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March 16, 2018

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Via email: CEAA.GrassyMountain.ACEE@ceaa-acee.gc.ca

File No. 1187-005

Canadian Environmental Assessment Agency
160 Elgin Street, 22nd Floor
Ottawa Ontario K1A 0H3

Attn.: Brett Maracle, Panel Manager

Re: Kainai First Nation (Blood Tribe) comments on the draft Agreement to establish a joint review panel and related Terms of Reference for the Grassy Mountain Coal Project (the "Project")

We act as counsel for the Kainai First Nation (Blood Tribe) ("Kainai"). We write to provide our comments with respect to the draft Agreement and Terms of Reference ("TOR") for the Grassy Mountain Coal Mine Joint Review Panel (the "Panel").

Introduction: Participation in the Regulatory Process

Kainai's relationship to the land and its resources lies at the heart of its traditional way of life, identity and culture. Indeed, Kainai identity and culture are inseparable from the land and our use of its resources. As a result, land and resource development decisions can have adverse impacts on the ability of the Kainai First Nation members to carry out their traditional way of life by, for example, reducing the availability of traditional food and resources; interfering with preferred harvesting locations; impeding access, transportation or navigation to preferred areas; reducing areas of cultural or spiritual value; and interfering with the ability to transfer knowing and teach culture, language and history. Its participation in the regulatory process, therefore, is a vital opportunity to voice our concerns about any adverse impacts of development on our traditional way of life.

Rather than a forum to voice its concerns, the regulatory process appears to be designed to silence its perspective, or at best, to force it into an uncomfortable and unfamiliar network where it is treated as less valid and less legitimate than the perspective of people who have studied in academic centres far from the places and issues our members have faced for decades.

One of the barriers to Kainai's participation is the failure of regulatory processes to properly consider its Indigenous perspective, and incorporate it into the decision making process. Incorporation of the Indigenous perspective requires decision makers to consider matters such as:

- what conditions are required for the exercise of our rights;
- what cultural connections do we have to the area and resources there;
- what is the timing of our harvest;
- what is the availability of the resource;

- what is the quality of the resource;
- what are our avoidance reactions (what are the effects of our safety concerns);
- what cultural transmission activities occur in this area;
- what is the habitat availability and quality in other areas; and,
- what preferences do we have for where and when our members exercise their rights.

Similarly, another barrier that First Nations often face when participating in regulatory processes, and inherently linked in the failure to consider the Indigenous perspective, is the privilege afforded to western science over our traditional knowledge.

Traditional knowledge refers to ecological knowledge, social rules, spirituality, and aboriginal philosophy. It is a distinctive, complex understanding of the environment and its connection to aboriginal culture. For centuries, Kainai has relied on its understanding of the land and resources to survive. As a result, it has an in-depth knowledge about the distribution of resources, the functioning of ecosystems, and the relationship between the environment and its culture. To meaningfully involve Kainai in the regulatory process, its knowledge must be incorporated into the process at every stage.

And while regulatory bodies often claim to “consider” traditional knowledge and land use information when making decisions, there is rarely any elaboration or explanation of how this information was incorporated into the assessment and demonstrably integrated into the decision making process.

Finally, another practice that prevents First Nation’s participation in regulatory processes is the lack of clarity regarding how their constitutional rights will be impacted. Far too often, regulatory bodies come to conclusions about how a First Nations rights will be impacted, but do not provide any rationale for how it came to this conclusion.

These comments and the accompanying changes to the TOR have been designed to address these by: requiring the panel to properly give consideration to the Indigenous perspective; by requiring that traditional knowledge and land use information be given the same weight and recognition as western science; by requiring that the full range of potential impacts to Kainai’s Treaty rights are considered; by clarifying the concepts and principles to guide the Panel when dealing with the constitutional issues raised during the hearing; and by removing the procedural barriers that undermine the accessibility of the Panel process.

1. Obligation to Incorporate the Aboriginal Perspective and Traditional Knowledge/Land Use Information

As currently drafted, there is nothing in the draft Agreement or TOR that clearly requires the Panel to consider the Indigenous perspective or incorporate that perspective into the Panel’s assessment. Without clearly requiring the Panel to consider and incorporate the Indigenous perspective in its assessments, there is a real risk that Kainai’s perspective will be ignored or discounted in the favour of the proponent’s perspective.

Courts have repeatedly confirmed that when dealing with an issue related to the rights of Aboriginal peoples, decision-makers must consider to the Indigenous perspective.¹

As Chief Justice Lamer observed in *Delgamuukw*, simply receiving evidence and submissions of Indigenous peoples in a proceeding is a hollow recognition of the Indigenous perspective where this evidence is then systematically and consistently undervalued or deprived of all independent weight (para. 98). It is imperative that the laws of evidence operate to ensure that the Indigenous perspective is given equal treatment and imbues every step of a proceeding.²

First Nations need to have a meaningful influence on the scope of the environmental assessment and their perspective and traditional knowledge must be meaningfully incorporated into that assessment. Scoping, through the TOR, determines the appropriate breadth and extent of the assessment process. It is therefore crucial that the TOR contain explicit reference to how the process will incorporate information from Indigenous groups, including Traditional Knowledge and Land Use Information into the decision making process.

To seek to address these concerns Kainai has proposed the following:

- adding a definition of “Aboriginal Perspective” and “Traditional Knowledge” in the draft Agreement (page 2-4)³;
- because it is not enough to merely receive information respecting the Indigenous Perspective and Traditional Knowledge in the draft Agreement and the TOR, Kainai’s proposed revisions also clarify where the Panel must consider and incorporate the Indigenous Perspective and set out principles for incorporating Traditional Knowledge (pages 8, 9, 10, 11, 12 and 17); and
- to ensure transparency in this regard, Kainai has also added a requirement for the Panel to explain in its report how it has incorporated the Aboriginal Perspective and Traditional Knowledge in its assessment and recommendations (pages 11, 16,17).

2. Impacts to Constitutionally Protected Rights

Another practice that prevents First Nation’s participation in the regulatory process is the lack of clarity regarding how their Constitutional rights will be impacted. Far too often, regulatory bodies come to conclusions about how a First Nations rights will be impacted, but do not provide any rationale for how it came to this conclusion. Typically, it is the proponent and Panel that define the rights or interest, and that determine whether they may be adversely impacts.

Moreover, it is all too common to see assessments carried out where only those environmental impacts that have a direct biophysical link are required to be assessed. This does not allow impacts to our rights and interests to be properly understood. Moreover, it is inconsistent with the Supreme Court of Canada’s decision in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, in

¹ *R v. Sparrow*, [1990] 1 SCR 1075 at 1112; *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43 at para 46-7; *Mitchell v. M.N.R.*, 2001 SCC 33 at para 37; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at 84], *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40.

² *R. v. Marshall* at para 50

³ All page references in this addendum refer to the page(s) in the attached revised draft Agreement and TOR containing Kainai’s revisions.

which the court specified that it is not enough to simply assess the environmental impacts of a project – the effects of the Project on the rights in question must be considered.⁴

Many of Kainai's revisions are directed at ensuring that the Panel undertakes a full and proper assessment of the potential adverse impacts on and potential infringement of Kainai's section 35 rights (the "Constitutional Issues").

As written, the draft Agreement and TOR do not provide sufficient clarity that the Panel will conduct an assessment of the "Constitutional Issues" raised in the hearing. For example:

- While the TOR require the Panel to accept information relating to the Constitutional Issues, the language throughout the TOR is vague, making it unclear as to whether the Panel is to assess any information it receives regarding Aboriginal and Treaty rights, and what role that information will play in the Panel's assessment. We are concerned that this vague language in the draft Agreement and TOR will allow the Panel to decline to consider Constitutional Issues;
- The draft Agreement is silent on the issue of the public interest. Kainai is concerned that the failure to explicitly state in a Panel agreement that the public interest includes reconciliation will result in Kainai's rights and the constitutional obligations that flow from those rights being excluded from consideration of the public interest. The draft Agreement does nothing to prevent this Panel from similarly excluding Kainai's constitutionally protected rights from its consideration of the public interest.

In this section, we highlight reasons why the draft Agreement and TOR must be revised to provide clarity that the Panel is obligated to deal with the Constitutional Issues raised during the hearing.

i. The Panel's Duty to Act Constitutionally

In exercising its statutory functions, whether to make decisions or to issue recommendations, the Panel must consider the issues of law and jurisdiction relating to the Constitutional Issues raised in this proceeding.

This obligation flows from the obligation of any regulatory board to act constitutionally.⁵ That is, unless specifically exempted through legislation, all boards must consider the constitutionally-protected rights of those appearing before them. As the Supreme Court of Canada confirmed in *Quebec v. Canada (NEB)*, [1994] 1 S.C.R. 159:

It is obvious that the Board must exercise its decision-making function, including the interpretation and application of its governing legislation, in accordance with the dictates of the Constitution, including s. 35(1) of the *Constitution Act, 1982* (at para. 32).

More recently, this principle was reaffirmed by the Supreme Court of Canada in *R v Conway*, 2010 SCC 22 ("*Conway*"), where the Court held that "administrative tribunals with the authority to apply the law have the jurisdiction to apply the *Charter* to the issues that arise in the proper exercise of their statutory functions".⁶ Statutory functions include making decisions on an application and issuing recommendations – the two primary obligations of this Panel.

ii. The Panel's Duty to Consider Constitutional Issues

⁴ *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, para 45

⁵ *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038

⁶ *Conway* at paras 20, 21, 46

The failure to include a requirement to make determinations regarding a question of constitutional law is at also odds with the decisions of the Supreme Court of Canada in *Paul v British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 SCR 585 ("*Paul*"), *Conway and Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 ("*Rio Tinto*"), among others. In *Rio Tinto*, the Supreme Court of Canada reiterated that an administrative body's power to decide questions of law implies a power to decide constitutional issues that are properly before it, unless there is clear evidence that the legislature intended to exclude such jurisdiction from the administrative body's powers.⁷

Here, the Panel, as a division of the AER, has been given the statutory mandate to make determinations on questions of constitutional law (see s.16 of the *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3, together with the *Designation of Constitutional Decision Makers Regulation*). If the Panel avoids making determinations on the Constitutional Issues because the TOR does not require it to (page A3) they would be acting *ultra vires* their enabling legislation and inconsistently with the jurisprudence of the Supreme Court of Canada.

iii. *Kainai's Right to Raise their Constitutional Issues in the Most Accessible Forum*

Canadians are entitled to assert the rights and freedoms that the constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts.⁸ The Supreme Court of Canada has confirmed the practice advantages and constitutional basis for administrative bodies deciding constitutional issues in the interests of accessibility and avoiding bifurcating processes. As explained by Justice Abella in the *Conway* decision:

... a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized jurisdiction.⁹

The Court has made similar observations in the aboriginal law context, noting in *Paul* that "...it would be most convenient for aboriginal persons to seek the relief afforded by their constitutionally protected rights as early as possible within the mechanisms of the administrative and judicial apparatus."¹⁰

If the draft Agreement and TOR do not provide sufficient clarity that the Panel must assess the Constitutional Issues raised in the hearing, there is a real risk that the Panel could decline jurisdiction to decide the Constitutional Issues and thereby conduct the Panel process in a manner that is contrary to the interests of accessibility and efficiency.

iv. *The Public Interest includes Reconciliation*

⁷ See also *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 at para 28, [2003] 2 SCR 504, where the Court unanimously held that an administrative tribunal with the jurisdiction to consider questions of law is presumed to also have jurisdiction to determine constitutional issues, including the constitutional validity of its enabling statute.

⁸ *Martin*, supra at para 29

⁹ *Conway*, supra at para 79

¹⁰ *Paul* supra at paras 32 and 36

The Panel has an obligation to determine whether the Project is in the public interest.¹¹ Aboriginal and Treaty rights intersect with most of the factors typically considered as being in the public interest (ex. resource conservation, economics, public safety, environmental protection and social interests). The weight to be placed on the Aboriginal and treaty rights, as a separate consideration within the public interest test, is of the highest order

To satisfy the obligation to consider the public interest, the Panel must consider issues related to adverse impacts to section 35 rights and other constitutional obligations and doctrines related to those rights as part of the public interest test. Courts have been clear that the public interest includes the doctrine of reconciliation between Aboriginal peoples and the Crown as well as adherence to court decisions pertaining to the recognition of section 35 rights.¹² As the Supreme Court of Canada explained in the *Rio Tinto* decision “[t]he constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of the consultation under the *Utilities Commission Act*. As Donald J.A. asked, “How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest?” (para. 42).¹³

Kainai revisions: To address our concern that the draft Agreement and TOR do not provide sufficient guidance to the Panel regarding its obligation to decide the Constitutional Issues raised in the hearing, Kainai has proposed the following revisions:

- Specifying in the whereas clause that the constituting agencies of the Panel must act constitutionally (page 1);
- Adding a definition of Impacts that is specifically related to the Constitutional Issues and ensuring that Impacts are included in a definition of environmental assessment (page 3);
- Specifying in the definitions that the “public interest” includes reconciliation and the honour of the Crown (page 3);
- Ensuring that the draft Agreement clearly requires the Panel to adhere to the TOR (subsection 2.2, page 4);
- Specifying that the assessment of the factors under Part II of the TOR includes consideration of the public interest (page 8);
- Specifying that the source of the scope of the assessment as it relates to Aboriginal and Treaty rights is 19(1), and in particular 19(1)(j), to reflect clearly that the Minister of the Environment requires the assessment of the Constitutional Issues raised in the hearing (page 9);
- Specifying that Impacts are included in the factors in Part II (page 8);
- Clarifying that the portion of Part III relating to Aboriginal Rights and interests includes Impacts (page 9); and

¹¹ *Oil Sands Conservation Act*, RSA 2000 C O-7, ss. 3(b), 3(f), 10(3); *Environmental Protection and Enhancement Act*, RSA 2000 C E-12, s.64(1); *Responsible Energy Development Act*, SA, C R-17.3, ss. 2(1) and 2(2)(a); *Fisheries Act*, R.S.C., 1985, c. F-14, s.6

¹² *Ahousaht v Minister of Fisheries and Oceans*, 2014 FC 197 at paras 30-32

¹³ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para 70

- Clearly stating that the Panel must incorporate its assessment of Impacts in its assessment and report (pages 8, 9, 10, 11, 12 and 17)

3. The need for clarity regarding all aspects of the Panel process

Many of Kainai's revisions pertain to clarifying the concepts and principles to guide the Panel when dealing with the constitutional issues raised during the hearing. Fundamentally, Kainai is seeking – and is entitled to – a clear, transparent and effective process for addressing their constitutional issues (i.e. impacts on Aboriginal and Treaty Rights, infringement and adequacy of Crown consultation and accommodation) in a manner consistent with key legal principles.

Among other uncertainties, as written, the draft Agreement and the TOR:

- Fail to provide clarity regarding the constitutional nature of Aboriginal and Treaty rights;
- Fail to clarify the assessment of impacts to section 35 rights must include more than just site-specific impacts;
- Fail to clarify the assessment of impacts to section 35 rights is not limited to residual environmental effects;
- Fail to clarify the assessment of impacts to section 35 rights is not limited to effects on the physical environment;
- Fail to clarify that cumulative impact assessment is not limited to biophysical effects and other shortcomings in the policy documents cited in the TOR relating to cumulative effects;
- Fail to clarify the cultural heritage has more than tangible aspects;
- Fail to clarify that the Indigenous perspective must be considered;
- Fail to identify valued components that are important to Indigenous peoples and the exercise of their rights and culture, and, in failing to do so, leave it up to the proponent and the Panel to determine which valued components are important in ad hoc and non-transparent manner;
- Fail to distinguish between environmental effects and impacts to section 35 rights;
- Fail to explicitly require the Panel to adhere to the TOR and to assess impacts to the Constitutional Issues raised in the hearing; and
- Fail to provide sufficient clarity respecting the scope of the factors for the assessment.

When a Panel's Agreement and TOR are unclear about the meaning of key principles or how they are to be considered, the result is confusion, conflict, and ultimately a reliance on approaches that are inconsistent with our Indigenous Perspective and the requirements set out in the section 35 jurisprudence. The degree of ambiguity on key issues in the draft Agreement and TOR is unacceptable and the documents must be revised so that the process is set out *explicitly* and *with clarity* in these constituting documents.

Kainai revisions: To address these deficiencies, Kainai has proposed the following:

- Adding to and revising definitions made to facilitate the full assessment of the Projects' impacts on First Nations' Aboriginal and Treaty rights. This includes definitions of Aboriginal Perspective, Aboriginal Rights, Culture and Cultural Heritage, Cumulative Effects, Environmental Assessment, Impacts, Mitigation, Public Interest, Traditional Knowledge, Traditional Uses (pages 2-4);
- Revisions to clarify the obligations of the Panel to assess the Constitutional Issues raised in the hearing in a manner consistent with these definitions (pages 8- 12 and 17);
- Revisions to Part II and III of the TOR to more clearly articulate what the Panel is to consider (pages 8-12 and 17); and
- Adding a new Appendix A to guide the Panel's consideration of Impacts by identifying clearly and transparently a minimum list of criteria that the Panel is to use when assessing the Constitutional Issues raised in the hearing (pages 20-23). The importance of valued components cannot be understated. It is not sufficient to leave it to the proponent or the Panel to select what valued components and factors are to be considered when assessing impacts to and potential infringements of Kainai's section 35 rights. The factors set out in Appendix A are a minimum list of criteria that are relevant to the Kainai.

4. Accessibility of the Panel Process

Kainai is also concerned that, as it is written now, the draft Agreement and TOR create a number of procedural barriers that undermine both the accessibility of the Panel process and the fairness of that process. Below we highlight areas where the draft Agreement and TOR create unnecessary hurdles to Kainai's ability participate in the Panel process.

These hurdles run contrary to the general principle that Canadians should be able to assert their rights in the most accessible forum available.¹⁴ As explained by the Supreme Court of Canada in the *Conway* decision, the denial of early access to remedies is a denial of an appropriate and just remedy.¹⁵

i) Burdensome Timelines

The TOR, as currently written, would allow the Panel to issue a Notice of Hearing only 45 days prior to the hearing. While the proponent, which has a fulltime staff and consultants dedicated to this Project, may not find it difficult to organize their participation in such a short timeframe, Kainai is in a completely different position. Kainai's witnesses at hearings are a mix of community members who spend considerable time in the bush hunting or fishing where they are difficult to reach; community members who need to request time off from their employment or organize shift changes to participate in a hearing, and consultants who have other clients and commitments that cannot be dropped on short notice. It is unrealistic to expect Kainai to be able to participate in a hearing effectively if it has such short timelines to prepare its written evidence and organize its witnesses. In our view, the document filing issue alone warrants a far longer notice period for a public hearing and the related filing of documents than is normally the case.

Kainai Revisions: To address this concern, Kainai has proposed requiring the Panel to provide no less than 75 days' notice of a hearing (page 16).

¹⁴ *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54 at para 29

¹⁵ *R v Conway*, 2010 SCC 22 at para 79

ii) *Hearing location*

As currently written, the draft Agreement does not provide any opportunity for Kainai to have input into the decision regarding hearing location – it is left to the discretion of the decision maker. Nor does the draft Agreement establish any obligation to require that at least portions of the hearing involving community participation be held in aboriginal communities. Without such clear guidance, we are concerned that the hearing venue will be determined without any consideration of Kainai's views or needs.

Kainai revisions: Kainai has proposed adding a requirement that the Panel hold the oral information gathering sessions in or near Indigenous communities if so requested by that community, and that at least those portions of the hearing relating to community evidence be held in the community of the group providing evidence (page 15-16).

iii) *Limited duration of the hearing*

Kainai wishes to ensure that it has sufficient time for its witnesses to present their information in a manner consistent with their traditions and protocols and to ask questions of other parties to the hearing. Unfortunately, the draft Agreement places a priority on speeding through the hearing rather than ensuring First Nation's have the time they need to adequately articulate their issues. In doing so, the draft Agreement is internally inconsistent: the draft Agreement requires the Panel to accept aboriginal evidence, but also places pressure on the Panel to limit evidence for the sake of meeting an imposed 45 day time limit.

Kainai revisions: To address this incongruity and potential barrier to Kainai's role at the hearing, Kainai has proposed making paragraph 28 of Part V consistent with the purpose of the portion of Part III relating to Aboriginal Rights and Interests (page 16).

iv) *Failure to require a Pre-Hearing Conference*

The draft Agreement contains no procedure for the Panel to convene with the parties to the hearing to ensure an efficient hearing process, to address any lack of clarity regarding how Constitutional Issues will be addressed, and to avoid any timing issues, particularly in respect of the scheduling of expert and lay witnesses and in respect of potential constitutional questions which may be raised.

The lack of such a process has frustrated First Nation participation in previous joint review processes.

Pre-hearing conferences would enable the parties to discuss issues such as: the anticipated dates for the hearings; procedures for the filing and exchange of documents, the length of time required to carry out the hearings; the timing of witness testimony and the organization of panels for the giving of testimony; the need for interpreters; logistical issues respecting conducting Aboriginal witness testimony in their communities, and the timing and procedure for raising constitutional questions (schedule for exchange of documents, any related motions, exchange of arguments, scheduling of lay and expert witnesses, scheduling of reply arguments, oral submissions, etc.). Pre-Hearing Conferences that focus on the items mentioned above would go a long way, to allaying the concerns of the First Nations and would be in the interest of all parties, interveners, and the Joint Review Panel itself.

Kainai revisions: Kainai has proposed adding a requirement that the Panel hold a pre-hearing conference prior to issuing a Notice of Hearing and has set out a minimum list of issues to be addressed through that conference (page 15).

v) *Limited experience and expertise of the Panel*

Section 3 of the draft Agreement requires that the Joint Panel members be unbiased and have the knowledge and experience relevant to the anticipated environmental effects of the Projects. These requirements alone are not sufficient to ensure the Panel is able to assess the Projects' Impacts (direct, indirect and cumulative) on Aboriginal and Treaty Rights.

It is essential that Panel members understand and apply (as more fully discussed below) the law regarding Aboriginal and Treaty rights in Canada. It is not enough for Panel members to be briefed on individual matters as they arise or seek to apply environmental considerations to the assessment of impacts to Aboriginal and Treaty rights. A full assessment of the Projects' impacts on Kainai's Aboriginal and Treaty rights will require a strong understanding of the unique source and nature of those rights and an understanding of and respect for Traditional Knowledge. Knowledge of Aboriginal and Treaty rights will become particularly important as Constitutional Issues are raised.

Kainai revisions: To address this concern, Kainai has proposed that panel members have knowledge or experience relevant to Impacts and Traditional Knowledge (page 4).

Moving Forward

We would be please to meet with the JRP to discuss our view further, or alternatively, suggest that the JRP hold a pre-hearing conference to settle the TOR.

Yours truly,

JFK Law Corporation

Per:

<Original signed by>

Mae A. Price
Counsel for Kainai First Nation (Blood Tribe)

MAP/evp

Encl.: Kainai's changes to the draft JRP Agreement and TOR

cc: Annabel Crop Eared Wolf <email address removed>
Mike Oka <email address removed>

**AGREEMENT
To Establish a Joint Review Panel
for the Grassy Mountain Coal
Project Between**

**The Minister of the Environment, Canada
- and -
The Alberta Energy Regulator, Alberta**

PREAMBLE

WHEREAS the Alberta Energy Regulator (the AER) has statutory responsibilities pursuant to the *Responsible Energy Development Act* (REDA); and

WHEREAS the Minister of Environment and Climate Change, Canada (the Federal Minister of the Environment) has statutory responsibilities pursuant to *the Canadian Environmental Assessment Act, 2012* (CEAA 2012); and

WHEREAS [the Minister of the Environment, Canada and the AER have constitutional obligations to discharge their statutory responsibilities constitutionally, having regard to section 91\(24\) of the Constitution Act, 1867 and section 35\(1\) of the Constitution Act, 1982;](#)

WHEREAS the proposed Grassy Mountain Coal Project (the Project) requires a public hearing and approvals from the AER pursuant to REDA and the *Coal Conservation Act* (CCA), the *Environmental Protection and Enhancement Act* (EPEA), the *Water Act*, the *Public Lands Act*, and is subject to an assessment under CEAA 2012; and

WHEREAS the Federal Minister of the Environment has referred the environmental assessment of the Project to a review panel in accordance with section 38(1) of CEAA 2012 and has determined that pursuant to section 40(1) of CEAA 2012 a review panel should be jointly established to consider the Project; and

WHEREAS the Government of the Province of Alberta and the Government of Canada established a framework for conducting joint review panels through the *Canada-Alberta Agreement on Environmental Assessment Cooperation (2005)* signed on May 17, 2005; and

WHEREAS the AER and the Federal Minister of the Environment have determined that a joint review of the Project will ensure the Project is evaluated according to the spirit and requirements of their respective authorities while avoiding unnecessary duplication, delays and confusion that could arise from individual reviews by the Government of Canada or the AER; and

WHEREAS [in making its decisions and formulating its recommendations regarding the Project, the joint review panel must be mindful of the fact that all administrative decision makers are bound to act in manner that is consistent with the Constitution, irrespective of whether the decision maker has the power to decide constitutional questions;](#)

WHEREAS the AER and the Federal Minister of the Environment have determined that a joint review of the Project should be conducted in a manner consistent with the provisions of Appendix 2 of the *Canada-Alberta Agreement on Environmental Assessment Cooperation (2005)* to the extent reasonable; and

WHEREAS the AER has determined that pursuant to section 18 of REDA a joint review panel cooperative proceeding should be established and that the Project should be considered in a cooperative proceeding by the AER and the Agency.

THEREFORE, the AER and the Federal Minister of the Environment hereby establish a Joint Review Panel for the Project in accordance with the provisions of this Agreement and the Terms of Reference attached as an Appendix to this Agreement.

1. Definitions

For the purpose of this Agreement and of the Appendix attached to it,

“Aboriginal” describes those Aboriginal peoples of Canada as defined in the *Constitution Act, 1982*, subsection 35(2) including the Indian, Inuit and Métis peoples of Canada;

“Aboriginal Perspective” includes Aboriginal views respecting the ecological, cultural environmental, social or other resources and conditions needed to exercise Aboriginal Rights and maintain culture in a preferred and meaningful way, taking into account Traditional Knowledge, cultural practices and values; holistic perspective of the land and resources; experiences with past projects and future intended uses of the land;

“Aboriginal Rights” mean the exercise of activities, practices, customs and traditions protected by Treaty 8 and/or section 35 of the *Constitution Act, 1982* including activities, practices, customs and traditions that facilitate the traditional livelihood of Aboriginal members and/or the continuity of Aboriginal culture, beliefs and Traditional Knowledge;

“culture” and “cultural heritage”, including as that term is used in section 5 of CEEA 2012, means both tangible and intangible aspects of the practices, kinship and communal networks, representations, relationships, expressions, knowledge, skills, and beliefs – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that Aboriginal groups recognize as part of their identity as belonging to their Aboriginal group and, for greater certainty, includes the modes by which cultural heritage is lived, transmitted and preserved.

“cumulative effects” in the context of Impacts, is not to be interpreted in a way that is limited to considering residual or biophysical effects of the Project;

“Agency” means the Canadian Environmental Assessment

Agency;

“environment” means the components of the Earth, and includes

- (a) land, water and air, including all layers of the atmosphere,
- (b) all organic and inorganic matter and living organisms, and

(c) the interacting natural systems that include components referred to in (a) and (b);

[“environmental assessment of the project” means the process conducted by the Joint Review Panel pursuant to this Agreement to assess environmental effects and Impacts from the Project.](#)

"**environmental effect**" means those effects described in section 5 of CEEA 2012;

"**federal authority**" means a Minister, agency or department of the Government of Canada;

"**follow-up program**" means a program for

- (a) verifying the accuracy of the environmental assessment of the Project, and
- (b) determining the effectiveness of any mitigation measures;

[“Impact\(s\)” means the potential direct, indirect and cumulative adverse impacts of the Project, as broadly interpreted from the Aboriginal Perspective, taking into account Traditional Knowledge, on Aboriginal Rights, traditional uses, culture and socio-economic conditions of Aboriginal groups and, for greater certainty](#)

- [a. include both site-specific and non-site specific Impacts;](#)
- [b. are not limited to residual impacts; and](#)
- [c. are not limited to effects on the physical environment;](#)

"**Indigenous**" describes an Aboriginal group or Aboriginal peoples;

"**interested party**" means any person who the Joint Review Panel determines, with respect to the Project, may be directly affected by the carrying out of the Project or has relevant information or expertise or is allowed to participate in the hearing;

"**Joint Review Panel**" refers to the Joint Review Panel established by the AER and the Federal Minister of the Environment through this Agreement, and is both a panel of AER hearing commissioners making decisions for the AER and a CEEA review panel;

"**mitigation measures**" or "**mitigate**" means, in respect of the Project, the methods used for the elimination, reduction or control of the adverse environmental effects [and Impacts](#) of the Project, [through measures with verified success, taking into account the Aboriginal Perspective and Traditional Knowledge](#) and include restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means;

"**parties**" means the signatories to this Agreement;

"**project**" means the proposed Grassy Mountain Coal Project described in Part 1 of the Terms of Reference;

[“public interest” includes, for the AER and the Minister of the Environment, Canada, reconciliation with Aboriginal peoples and the Crown’s obligation to act honourably with respect to Aboriginal Rights](#)

"**proponent**" has the meaning provided in section 2 of CEEA 2012;

"**public registry**" means the Canadian Environmental Assessment Registry

established under section 78 of CEEA 2012;

Traditional Knowledge is the cumulative body of knowledge, values, beliefs and practices of an Aboriginal group accumulated through experience and observation on the land and/or through teachings handed down from one generation to another. Among other things, it includes: traditional ecological knowledge, traditional land use practices, values about the environment, land use management and the relationships of living beings with one another and with their environment, Aboriginal history and Aboriginal cultural and spiritual practices;

“traditional uses” means all activities carried by Aboriginal peoples on land and water, other than Aboriginal Rights, which have cultural significance to Aboriginal peoples;

“report” means the document produced by the Joint Review Panel, which contains decisions pursuant to REDA, the CCA, the EPEA, the *Water Act*, and the *Public Lands Act*, and the Joint Review Panel's rationale, conclusions and recommendations relating to the environmental effects of the Project including any mitigation measures and follow-up program pursuant to CEEA 2012 and a summary of comments received from the public, including Indigenous persons and groups.

2. Establishment of the Joint Review Panel

- 2.1** A process is hereby established to create a co-operative proceeding pursuant to section 18 of REDA, and a Joint Review Panel pursuant to sections 38, 39, 40 and 42 of CEEA 2012, for the purposes of the joint review of the Project.
- 2.2** The Joint Review Panel will conduct the co-operative proceeding in accordance with these Terms of Reference and the Appendix attached hereto.
- 2.3** The AER and the Agency will make arrangements to coordinate the announcements of a joint review of the Project by both the AER and Canada.

3. Constitution of the Joint Review Panel

- 3.1** The Joint Review Panel will consist of three members. The Chief Hearing Commissioner of the AER shall appoint the chairperson and shall appoint one other member of the Joint Review Panel, with the approval of the Federal Minister of the Environment. The third Joint Review Panel member will be appointed by the Federal Minister of the Environment in accordance with article 3.2 of this Agreement.
- 3.2** The third Joint Review Panel member will be selected by the Federal Minister of the Environment, who will recommend the selected candidate as an individual who may serve as a potential hearing commissioner of the AER. If acceptable to the Lieutenant Governor in Council of Alberta and the Chief Hearing Commissioner of the AER, the Lieutenant Governor in Council of Alberta will nominate this candidate to serve as a hearing commissioner of the AER and the Chief Hearing Commissioner of the AER will appoint this candidate as a member of the Joint Review Panel.
- 3.3** The Joint Review Panel members shall be unbiased and free from any conflict of interest relative to the Project and have knowledge or experience relevant to the anticipated environmental effects and Impacts of the Project and Traditional Knowledge. In the event that a Joint Review Panel member resigns or is unable

to continue to work, the remaining members shall constitute the Joint Review Panel unless the Federal Minister of the Environment and the AER determine otherwise. In such circumstances, the Federal Minister of the Environment and the AER may choose to replace the member.

4. Secretariat

- 4.1 Administrative, technical, and procedural support requested by the Joint Review Panel shall be provided by a Secretariat, which shall be the joint responsibility of the AER and the Agency. The Secretariat will consist of staff involved in the review process from the Agency and the AER.
- 4.2 The Secretariat will report to the Joint Review Panel and will be structured so as to allow the Joint Review Panel to conduct its review in an efficient and cost-effective manner.
- 4.3 The AER will provide its offices, when required, for the conduct of the activities of the Joint Review Panel and the Secretariat.
- 4.4 Costs for conducting the joint review will be shared between the Agency and AER. The details of a cost-sharing agreement will be negotiated between the Agency and the AER.

5. Record of the Joint Review and Report

- 5.1 A public registry will be maintained by the Agency during the course of the joint review in a manner that provides for convenient public access and for the purposes of compliance with sections 79 to 81 of CEEA 2012.
- 5.2 The public registry will include relevant documents submitted or produced during the environmental assessment under CEEA 2012 and documents placed on the AER's public record prior to the referral to a review panel.
- 5.3 Subject to sections 45(3), (4), and (5) and 79(3) of CEEA 2012, the public registry will include all records relating to the review, including submissions, correspondence, hearing transcripts, exhibits and other information, received by the Joint Review Panel and all public information produced by the Joint Review Panel relating to the review of the Project.
- 5.4 On completion of the review of the Project, the Joint Review Panel shall prepare a report. The report shall include an executive summary in both official languages of Canada. The report will set out the rationale, conclusions and recommendations of the Joint Review Panel relating to the environmental effects of the Project, including any mitigation measures and follow-up programs, and a summary of comments received from the public, including Indigenous persons and groups. The report will be conveyed to the Federal Minister of the Environment within the overall time limit for the review established by the Federal Minister of the Environment. The report will also include the Joint Review Panel's written decision, with reasons, as required under section 35 of REDA.
- 5.5 After the report is submitted, the Agency will maintain the public registry in accordance with its normal practices and procedures. The AER will continue to maintain records of the proceedings and the report in accordance with its normal practices and procedures. In relation to the conduct of the environmental assessment, the registry will include all documents considered in the environmental assessment from the referral of the Project to a review panel

until the issuance of the Final Decision Statement by the Federal Minister of the Environment.

- 5.6 The Agency will be responsible for the translation of public notices and releases and the report prepared by the Joint Review Panel, into both of the official languages of Canada. The Agency will use all reasonable efforts to expedite the translation of the report following its submission by the Joint Review Panel.

6. Other Government Departments

- 6.1 The Joint Review Panel may request federal and provincial authorities having specialized information or knowledge with respect to the Project [and Impacts](#) to make that information or knowledge available to the Joint Review Panel. The Joint Review Panel may also retain the services of independent non-government experts to provide advice on certain subjects within the Joint Review Panel's Terms of Reference.
- 6.2 Nothing in this Agreement will restrict the participation by way of submission to the Joint Review Panel by federal or provincial government departments or bodies, subject to article 6.1 above, under section 20 of CEEA 2012 and section 49 of REDA.
- 6.3 The names of any experts retained by the Joint Review Panel and any documents obtained or created by the experts and that are submitted to the Joint Review Panel will be placed on the Public Registry. This shall exclude any information subject to solicitor-client privilege.
- 6.4 The Joint Review Panel may, in its sole discretion, require any expert referred to in articles 6.1 and 6.3 to appear before the Joint Review Panel at the public hearing and testify in regard to the documents they have created or obtained and that were submitted to the Joint Review Panel and made public in accordance with the preceding paragraph.

7. Participant Funding

- 7.1 Decisions regarding participant funding by the Agency under the federal Participant Funding Program, and decisions on participant funding by the AER as provided for in REDA, the AER *Rules of Practice* and the AER's *Directive 031: REDA Energy Cost Claims* will, to the extent practicable, take into account decisions of the other party [following consideration of written submissions respecting participant funding from the person or group seeking participant funding.](#)

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8. Amending this Agreement

- 8.1 The terms and provisions of this Agreement may be amended by written memorandum executed by both the Federal Minister of the Environment and the Chief Executive Officer of the AER.
- 8.2 Subject to sections 49 and 62 of CEEA 2012, this Agreement may be terminated at any time by an exchange of letters signed by both parties.

9. Signatures

WHEREAS the parties hereto have put their signatures

The Honourable Catherine McKenna
Minister of the Environment

Jim Ellis
Chief Executive Officer
Alberta Energy Regulator

Date

Date

Appendix 1 Terms of Reference

Part I - Scope of Project

Benga Mining Ltd. (the proponent), a wholly owned subsidiary of Riversdale Resources Limited, proposes to construct and operate the Grassy Mountain Coal Project (the Project), an open-pit metallurgical coal mine near the town of Blairmore in the Crowsnest Pass in southwestern Alberta.

The Project would be located on the east side of the continental divide, approximately 150 km southwest of Calgary and approximately 13 kilometres from the Alberta border with British Columbia. As proposed, the mine would occupy an area of approximately 2,800 hectares and have the capacity to produce a maximum of 4.5 million tonnes of clean coal per year over a mine-life of approximately 24 years. [For clarity, the geographic scope of the assessment of the Project's environmental effects and Impacts cannot be limited to the area directly disturbed by the project.](#)

Components of the Project would include the surface coal mine pits and waste disposal areas, a coal preparation plant, and associated infrastructure including a coal conveyor system, an access corridor, maintenance shops, a rail load-out facility and other pertinent facilities. Coal would be brought from the Project area to the processing plant where it would be cleaned and loaded into trains for transport to market.

Part II - Scope of the Environmental Assessment of the Project

The Joint Review Panel shall conduct an assessment of the environmental effects of the Project referred to in the Scope of the Project (Part 1) [and Impacts](#) in a manner consistent with the requirements of the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), the *Responsible Energy Development Act* (REDA), the *Coal Conservation Act*, the *Environmental Protection and Enhancement Act* (EPEA), the *Water Act* and the *Public Lands Act* [these Terms of Reference, and the Public Interest.](#)

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As per section 19(1) of CEAA 2012 [and the Public Interest](#), the assessment shall include a consideration of the following factors:

- a) the environmental effects of the Project, including the environmental effects of malfunctions or accidents that may occur in connection with the Project and any cumulative environmental effects that are likely to result from the Project in

combination with other projects or activities that have been or will be carried out, including the Aboriginal Perspective and Traditional Knowledge regarding environmental effects;

- b) the significance of the effects referred to in paragraph a);
- c) Aboriginal Rights, Traditional Uses, culture, Traditional Knowledge and Impacts
- d) comments from the public, including Aboriginal persons and groups, that are received during the joint review;
- e) mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project;
- f) the requirements of the follow-up program in respect of the Project;
- g) the purpose of the Project;
- h) alternative means of carrying out the Project that are technically and economically feasible and the environmental effects of any such alternative means; and
- i) the capacity of renewable resources, including resources used for traditional uses, culture and the exercise of Aboriginal Rights, that are likely to be adversely affected by the project to meet the needs of the present and those of the future;

any change to the Project that may be caused by the environment.

As provided in subsections 19(1)(j) and 19(3) of CEAA 2012 and the public interest, the assessment by the Joint Review Panel under these terms of reference shall also include a consideration and assessment of the effects and Impacts of the Project on asserted or established Aboriginal or Treaty rights.

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In examining all of the 19(1) factors set out in CEAA 2012, community knowledge, Traditional Knowledge (such as, but not limited to, traditional use studies), and the Aboriginal Perspective of environmental effects and Impacts shall inform the assessment.

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Part III – Scope of the factors

The scope of the factors includes those specified in the final “Guidelines for the preparation of the Environmental Impact Statement” (final Guidelines) for the Benga Mining Limited Grassy Mountain Coal Project issued by the Canadian Environmental Assessment Agency on June 24, 2015. These final Guidelines were prepared under the *Canadian Environmental Assessment Act, 2012*.

In considering the factors outlined in Part II, the Joint Review Panel shall have regard for the following:

A. Aboriginal Rights, Traditional Uses, Interests and Impacts

The Joint Review Panel shall accept as part of its record and incorporate in its assessment information from Indigenous groups related to:

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- the nature, scope, location and extent of asserted or established Aboriginal or Treaty rights in the area of the Project,
- the potential adverse environmental effects and Impacts that the Project may have on asserted or established Aboriginal or Treaty rights and

- [culture](#),
- any measures proposed to avoid or mitigate the potential adverse effects [or Impacts](#) of the Project on asserted or established Aboriginal or Treaty rights,
- cumulative environmental effects and cumulative impacts to asserted or established Aboriginal or Treaty rights and related interests,
- historic, current and intended future uses of lands and resources, and

information on determining thresholds for significance of environmental effects as defined under s. 5 of CEAA 2012, and of impacts to asserted or established Aboriginal or treaty rights. The Joint Review Panel may also receive information in this regard provided by the proponent, interested parties, federal authorities or government, and provincial departments or government.

The Joint Review Panel shall summarize in its report [and incorporate in its assessment](#) the information provided regarding the manner in which the Project may adversely impact asserted or established Aboriginal or Treaty rights, [Traditional Uses and Culture](#), and where appropriate, may summarize [and incorporate into its assessment](#) information received on the potential infringement that the Project may cause on asserted or established Aboriginal or Treaty rights, [Traditional Uses and Culture](#),

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[The Joint Review Panel shall accept and incorporate in its assessment information about the adequacy of the Crown and Proponent's consultation with Aboriginal groups.](#)

The Joint Review Panel may use this information to make conclusions and recommendations that [that incorporate the Aboriginal Perspective and Traditional Knowledge and that](#) relate to the manner in which the Project may adversely impact asserted or established Aboriginal or Treaty rights as described by Indigenous persons or groups.

The Joint Review Panel, based on its assessment of the environmental effects [and Impacts](#) of the Project, may recommend measures [that incorporate the Aboriginal Perspective and Traditional Knowledge](#) to mitigate any adverse environmental effects [or Impacts](#) caused by the Project that could adversely impact or infringe the asserted or established Aboriginal or Treaty rights that were identified.

[Except as necessary to determine whether the Project is in the public interest and to assess Impacts,](#) the Joint Review Panel shall not make any determinations as to:

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- the validity of asserted or established Aboriginal or Treaty rights asserted by an Indigenous group or the strength of such claims;
- [any matter of Treaty interpretation.](#)

Nothing in these Terms of Reference limits the application of section 21 of REDA or Part 2 of the *Administrative Procedures and Jurisdiction Act* to the AER, and the Joint Review Panel is entitled to exercise the powers under Part 2 of the *Administrative Procedures and Jurisdiction Act*, including but not limited to section 13 thereof.

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B. Cumulative Effects Assessment

[Except where modified by these terms of reference,](#) the cumulative effects assessment should take into consideration [and follow](#) the approach described in the latest version of the Agency's "Technical Guidance for Assessing Cumulative Environmental Effects

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under CEAA 2012” (updated April 2017), and in the Operational Policy Statement “Assessing Cumulative Environmental Effects under CEAA 2012” (March 2015) [with respect to environmental effects. For greater clarity, the cumulative effects assessment under these terms of reference as it relates to Aboriginal Rights, Traditional Uses and culture is not limited to residual environmental effects or Impacts caused by effects on the physical environment.](#)

The Joint Review Panel should focus its consideration of cumulative effects on key valued components.

Cumulative effects assessment should include effects from projects or activities that have been or will be carried out, including a consideration of accidents or malfunctions, as of the issuance of the Joint Review Panel’s Terms of Reference, [as well as an explanation of how the Aboriginal Perspective and Traditional Knowledge were incorporated in the conclusions of the cumulative effects assessment.](#)

C. Accidents & Malfunctions

In considering the environmental effects [and Impacts](#) of malfunctions or accidents that may occur in connection with the Project, the Joint Review Panel should consider potential malfunctions or accidents associated with the following components:

- tailings management;
- surface water diversion and management;
- waste management and disposal;
- use, handling or spills of chemicals and hazardous materials on-site;
- the increase in road traffic, and the risk of road accidents;
- any other project components or systems that have the potential, through accident or malfunction, to adversely affect the natural environment [or Aboriginal and Treaty rights.](#)

The Joint Review Panel should consider the likelihood of occurrence of a malfunction or an accident and the sensitive elements of the environment (e.g. communities, homes, natural sites of interest, critical habitat for species at risk, areas of major use, or areas of interest to Aboriginal peoples) that may be affected in the event of any such malfunction or accident.

Plans, measures and systems to reduce the potential occurrence of a malfunction or accident should be considered in the assessment and should indicate how they will reduce the effects or consequences of any such malfunction or accident.

D. Species at Risk

The Joint Review Panel shall consider the effects of the Project on *Species at Risk Act* listed wildlife species and their critical habitat and identify measures that could be taken to avoid or lessen those effects and to monitor them. The measures must be taken in a way that is consistent with any applicable recovery strategy and action plans.

E. Change to the Project Caused by the Environment

In considering any change to the Project that may be caused by the environment, as required under s. 19(1)(h) of CEAA 2012 and Part II of this Terms of Reference, the Joint Review Panel will consider environmental changes and hazards that may occur and may affect the Project. The Joint Review Panel should also take into account the potential influence of climate change scenarios presented by the proponent and other interested parties on climate parameters (e.g. precipitation, temperature), and physical environmental processes.

The Joint Review Panel shall consider the influence that these environmental changes and hazards may have on the Project as predicted and described by the proponent and interested parties.

Renewable Resources

The Joint Review Panel shall consider the capacity of renewable resources, including resources used for the exercise of Aboriginal Rights and culture, that may be adversely affected by the project to meet the needs of the present and those of the future. The following points should be addressed:

- a description of the renewable resources that may be affected by the project, including renewable resources important to Aboriginal groups, having regard the Aboriginal Perspective;
- a brief description of the project's environmental effects and Impacts on the renewable resource;
- an indication as to the way in which the capacity of this resource was measured or evaluated;
- an indication of the temporal and geographic boundaries used to assess the capacity of the affected resource;
- a determination of the capacity of the resource to meet current needs;
- a determination of the capacity of the resource to meet future needs;
- a description of any other appropriate mitigation measures;
- a determination of the significance of the effects on the renewable resource and its capacity to meet the needs of current and future generations;
- an identification of the risks and uncertainties that remain and the description of the next steps, if any, that will be required to address this effect

F. Additional Information Available for Consideration

If the Joint Review Panel concludes that, taking into account the implementation of mitigation measures, and the Aboriginal Perspective, the Project is likely to cause significant adverse environmental effects or Impacts that are greater than de minimis, it may include in its report a summary of any information it has received and that may be relevant to a determination by the Government of Canada with respect to the justifiability of any such significant adverse environmental effects. However, the Joint Review Panel shall not have a mandate to make any conclusions or recommendations with respect to the justifiability of any significant adverse environmental effects for the purpose of the review under CEAA 2012.

Part IV – Joint Review Panel Mandate

The Joint Review Panel shall conduct its review in a manner that discharges the responsibilities of the AER under REDA, the requirements set out in CEEA 2012, and the requirements set out in this Terms of Reference that were fixed and approved by the Federal Minister of Environment and the AER.

The Joint Review Panel shall uphold the following principles when conducting its review:

- Traditional Knowledge is a crucial component of environmental stewardship, Aboriginal Rights and Traditional Uses; and
- Traditional Knowledge has the same level of legitimacy as western science

The Joint Review Panel shall have all the powers and duties of a panel described in section 45 of CEEA 2012, a panel of hearing commissioners described in REDA, and the rules and regulations thereunder.

A majority of the Joint Review Panel members constitutes a quorum for the purposes of the proceeding to be conducted by the Joint Review Panel. When a public hearing or meeting, or other activity is conducted by the Joint Review Panel and a member of the Joint Review Panel for any reason does not attend on any day or part of a day, the other members who are sitting at the public hearing or meeting or other activity may continue as fully and effectively as though the absent member were present.

PART V – Environmental Assessment Process

The environmental assessment for the Project consists of three stages. These stages are referred to as the Pre-Panel Stage, the Joint Review Panel Stage and the Post-Panel Stage.

Pre-Panel Stage

This description of the review process is limited to those activities occurring from the referral of the environmental assessment to a review panel under CEEA 2012 to the appointment of the review panel members. The main steps of the review process during the Pre-Panel stage of the environmental assessment will be as follows:

1. The proponent will prepare its EIA report in accordance with the Provincial Terms of Reference and the Agency's EIS Guidelines and submit it to the Agency and the AER. The Agency will make the EIA report available to the public in a timely manner.
2. Prior to the establishment of the Joint Review Panel, the Agency and the AER will evaluate the EIA report against the requirements of the Provincial Terms of Reference and the Agency's EIS Guidelines and applicable legislation. The AER and the Agency will determine if the required information is present and if there is enough information to enable the Joint Review Panel to commence its assessment of the EIA report. This will ensure adequate information is available for the Joint Review Panel to start its review of the EIA report, upon the members' appointments, in an efficient manner.
3. If the Agency or AER determines that the EIA report does not contain the information required in the provincial Terms of Reference and the Agency's EIS Guidelines, they shall request additional information from the proponent. Upon receipt of the additional information, the Agency or AER shall determine

if additional review is required, and if so, will conduct the additional review.

4. The procedures above will apply until such time as the Agency and the AER determine that there is enough information for the Joint Review Panel to commence its assessment of the EIA report.
5. When the Agency and AER determine that there is enough information for the Joint Review Panel to commence its review of the EIA report, the Joint Review Panel will be appointed in accordance with sections 3.1 and 3.2 of the Joint Review Panel Agreement.
6. If the Agency or AER determine that additional information is required from the proponent but the information deficiency is minor in nature, and the Agency and AER receive a commitment from the proponent to provide outstanding information in a timely manner, the Joint Review Panel may be appointed in accordance with sections 3.1 and 3.2 of the Agreement.
7. The Pre-Panel review of the EIA report does not affect or predetermine the result of the assessment of the proponent's EIA report by the Joint Review Panel, and in particular the Joint Review Panel may decide that the proponent must provide additional information.

Joint Review Panel Process

The main steps of the review process during the Joint Review Panel stage of the environmental assessment will be as follows:

8. The Joint Review Panel shall undertake its mandate in three stages:
Stage 1 – Review of the EIA report and any Supplemental Information;
Stage 2 – Conduct of a public hearing; and
Stage 3 – Preparation of a report and submission to the Federal Minister of Environment
9. The Joint Review Panel shall fulfill its mandate and submit its report to the Federal Minister of the Environment within 420 days (14 months) following the date of establishment of the Joint Review Panel. The 420 days does not include the time period(s) between a request for information from the Joint Review Panel to the proponent and receipt of the requested information by the Joint Review Panel.

Stage 1 - Review of the EIA Report and Supplemental Information

10. As soon as possible following its appointment, the Joint Review Panel will initiate a public comment period on whether the information available on the public registry, including the EIA report, is sufficient to allow a review that complies with the Joint Review Panel's Terms of Reference and to proceed to the public hearing phase of the process. The public, Indigenous groups and government departments and agencies will have a minimum of 60 days to provide comments.
11. If the Joint Review Panel determines that the EIA report, including supplemental information on the public registry, is not sufficient after review of the documentation outlined in article 10 above, it shall request additional information to be provided by the proponent.

12. If the Joint Review Panel determines that it requires additional information to meet its mandate, it may request the information from the Indigenous groups, government bodies, the public and other interested parties.
13. The Joint Review Panel will allow for the public review of and comment on any additional information it receives. The length of the public comment period on the additional information will be determined by the Joint Review Panel.
14. The process described above will apply, with any necessary adjustments, until such time as the Joint Review Panel determines it has sufficient information to proceed to issue the Notice of Hearing.
15. If the Joint Review Panel is of the view that it requires additional information from the proponent, Indigenous groups, government bodies, the public or other interested parties, but the information deficiency is minor in nature and the Joint Review Panel receives a commitment to provide the outstanding information in a timely manner, the Joint Review Panel may issue the Notice of Hearing.
16. The Joint Review Panel may request specialist or expert information or knowledge with respect to the Project from federal or provincial authorities in possession of such information or knowledge.
17. The Joint Review Panel may retain the services of independent non-government experts to provide advice on certain subjects with respect to the environmental assessment of the Project.
18. The Joint Review Panel shall notify Indigenous groups, government bodies, the public and other interested parties of the names of experts retained by the Joint Review Panel, and any relevant documents obtained or reports prepared by the experts that are submitted. For greater certainty, this shall exclude any information subject to solicitor-client privilege.
19. The Joint Review Panel may require any expert to appear at the public hearing to address the report(s) they have created or relevant documents obtained and that were submitted to the Joint Review Panel and made public in accordance with the preceding paragraphs.
20. Comments received during all comment periods will be made available to the public through the public registry as soon as possible.

Pre-Hearing Conference

21. Prior to issuing a notice of hearing, the Joint Review Panel shall conduct a pre-hearing conference to ensure an efficient hearing process and to avoid any timing issues, particularly with respect to the scheduling of expert and aboriginal community evidence and in respect of other issues which may be raised. The pre-hearing conference will include, at a minimum, discussion of the following:
 - Potential hearing dates;
 - Procedures for the filing and exchange of documents;
 - The length of time required to carry out the hearing;
 - The timing of witness testimony;
 - Rights of cross-examination of the parties;

- [Any requests for site visits:](#)
- [Other matters requested by the parties to the hearing in advance of the pre-hearing conference.](#)

Stage 2 – Public Hearing

22. If, after reviewing the information on the record and any written comments from the public, Indigenous persons and groups, government departments or agencies, or other technical experts, the Joint Review Panel determines that it has sufficient information to proceed to the public hearing, it will announce the hearing, providing for a minimum notice of [75 days prior to the commencement of the hearing.](#)

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23. The Joint Review Panel shall conduct its hearing in accordance with the AER's *Rules of Practice*.

24. The public hearing shall provide opportunities for timely and meaningful participation by the public, including Indigenous persons and groups, in accordance with CEAA 2012, subsection 34(3) of REDA, [section 9 of the AER Rules of Practice and these Terms of Reference.](#) The Joint Review Panel will make the hearing as accessible as reasonably possible for individuals or groups who are not represented by legal counsel or who may lack experience with the quasi-judicial nature of the hearing process.

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[25.](#) The Joint Review Panel shall hold at least a portion of the public hearing sessions in the area(s) in proximity to the Project.

26. [If requested by an Indigenous group,](#) the Joint Review Panel [shall hold](#) oral information gathering sessions in or near an Indigenous community or communities.

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The Joint Review Panel shall take into account the timing of traditional activities in Indigenous and local communities when setting the time and location of the public hearing session, having due regard for the timelines set out in articles 9 and 26 of this Part V.

[27. Notwithstanding the foregoing, the Joint Review Panel shall hold at least those portions of the hearing relating to the submissions of aboriginal groups in the respective communities in which the aboriginal groups have their administrative centres.](#)

28. The Joint Review Panel shall make best efforts to [ensure that Aboriginal groups have sufficient time to present their information and concerns in a manner consistent with cultural values and community needs.](#)

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Stage 3 - Joint Review Panel Report

29. Following the completion of the public hearing, the Joint Review Panel shall prepare and submit to the Federal Minister of the Environment a report as required in article 5.4 of the Agreement. The Joint Review Panel shall provide the executive summary of the report in both official languages of Canada. The report will include:

- An executive summary;
 - A summary description of the Joint Review Panel's process;
 - The rationale, conclusions, and recommendations of the Joint Review Panel relating to the environmental assessment of the Project [and the assessment of Impacts](#), including any mitigation measures and follow-up programs;
 - A summary of any comments received including those from Indigenous groups, government bodies, the public and other interested parties;
 - An identification of those conclusions that relate to the environmental effects defined in section 5 of CEAA 2012, [and Impacts](#);
 - An identification of recommended mitigation measures and follow-up programs that relate to environmental effects, socio-economic impacts, and impacts to interested parties, including impacts on asserted or established Aboriginal or treaty rights and related interests, including, as appropriate, any commitments identified by the proponent in the EIA report or during the review panel process; and
 - A summary of the information received from participants as set out in Part III (A) on Aboriginal rights above [and the Joint Review Panel's rationales and conclusions respecting Impacts and any other matters set out under the heading "Aboriginal Rights and, Traditional Uses, Interests and Impacts" in Part III and Appendix 2.](#)
30. If the Joint Review Panel concludes that, taking into account the implementation of mitigation measures, the Project is likely to cause significant adverse environmental effects [or Impacts that are greater than de minimis](#), it may include in its report a summary of any information it has received on the justifiability of any such significant adverse environmental effects [and shall explain how mitigation measures relate to Impacts and how the Joint Review Panel incorporated Traditional Knowledge and the Aboriginal Perspective in mitigation measures relating to Impacts.](#)
31. Under its authority as the AER, the Joint Review Panel shall make a decision on the Project applications and as appropriate for the purposes of that decision, shall include conclusions about the justifiability of any significant adverse effects [and Impacts](#). In relation to its role as a review panel under CEAA 2012, the Joint Review Panel shall not make any conclusions or recommendations with respect to the justifiability of any significant adverse environmental effects. The Federal Minister of the Environment will determine the significance of adverse environmental effects under CEAA 2012. If the Federal Minister of the Environment decides that the Project is likely to cause significant adverse environmental effects, the matter is referred to the Governor in Council (Cabinet) who must decide whether these environmental effects are justified in the circumstances.
32. The report shall take into account and reflect the views of all Joint Review Panel Members.
33. The Joint Review Panel may consider any request made by an Indigenous group

to have the executive summary of the report translated into its Indigenous language. If the Joint Review Panel agrees with such a request, it must recommend to the Agency and the AER that such translation be provided by the Agency and the AER in a timely manner.

34. The Joint Review Panel will submit its report to the federal Minister of the Environment at the earliest possible date, and within the overall time limit established by the Federal Minister of the Environment for the Joint Review Panel process described in Part V, articles 9 and 26.
35. Upon receiving the report submitted by the Joint Review Panel, the Federal Minister of Environment and the AER will make the report available to the public and will advise the public that the report is available.
36. In accordance with paragraph 43(1)(f) of CEAA 2012, the Joint Review Panel may be required to clarify any of the conclusions and recommendations set out in its report with respect to the environmental assessment.

Part VI - Amendments

1. The Joint Review Panel may request clarification of its Terms of Reference by sending a letter signed by the chairperson to the President of the Agency and the Chief Executive Officer of the AER, setting out the request. Upon receiving such a request, the President is authorized to act on behalf of the Federal Minister of the Environment and collaborate with the AER to provide to the Joint Review Panel such clarification. The President and the AER shall use best efforts to provide a response to the Joint Review Panel within 14 calendar days. The Joint

Review Panel shall continue with the review to the extent possible while waiting for the response in order to adhere to the timelines of these Terms of Reference. The Joint Review Panel shall notify the public of any clarifications to its Terms of Reference.

2. Subject to articles 9 and 26 above, the Joint Review Panel may seek an amendment to its Terms of Reference by sending a letter signed by the chairperson to the Federal Minister of the Environment and the AER setting out the request. As appropriate, the Federal Minister of the Environment may delegate to the President of the Agency the authority to act on the Federal Minister of the Environment's behalf and, in collaboration with the AER, consider and respond to any request from the Joint Review Panel to amend the Terms of Reference. The Federal Minister of the Environment, or the President in case of such delegation, and the AER shall use best efforts to ensure a response is provided to the Joint Review Panel's letter within 14 calendar days. The Joint Review Panel shall continue with the review to the extent possible while waiting for the response in order to adhere to the timelines of these Terms of Reference. Any requests for amendments under this article, as well as any amendments to these Terms of Reference, shall be posted on the Public Registry.

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Appendix A
Factors for identifying and assessing Impacts

As per section xx herein, the Joint Review Panel shall....The factors listed below are not exhaustive.

Environmental:

1. Is this an area where there are unique sensitivities, including but not limited to:
 - a. are there plant, wildlife, fish, or other resources relied on by Aboriginal groups that are valued, scarce or unique and what is the understanding of Aboriginal groups regarding the conditions necessary for the viability and harvesting of those resources;
 - b. is this an area where the environment, traditional resources and/or use of the area by Aboriginal groups has already been impacted by development such that the environment, traditional resources and use of the area are at greater risk;
 - c. is this an area that can be accessed only in certain conditions or at certain times of year and/or is this an area of preferred access for Aboriginal groups?
2. Will there be potential adverse impacts on:
 - a. Wildlife or wildlife habitat of importance to Aboriginal groups;
 - b. Fish of importance to Aboriginal groups;
 - c. Vegetation of importance to Aboriginal groups;
 - d. Ecologically significant, sensitive or unique area for exercise of Aboriginal rights and culture;
 - e. Migration routes, corridors, breeding grounds, or areas used by species of importance to Aboriginal groups;
 - f. Water quality or quantity relied upon by Aboriginal groups for patterns of use, harvesting or conservation such as by introducing new material into a water body or removal of water from a water body;
 - g. In-stream habitat used by Aboriginal groups for harvesting or conservation;
 - h. A water body that is proximate to the activity and used by Aboriginal groups for the exercise of rights or culture;
 - i. Air quality required by Aboriginal groups for patterns of use, harvesting, or conservation;
 - j. Noise levels that may affect wildlife or patterns of use by Aboriginal groups or conservation;
 - k. Riparian access;
 - l. Other forms of access;
 - m. For each of the foregoing, what is the state of the resource; what is its sensitivity to impacts; and what role does it play in the exercise of Aboriginal rights and culture?
3. What are the potential adverse impacts on the conditions and thresholds that Aboriginal groups need to continue exercising Aboriginal Rights and culture, including, but not limited to:

- a. quality and abundance of valued plant and wildlife species harvested by Aboriginal groups
- b. land formations and terrain values;
- c. habitat design and availability and wildlife movement patterns;
- d. surface water regimes, including watersheds;
- e. noise and odour levels;
- f. accessibility, including trails, travel routes, preferred modes and locations of access;
- g. competition and damage from access to the area by non-aboriginal harvesters;
- h. connections to nearby ecosystems, waterbodies and/or harvesting areas and Traditional Knowledge respecting the potential for impacts to those areas?

4. Does the project/decision have the potential to effect the carrying capacity of lands, waters and resources for the exercise of s.35 rights alone or together with other approved or reasonably foreseeable development in the area?

Cultural:

- 1. Will there be potential adverse impacts on:
 - a. Areas of cultural or spiritual value or significance (e.g. historical villages, habitation areas, family areas, camping sites, archaeological or traditional heritage sites, burial sites, areas important for cultural identity, passing down traditional knowledge and history, sense of "home place", etc.);
 - b. Emergence or re-emergence of resources or species of importance to cultural transmission and cultural practices;
 - c. Preferred harvesting locations, methods or timing consistent with cultural values;
 - d. Places available to transfer traditional knowledge, including valued places for teaching culture, language and history;
 - e. Practices to transfer traditional knowledge, including valued places for teaching culture, language and history;
 - f. Availability of traditional foods, plants, trees and other items gathered, water and other resources for use for food individually or collectively that play a role in maintaining cultural well-being;
 - g. Availability of traditional foods, plants, trees and other items gathered, water and other resources for use for social or ceremonial purposes individually or collectively that play a role in maintaining cultural well-being;
 - h. Access to harvesting areas and cultural sites, considering traditional and current transportation, navigation and preferred routes;
 - i. areas of significance to a particular family, families or sub-population of the Aboriginal groups and what is needed to maintain that connection;
 - j. social organization, customs, traditions, or ceremonies;
 - k. spatial components of Aboriginal groups' culture;

1. Aboriginal groups' connection to their traditional lands and cultural well-being?
2. How could the project/decision adversely impact how Aboriginal groups use the lands, waters and resources in and around the area for hunting, trapping, fishing, gathering, and cultural activities, considering, among other factors:
 - a. Why is this area used for those activities;
 - b. What quality and quantity of resources are hunted, fished, trapped and gathered and how are those resources used/shared in the community;
 - c. How do Aboriginal groups access the area and what conditions are necessary for Aboriginal groups to access the area at different times of year;
 - d. Is the area used for teaching, passing down of Traditional Knowledge or for the continuity of Aboriginal Rights and culture and why is that area used;
 - e. Aboriginal groups' holistic perspective of the land and their experience of project activities?
3. How have cultural practices already been impacted by development in the region including:
 - a. The passing down of traditional knowledge;
 - b. The use of Aboriginal languages;
 - c. Access to and availability of cultural and spiritual sites;
 - d. Access to areas used for teaching cultural practices;
 - e. Health and mobility of elders and cultural knowledge holders;
 - f. Loss of availability and trust in the safety of traditional resources;
 - g. connection to its traditional lands and family areas;
 - h. Availability of resources used for cultural and spiritual practices;
 - i. Other intangible elements of culture?

Social/Economic:

1. Will there be potential adverse impacts on:
 - a. Continuity of traditions (e.g. consider any period of interference, disruption, suspension or delay of harvesting, and potential for displacement, deterrence or loss of use);
 - b. Cohesion of family groups;
 - c. Privacy and the need to limit competing, interfering uses;
 - d. Areas that are used for particular ceremonies, customs or traditions by members of Aboriginal groups individually, through families, or collectively;
 - e. Ability to spend time on the land in accordance with traditional values;
 - f. Aesthetic and visual quality of the landscape, and the nature and character of the area necessary for exercise of rights or practice of or passing down of culture;
 - g. sense of place;
 - h. Other conditions required to maintain the community in Aboriginal groups?

2. Will there be potential for displacement or loss of ability to use lands, resources and water for economic and livelihood purposes?
3. Will there be potential increases in time or expense required to harvest, exercise rights and pass down culture?
4. Will there be potential competition or interference with economic activity and opportunities for Aboriginal groups?
5. Will there be potential socio-economic Impacts, such as increase in pressures to existing housing, medical care, or social services?
6. Will there be potential for change in values – traditional to wage economy – less practice of traditional economic activity/harvesting due to increased involvement in wage economy?
7. Will there be potential for adverse impacts to the emergence or re-emergence of traditional economic activities?
8. Will there be potential displacement or loss of ability to use lands, resources and water for the practice of Aboriginal Rights and ancillary uses now or in the future?

Injurious affection:

1. Considering the factors identified above, to what extent does the activity have the potential to adversely affect the lands, resources and water available for the exercise of Aboriginal rights and culture, alone or together with other approved or reasonably foreseeable development or activities in the area?
2. Considering the factors identified above, to what extent does the activity have the potential to adversely affect the adjacent, proximate or surrounding lands, resources and water available for the exercise of Aboriginal rights and culture?
3. To what extent are there reasonably foreseeable connections of the activity to future applications, conduct, development, or expansions?
4. Considering the factors identified above, to what extent does the activity have the potential to adversely affect the lands, resources, and water available for the exercise of Aboriginal rights and culture, considering the duration of the activity, the size and geographic extent, and whether the activity is temporary, seasonal or long-term?
5. What is the nature of the activity, decision or tenure at stake in terms of its impact on access to places where rights and culture are exercised by Aboriginal groups:
 - a) Will there be increased public access or restriction in access by Aboriginal groups?
 - b) Is the access permanent or temporary?
 - c) Does the tenure at stake provide exclusive development rights to the tenure holder or otherwise limit use by Aboriginal groups for the practice of rights and culture?
6. Considering the factors identified above, to what extent has existing development in the proposed and surrounding area adversely affected the exercise of Aboriginal rights and culture?