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January 8, 2021

**VIA ELECTRONIC MAIL:** IAAC.GrassyMountain.AEIC@canada.ca

Joint Review Panel for the Grassy Mountain Coal Project
c/o Impact Assessment Agency
160 Elgin Street, 22nd Floor, Place Bell Canada
Ottawa, Ontario K1A 0H3

**Attention: Alex Bolton, Chair**

Dear Sir:

**Re: Grassy Mountain Coal Project - Reference Number: 80101**

Please find attached the final written submissions of the federal authorities (Environment and Climate Change Canada, Fisheries and Oceans Canada, Health Canada, Natural Resources Canada, and the Impact Assessment Agency of Canada) in respect of this joint review assessment.

Again, on behalf of all our colleagues, we express our thanks and appreciation to the Panel and the Secretariat for conducting this assessment through these remarkably challenging conditions.

Yours truly,

<Original signed by>

**Robert Drummond / Sydney McHugh**
Senior Counsel / Counsel
Prairie Region
Department of Justice Canada

Encl.

Canada

CEAA NO. 80101

IN THE MATTER OF A JOINT PANEL REVIEW OF THE
GRASSY MOUNTAIN COAL PROJECT PROPOSED BY BENGA MINING
LIMITED

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**FINAL WRITTEN SUBMISSIONS OF THE GOVERNMENT OF CANADA**

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Robert Drummond / Sydney McHugh

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## I. Final Submissions of Environment and Climate Change Canada

1. Following the Panel Hearing, Environment and Climate Change Canada's (ECCC) recommendations remain largely unchanged. They are summarized below. As noted in the hearing record, Benga has indicated that a number of additional project design and operation details would be developed if the Project is approved. Without these details, there is some uncertainty about the magnitude of effects that the Project will have on the environment.

2. ECCC's recommendations remain focused on the need for baseline data collection, monitoring and adaptive management, and a Best Available Technologies/Best Environmental Practices (BAT/BEP) Determination to reduce GHG emissions. The following summary of ECCC's recommendations takes into account Benga's October 5, 2020 Hearing Response Submission, what was presented during the hearings, and Benga's December 11, 2020 Final Argument.

Selenium impacts to terrestrial and aquatic ecosystems

3. ECCC recommended that Benga implement a biomonitoring program in an effort to protect sensitive egg-laying aquatic-dependent vertebrates.[1] Following discussions at the hearing, uncertainties remain with respect to the sources of selenium and the concentrations used by Benga to model bioaccumulation of selenium in migratory birds and other wildlife receptors. For instance, during the hearing, Benga was questioned as to whether water from the raw water pond used for dust control on the haul roads might be a vector for selenium to enter the environment via runoff from the roads[2]. The monitoring recommendations issued by ECCC in the final written submission will aid the proponent in detecting and responding to any unforeseen contributions of selenium to egg-laying vertebrates.

[1] CIAR 542, GoC Final Written Submission, pdf page 30.
[2] CIAR 931, Transcript Volume 27, November 30, 2020, pdf page 204 (transcript page 5962) line 20 to pdf page 208 (transcript page 5966) line 25.

Migratory birds

4. ECCC continues to recommend that Benga implement their commitments to conduct work outside of the nesting season and to undertake progressive reclamation as soon as possible in order to minimize effects of the Project on migratory birds.[3]

Whitebark pine and limber pine species at risk

5. ECCC continues to recommend that Benga implement their commitments to replant Whitebark Pine and Limber Pine with blister rust resistant seedlings at a three to one ratio for each tree destroyed, and to monitor and apply adaptive management to ensure seedling success.[4]

Water quality

6. ECCC recommended that Benga apply a risk assessment methodology based on the potential for both selenate and selenite forms of selenium to be present in surface water during the operational phase of the project.[5] ECCC also recommended excluding the application of a sulphate-mitigation factor in the risk-based water quality objective, as it will only be relevant if all selenium is in the form of selenate. Benga has indicated that selenate will be the only selenium species present[6]. However, uncertainty remains regarding the efficacy of proposed water treatments (the saturated backfill zones and the advanced oxidation process), and the resulting selenium concentration and speciation. ECCC continues to hold the opinion that the bioaccumulation predictions may be underestimated and will impact the establishment of a reliable risk-based site-specific water quality objective for selenium.

[3] CIAR 542, GoC Final Written Submission, pdf page 34.
[4] CIAR 542, GoC Final Written Submission, pdf page 38.
[5] CIAR 542, GoC Final Written Submission, pdf page 44.
[6] CIAR 962, Benga's Final Argument, pdf page 90.

7. It is understood that the true measure of water quality will be determined once the project, should it be approved, is operating. ECCC therefore continues to recommend that Benga implement a monitoring program that includes determination of selenium speciation in surface water, biomonitoring of the aquatic community, and comprehensive triggers for adaptive management in the case of elevated selenium concentrations. Also, ECCC continues to recommend that the monitoring program inform the actions that Benga will take to mitigate the water quality impacts due to selenium.

Air quality

8. ECCC recommended that Benga establish nitrogen oxide emissions values that would trigger adaptive management, identify measures to control emissions during mine operation, and investigate the use of lower-emitting blasting agents.[7] ECCC reviewed Benga's Hearing Response Submission dated October 5, 2020, and acknowledges that Benga provided modeling of nitrogen dioxide[8] per ECCC's recommendation 6.1.2.

9. To enable an effective comparison to baseline regional air quality, ECCC also recommended that Benga conduct monitoring of nitrogen dioxide and fine particulate matter in nearby communities for a minimum of one year prior to construction. During the hearings, ECCC clarified that the sensor currently in use may not provide data of sufficient quality[9]. The monitoring data collected so far is acceptable to inform the baseline prediction, however ECCC notes that the current sensor does not meet minimum performance specifications with respect to detection limits and precision for continuous $NO_2$ monitoring established by the Alberta Air Monitoring Directive. It is important that air quality data is generated using equipment and other standards and siting criteria that are robust, such as those described by the Alberta Air Monitoring

[7] CIAR 542, GoC Final Written Submission, pdf page 50.
[8] CIAR 571, Benga's Hearing Response Submission, pdf pages 45-61.
[9] CIAR 941, Transcript Volume 28, December 1, 2020, pdf page 85 (transcript page 6055) line 20 to pdf page 87 (transcript page 6057) line 13.

Directive.

10. In relation to fugitive dust along the rail corridor, ECCC continues to recommend that Benga consider alternative fugitive dust mitigation measures including possible re-application of the latex binder on uncovered rail cars, or the introduction of covers.[10, 11] Regarding the haul roads, ECCC continues to recommend that sampling, monitoring and adaptive management be undertaken to assess and mitigate fugitive dust to ensure the proposed level of mitigation is achieved.

Greenhouse gases

11. The Government of Canada recently tabled legislation that, if passed, will commit the Government to a process to achieve net-zero emissions by 2050. This legislation aligns with the comments ECCC provided concerning Benga's predicted GHG emissions[12].

12. ECCC continues to recommend that Benga develop, implement and regularly update a GHG emission reduction plan to ensure the Project's GHG emissions are minimized and continue to be reduced based on emerging technologies and practices, in alignment with the Government of Canada's climate change objectives.[13] Such a plan should include conducting a BAT/BEP Determination process[14] to identify mitigation measures to further improve the Project's GHG emissions throughout its lifetime (including during the decommissioning phase).

13. ECCC is of the view that the Project's expected GHG emissions levels are above the average, but within the range of emissions intensities of similar existing mines in Canada. Benga acknowledged this during the hearing, indicating that the Project is mid-

[10] CIAR 542, GoC Final Written Submission, pdf page 55.
[11] CIAR 941, Transcript Volume 28, December 1, 2020, pdf page 90 (transcript page 5990) lines 5-14.
[12] CIAR 542, Goc Final Written Submission, pdf page 56.
[13] CIAR 542, GoC Final Written Submission, pdf page 60.
[14] More details on how conducting a BAT/BEP Determination process is presented in the Strategic Assessment of Climate Change (SACC).

range in terms of GHG emissions and that there are opportunities for Benga to improve its performance during operation and to potentially become one of the leading mines in terms of emissions per tonne of coal.[15]

14. ECCC has reviewed Benga's Response Submission dated October 5, 2020,[16] and acknowledges the additional information contained in the submission. However, the submission did not provide new GHG mitigation measures, a commitment to continuous improvement, or a BAT/BEP Determination following the methodology described in the Strategic Assessment of Climate Change as recommended by ECCC.

Impact of climate change on the Project

15. ECCC continues to recommend using best-available methodologies to plan for projected future changes in climate such as potential changes in short-duration precipitation extremes in order to ensure that the Project can withstand the effects of future climate change.[17]

## II. Final Submissions of Fisheries and Oceans Canada

Introduction

16. Fisheries and Oceans Canada (DFO) provided a technical submission to the Grassy Mountain Coal Project Joint Review Panel (the Panel) on September 21, 2020.[18] DFO was cross-examined on November 23, 2020, during the "Water including surface and groundwater management, quantity and quality, selenium management and aquatic resources, including fish and fish habitat and fish species at risk" session.

17. DFO's technical submission and direct evidence at the hearing summarized the status of

[15] CIAR 919, Transcript Volume 25, November 26, 2020, pdf page 178 (transcript page 5515) lines 2-13.
[16] CIAR 571, Benga's Hearing Response Submission, pdf pages 16-19.
[17] CIAR 542, GoC Final Written Submission, pdf page 67.
[18] CIAR 542.

Westslope Cutthroat Trout (WCT), listed as "Threatened" under the *Species at Risk Act* (SARA), and DFO's assessment of the potential environmental effects of the project on WCT, and all fish and fish habitat. The project will result in impacts to both Gold and Blairmore creeks. While Blairmore Creek is not protected under SARA because the population of WCT is only near-pure, DFO's evidence was that Blairmore Creek is considered important because of its potential to support population and distribution objectives of the 2019 *Recovery Strategy and Action Plan for the Westslope Cutthroat Trout* (Oncorhynchus clarkii lewisi) *Alberta Population (also known as Saskatchewan-Nelson River Populations) in Canada*.[19] As such, Blairmore Creek's sensitive status will inform any future risk assessment of impacts reviewed under the regulatory framework of the *Fisheries Act*, should the project be approved.

Baseline Data

18. With respect to WCT baseline population data collection, DFO's evidence was that the limited time period of baseline data collection and variability between methods creates uncertainty in abundance estimates and the proponent's ability to effectively monitor population status over time.

19. The proponent provided additional information in response to undertaking 19 during the hearing process that underscored the variability in the population estimate for Gold Creek.[20]

20. Understanding the limitations of the data collection and estimates is critical for impacts of this scale proposed on a species at risk. The information to date provides minimal confidence that baseline data collected is sufficient to validate predictions, define adaptive management triggers, and effectively monitor population changes. This is a critical piece in validating project impacts, and the effectiveness of mitigation and offsetting measures.

[19] CIAR 542, pdf page 235.
[20] CIAR 877.

Residual Effects

21. DFO's technical submission provides a detailed assessment of the limitations, gaps and uncertainties associated with the identification and quantification of residual effects of the project on fish and fish habitat, specifically WCT.[21] We have chosen to only reiterate particularly problematic pathways here.

*a) Changes to hydrology in Gold and Blairmore Creeks*

22. DFO's evidence was that impacts to WCT due to changes in hydrology are subject to significant uncertainty and have likely been underestimated.[22] In particular, the proponent only identified residual effects to habitat with a modelled change in area weighted suitability of 10% or more, using the Canadian Science Advisory Secretariat report *Framework for Assessing the Ecological Flow Requirements to Support Fisheries in Canada* (2013) to support this approach.[23] The advice in this report has been incorrectly interpreted in two ways:

    i) First, the proponent has used it to support an allowable hydrologic alteration of 10% of monthly flows. The 10% value in the report refers to alterations in instantaneous flows; applying this to monthly flows dampens the changes and their effects. Furthermore, this value represents estimated thresholds where the impacts have a lower probability of causing impacts, which is not synonymous with no residual effects.

    ii) Second, the proponent has equated the 10% change in instantaneous flow with a 10% change in physical habitat area. These metrics are not equivalent, as evidenced in the response to undertaking #22,[24] and applies another level of dampening to potential changes in habitat. DFO would consider any loss in critical habitat area as a result of changes in flow a residual effect. The report also states "the advice within this report is not necessarily recommended for direct application to intermittent, seasonal or ephemeral streams or rivers." DFO reiterates that that this may not be an appropriate threshold to apply due to the nature of these systems.

[21] CIAR 542, pdf page 225-269.
[22] CIAR 542, pdf page 249-256.
[23] CIAR, pdf page 256.
[24] CIAR 929.

*b) Direct loss of aquatic and riparian habitat*

23. DFO's evidence was that the proponent has not provided an updated analysis of impacts to critical habitat based on the 2019 recovery strategy and action plan that includes a 30 m riparian area extending from the high water mark on both banks for the entire geospatial area of designated critical habitat.[25]

24. Additionally, the proponent's riparian quality classification system results in residual effects only for some medium and high quality rated habitat. The methodology for arriving at the resulting quantified impacts is unclear and does not acknowledge the ecological context and sensitivity of an isolated population of a species at risk with limited resiliency.

25. DFO re-emphasizes its recommendation to undertake an updated analysis of the ability of the riparian area on Gold Creek to support the features, functions and attributes of critical habitat defined in the recovery strategy and action plan. A similar analysis should be undertaken for Blairmore Creek given its sensitivity.

26. Overall, DFO's evidence was that uncertainty remains with all pathways of effects identified. As a result, the effects to WCT are likely underestimated and a full quantification of effects is unknown. DFO reiterates its recommendations to address all residual effects in order to fully understand the project's effects on WCT.[26]

<u>Offsetting</u>

27. DFO's evidence was that a complete assessment of residual effects is required to quantify offsetting to counterbalance the impacts.[27] The detailed offsetting plan was intended to provide offsetting concepts to counterbalance the impacts to WCT. Without identifying all residual effects, the quantification presented does not represent what

[25] CIAR 542, pdf page 260-263.
[26] CIAR 542, pdf page 283-288.
[27] CIAR 542, pdf page 263-268.

would be required to offset for residual impacts to WCT. Additional offsetting will be required once all residual effects are quantified, should the project be approved.

28. With respect to the offsetting options, DFO's evidence was that there is still uncertainty with the feasibility, sustainability and appropriateness of some of the offsetting options e.g.:

    i) Habitat gains associated with increased flows in Blairmore Creek due to mine water management is incidental and not in line with DFO's offsetting policy.

    ii) There is not sufficient data to indicate that a section of braided stream channel in Gold Creek is posing a barrier to WCT, nor to support the proposal that realigning it to a single channel is sustainable in the long-term due to natural sediment transport dynamics.

    iii) There is not sufficient data to confirm that creating deeper overwinter pools would be sustainable long-term.

29. Offsetting should be constructed and proven effective prior to impacts in order to support a determination that the survival and recovery of WCT will not be jeopardized, a Section 73 precondition of SARA that must be met prior to issuing a permit.

30. Should the project be approved and the proponent applies for a SARA permit, DFO may then be in a position to understand the risk to WCT and whether preconditions of SARA can be met in order to issue a SARA permit. Acquisition of the information outlined in the recommendations does not guarantee the issuance of a SARA permit; rather, it facilitates the collection of information to support the regulatory decision making process.

SARA Permitting

31. During the hearing, the proponent provided examples of SARA permits issued by DFO as aids to cross examination,[28] and referenced these in their final argument to indicate

[28] CIAR 886 and 887.

that DFO has permitted other activities that may be relevant to the Grassy Mountain Coal Project.[29]

32. The legislative requirements and framework for consideration when issuing a SARA permit is the same regardless of species and impacts. However, each permit application must be considered within the context of the species being impacted and the scale and type of activities proposed. While the permits the proponent identified may have some similarities to what the proponent will apply for, should the project be approved, the scale of impacts to critical habitat and the potential harm to WCT associated with capture, handling and long-term monitoring will make the application extraordinary. The permits put forth by the proponent are not particularly relevant to the project, and an individual review of the application in the context of the WCT recovery strategy and action plan, and permitting policy will be required.

33. DFO's Science Response[30] outlines a population modelling approach that would support an assessment of the effectiveness of mitigation and offsetting measures to the populations required when considering the issuance of a SARA permit.

Other issues

*Mitigation and risk of failure*

34. DFO was asked questions at the hearing related to the possibility of restoration or compensation in kind for losses or damages to WCT resulting from a dam or pond failure.[31] DFO's response was that the possibility would depend on the scale and type of event. DFO would like to reemphasize that significant uncertainty remains regarding any possibility of restoring habitat and the genetics of a population from a dam or pond failure. Depending on the scale, location, timing, extent, and the proponent's response, even a small release from the site could cause significant harm to the population. The

[29] CIAR 962, pdf page 102-103.
[30] CIAR 847.
[31] CIAR 891.

genetics of each WCT population are unique and valuable, and the population itself lacks resilience due to its isolated nature. The feasibility of re-establishing the Gold Creek population and its unique genetics should an event remove a portion of the population presents significant uncertainty.

35. Identifying and reducing risk where it exists, and implementing a comprehensive monitoring plan over the life of the mine will be critical. Should the project be approved, survival and recovery of this population of WCT depends on eliminating risk associated with accidents and malfunctions on site over the life of the project due to the potential high risk of jeopardizing survival and recovery.

*Water quality*

36. DFO's evidence was that it understands that Environment and Climate Change Canada (ECCC) has outstanding concerns regarding the proponent's risk assessment methodology and proposed site-specific water quality objective for selenium. Specifically, it may not accurately characterize the risk to aquatic receptors, including WCT, from selenium exposure and bioaccumulation. DFO reiterates its support for ECCC's recommendation 5.1.[32]

Conclusion

37. Overall, an assessment of effects informed by the precautionary approach at all assessment stages is necessary when the proposed effects are to a species at risk. DFO's evidence was that application of the precautionary approach was not evident in the proponent's assessment of effects to WCT.

38. The intent of DFO's recommendations is to address remaining uncertainties with the project effects on WCT. They are based on questions and concerns raised in information requests throughout the environmental assessment process that were not fully

[32] CIAR 542, pdf page 44.

addressed.[33] DFO also advised the proponent of potential additions to critical habitat in these registry documents, which was not subsequently incorporated into the assessment when the updated recovery strategy and action plan for WCT was released in December 2019.

39. DFO confirms that the advice and recommendations provided to the Panel to date are still valid. DFO's opinion is that the information outlined in the recommendations is required in order to determine the significance of effects to WCT. Without the information, DFO defaults to using the precautionary approach and advises that based on the information available to date, the project is likely to result in significant adverse effects to WCT. Based on the information currently available for the project, DFO would not be able to issue the required regulatory permits.

## III. Final Submissions of Health Canada

40. Health Canada maintains all of its recommendations provided in its written submission to the Joint Review Panel.[34] These recommendations relate to air quality, drinking water quality, noise and the human health risk assessment. From Health Canada's perspective, the hearing brought forward additional uncertainties (some of which are provided in the bulleted list below) with the predictions of potential impacts to human health from all project emission sources throughout the lifetime of the project. Due to the existing uncertainties of the assessment[35] of risk to human health and additional information provided at the hearing, there remain, in Health Canada's opinion, outstanding limitations with the reliability of the proponent's predictions of potential risks to human health.

41. Health Canada suggests that a comprehensive and robust environmental monitoring program of all relevant environmental media (i.e., air, water, soil, sediment, etc.) be

[33] e.g. CIAR 60 and 75.
[34] CIAR 542.
[35] Please see previous Health Canada submissions on the registry: CIAR 76, 167, 283, 347, 542.

developed and implemented by the proponent throughout the lifetime of the project and post-mine closure, should the project be approved. The monitoring data from this program would be used to verify and/or update all assumptions, calculations and final predictions in the environmental assessment, and to address the uncertainties in the assessment of risks to human health. This updated information could then be used by the proponent to reassess (either in part or in whole) risks to human health from all project emission sources (both independently and collectively). As a result, this would improve human health risk estimates such that they more accurately reflect the actual level of risk to potentially impacted human receptors during the life of the project. In addition, where uncertainties remain, the precautionary approach should be applied (i.e., an appropriate level of conservatism) for the protection of human health. The revised risk estimates may be used to identify the appropriate risk drivers and mitigation measures.

42. In addition to comments that Health Canada raised in previous submissions[36], limitations in the assessment of risks to human health from project emissions sources highlighted during the hearing remain unaddressed. These limitations include but are not limited to:

- lack of site-specific project data used in the assessment of risks to human health;
- a single year's accumulation of dust;
- lack of total project dust considerations from all sources, not just coal;
- lack of cumulative exposures from all media (including project dust and re-suspended dust combined);
- lack of consideration of all exposure groups (including current and future residents living on or near the project area and exposure routes);
- lack of analysis of the health effects of coal and mixtures that include coal; and
- lack of accounting for all contaminants of potential concern as they move through and between all impacted media (i.e., mass balance accounting).[37]

43. Comments raised by Health Canada in its final written submission and previous submissions on the registry should be addressed in advance of or during project development/design stages of the project (i.e., before extensive field work begins). This

[36] *Ibid*.
[37] An example is the contaminants of potential concern in the water from the raw water pond being used in road dust suppression were not accounted for in the human health risk assessment. CIAR 931, pdf pp. 203 – 208.

would better inform the development of a comprehensive and robust environmental monitoring program.

44. Results of the comprehensive environmental monitoring program should be used to implement additional mitigation measures, if necessary, in order to minimize risks to human health. Furthermore, relevant environmental media quality guidelines should not be viewed as pollute up-to levels and all efforts should be made to minimize project emissions and subsequent potential impacts to human health. Health Canada suggests that the monitoring data and its relevance to human health could be regularly reported in plain-language to all community engagement committees as described in CIAR#571.[38]

## IV. Final Submissions of Natural Resources Canada

45. Since 2015, Natural Resources Canada (NRCan) has participated in the environmental assessment for the proposed Grassy Mountain Coal Project (the Project) as a Federal Authority that is in possession of specialist or expert information or knowledge with respect to the Project, pursuant to Section 20 of the *Canadian Environmental Assessment Act, 2012*.

46. NRCan provided expertise to support the environmental assessment of the Project in the areas of seismicity, surficial geology, terrain hazards and hydrogeology. On September 21, 2020, NRCan provided its final recommendations to the Joint Review Panel.[39]

47. In summary, to address seismic concerns associated with the Project, NRCan recommended that the Proponent adhere to the most current National Building Code of Canada and Canadian Dam Association Guidelines during the construction phase of the Project. In regards to surficial geology and terrain hazards, NRCan recommended that the Proponent implement their commitments to perform a foot survey, field mapping exercise, ground condition inspections and ground monitoring program. Lastly, NRCan

[38] CIAR 571, Section 3.3 pdf pp. 12.
[39] CIAR 542.

recommended that through the Groundwater Management Plan, the Proponent provide metrics and parameters that will be used to evaluate the performance of the drainage ditches and seepage capture wells. The plan should be updated and adaptable in accordance with the monitoring activities and acquisition of relevant observation data and it be provided to relevant authorities and accompanied with annual progress reports submitted for review.

48. Natural Resources Canada staff from the Office of the Chief Scientist and the Geological Survey of Canada (GSC) participated in the public hearings that took place from October 27th – December 2nd, 2020. Senior research scientists from the GSC delivered presentations in the areas of seismic hazards and surficial geology and terrain hazards during the Geology and Geotechnical session on November 7, 2020 to supplement the recommendations provided in NRCan's final submission. During the Water session on November 23rd, NRCan's Senior Research Scientist presented a summary of the department's final recommendations in relation to groundwater and hydrogeology to Panel members and intervenors, and was available to answer questions related to NRCan's review.

49. In review of the information presented and discussed during the Public Hearing proceedings, NRCan wishes to confirm with the Panel that the advice and recommendations provided by NRCan to date represent the department's final advice for this process.

50. NRCan would like to thank the Joint Review Panel, the Impact Assessment Agency of Canada, and the Alberta Energy Regulator for facilitating an efficient virtual hearing process and providing the opportunity to participate. NRCan will continue to provide expertise related to its mandate as needed in the next steps of the process.

## V. Final Submissions of Impact Assessment Agency of Canada

Introduction

51. The Impact Assessment Agency of Canada (IAAC), formerly the Canadian Environmental Assessment Agency (CEAA), has been consulting with potentially affected Indigenous communities since March 2015, shortly before the Project was referred to a Joint review Panel on July 16, 2015.

52. The Agency submitted a Preliminary Assessment of Potential Impacts on Asserted or Established Aboriginal or Treaty Rights for the Treaty 7 and Ktunaxa Nation Council (KNC) communities to the Panel. This initial assessment was the basis of the Agency's Hearing submission to the Panel.[40] The Agency was cross-examined during the "Indigenous current use of land and resources, rights, culture, and other Indigenous topics" session on November 10, 2020.

53. The Agency will continue to consult with all potentially impacted Indigenous communities about the Project.

Roles within the Agency

54. The Crown Consultation Operations Division (CCOD) in the Agency's Operations Sector is responsible for coordinating the Government of Canada's consultation with Indigenous communities during the environmental assessment (EA) of the Project. The Agency's Review Panels Division is separate from the CCOD.

55. The Review Panels Division is responsible for projects referred to an assessment by review panel. The Review Panels Division plays a role in supporting the Agency's work in the earlier phases of the assessment, including managing the public comment period on the draft Terms of Reference for the review panel. Once an independent review panel is appointed, a secretariat composed of review panel staff is assigned to support the

[40] CIAR 542.

review panel throughout the EA process. The secretariat, led by the Panel Manager, provides technical, procedural, and administrative advice and support to the review panel. Once established, the review panel members and the secretariat staff are subject to confidentiality and cannot discuss any of their deliberations with external parties, including all other sectors within the Agency.

56. Once a review panel has been appointed, there is no information shared between CCOD and the secretariat supporting the review panel. Similar to any interested party in the process, CCOD receives information regarding the process when it is made publicly available by the review panel on the Canadian Impact Assessment Registry. This deliberate separation of duties is required in order to respect the independence and impartiality on the review panel, and ensure that there is no real or perceived apprehension of bias, or lack of transparency of process with the work of the review panel.

Methodology - Assessment of Potential Impacts on the Rights of Indigenous Peoples

57. The methodology used to assess the impacts on rights was developed by the Agency and the Mikisew Cree First Nation in 2018 within the Teck Frontier Joint Review Panel process. On July 29, 2020, the Grassy Mountain Coal Project Panel invited the Agency to provide information specifically "regarding the assessment of potential impacts on the rights of Indigenous peoples in their submission".

58. The Agency included all potentially impacted communities in correspondence during key stages of the project. The Agency remains open to ongoing discussion about the methodology. Based on their active participation, the Agency sought comments on the methodology in April 2019 from the Treaty 7 and KNC communities. There are seven (7) steps in the methodology as outlined on the Agency's website[41]. The steps used in the assessment are iterative and do not follow a linear path.

[41] Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples - Canada.ca

Preliminary Assessment of the Project's Impact to Rights

59. The Preliminary Assessment of Potential Impacts on the Aboriginal and Treaty Rights focused on the information that the Agency received from the five Treaty 7 communities (Kainai, Piikani, Siksika, Stoney Nakoda and Tsuut'ina First Nations) and the four Ktunaxa Nation Council's communities (?aqam, ?Akisq'nuk, Lower Kootenay and Tobacco Plains). There was sufficient information from each of the communities to conduct preliminary, individual assessments on the potential impacts to their Aboriginal and Treaty rights. In the IAAC submission to the Panel, the preliminary impacts to rights assessments were provided as an aggregate to make the submission more succinct and accessible. The Agency intends to collaborate with each individual community, including those with whom it has not yet met, to finalize the assessment based on their guidance and contribution.

60. The Agency's preliminary assessment focused on five (5) valued components that were common amongst the First Nation communities, namely water, fish and fish habitat, cultural and spiritual values, plant gathering, and hunting and trapping.

61. The Agency followed Steps 2 to 5 in the methodology to make its initial aggregated assessment, relying on information that is on the record from the communities to date as well as on information it received directly from the communities. Pursuant to Step 2, the Agency first sought to understand the context of the Aboriginal and Treaty rights. The Agency then sought to understand what the conditions are that allow or would allow the communities to practice these rights. Step 3 involves identifying the guiding values and topics or what are commonly referred to as "valued components" in the biophysical assessment. Step 4 is focused on describing and understanding the pathways that environmental effects might lead to potential impacts on the exercise of the rights. Step 5 and beyond requires the validation and feedback from the communities themselves. The Agency was able to do some initial validation by using information directly from the Indigenous communities' submissions during various stages of the EA process (e.g., Environmental Impact Statement (EIS), direct submissions, Information Requests, community meetings, etc.). As part of the path forward, the Agency will continue to

actively consult and seek input from all potentially impacted Indigenous communities to further inform and validate its final assessment of the Project's potential impacts to Aboriginal and Treaty rights. Additional information from the communities will assist the Agency as it prepares its Consultation and Accommodation Report (CAR).

62. The preliminary assessments are based on predicted, potential impacts of the project on the communities based on their relationship to the area in terms of the project footprint, and the local and regional study areas.

63. In July 2020, the Treaty 7 and the KNC communities were invited to provide feedback on their individual preliminary assessments. The Agency has not yet received any feedback on the information used, the appropriateness of the methodology to capture the potential impacts to Aboriginal and Treaty rights, or the Agency's preliminary conclusions.

64. In order to accurately assess the potential impacts the Project may have on Aboriginal and Treaty rights, the Agency will continue to engage with potentially impacted Indigenous communities and remains open to receiving additional information from them.

Example of Elements Necessary to Support the Exercise of Aboriginal and Treaty Rights

65. The meaningful exercise of Aboriginal and Treaty rights requires the necessary natural resources and an understanding of the lands and waters to support the practice. The Agency has heard from some of the communities that previous industrial development in the area has hampered some ways of life and activities such as hunting and trapping.[42]

66. All of the Treaty 7 and KNC communities are signatory to the Buffalo Treaty, which is described as a treaty of "Cooperation, Renewal and Restoration". This treaty was first signed in 2014 and focusses on protecting and revitalizing the cultural, material, and

[42] CIAR 542, pdf page 539-540.

spiritual relationships between the signatory communities and the buffalo.[43]

67. Information from the communities will help the Agency to assess how the Project could impact the conditions that might support the return of the buffalo. All of the communities have expressed that the buffalo is a keystone species in their respective cultures. If the buffalo is to be re-introduced to the area, Indigenous peoples will expect to exercise those rights associated with the buffalo. As we move forward in assessing the project's potential impacts to rights, Agency efforts will be focussed on better understanding the potential adverse effects on the exercise of rights associated with this species.

Federal Review Team Role

68. Prior to the drafting of its first submission to the Panel,[44] the Agency requested input from the Federal Review Team (FRT) on the individual Treaty 7 and KNC community assessment tables. The assessments were conducted using valued components from the EIS and submissions from Indigenous communities. The Agency received some feedback from the FRT based on those valued components and submissions from the communities.

69. The Agency will continue to seek the FRT's input as it receives additional information from the communities that will help to determine the potential impacts to the natural environment and how they relate to the potential, adverse impacts to Aboriginal and Treaty rights.

[43] CIAR 542 pdf page 540.
[44] CIAR 542.

Path Forward

70. The Agency will continue to provide consultation opportunities for all Indigenous communities potentially impacted by the Project, including those for whom there was no preliminary assessment. Information provided as part of the hearing, as well as the Panel's report will help the Agency in making a final assessment on the potential adverse impacts to Aboriginal and Treaty rights. As well, some communities may wish to submit additional information that will further contribute toward the Agency's final assessment which will be provided to decision makers as part of the CAR.

## VI. Conclusion

71. These final submissions are provided on behalf of the federal authorities Environment and Climate Change Canada, Fisheries and Oceans Canada, Health Canada, Natural Resources Canada and the Impact Assessment Agency of Canada in its role as federal crown consultation coordinator. These federal authorities appeared to provide their information and knowledge to the Panel in response to its request pursuant to the provisions of s. 20 of the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 (*CEAA, 2012*). They participated to assist the Panel in its assessment. Their role is not to advocate for or against the proposed project. Rather, the Panel's assessment report will inform the federal decision making process pursuant to s. 52 of *CEAA, 2012*

72. Canada's consultation with potentially affected Indigenous groups and communities continues. This concluded hearing and the Panel's report form part of the federal Crown's consultation and accommodation process and will inform subsequent steps. That process will in turn result in Canada's Consultation and Accommodation Report to be provided to the federal decision makers.

73. As before, the federal authorities express their thanks and appreciation to the Panel and the secretariat for their efforts to conduct this assessment in particularly challenging circumstances and look forward to the report.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of January, 2021.

**ATTORNEY GENERAL OF CANADA**

<Original signed by>

Per:
**Robert Drummond/ Sydney McHugh**

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