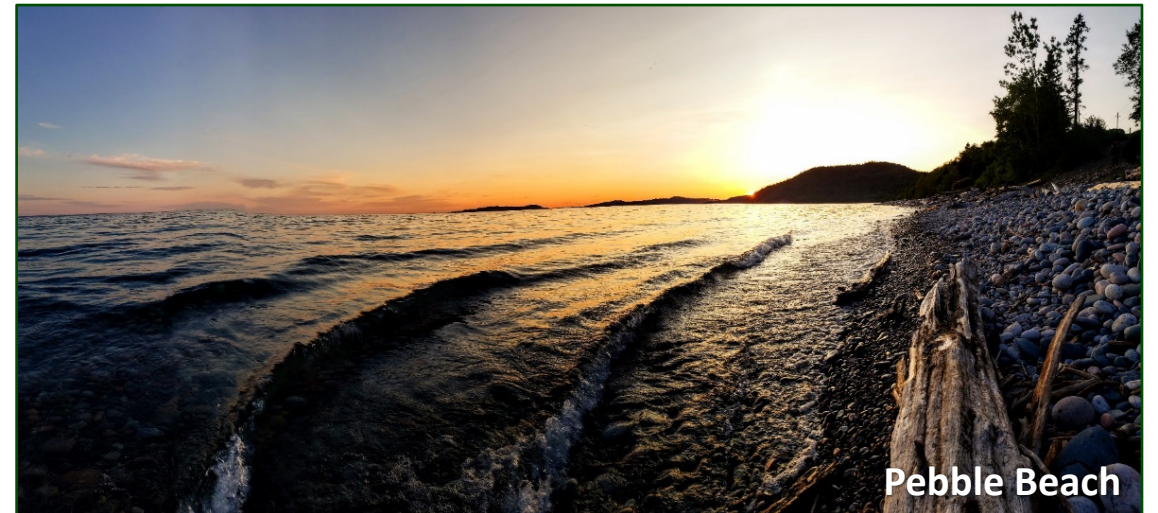
- Response #2: Environmental Management System

Overview of Presentation

1. The Role of Environmental Monitoring and Environmental Enforcement

- ✓ Applicable Federal laws and regulations to protect the environment
- ✓ Applicable Provincial (Ontario) laws and regulations to protect the environment
- ✓ CRINO's concerns about governmental capacity to monitor and enforce environmental regulations and protocols
 - ✓ Federal Level
 - ✓ Provincial Level
- ✓ Environmental Performance Targets and Other Strategies

2. Recommendations



The Role of Environmental Monitoring and Environmental Enforcement

Federal Legislation & Permits

Fisheries Act

- Sections 35 & 35.1

Metal and Diamond Mining Effluent Regulations (MDMER), under the Fisheries Act

Canadian Environmental Protection Act, 1999 (CEPA)



The Role of Environmental Monitoring and Environmental Enforcement

Provincial Legislation & Permits



Environmental Protection Act (EPA)

- Environmental Compliance Approvals (ECAs)

Ontario Water Resources Act

- Permits to Take Water

Mining Act

- Closure Plan

Concerns About Federal Government's Capacity to Effectively Monitor & Enforce Environmental Regulations and Protocols

Fisheries Act & its Regulations

The capacity (or lack thereof) of Environment and Climate Change Canada (ECCC) to effectively administer and enforce the *Fisheries Act* and its Regulations.

2019 Report from Commissioner of the Environment and Sustainable Development (CESD) regarding the Protection of Fish from Mining Effluent

- Insufficient monitoring of whether mining companies carried out plans to counteract harm to fish and their habitat when building tailings impound areas.
- ECCC lacked complete and up-to-date information on compliance with effluent limits.
- Inspections of Ontario mines by the ECCC were significantly less frequent compared to other regions, despite Ontario having the highest number of mines in Canada.

Concerns About Federal Government's Capacity to Effectively Monitor & Enforce Environmental Regulations and Protocols

Example: Teck Coal Limited (British Columbia)

- March 2021: ordered to pay \$60 million under the *Fisheries Act* for two counts of unlawfully depositing a deleterious substance into water frequented by fish.
- The largest penalty ever imposed by a court for violating the Fisheries Act
- The deposit of waste rock leachate into the Fording River occurred in 2012
- Despite these severe penalty, it was slow to come to fruition, and local community groups were wary of this potential risk unfolding for a long time:
 - Lars Sanders-Green of Wildsight (a grassroots conservation group situated in BC) stated that this problem of Teck's emissions has been known since 1995.

Concerns About Federal Government's Capacity to Effectively Monitor & Enforce Environmental Regulations and Protocols

Canadian Environmental Protection Act, 1999 (CEPA)

With the 2019 audit of the ECCC's record of monitoring and enforcement under the *Fisheries Act*, it is reasonable to be cautious about the ECCC's ability to effectively enforce *CEPA's* regulations in the Marathon Palladium Project.

Bill S-5, *An Act to Amend the Canadian Environmental Protection Act, 1999* was tabled in the Senate of Canada in February 2022. Further amendments and changes to Bill will greatly shape the way toxic chemicals are monitored and controlled.

- CRINO awaits to see how this Bill will change the ECCC's enforcement responsibilities.

Concerns About Federal Government's Capacity to Effectively Monitor & Enforce Environmental Regulations and Protocols

Federal Petition No. 460

CRINO submitted a Federal Petition to the CESD in October 2021. The petition expressed concerns about the federal environmental monitoring and enforcement regime for resource-based projects, largely referring to the findings from a 2019 CESD Audit Report on protecting fish and fish habitats from mining effluent.

Sought input from:

- Environment and Climate Change Canada
- Fisheries and Oceans Canada
- Impact Assessment Agency of Canada
- Natural Resources Canada

CRINO received a response in February 2022 from the Minister of Environment and Climate Change Canada, which was prepared jointly with the above-mentioned Ministries.

The Response did not illicit re-assurance or faith in the monitoring and enforcement practices surrounding resource-based projects, as the response primarily focused on explaining what procedures are in place according to legislation and regulations, rather than explaining whether these procedures are properly implemented.

Concerns About Ontario's Capacity to Effectively Monitor & Enforce Environmental Regulations and Protocols

The Collection of Penalties (or lack thereof)

Environmental Penalties, Fines, and remediation costs are not collected from polluters.

- This jeopardizes the **"Polluter Pays" Principle**.

The Auditor General of Ontario found that between 2016-2020, \$5.6 Million in spills-response was unpaid by spillers.

The \$ Value of environmental fines in Ontario has experienced a downward trend since 2017

Unpaid penalties and fines are a serious issue in Ontario. For Example:

- Sunrise Propane fined over \$5.3 million plus victim surcharges after a 2008 explosion
 - \$5,642,058 remained outstanding at the time of the CBC Report
 - Sunrise Propane has not gone bankrupt
- Mohawk Garnet Mine fined \$250,000 for EPA violations
 - The Mining Company went bankrupt in 2016
 - It is unlikely that the fine will ever be paid



Concerns About Ontario's Capacity to Effectively Monitor & Enforce Environmental Regulations and Protocols

Ministry of Northern Development, Mines, Natural Resources, and Forestry [Natural Resources Ministry]

Mining Act: concerns about closure-costs estimates and financial assurances being sufficient to properly close out a mine.

A closure-plan needs to be robust, and adequately financed to protect human and environmental health.

Self-assurance should not be a financing practice for closure plans.

- This exposes the government to financial risk of covering rehabilitation costs in the event that a company fails to meet its obligations

Ministry of Environment, Conservation and Parks (Environment Ministry)

Environment Ministry's shortfalls in Environmental Monitoring and Enforcement:

- CRINO has expressed concerns about this ministry's enforcement record for the past decade.
- These concerns have also been highlighted repeatedly in reports released by both the former Environmental Commissioner of Ontario, and the Auditor General of Ontario

Concerns About Ontario's Capacity to Effectively Monitor & Enforce Environmental Regulations and Protocols

Auditor General of Ontario's 2021 Value-for-Money Audits

“Reporting on Ontario's Environment”

- The Province is **not** publicly reporting on the overall state of Ontario's environment
- The three Ministries [Environment Ministry, Natural Resources Ministry, and Agriculture Ministry] are not taking advantage of the Environmental Registry to inform the public of the release of Ministerial reports that relate to the environment
- The Environment Ministry has stopped regularly reporting on the overall state of Ontario's water quality

Concerns About Ontario's Capacity to Effectively Monitor & Enforce Environmental Regulations and Protocols

Auditor General of Ontario's 2021 Value-for-Money Audits

"Hazardous Spills"

- Environment Ministry does **not** conduct adequate regulatory activities to reduce the risk of occurrence of the most common sources of spills.
- Environment Ministry does **not** verify that entities with requirements for spill prevention and contingency planning have effective plans in place.
- The Environment Ministry is **not** informed of spills in a timely manner
- Decrease in proactive inspection & enforcement due to staff reductions
- The Environment Ministry allows repeat offenders to continue operating because of an ineffective compliance strategy

Using Environmental Performance Targets

- Any annual operating permits or ECAs being issued to the proponent must be tied to environmental performance.
- With inadequate inspections of Ontario mines being a flagged issue for ECCC and Ontario's Environment Ministry, it is important that there are strict standards applied to permits issued to this Proponent.
- It is also essential that the environmental standards and performance that shape these permits are assessed on a regular basis, and are altered/updated as necessary to sufficiently protect human and environmental health from the emissions of the Marathon Palladium Project.
- Any government funding from both federal or provincial ministries must also be tied to environmental performance.
 - The public purse should not be providing grants or funding to extractive industries when there is the risk that the same industry is polluting the community.

Other Strategies

Adaptive Management

- Adaptive management is a “best practice mechanism to respond to inevitable unforeseen events impacting the design, implementation and operation of developments.”
- To have an effective adaptive management strategy, the following elements should be implemented:
 - decisions being reviewed on a regular basis;
 - on-going examination of key uncertainties;
 - systematic monitoring;
 - an emphasis on feedback and learning; and
 - community involvement in design and implementation of the monitoring programs.
- Adaptive management needs to be used appropriately. It is not a cure-all approach to environmental monitoring. Adaptive management may not always be appropriate. For instance, it may be inappropriate if mitigation is not identified, or if there is uncertainty about significant adverse environmental effects and/or there is a likelihood of significant adverse environmental effects.
 - CRINO does have concerns about significant adverse environmental effects (in particular regards to cumulative effects).
 - If adaptive management is utilized, it must be reasonable. It should not replace the implementation of mitigation measures. And it should not lessen the significance of a significant adverse effect.

Community Inclusion in Monitoring & Enforcement

- CRINO maintains that two fundamental principles of corporate sustainability include reporting progress and local action.
- Engaging community members and government in environmental monitoring beyond the minimum legal standards would be an effective way of implementing these principles.
 - Environmental oversight agencies are an example of an independent body having access to key information about the operations of resource extraction sites.

Recommendations

1. Ensuring environmental performance targets are used before the issuance of environmental permits. The proponent needs to prioritize these targets, and not merely attempt to adhere to them whenever economically feasible.
2. Embracing an adaptive management strategy to fulfill ECAs and other permits with ease, where appropriate.
3. Engage the impacted communities in the monitoring process. This engagement cannot be in a vacuum. Community concerns need to have weight in the monitoring process. An Independent Oversight Body would assist in maintaining adequate engagement with the community.
4. Any forms of financial assurance for this project, e.g., Closure Plan under the *Mining Act*, must be a hard form of assurance [such as cash, letters of credit, or insurance bonds]. Relying on a corporate financial test increases the risk of the public being on the hook to clean up the mine site.
5. Monitoring and enforcement departments within the appropriate government departments need adequate funding for the following:
 - Collection of data relevant to permits in a timely and consistent manner
 - The prompt collection of fines to instill the goals of environmental enforcement (to deter non-compliance, and punish violations when they occur).



References

Public Record Sources:

- Responsibility, Accountability, and Transparency are Vital to Safeguard the Well-Being of Community Members and the Natural Environment ([Reference # 873](#))
- Request for Additional Information from the Joint Review Panel for the Marathon Palladium Project—Information Request Package 3 ([Reference # 875](#))
- Generation PGM Response to the Joint Review Panel’s Request for Information #3, IR3-2 Environmental Management System ([Reference # 912](#))

Additional Sources:

- Canada, Office of the Auditor General of Canada, *2019 Spring Reports of the Commissioner of the Environment and Sustainable Development: Report 2—Protecting Fish from Mining Effluent* (2019), online: https://www.oag-bvg.gc.ca/internet/English/parl_cesd_201904_02_e_43308.html#hd2e
- Melissa Gorrie and Karen Campbell, "Workshop on Adaptive Management, Follow-up, Monitoring and Enforcement," (2016), online: https://d3n8a8pro7vhmx.cloudfront.net/envirolawsmatter/pages/290/attachments/original/1461906623/EA_Summit_Primer_on_Adaptive_Management_Follow-up_Monitoring_and_Enforcement.pdf?1461906623
- Ministry of the Environment, Conservation and Parks, “Pulp and Paper Mill Fined \$400,000 for Environmental Protection Act Violations”, online: <https://news.ontario.ca/en/court/1000892/pulp-and-paper-mill-fined-400000-for-environmental-protection-act-violations>
- Ministry of the Environment, Conservation and Parks & Environment and Climate Change Canada, *Canada-Ontario Agreement on Great Lakes Canada-Ontario Agreement on Great Lakes Water Quality and Ecosystem Health*, 2021 (entered into force 1 June 2021), online: <https://files.ontario.ca/mecp-coa-great-lakes-en-2021-05-26.pdf>
- Office of the Auditor General of Ontario, “Value-for-Money Audit: Hazardous Spills”, November 2021: https://www.auditor.on.ca/en/content/annualreports/arreports/en21/ENV_HazardousSpills_en21.pdf
- Office of the Auditor General of Ontario, “Value-for-Money Audit: Reporting on Ontario’s Environment”, November 2021: https://www.auditor.on.ca/en/content/annualreports/arreports/en21/ENV_Reporting_en21.pdf