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October 15, 2012

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Joint Review Panel

Jackpine Mine Expansion Project
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Attention: Mr. Jim Daly – Joint Review Panel Chairman

OTTAWA

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Dear Mr. Dilay:

**Re: Jackpine Mine Expansion Project (the “Project”)
CEAR Reference No. 10-05-59540
Standing to Participate at the Hearing**

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I write on behalf of the Oil Sands Environmental Coalition (“OSEC”) in response to the letter submitted by counsel for Shell Canada Ltd. on October 4th, regarding standing to participate at the upcoming hearing. In that letter, Shell request that the Shell Jackpine Mine Expansion Joint Review Panel (the “Panel”) apply the standing test set out in section 2(2) of the *Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52* (“CEAA 2012”).

Although OSEC was not mentioned in the October 4th letter, the issue raised therein is one that could affect how the Project hearing proceeds, and may have implication for future hearings conducted under CEAA. As such, OSEC would like to take this opportunity to provide the Panel with information that is relevant

to its determination of the issue of standing and to request that Panel apply its amended Terms of Reference and CEEA 2012.

A. Interpretation of the “interested party” test by the New Prosperity Gold-Copper Mine Joint Review Panel

As the Panel is aware, the standing test set out in section 2(2) CEEA 2012 is whether an individual is an “interested party”, which is as a person who, in the opinion of the Panel, is either “directly affected by the carrying out of the designated project” or “has relevant information or expertise.” Section 2(2) is a new provision, and to our knowledge, only one other panel has been asked to consider the application of the “interested party” test.

The Joint Review Panel for the environmental assessment of the New Prosperity Gold-Copper Mine was recently asked by MiningWatch Canada for a ruling regarding the application of the “interested party” test under s. 2(2) of CEEA 2012.¹

In response to the request, the New Prosperity Mine Panel issued interim Directions.² In the Directions, the New Prosperity Mine Panel importantly notes that CEEA 2012 requires the Panel to:

- take comments from the public into account as part of the environmental assessment; and,³
- in accordance with its terms of reference, hold hearings in a manner that offers any interested party an opportunity to participate in the environmental assessment.⁴

In the Directions, the New Prosperity Mine Panel also sets out the structure for the hearing as follows:

- General and Community hearing sessions: the Panel will allow opportunity for comments from the public and Interested Parties. The format of those hearing sessions will be less formal.
- Topic-Specific hearing sessions, members of the public may attend as observers but the Panel will allow only those who are granted Interested

¹ Motion submitted by MiningWatch Canada, July 16, 2012, available online at: <http://www.ceaa.gc.ca/050/documents/p63928/80452E.pdf>.

² September 14, 2012 letter from the New Prosperity Gold-Copper Mine Project Joint Review Panel re: Direction for applying for Interested Party status, available online at: <http://www.ceaa.gc.ca/050/documents/p63928/81387E.pdf>.

³ CEEA 2012, section 19(1)(a).

⁴ CEEA 2012, section 43(1)(c).

Party status to participate in the proceedings. The format of those hearing sessions will be more formal.

The New Prosperity Mine hearings will, therefore, be divided into topic specific sessions where only "interested parties" may participate, and general and community sessions where members of the general public may participate. This approach to CEAA 2012 allows for broad, general participation by members of the public, and does not attempt to use the new "interested party" test as a means to limit public participation in the hearing.

A final Ruling was issued by the New Prosperity Mine Panel on October 12, 2012.⁵ The Ruling reinforces that the interested party test should be interpreted broadly and should provide members of the public with an opportunity to participate in the hearings. As stated in the ruling:

Subsection 2(2) states that it is a matter of opinion for the Panel to decide if a person is "directly affected by the carrying out of the designated project" or has "relevant information or expertise." However, the exercise of that opinion must take into account and balance the important public interests reflected in the stated purposes set out in section 4 of the Act. [emphasis added]

The Panel then goes on to state that:

...the Panel has followed a liberal and generous approach to determine Interested Party status for this Review, weighing the requirements of 2(2) with the purposes listed in section 4. [emphasis added]

The New Prosperity Mine Panel is allowing broad participation in the hearing as demonstrated by the fact that all of the organizations that submitted an application were granted standing as an "interested party". Only two individuals were not granted independent standing, but only on the basis that it was "not necessary" given that they would already be appearing as experts on behalf of an organization that had been granted status. Those individuals would still be able to participate in the hearing as part of the organizations that have engaged them to present on their behalf.

It is also important to note that some of the applications to participate in the New Prosperity Mine hearing were only one paragraph in length. Clearly, the New Prosperity Mine Panel did not require extensive supporting information to be provided by the parties in order to make a determination as to whether they meet the "interested party" test.

⁵ October 12, 2012 New Prosperity Gold-Copper Mine Project Joint Review Panel Ruling on Interested Party Status, available online at: <http://www.ceaa.gc.ca/050/documents/p63928/82370E.pdf>.

B. The Panel's Terms of Reference

The Panel is guided not only by its governing legislation, which includes CEAA 2012, but also by its Terms of Reference.

As stated in the New Prosperity Mine Panel Ruling:

The explicit definition of “interested party” and the requirement for the Panel to determine whether a person qualifies as an interested party are new under the Act. The Canadian Environmental Assessment Agency does not have policy guidance on this issue. Therefore, the Panel is guided by the general principles established by case law on interested party standing, the Panel's Terms of Reference, and the Act. [emphasis added]

Section 43(1)(c) of CEAA also requires that:

[a] review panel must, in accordance with its terms of reference, hold hearings in a manner that offers any interested party an opportunity to participate in the environmental assessment in accordance with its terms of reference. [emphasis added]

Further, section 42(2) of CEAA 2012 states that:

When there is an agreement or arrangement to jointly establish a review panel under subsection 40(1) or (2), or when there is a document jointly establishing a review panel under subsection 41(2), the agreement, arrangement or document must provide that the environmental assessment of the designated project includes a consideration of the factors set out in subsection 19(1) and is conducted in accordance with any additional requirements and procedures set out in it ... [emphasis added]

These provisions clearly require that the assessment by the Panel be conducted in accordance with any additional requirements set out in the Panel's amended Terms of Reference. The amended Terms of Reference for the Panel include the following provision at section 4.4:

The Joint Review Panel hearing shall be public and the review will provide opportunities for timely and meaningful participation by the public, including Aboriginal persons and groups. Hearing participants will not be required to satisfy the test under subsection 26(2) of the *Energy Resources Conservation Act*. The Joint Review Panel shall conduct its hearing in accordance with the ERCB's Rules of Practice. The Joint Review Panel will, however, attempt to make the review process 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.

The Panel's own Terms of Reference clearly require that the hearing be held in a manner that provides the public with an opportunity to participate.

C. Conclusion

The Directions and the Ruling given by the New Prosperity Mine Panel demonstrates that the "interested party" test should be applied in a broad and liberal manner, and that hearings should provide opportunities for participation by members of the general public.

Further, in the present instance, the requirements for participation in the hearing, as set out in CEAA 2012, have been expanded by the Panel's amended Terms of Reference such that the hearing should be held in a manner that provides the public with an opportunity to participate.

Therefore, OSEC request that Panel apply its amended Terms of Reference and CEAA 2012 to ensure that the public is provided with an opportunity to participate in the upcoming Project hearing.

Finally, OSEC requests that if the Panel intends to make a determination or ruling on this issue, fairness requires that everyone who filed submissions to appear at the hearing be given notice and be provided with an opportunity to make submissions on this issue prior to a decision being made by the Panel.

Sincerely,



Melissa Gorrie
Staff Lawyer

cc (via e-mail): Shawn Denstedt, Q.C.
Gary Perkins
Karin Buss
Kirk Lambrecht, Q.C.
Jenny Biem