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July 16, 2012

Via e-mail

Review Panel for the Proposed New Prosperity Gold Copper Mine Project
c/o Canadian Environmental Assessment Agency
160 Elgin Street, 22nd Floor
Ottawa, ON K1A 0H3

Attn: Livain Michaud, Panel Manager

Dear Panel Chair and Members:

Re: MiningWatch Canada motion for standing as an “interested party”

We write as legal counsel to MiningWatch Canada (“MiningWatch”), who is a participant in the review panel environmental assessment of the proposed New Prosperity Gold Copper Mine Project (“New Prosperity Project”).¹ For clarity, MiningWatch will continue to engage directly with the Panel in this environmental assessment. However, when appropriate or necessary, we will communicate with the Panel on MiningWatch’s behalf.

For many months, MiningWatch has participated in the pre-hearing assessment proceedings for the New Prosperity Project. To date, this assessment has been conducted under both the Panel’s Terms of Reference and the *Canadian Environmental Assessment Act*, S.C. 1992, c.37 (“CEAA 1992”). As of June 29, 2012, as a result of the repeal of CEAA 1992 by the Government of Canada’s budget bill and the transitional provisions in that legislation,² this environmental assessment will henceforth be conducted under both the Panel’s Terms of Reference and the *Canadian Environmental Assessment Act 2012*, S.C. 2012, c.19 (“CEAA 2012”).

The purpose of our letter is to request a ruling from the Panel that, under s. 2(2) of CEAA 2012, MiningWatch is an “interested party” and may participate in the Panel’s hearings.

¹ We use the term “participant” to describe those persons (individuals, organizations, governments and other entities) that, to date, have participated in this assessment. The Panel used the term “Registered Party”, in its correspondence of June 29, 2012 (Re: Panel Site Visit). We understand this term to be largely overlapping with the term participant, although it may not include all participants and it may include certain persons who themselves are not participants but who have previously written to the Panel Manager (such as counsel for a participant).

² CEAA 2012, ss. 126 and 128

In an effort to be helpful and to connect this motion in a principled way to the broader issue of interested party standing, this letter also proposes a principled approach that the Panel may wish to adopt to determine whether other participants or persons qualify as “interested parties”.

We turn now to the legal and factual grounds supporting our requested ruling. We conclude with a proposal for how the Panel should determine, as soon as reasonably possible, the standing of other participants and other persons to participate in the hearings.

1. Grounds for the ruling

a) *The law has recently changed, necessitating this motion*

As noted above, on June 29, 2012, Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, received royal assent and came into force.³ Among many other significant changes, Bill C-38 repealed CEAA 1992 in its entirety, and replaced it with CEAA 2012.

This change has necessitated the present motion. Under CEAA 1992, the public was legally entitled to an opportunity to participate in a review panel’s hearings.⁴ As such, MiningWatch had every expectation that it would participate in this Panel’s future hearings. Under CEAA 2012, by contrast, while the public continues to have the right to participate in a review panel’s assessment generally and to have their comments reflected in a review panel’s final report, only “interested parties” are legally entitled to participate in a review panel’s hearings.⁵

While “interested party” is not defined *per se* in CEAA 2012, s. 2(2) prescribes that review panels themselves shall decide if a person qualifies under two categories of “interested party”:

- s. 2(2)** One of the following entities determines, with respect to a designated project, that a person is an interested party if, in its opinion, the person is directly affected by the carrying out of the designated project or if, in its opinion, the person has relevant information or expertise
- (a)
 - (b) in the case of a designated project in relation to which the environmental assessment has been referred to a review panel under section 38, that review panel.

The Panel is thus now required to determine whether MiningWatch and other participants are directly affected by the carrying out of the New Prosperity Project, have relevant information or expertise to offer the Panel, or both, and as such may participate in the Panel’s hearings.

³Bill C-38’s status and royal assent is confirmed on the Parliament of Canada’s website at: <http://www.parl.gc.ca/LEGISInfo/BillDetails.aspx?Language=E&Mode=1&billId=5514128>

⁴ CEAA 1992, s. 34(1)(b)

⁵ CEAA 2012, s. 43(1)(c)

b) A flexible, criteria-based approach is needed to confirm “interested parties”

Based on our experience and MiningWatch’s experience with environmental assessment in Canada, we respectfully propose that the Panel apply the following factors to determine whether persons (individuals, organizations, governments, and other entities) qualify as “interested parties” in this assessment:

- How and to what extent the Project may affect the person, including potential environmental, economic, cultural, social, recreational or aesthetic effects;
- Whether the person lives, works, recreates, or otherwise uses an area that may be affected by the Project;
- Whether and to what extent the person has information or knowledge relevant to the Panel’s mandate; this could include information about the Project’s effects, or knowledge which may tend to augment or diminish the weight that the Panel gives to information provided by the Proponent or government agencies;
- Whether the person has experience or expertise relevant to part of the Panel’s mandate, including expertise related to any of the types of environmental effects anticipated;
- Whether and how the person will contribute to the Panel’s hearings (or to processes closely related to the hearings); and
- Whether the person has shown a genuine interest in matters within the Panel’s mandate.

In no way do we suggest that these factors should constitute a rigid, mandatory or exhaustive “test” to be met by every individual or organization seeking standing as an interested party. Rather, in our view they are simply “relevant considerations” that should be applied flexibly. It would be inappropriate and unrealistic to require that every one of these factors be applied to every potential interested party, or to otherwise apply these factors mechanically.

In this respect, we commend to the Panel the “relevant considerations” approach taken by the Honourable Mr. Justice Bruce Cohen, as the Commissioner of the Commission of Inquiry on the Decline of Sockeye Salmon in the Fraser River. Commissioner Cohen’s terms of reference authorized him to grant participant standing to any persons who satisfied him that they had “a substantial and direct interest in the subject matter of the inquiry”. Thus, in April 2012, Commissioner Cohen issued a ruling granting participant standing to 48 individuals and organizations.⁶ In coming to his ruling, he applied a number of non-exhaustive, non-mandatory, relevant considerations.⁷

⁶ Cohen Commission, Ruling on Standing, 14 April 2010 at: <http://www.cohencommission.ca/en/pdf/StandingRuling.pdf#zoom=100>.

⁷ Ruling on Standing, *supra* note 6 at pp. 5-7. In addition, prior to the Ruling on Standing, the Cohen Commission published a “Notice for Standing and Funding” setting out relevant considerations to standing applications; see <http://www.cohencommission.ca/en/pdf/NoticeForStandingAndFunding.pdf#zoom=100>

Among those found to have a “substantial and direct interest in the inquiry’s subject matter” were individuals, commercial fishing groups, recreational users, unions, industry groups, the Province, First Nations, Aboriginal organizations and environmental groups. Thus, the Commissioner properly recognized that, despite lacking any legal or proprietary rights to sockeye salmon, environmental and industry organizations working for charitable or advocacy purposes have interests that are not simply “direct interests” but also “substantial interests”.

Commissioner Cohen’s ruling is a useful and compelling authority that should inform this Panel in determining who is “directly affected” or has “relevant or expert information” or both (note that the test used by Commissioner Cohen arose from stricter language, namely “substantial and direct interest in the inquiry’s subject matter”, than the equivalent language used in s. 2(2) of CEA 2012). As a matter of law, federal commissions of inquiry under the *Inquiries Act*, R.S.C. 1985, c.I-11 are statutorily similar to review panels. Both are *ad hoc* (non-permanent) tribunals, empowered both by an overarching statute and terms of reference thereunder. They have similar powers and duties (including the power to compel information by subpoena). In particular, their mandate is to make factual findings and recommendations that are presented in a report to the Government.⁸

Finally, in our view, the Panel should take the opportunity to confirm that, in the context of an assessment aimed at gathering relevant information about a proposed project’s environmental, economic and cultural effects, an individual or organization need not have any legal, economic or property interests to qualify as “directly affected”. While economic interests may be a relevant factor to some persons, they cannot be a mandatory factor for all persons. Other persons may be directly affected simply by living, working or recreating in the vicinity of a proposed project.

c) *MiningWatch should be able to participate in hearings as an interested party*

In our submission, for the reasons summarized below, this Panel should conclude that MiningWatch is entitled to participate in the Panel’s hearings as an “interested party”.

First, MiningWatch has **participated in pre-hearing proceedings** of this assessment of the New Prosperity Project. For example, on February 22, 2012, MiningWatch filed a 15-page submission on the draft EIS Guidelines and draft Terms of Reference.⁹ It would be unfair, in our view, if the Panel were to deny “interested party” status to those who have already participated meaningfully in this assessment for many months. MiningWatch commenced its participation in this review panel assessment in December 2011 when a successful application for participant funding was filed with the Canadian Environment Assessment Agency (“the Agency”).¹⁰ Thus the Agency has recognized the utility of MiningWatch’s participation. This funding was awarded to enable MiningWatch to review and

⁸ See *Inquiries Act*, R.S.C. 1985, c.I-11. See also e.g. Cohen Commission Terms of Reference at <http://www.cohencommission.ca/en/TermsOfReference.php>

⁹ See the CEA Registry at: <http://www.ceaa.gc.ca/050/documents/54444/54444E.pdf>

¹⁰ CEA Agency, January 23, 2012, Funding Review Committee’s Report: Allocation of Federal Funds for the Environmental Assessment of the New Prosperity Gold Copper Mine Project, on the CEA Registry at: <http://www.ceaa.gc.ca/050/document-eng.cfm?document=54008>

comment on the EIS Guidelines and Terms of Reference, and to prepare for and participate in the Panel's hearings.¹¹ MiningWatch met one or more of the Agency's funding eligibility criteria, which are that funding applicants shall have:

- A direct, local interest in the Project such as living or owning property in the project area;
- Community knowledge or Aboriginal traditional knowledge relevant to the EA; or
- Expert information relevant to the anticipated environmental effects of the Project.¹²

Third, MiningWatch **participated in the previous assessment** of the proposed Prosperity Mine Gold Copper Project ("Original Prosperity Project"). MiningWatch provided relevant information to the previous Panel; in particular, with other participants, it helped to ensure that the previous Panel was made aware of limitations and deficiencies in the Proponent's information. MiningWatch's input through written submissions and oral presentations was reflected in the Review Panel Report. After the Original Prosperity Project was rejected by the Government of Canada, the Proponent submitted a revised project description. We submit that MiningWatch's contributions remain as relevant, expert and helpful now as they were before the Proponent amended its proposal.

Fourth, MiningWatch is **genuinely interested in mining development, mining policy and environmental assessment and planning**. It aims to: ensure mineral development practices are consistent with the goals of sustainable communities and ecological health; strengthen technical and strategic skills within communities faced with impacts of mineral development; impose appropriate terms and conditions on mining projects and in some cases prevent the development of projects that would adversely affect areas of ecological, economic and cultural significance; and advocate policies to improve the efficiency and reduce the risks of mineral development. It has participated in assessments of mining projects throughout Canada. It brought a successful challenge of federal departments' unlawful practices of narrow "scoping to trigger" and project-splitting, in the context of the Red Chris Mine, to the Supreme Court of Canada. It promotes responsible mining development internationally and monitors Canadian mining companies abroad.¹³ We submit that **MiningWatch's broad interest, knowledge and expertise with mining, both in Canada and internationally, will be of great assistance to the Panel**.

Finally, MiningWatch **will contribute to the Panel hearings and other closely related processes**. MiningWatch will contribute to the Panel's hearings by: commenting on the Panel's pre-hearing documents; filing requests that relevant information be provided for use in the hearings; proposing witnesses; tendering relevant evidence; testing the Proponent's evidence through questioning; and making submissions about what weight the Panel should give to the evidence it hears. In addition, prior to the hearings, MiningWatch will continue to participate in other important pre-hearing processes such as the sufficiency review of the Proponent's EIS.

¹¹ *Supra* note 10.

¹² *Supra* note 10.

¹³ See MiningWatch's website at <http://www.miningwatch.ca/> and at <http://www.miningwatch.ca/about-us-1>

We emphasize strongly that, in our view, the Panel should not treat any one of the considerations discussed above as a mandatory or dispositive factor, either in the context of MiningWatch's present motion or for other individuals or organizations. Rather, they operate as relevant considerations; other considerations may be relevant for other individuals and groups.

2. A proposed process for the Panel to resolve who has "interested party" standing

In the interests of assisting the Panel, we respectfully propose the following process by which the Panel may resolve current participants' standing to participate in the hearings. Our proposal is made to ensure a timely approach to resolving the issue of who is an interested party. We are concerned that any decision to delay or postpone resolution of this issue until the eve of the hearings would impede MiningWatch's and other participants' ability to prepare for them.

Specifically, we respectfully propose that, in response to MiningWatch's motion, the Panel should release a ruling that:

- Confirms MiningWatch's standing as an interested party;
- Expressly adopts some or all of the factors proposed as relevant considerations, and identifies any other factors that in the Panel's opinion are relevant;
- Confirms "interested party" status for all persons or groups that received participant funding for this assessment process from the CEA Agency, based on the substantial overlap between the factors the Panel identifies as relevant considerations and the Agency's criteria for funding eligibility;
- For greater certainty, confirms the standing of the Proponent and of any participating federal or provincial government departments or authorities; and
- Invites applications for "interested party" standing from other persons or groups, based on a simple, accessible and flexible procedure.

Moreover, in addition to adopting the factors that the Panel considers to be relevant in its ruling on this motion, the Panel may wish to issue a Public Notice that again sets out these factors. The Public Notice could advise of any deadline for individuals, organizations, governments or other entities to apply to be interested parties.¹⁴ In this way, other persons who may be directly affected, or may have relevant information and expertise to offer, will still have the opportunity to participate in the hearings.

To be clear, this motion only seeks confirmation of MiningWatch's standing as an interested party to participate in the hearings themselves – MiningWatch continues to have the right to participate in pre-hearing stages of this assessment. Despite this, it should be acknowledged that many pre-hearing steps are fundamentally tied to the hearings. For example, participants and other members of the public will be asked to comment on the Panel's draft hearing procedures. We submit that it would be unfair and

¹⁴ For a useful example of such a public notice, refer to the "Notice for standing and funding" published by the Cohen Commission on its website at <http://www.cohencomission.ca/en/pdf/NoticeForStandingAndFunding.pdf>.

inefficient to allow these persons to put time and effort into reviewing and commenting on draft hearing procedures, or other draft documents closely related to the hearings, only to later deny them the right to participate in those hearings.

Thus, we respectfully request that the Panel resolve this motion in a timely manner. Without a ruling confirming that MiningWatch and other participants may participate in the hearings as “interested parties”, hearing preparation efforts will be disrupted. A timely ruling confirming that MiningWatch is an interested party will create the certainty necessary to contact prospective witnesses, review draft hearing documents, collect relevant information, review the Proponent’s documents and prepare any cross-examination. Critically, current participants and their counsel cannot effectively coordinate – by distributing various hearing tasks and topics amongst themselves – without certainty that they will later be able to participate. A lack of certainty will undermine ongoing collaborative efforts, which are aimed at ensuring efficiency in the hearings.

We trust that this letter and its enclosures will suffice for the purpose of this motion. It would appear unnecessary and onerous to require participants, including those lacking counsel, to file sworn evidence in support of motions for “interested party” standing. However, should the Panel determine that further materials are necessary on this motion, such as sworn affidavit evidence or testimony or both, please advise us and we will respond as quickly as possible.

Yours truly,



Lara Tessaro
Barrister & Solicitor



Sean Nixon
Barrister & Solicitor

cc: Registered Parties
(via posting by the Agency on the Internet Site of the CEA Registry)

Encl. Cohen Commission, Ruling on Standing, 14 April 2010
Cohen Commission “Notice for standing and funding”
Printout of pages from the website <http://www.miningwatch.ca>