



**WOODWARD & Co.
LAWYERS LLP**

REPLY TO: JENNY BIEM
Victoria Office
email: jenny@woodwardandcompany.com

ASSISTANT: BARB BARBER
bbarber@woodwardandcompany.com

Our file: 4920

August 18, 2014

British Columbia Environmental Assessment Office ("EAO")
2nd Floor, 836 Yates Street
PO Box 9426 Stn Prov Govt
Victoria, BC V8W 9V1

Attention: Doug Caul, Associate Deputy Minister

Via Email: Doug.Caul@gov.bc.ca

Canadian Environmental Assessment Agency ("Agency")
22nd Floor, Place Bell
160 Elgin Street
Ottawa, Ontario K1A 0H3

Via Email: Ajax@ceaa-acee.gc.ca

Re: Proposed Ajax Mine

I am legal counsel for the Kamloops Area Preservation Association ("KAPA") in relation to each of the old and new proposed Ajax Mine projects.

I write today because KAPA understands that the EAO and the Agency are considering how to respond to the partially disclosed new Ajax Mine project, announced by KGHM Ajax on May 29, 2014

KAPA is of the view that the *Canadian Environmental Assessment Act, 2012* requires that the current assessment be abandoned and a fresh assessment for the new project be initiated. Further, whether or not the regulators initiate a new assessment, for the reasons outlined below, KAPA is further of the view that much more information must be provided by the Proponent prior to any further action being taken on this matter by either the EAO or the Agency. Finally, if the regulators continue the current assessment, KAPA requests the opportunity to review and comment on any revisions to the AIR/EIS.

VICTORIA OFFICE:
844 COURTNEY STREET, 2ND FLOOR
VICTORIA, BC V8W 1C4
TEL: 250-383-2356; FAX: 250-380-6560
WEBSITE: www.woodwardandcompany.com

WHITEHORSE OFFICE:
3059 3RD AVENUE, 2ND FLOOR
WHITEHORSE, YT Y1A 1E2
TEL: 867-633-5940; FAX: 867-633-5945
*DENOTES A LAW CORPORATION

1. A New Assessment is Required

KAPA's position is that the Project Description provided by KGHM in 2011 can no longer be considered complete or even relevant. The partial information disclosed to date indicates material and significant changes to the structure, productive capacity, and geographical location and extent of the Ajax mine. KAPA believes that a new Project Description is required under *CEAA 2012* and the *Regulations Designating Physical Activities*, SOR/2012-147. This will enable an informed decision by the Minister as to whether to refer the matter to Review Panel, in light of the changed potential for the project to have significant adverse environmental effects, for example the potential for a catastrophic tailings dam breach in light of a change to wet tailings management for the mine.

As held by the Supreme Court of Canada in *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, the appropriate environmental assessment track is determined by the project as proposed by the Proponent. (at paras. 2, 34). The ratio of *MiningWatch* is equally applicable to the tracking decision that rests with the Minister under section 38 of *CEAA 2012*. A legally defensible tracking determination cannot be made in advance of receipt of a Project Description that complies with the *Regulations Designating Physical Activities*. To date, KGHM has not provided a compliant Project Description for the Ajax mine as currently proposed.

2. More Information is Required

As the EAO Service Standard, *Early Identification of Potential Concerns and Challenges*, states: "The environmental assessment will identify and evaluate potential effects of a proposed project as early in the process as possible, allowing time for adjustments to be made before design decisions are finalized." To meet this standard, potentially impacted communities need to be provided with sufficient details on the nature of the proposed action for such communities to be fully-informed of the true nature of the proposed action. Further, to meet the standard of fairness, fully-informed means the communities know and understand as much possible about the proposal, so that affected people can participate with equality of information. This is especially so in the circumstances, where mining is expected to take place in close proximity to residential areas.

The EAO requires sufficient detail of the pending changes in order to draft a modification of the section 11 order that is consistent with the EAO's responsibilities under sections 11 and 13 of the *Environmental Assessment Act*. Under section 13 of the *Environmental Assessment Act*, the EAO may amend a section 11 order to take into account modifications proposed for a reviewable project. A section 11 order should address several factors, including: the facilities at

the main site of the project; ancillary facilities; activities related to the project; and the potential effects of the project. Clearly the EAO cannot satisfy section 11 without adequate information from the Proponent on these points.

Furthermore, the EAO's *Fairness and Service Code* (the "EAO Code") requires that assessments be comprehensive. An assessment of the new Ajax mine proposed by the proponent will not be comprehensive if adequate disclosure is not made prior to a new assessment process being set, or prior to an amendment to the existing AIR/EIS.

KAPA takes the view that 'adequate' information would include information at least as detailed as was provided in the original Project Description, as well as disclosure of material information about the Ajax project known to be in the possession of the Proponent, but not released to the public, or, to KAPA's knowledge, submitted to the assessment agencies.

KAPA's position is that the withholding of significant, material information about the Ajax project by the Proponent has been characteristic of the Ajax assessment to date. This withholding raises questions of due process and consistency with the EAO Code, particularly as it relates to fairness and transparency. In KAPA's view the withholding of information could make any statutory decisions that rely on the assessment vulnerable to legal challenge.

KAPA is further concerned that the Proponent has made incomplete and possibly misleading statements about securities regulations in support of its decision to withhold relevant information in Section 6.6 of the Public Consultation Order, as discussed in Section 2 of the Addendum enclosed with this correspondence.

Closely related to the Proponent's failure to voluntarily disclose material information is the interpretation of Section 8.6 of the Section 11 Order by the Ajax Project Assessment Lead, who maintains that he only has the authority to require additional information from the Proponent at the Application Stage. As discussed in the Addendum, Section 8.6 resides in Part D of the Order, *Assessment Procedures – Pre-Application Stage*. Section 8.6 does not prevent the Project Assessment Lead from requiring the Proponent to disclose information, such as assay data, during the Pre-Application Stage. Disclosure of such information is consistent with regulation and policy.

KAPA suggests there is no valid basis to be found in either Sections 6.6 of the Public Consultation Order or Section 8.6 of the Section 11 Order for the Project Assessment Lead's refusal to require the Proponent to disclose relevant information. This is especially so when some of that information has been requested by government agencies involved in the Ajax assessment (e.g. Interior Health Authority request for assay data).

The enclosed Addendum discusses several other deficiencies in the Ajax assessment that concern KAPA. Unless resolved now, these deficiencies will have to be addressed at a later date. A new assessment project, or at minimum a public comment period for the new mine plan, would create the opportunity for public concerns about the new mine plan to be taken into account, and would also provide an opportunity to refine the AIR/EIS to correct the current deficiencies in this document.

3. Citizens are Entitled to Comment on Draft AIR/EIS

In the Section 11 Order for the old Ajax project, the Project Assessment Director required the Proponent to provide draft Application Information Requirements to the Project Assessment Lead (s. 8.2), and committed that the Project Assessment Lead would make revised draft Application Information Requirements available for a formal public comment period (s. 8.3(b)). It is KAPA's understanding that the Proponent has submitted draft revised Application Information Requirements for the new Ajax mine to the Project Assessment Lead. If the regulators do not begin a fresh assessment for the new Ajax mine, then according to the section 11 order for the old Ajax mine, the Project Assessment Lead must now establish a formal public comment period for the draft Application Information Requirements. In KAPA's view, failure to provide a public comment period would constitute a breach of the section 11 order for the old Ajax mine, would contravene the EAO's promise to "give full and fair consideration to all interests" in the conduct of environmental assessments, as well as the EAO's commitment to provide opportunities for all interested parties to participate in the assessment process.

KAPA requests advance notice of the formal public comment period, so that it may prepare for full participation.

Sincerely,



Jenny Biem

JB:jz

cc: Don Barz, KAPA (dbarz@shaw.ca)
Ruth Madsen, KAPA (ruthjmadson@gmail.com)
Scott Bailey, Environmental Assessment Office (scott.bailey@gov.bc.ca)
Chief Michael LeBourdais, Whispering Pines/Clinton Indian Band
(Michael.lebourdais@gmail.com)
Chief Ron Ignace, Skeetchestn Indian Band (kukpi7@gmail.com)
Chief Shane Gottfriedson, TK'emlups te Secwepemc (chief@kib.ca)
Ronaye H. Elliott, Thompson-Nicola Regional District (director.relliott@tnrd.ca)

Cathy McLeod, MP for Kamloops-Thompson-Cariboo (cathy.mcleod@parl.gc.ca)

Todd Stone, MLA for Kamloops-South Thompson (todd.stone.mla@leg.bc.ca)

Terry Lake, MLA for Kamloops-North Thompson (terry.lake.mla@leg.bc.ca)

Jackie Tegart, MLA for Fraser-Nicola (Jackie.tegart.mla@leg.bc.ca)

Peter Milobar, Kamloops Mayor (mayor@kamloops.ca)

Donovan Cavers, Kamloops Councillor (dcavers@kamloops.ca)

Ken Christian, Kamloops Councillor (kchristian@kamloops.ca)

Nelly Dever, Kamloops Councillor (ndever@kamloops.ca)

Tina Lange, Kamloops Councillor (tlange@kamloops.ca)

Arjun Singh, Kamloops Councillor (asing@kamloops.ca)

Marg Spina, Kamloops Councillor (mspina@kamloops.ca)

Pat Wallace, Kamloops Councillor (pwallace@kamloops.ca)