

October 19, 2020

By email only

Ackroyd LLP
Attention: Ifeoma M. Okoye

Osler, Hoskin & Harcourt LLP
Attention: Martin Ignasiak

Dear Counsel:

**Re: Benga Mining Limited (Benga)
Grassy Mountain Coal Project (the Project)
Alberta Energy Regulator Application No. 1902073; IAAC Registry No. 80101
Panel Decision on Coalition of Alberta Wilderness Association (AWA) and Grassy Mountain
Group (the Coalition) Advance Funds Application**

The Joint Review Panel (the Panel) has considered the Coalition's request for advance funding received on September 6, 2020, the subsequent submission from Benga on October 2, 2020, and the reply from the Coalition on October 9, 2020.

In its September 6, 2020, submission, the Coalition emphasized its financial need for assistance in order to fully participate in the proceedings before the Panel, particularly given the scope of fees and costs involved in retaining the necessary legal counsel and experts to address the issues in this proceeding. The Coalition stated that the advanced funds being claimed are reasonable and are required in order to effectively participate in the hearing.

The Coalition provided a description of the experience of Richard Secord, Ifeoma Okoye and Emily Bonnell (student-at-law); and a description of legal work, including hours estimates, that Ackroyd LLP has undertaken or will undertake in this proceeding. The Coalition has requested advance funds for legal work and anticipated expenses in the amount of \$305,517.45.

The Coalition provided a description of proposed consultant/expert work and anticipated expenses related to concerns about potential environmental impacts arising from the Project. The Coalition requested advance funds for anticipated expert/consultant fees in the amount of \$212,278.50.

The combined amount of advance funds requested for legal work and anticipated expenses and expert witness consulting fees is \$517,795.95.

On October 2, 2020, Benga responded to the Coalition's advance funds application. Benga submitted that:

1. No advance funds should be awarded based on the AWA's stated mission and purpose, and active fundraising. In addition, the Coalition has not explained why it requires advance funds to participate in the hearing.
2. In the alternative, Benga requested that the AER award only reasonable and necessary costs for one legal counsel and for necessary, non-duplicative work by expert witnesses retained by the Coalition. Considering the AER's inability to consider relevant factors regarding the Coalition's conduct and contribution in the hearing at this point in time, Benga requests that the AER award no more than 50% of any appropriate costs requested in the Application.

Benga stated the Coalition has not provided any rationale for why it should not bear its own costs and asks the Panel to consider section 58.1(b) of the *AER Rules of Practice (the Rules)*, which addresses "the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions". Further, Benga states that the AWA solicits donations to support its participation in processes such as the review of the Grassy Mountain Coal Project.

The Coalition responded to Benga's claim and notes that contrary to Benga's assertion, the regulatory regime in Alberta, especially as it relates to proceedings before the AER, does not proceed on the presumption that parties bear their own costs. Further, AWA is a not for profit charity and if it spends all the funds it receives from the public to cover the cost of its participation in the hearing for the Project, it will not have sufficient funds to continue its community awareness programs regarding the need to protect Alberta's wilderness for future generations.

Benga submitted that the Coalition has received other funding sources and has not accounted for how that funding was used. The Coalition responded that it has only accessed \$300 out of the \$16,413.83 it was allocated in funding from the federal Participant Funding Program. It intends to submit its financial reports to access the allocated federal funds at the completion of the hearing and at the completion of all participation opportunities. The Coalition confirmed it will account for the accessed funds when it submits its final cost claim in relation to this Project.

With respect to duplication of the evidence being prepared via expert reports, Benga states the Coalition has not sufficiently consolidated common issues with the other participants in this hearing. The Coalition presented reports by eight expert witnesses and it is Benga's opinion that some of these witnesses' expertise duplicates evidence presented by other participants. The Coalition submitted that it has adequately consolidated issues with other participants and has taken robust and active steps to eliminate duplication of evidence with other participants. However, it is not practical or reasonable to impose an

obligation on or to expect the Coalition to ensure that there is no duplication of evidence from all participants.

Benga also stated the Coalition has not demonstrated how all of counsels' costs are reasonable and has not shown exceptional circumstances requiring costs for three counsel, two of them experienced. Benga submits it would be reasonable for the AER to award a maximum of 50% of the costs for one counsel's anticipated work for this hearing, if any advance funds are awarded.

In response, the Coalition submitted that given the length and extensive nature of this proceeding, the amount of materials on the record, the number of Coalition members and the number of experts retained by the Coalition, a second experienced counsel is needed. Further, the AER's assessment of reasonableness of costs is more appropriate when considering a final costs claim and not an advanced funding application.

Benga notes that the advance funding application asks the AER to award costs without the benefit of assessing the Coalition's conduct in, and contribution to, the hearing. For this reason, Benga requests the Panel award a maximum of 50% of necessary costs in advance, if any advance funds are awarded. The Coalition stated although its preference is to be awarded advance funds greater than 50%, awarding 50% of the total advance cost request will assist the Coalition in preparing for the hearing and will alleviate the financial burden on the Coalition.

Decision

The Panel has considered these submissions, and wishes to restate some of the principles of general application relating to participant costs. The AER's cost regime is not intended to indemnify a participant for each and every cost that is incurred to participate in a proceeding. As indicated in *Directive 031*, cost awards are intended to provide a measure of compensation to participants for expenses that are reasonable, and are directly and necessarily incurred in relation to the preparation and presentation of the intervention. Costs claimed must fall within the Scale of Costs, and are always subject to review in accordance with criteria set out in section 58.1 of *the Rules*, which are expanded upon in *Directive 031*. Maximum allowable hourly rates under the Scale of Costs are not awarded as a matter of course. These principles apply equally to advance funding applications. As stated in *Directive 031*, when advance funding is awarded, it is in no way representing approval of any of the costs claimed or awarded. If the actual amount of costs awarded following the conclusion of the proceeding is less than the advance funding received, the Panel can direct that the difference be reimbursed by the participant who received the advance funding. When a participant receives an advance funding award, it must file a final cost claim that is in accordance with *Directive 031* within 30 days after the close of the proceeding.

Section 59 (2) of *the Rules* provide that the Regulator may award an advance of funds to a participant if it finds it appropriate to do so in the circumstances of a case, taking into account the factors listed in section 58.1. Having considered these factors, the Panel finds that providing an award of advance funds is appropriate in the circumstances.

The Coalition is a participant in this proceeding. The hearing is scheduled to commence on October 27th, 2020 and last for more than 30 days. The Coalition has retained legal counsel and a number of experts to

assist the Coalition in preparing its hearing submissions and to support its participation in the hearing. The Coalition's advance funding application includes the information required by *the Rules* and provides a summary of the intended scope of work and estimated costs for the Coalition's counsel and experts. The Panel accepts that financial resources may be required to generate expert reports, conduct legal analysis and represent participants positions during the hearing.

The Panel has considered whether there is a compelling reason why the Coalition should not bear its own costs and the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions. The Panel acknowledges that the cost of participating in a review and public hearing for a complex project such as this can be significant and could create difficulties for individual members of the Grassy Mountain Group if they are required to fully fund their intervention. Similarly, if the AWA required the majority of their financial resources to fund their participation in the proceeding, their ability to provide satisfy other aspects of their mission may be significantly constrained.

The Coalition has and plans to make use of other funding sources, specifically the federal Participant Funding Program. The Panel accepts the Coalition's commitment to provide an account of how these funds were used as part of its final costs claim to the AER. The Panel notes that the Coalition's reply submission did not refer to the federal participant funding provided to Shirley Kirby, who the Panel understands is a member of the Coalition. The Panel expects that an accounting for the use of these funds will also be included in the Coalition's final costs claim to the AER.

The Panel agrees that it is important for participants to make efforts to reduce duplication in the evidence collected and presented to the Panel. At this point in time, it appears that the Coalition has undertaken reasonable steps to attempt to reduce duplication in the evidence that has been prepared by expert consultants. The Coalition confirmed that it has and continues to work with other hearing participants, such as the Canadian Parks and Wilderness Society, the Livingstone Landowners Group, and the Municipality of Ranchlands, to reduce the potential for duplication of evidence. The Panel agrees with the Coalition that given the number of participants, it is not practical or reasonable to expect that the Coalition will be able to coordinate with all other participants and ensure there will be no duplication of evidence. The Panel also accepts the Coalition's argument that it may not be feasible or appropriate for coordination to occur between participants and the Government of Canada, given that the federal government is not necessarily aligned in interest with any particular participant.

The Panel expects that the Coalition and other hearing participants will make best efforts to demonstrate that they have minimized duplication throughout the hearing process. The Panel will carefully consider the question of duplication of evidence when adjudicating future costs claims, at the end of the hearing process.

As the panel cannot at this time assess the Coalition's conduct in, and contribution to, the hearing, the Panel agrees that it is appropriate to award only a portion of the estimated total costs of participation in advance of the hearing.

With respect to the expert consultant reports, the Panel has not yet seen information as to whether the rates are consistent with the Scale of Rates in *Directive 031*. The Panel notes that total consultant fees are

provided, yet there is no hourly rate indicated. Nevertheless, there is sufficient information to determine the general scope and cost of expert work proposed, which seems to generally be reasonable and relevant to issues to be considered at the hearing. The Panel finds awarding 50% of the advance funding request for the expert consulting fees to be appropriate. The Panel confirms that the details and time as to the work performed by the expert consultants will have to be provided in the final costs claim.

With respect to legal counsel, the Panel is prepared to consider advance funding for some amount of legal costs. The Panel acknowledges the concern from Benga that the overall amounts sought by counsel for the Coalition could involve duplication of effort. The Panel has not determined, at this time, whether it is reasonable for two senior counsel to appear on behalf of the Coalition, but notes that the estimates for counsel time are significant. It is also unclear whether all of the counsel time incurred prior to September 7th was incurred after the Notice of Hearing was issued. For these reasons, the Panel believes that an advance award of 25 % of estimated legal costs is appropriate. The Panel will consider the need for two experienced counsel, any duplication of effort, and the reasonableness of legal costs when considering the Coalition's final costs claim.

In summary, the Panel awards the following advance funds to the Coalition:

- 50% of the total amount requested by the Coalition for expert consultant fees; i.e. 50% of \$212,278.50 requested, so \$106,139.25
- 25% of the total amount requested by the Coalition for legal costs and anticipated expenses; i.e. 25% of \$305,517.35, so \$76,379.34.

The Panel directs Benga to pay Ackroyd LLP advance funding in the amount of **\$182,518.59**.

As noted above, all costs claimed in relation to this hearing will be reviewed and addressed by the Panel following the proceeding. The Panel emphasizes that an award of advance funding in no way represents ultimate approval by the Panel of the costs claimed. If the ultimate costs awarded are less than the advance funding received, the Panel may direct the repayment of any amounts awarded herein.

Alex Bolton, P.Geo.
Panel Chair

Dean O'Gorman, M.Sc.
Panel Member

Hans Matthews, B.Sc. P.Geo.
Panel Member

cc: M. LaCasse, AER Counsel
B. Kapel Holden, AER Counsel