



October 23, 2022

Impact Assessment Agency of Canada
Joint Panel Review of the proposed Marathon Palladium Project
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re: Draft federal environmental assessment conditions for the Marathon Palladium Project

Thank you for this opportunity to comment on the Proposed Federal Environmental Assessment Conditions for the Marathon Palladium Mine.

We are disappointed that conditions for approval are being proposed when the Panel Report clearly states that there will be significant negative environmental effects, and does not address the reliability of projected benefits that would allow those effects to be deemed “justifiable under the circumstances.” It is even more concerning that the Proposed Conditions do not describe any mechanisms to ensure compliance and implementation beyond recognising the Proponent’s obligation to obey existing laws and regulations. At the same time, there are no requirements placed on regulatory agencies to enforce those laws and regulations, nor any conditions describing what measures those agencies would need to take to ensure they have the capacity and ability to undertake the necessary monitoring and enforcement.

The Panel Report also identifies a number of areas where the proponent had failed to demonstrate its ability to safely pursue the project, for example, to reliably identify non-potentially acid generating and non-metal leaching materials¹ and therefore to describe appropriate management regimes, or to correctly identify travel times for groundwater contamination.² The notion that such issues can and should be resolved as they arise is a violation of the precautionary principle and a crucial misunderstanding and misapplication of the practice of adaptive management, which is meant to anticipate a full range of potential eventualities – and prepare courses of action appropriate to each of them – not to improvise or develop management measures after the project has been approved.

Regarding project economics, benefits, and employment – critical to a determination that the project may be justified under the circumstances notwithstanding its significant negative environmental effects – the Panel Report itself repeats the proponent’s assertions without considering the challenges and alternative perspectives offered by intervenors, or venturing any critical analysis of its own.

¹ Joint Review Panel Report for the Marathon Palladium Project, August 2, 2022, page 51.

² Joint Review Panel Report for the Marathon Palladium Project, August 2, 2022, page 64.

Geotechnical issues

While we are supportive of the establishment of an independent expert review committee as described in Condition 13, there is no provision to ensure compliance. As with the proponent's other commitments, it is to submit the final Terms of Reference for the independent expert review committee to the Agency prior to construction, and to notify the Agency in writing of any variance in carrying out the project as described in Condition 1.7 (i.e. the Marathon Palladium Project as described in section 4 of the Joint Review Panel Report). However, there is no mechanism to ensure that the Terms of Reference meet the requirements of Condition 13, nor even that all good faith efforts be made to meet those requirements. What are the consequences if the Proponent fails to meet these requirements?

Specifically regarding acid-generating material and metal-leaching material, it is not clear how the Potential Conditions can be met given the information that the Panel reports. For example, Condition 3.2.1 is to "only use non-potentially acid generating and non-metal leaching materials, including mine rock, for construction purposes."

Citizens for Responsible Industry in Northwestern Ontario identified the lack of field-scale testing as a serious knowledge gap, noting that data from laboratory tests for leachate chemistry cannot be adequately upscaled to clearly interpret drainage chemistry for predictive purposes. They concluded that, without data from field-scale tests over an extended period of time, contaminant loading rates may have been underestimated by a factor of 1,000 or more.³

This observation was supported by NRCan, and leads to the conclusion that the Proponent cannot reliably identify "non-potentially acid generating and non-metal leaching materials." The criteria that it uses (1) underestimate the volume of this material and (2) include some contaminating acid-generating material and leaching material as *non*-potentially acid generating and non-metal leaching materials.

In this situation it is important to emphasise the importance of precautionary decision-making in the environmental assessment process, and the importance of proponents providing adequate information about how they propose to address a project's environmental effects. The precautionary principle is key to ensuring that projects can only proceed if the risks to the environment are clearly understood and the proponent has shown how it will address them. In this case, a meaningful assessment of these risks is undermined by the Proponent's incomplete information and the Proposed Conditions that allow it to address these deficiencies after the assessment is completed.

As Federal Court Justice Phelan commented in rejecting Taseko Mines Ltd.'s judicial review of the federal panel review and report for the proposed New Prosperity Gold-Copper Mine under the *Canadian Environmental Assessment Act* (2012) in 2017:

Indeed, acceptance of vague adaptive management schemes in circumstances such as these would, in my view, tend to call into question the value of the entire review panel process - if all such decisions could be left to a later stage, then the review panel process would simply be for the sake of appearances.⁴

³ Joint Review Panel Report for the Marathon Palladium Project, August 2, 2022, page 64.

⁴ Taseko Mines Limited v Canada (Environment) 2017 FC 1099, Para 124.

Benefits and justification

We note with concern that the Panel Report provides no interrogation of the benefits claimed by the Proponent with respect to direct, indirect, and induced full-time equivalents and labour income, despite the highly questionable assumptions and methodology employed. Nor does the Report interrogate the Proponent's claims with respect to taxation and payments to governments and communities, again despite obvious problems; for example, the project's largest anticipated economic contribution is from income tax paid by workers, which (a) is, indeed, paid by workers, not the Proponent, and (b) would be paid by those workers regardless of whether they are working on this project or elsewhere.

While our earlier concerns about the economic viability and longevity of the project have been rendered tragically irrelevant by Russia's invasion of Ukraine and consequent impacts on palladium and platinum markets due to restrictions on Russian metal sales, our concerns about the labour market and the ability of the project to contribute to local employment to the extent intended and in the equitable manner proposed was never addressed and remains a significant potential challenge.

In discussing the effects of the mine's closure, the Panel Report notes that:

The Proponent predicted that adverse economic effects would be triggered as the Project transitions from the operations to closure phases. The Proponent stated these effects would occur within the boundaries of normal variation of conditions, given the cyclical nature of the mining industry in the region. They stated they intended to implement strategies to help transition the workforce after mine closure.⁵

The Proposed Conditions do not address these strategies. This is a major oversight. On its face, this is not a matter of federal jurisdiction under CEAA 2012; however, it is central to the question of the justification of the project's impacts given the Panel's finding there will be significant negative environmental effects. Federal approval of the project hinges on whether those impacts are deemed "justifiable under the circumstances." For that decision to be based on the Proponent's untested assertions of the projects benefits would be a failure of the assessment process and of responsible decision-making.

Further on this question, the Panel Report notes that:

Indigenous communities who have occupied the lands since time immemorial, would experience adverse effects. The Panel notes that while the Project could provide employment benefits, measures need to be taken by the Proponent, and potentially the Government of Ontario and/or Government of Canada, to ensure Project benefits are equitably experienced, and for Indigenous communities to realize a long-term, net benefit from the Project, beyond limited-term employment opportunities.⁶

Nonetheless, the Proposed Conditions make no mention of such measures. There is no mention of direct benefit-sharing, of economic diversification, or a legacy fund, whether for Indigenous or non-Indigenous communities.

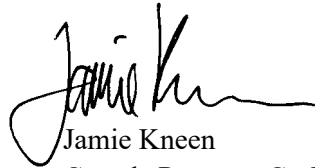
⁵ Joint Review Panel Report for the Marathon Palladium Project, August 2, 2022, page 337.

⁶ Joint Review Panel Report for the Marathon Palladium Project, August 2, 2022, page xxi.

At the same time, it is notable that despite extensive discussion in the Panel Report of the need for technical and environmental monitoring and regulatory enforcement – all the more critical given the degree to which important gaps in knowledge, design, and implementation are left to be resolved post-approval – the Proposed Conditions make no reference to the role of federal regulatory agencies and departments (eg., the Department of Fisheries and Oceans, Natural Resources Canada, Environment and Climate Change Canada) in enforcing legal and regulatory requirements. Relatedly, the Proposed Conditions make no mention of what measures those agencies would need to take to ensure they have the capacity and ability to undertake the necessary monitoring and enforcement.

Given the Panel’s finding that the project will have significant negative environmental effects, any decision that those effects would be “justifiable under the circumstances” will require a much more rigorous analysis of the benefits, largely economic, that have been presented as likely to flow from the project, as well as a much more comprehensive and prescriptive set of Conditions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jamie Kneen', with a stylized flourish extending to the right.

Jamie Kneen
Canada Program Co-Lead
MiningWatch Canada