
Grassy Mountain Coal Project Joint Review Panel

January 20, 2020

By email only

Mr. Martin Ignasiak

Partner, Osler, Hoskin & Harcourt LLP

<contact information removed>

Subject: Benga Response Letter to Information Request (“IR”) Package #6 (CIAR #300)

Dear Mr. Ignasiak:

Thank you for your letter of December 6, 2019, which provided Benga’s estimated timeline for responding to IR Package #6 (issued on November 28, 2019), as well as Benga’s comments on what it described as scheduling risks. Benga’s letter also requested the Joint Review Panel (the Panel) rescind IR 6.2 and 6.6. In making these responses, the Panel has carefully considered the concerns and supporting rationale provided by Benga.

The Panel rescinds Information Request (IR) 6.2 for the reasons described below. IR 6.6 is not rescinded and the Panel requires Benga to respond to it. The Panel has taken this opportunity to clarify the rationale in IR 6.6 in order to provide guidance to Benga so that Benga can assist the Panel in fulfilling its obligations.

6.2 Land Use and Land Management

IR # 6.2 stated:

References:

Tenth Addendum to the Environmental Impact Assessment. Response to Information Request 3.4. (CIAR #251)

Public Lands Act. Public Lands Administration Regulation. Alberta Regulation 187/2011, Section 9(1)(e), p. 19.

Rationale:

The *Public Lands Act* application process requires applicants to obtain a public land standing report (PLSR) in order to identify the existing land occupants and interests on the public land subject to the application. Section 9(1)(e) of the *Public Lands Administration Regulation* specifies that an application for a disposition “must, if the application relates to

public land that is already the subject of a disposition under the Act or a timber disposition, be accompanied with a statement of consent, in a form acceptable to the director, that is signed by the disposition holder or timber disposition holder”. The process also requires that consent is included in an application where the lands are subject to an existing reservation or notation that requires consent.

In response to IR 3.4 (CIAR #251), Benga provided some consents, however there are still required consents that remain outstanding. In addition, some of the information provided by Benga are not consents, but simply the notifications that were sent to the land occupants. In certain circumstances, notifications and responses did not include appropriate disposition numbers, therefore confirmation of notification adequacy cannot be confirmed.

In order to comply with Section 9(1)(e) of the *Public Lands Administration Regulation*, Benga is required to review the Public Land Standing Report and all comments associated with each entry and provide the following information:

Information Request:

- a) Submit a complete package of all required consents and clearances from the existing occupants and reservations/notations identified in the report; and
- b) Submit all consents and notifications and include the appropriate disposition identifications. The letters of notification and requests for consent must identify the disposition number(s).

In the December 6, 2019 letter, Benga indicated that it had in its response to IR 3.4 already provided consent and notification “status” for the land reservations within the proposed disposition boundaries, as well as consent letters obtained to date by Benga. Further, Benga acknowledged that it may not have all consents necessary to support its public lands applications. It also acknowledged that if the overall Grassy Mountain Coal Project is approved, it may be necessary for Benga, in order to obtain access to the necessary lands, to seek orders from the Alberta Surface Rights Board. Implicit in the recognition of a possible role of the Surface Rights Board is an acknowledgement that the Joint Review Panel (the Panel) will not be able to issue dispositions for *Public Lands Act* applications for which necessary consents have not been provided, even if the overall project were to be approved.

In these circumstances and given the opportunity during the ongoing Joint Review Panel and hearing process for Benga to obtain all required consents, the Panel considers that it no longer requires Benga to respond to IR 6.2. However, it is the Panel’s present understanding that if consents required by the relevant legislation are not provided by the close of the hearing, even if

all other requirements are met, the Panel will not be able to issue dispositions in relation to applications where those consents are required.¹

At this time, necessary consents from the disposition holder, Alberta Environment and Parks, relating to the following reservations/activities are outstanding:

- CNT 190002
- PNT090084
- PNT 090087
- PNT 900426 and DHR000001
- PNT 900430

6.6 Cultural Heritage

IR #6.6 stated:

References:

Information Request Package #4 from the Joint Review Panel to Benga, Information Requests 4.2 and 4.4. (CIAR #212).

Tenth Addendum to the Environmental Impact Assessment. Response to Information Request 4.2 and 4.4. (CIAR #251).

Canadian Environmental Assessment Agency “Technical Guidance for Assessing Physical and Cultural Heritage or any Structure, Site or Thing that is of Historical, Archeological, Paleontological or Architectural Significance under the *Canadian Environmental Assessment Act, 2012*”. (March 2015).

Rationale:

As the Panel noted in IR 4.2 (CIAR #212), physical and cultural heritage is not only associated with an individual physical site, but also with the experience lived by Indigenous peoples in those areas, and the importance of the landscape as a whole. In Appendix 4.1-1 (CIAR #251), in response to IR 4.4, Benga provides information on the potential effects to cultural heritage sites for specific Indigenous groups. For example, with respect to Tsuut’ina Nation, Benga states that “the potential effects... could result in a change in use or access or disturbance to features associated with sacred, gathering, or habitation sites. Together, these changes will change the cultural value or importance to the value.” In another instance, Benga states “The Project will intersect or be in proximity to

¹ Section 9 (e) of the *Public Lands Administration Regulation* AR 187/2011

sacred, gathering and habitation sites identified by the Ktunaxa Nation.” Benga notes that “spiritual integrity of the landscape will be forever changed despite lasting reclamation efforts” however, no further description of the initial state of the spiritual integrity of the landscape, or the residual effects that will result in a permanent alteration of the spiritual landscape, is provided.

1The “Technical Guidance for Assessing Physical and Cultural Heritage or any Structure, Site or Thing that is of Historical, Archeological, Paleontological or Architectural Significance under the *Canadian Environmental Assessment Act, 2012*”² states that the heritage value of a resource is embodied in tangible and/or intangible character-defining elements. These elements include the materials, forms, location, spatial configurations, uses and cultural associations or meanings that embody the heritage value of a cultural resource, which must be retained to preserve that value.

Tsuut’ina Nation stated (CIAR #286) that Benga has failed to properly scope and understand the impacts of the Project on transmission of knowledge, language and culture through lack of access to sites. Benga acknowledges in Appendix 4.1-1 that “Intergenerational knowledge provides instruction on cultural and spiritual practices such as gathering plants for food and subsistence, ceremonial procedures, legends, using plants as medicine and harvesting berries” and indicates that the effects pathways consider both tangible and intangible values. Appendix 4.1-1 indicates that Tsuut’ina members are “granted the privilege of harvesting specific species, many of which are only found in specific environments (e.g., alpine areas such as at Grassy Mountain). Such rights are designated within the context of celebrations and customs, such as annual bundle openings and Sun Dance ceremonies” (CIAR #251). Transmission of knowledge is however not carried forward as an effects pathway for cultural heritage, as shown in Table 3.2.1-1.

Tsuut’ina Nation has stated that Benga’s cumulative effects assessment in relation to their physical and cultural heritage is deficient as it does not consider the impacts of the Project on intangible culture, such as the ability to transmit knowledge to future generations because of access restrictions or avoidance of areas because of noise and dust (CIAR #286). Tsuut’ina Nation notes “Once knowledge of a place is lost by one generation, it is very difficult if not impossible to regain this knowledge in the future because this information is passed along inter-generationally” (CIAR #286).

²Available online: Technical Guidance for Assessing Physical and Cultural Heritage or any Structure, Site or Thing that is of Historical, Archeological, Paleontological or Architectural Significance under the *Canadian Environmental Assessment Act, 2012*. <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/technical-guidance-assessing-physical-cultural-heritage-or-structure-site-or-thing.html>

The Final EIS Guidelines, Section 6.3.4 (CEAR #11) require Benga to consider how changes to the environment caused by the Project will affect the cultural value or importance associated with physical and cultural heritage and the current uses of land and resources for traditional purposes (e.g., inter-generational teaching of language or traditional practices, communal gatherings) and indirect effects such as avoidance of the area due to increased disturbance (e.g., noise, presence of workers).

Information Request:

- a) Provide an assessment of the effects of the Project on the intangible aspects of cultural heritage, including but not limited to cultural and spiritual practices, ceremonies, and intergenerational transfer of language, knowledge, and culture.
- b) For each biophysical VC that is identified as having a link to an Indigenous VC:
 - i. describe the link from the biophysical VC or physical or cultural heritage site to any cultural and spiritual practices, ceremonies, and related intergenerational transfer of knowledge (i.e. if specific plants are used for ceremonial purposes, describe the ceremony, and its importance in Indigenous culture); and
 - ii. describe how the effects to the specific biophysical VC or physical or cultural heritage site may affect cultural and spiritual practices, ceremonies, and intergenerational transfer of knowledge.
- c) Where residual effects to cultural and spiritual practices, ceremonies, and/or intergenerational transfer of knowledge are identified, describe the residual effect.
- d) Update the cumulative effects assessment in relation to the current use of lands and resources for traditional purposes and the physical and cultural heritage of Indigenous peoples to consider the effects of the Project on cultural and spiritual practices, ceremonies, and intergenerational transfer of knowledge.

The Panel does not consider the request in IR 6.6 to be inappropriate or represent cultural [mis]appropriation. The information requested of Benga in IR 6.6 is in accordance with the requirements of *Canadian Environmental Assessment Act, 2012* (CEAA 2012), the EIS Guidelines, and has been required of Benga since 2015. A response to IR 6.6 will contribute necessary evidence to the record that will allow the Panel to conduct an assessment of the potential effects of the proposed project as identified in section 5 of CEAA 2012.

In 2015, the Project Description (CIAR #4) filed with the Canadian Environmental Assessment Agency noted that Benga had commenced Aboriginal engagement. Section 6.3 of the Project

Description stated that early consultation had identified concerns which included project impacts on cultural heritage. The Proponent states, under the heading Key Comments and Concerns to Date, that: “Initial comments from the consultation discussion with all of the Treaty 7 First Nations groups (to-date) have referred to potential adverse effects to:

- heritage, archaeological and cultural resources: potential impacts to travel routes, sacred areas (e.g., buffalo rock and vision quest sites), as well as cultural practices and customs;
- spiritual/sacred sites: potential impacts to spiritual sites as pointed out by Elders.”

The Project Description went on to state that it would consider and incorporate this information into its regulatory documents:

Throughout the Project, Riversdale will continue to share Project information and seek input from Aboriginal groups to develop a greater understanding of, potential impacts to Aboriginal and Treaty rights and traditional uses. This input will be considered and incorporated, as appropriate, into the Application and other regulatory documents.

An Initial EIS was filed in late 2015, in which Section H related to the assessment of impacts on Aboriginal peoples (CIAR #29). An updated EIS was provided in August of 2016 and, again, Section H related to the assessment of impacts on Aboriginal peoples (CIAR #42). In early 2019, and in response to CIAR #112, Benga provided the *Ninth Addendum to the Environmental Impact Assessment* (CIAR #185). Benga responded to Information Request 4.2 and 4.4, issued by the Panel in 2019 (CIAR #212), with *Tenth Addendum to the Environmental Impact Assessment* (CIAR #251).

Package 4 of the Tenth Addendum dealt with Indigenous Rights, Land Use and Culture and Human Health. Appendix 4.1-1 to the Tenth Addendum is a document entitled “An Updated Assessment of the Potential Effects of the Grassy Mountain Project on Indigenous Groups”. Benga states that Appendix 4.1-1 provides a complete update regarding Indigenous consultation, including a discussion of concerns raised since the filing of the EIA in August 2016. Benga states that Appendix 4.1-1 addresses valued components such as “Cultural and spiritual values” and “Indigenous Physical and Cultural Heritage”.

Benga’s submissions, as described above, were the subject of public comment submitted on behalf of Tsuut’ina Nation (CIAR #286), which expressed “concerns that the EIS does not sufficiently respond to the EIS Guidelines and the requirements under CEAA 2012” because, in part:

Benga has failed to properly scope and understand the impacts of the Project on transmission of knowledge, language and culture through lack of access to sites (Table 3.1.2-1 Indigenous Value Components and Potential Effects in Appendix 4.1-1). While Benga acknowledges “Intergenerational knowledge provides instruction on cultural and spiritual practices such as gathering plants for food and subsistence, ceremonial procedures, legends, using plants as medicine and harvesting berries” this does not translate into the assessment of impacts. Benga does not include the transmission of knowledge as an effects pathway (Table 3.2.1-1 Pathways of Potential Effects on Indigenous Valued Components in Appendix 4.1-1). This is a failure to recognize and incorporate the Indigenous perspective in the EIS. ...

Benga’s cumulative effects assessment in relation to physical and cultural heritage is deficient as it does not consider the impacts of the Project on intangible culture, such as the ability to transmit knowledge about areas within the Regional Study Area (“RSA”) and Local Study Area (“LSA”) to future generations because of access restrictions or avoidance of areas because of noise and dust.

Part of the rationale of IR 6.6 is to give the Proponent the opportunity to respond to comments, recommendations, and criticism. The Panel recognizes that since the submission of CIAR #286, the Tsuut’ina Nation has submitted a non-objection letter to the Panel (CIAR #299) indicating that Benga has adequately consulted with Tsuut’ina Nation and addressed the group’s project specific concerns. However, the Panel considers the comments from CIAR #286 to remain valid.

The EIS Guidelines for this Project (CIAR #11) require the Proponent to adopt a precautionary approach in documenting the analyses included in the EIS:

2.4. Application of the Precautionary Approach

In documenting the analyses included in the EIS, the proponent will demonstrate that all aspects of the project have been examined and planned in a careful and precautionary manner in order to avoid significant adverse environmental effects.

IR 6.6 therefore asks Benga to conduct an assessment, using a precautionary approach, for all Indigenous groups and to document the reasoning through which it arrived at its conclusions, as well as its conclusions concerning cultural impacts, and residual impacts on culture.

The Panel reminds Benga that the Panel is mandated to assess Project impacts on Aboriginal peoples, even if Aboriginal peoples file letters of non-objection with the Panel. The Panel acknowledges that Benga may have limited information from some Indigenous groups to enable the analyses required by I.R. 6.6. The Panel also recognizes that other Indigenous groups have provided Benga with letters of non-objection, despite having expressed concerns about the

impacts of the Project on the matters which I.R. 6.6 seeks to address; and despite having provided Benga with factual information which would enable Benga to provide the analyses required by I.R. 6.6.

If Benga declines to conduct an assessment for all Indigenous groups, as described in IR 6.6, in whole or part, for any Indigenous group(s), then Benga should clearly indicate so and provide its justification so that the public and Aboriginal groups have an opportunity to comment on such a decision, prior to the Panel considering whether to proceed to the public hearing stage of its process.

To ensure the Panel is able to continue to provide meaningful opportunities for public participation, the Panel requests Benga confirm its estimated timeline for submission of a response to Package 6, including IR 6.6, by January 27, 2020.

Yours truly,

<Original signed by>

Alex Bolton
Chair, Joint Review Panel

cc: Mike Bartlett, Senior Project Manager, Benga Mining Client Lead, Millennium EMS Solutions Ltd.