

Backgrounder – Prosperity Mine Review Panel Assessment (5 July 2010)

It is highly unusual for a review panel to find that a project has significant adverse effects

- ❖ **The *Canadian Environmental Assessment Act* (CEAA) has been in force for almost two decades, since 1992.**
- ❖ In that time, **only three review panels have found that the project they were assessing had “significant adverse environmental effects”** (this is the key test under the CEAA): the Prosperity Mine review panel, the Kemess North gold-copper mine joint review panel,¹ and the Whites Point Quarry joint review panel² (in relation to a proposed stone quarry in Nova Scotia).
- ❖ The federal Cabinet has the power under section 37(1) of CEAA to declare that a project with significant adverse environmental effects can go ahead nevertheless because it is “justified in the circumstances”. **The federal government has never used this power to over-ride an independent review panel’s findings.**
- ❖ Ever since the Panel in Kemess North recommended against the mine project before it, Panels have been prohibited by their Terms of Reference from making determinations about the justification for significant adverse environmental effects – which is why the Panel in this case simply reported what was presented to it by interested parties, rather than recommending for or against the project.

Key conclusions from the Prosperity mine review panel’s report

- “The Panel concludes that the Project would result in **significant adverse environmental effects** on fish and fish habitat, on navigation, on the current use of lands and resources for traditional purposes by First Nations and on cultural heritage, and on certain potential or established Aboriginal rights or title. The Panel also concludes that the Project, in combination with past, present and reasonably foreseeable future projects would result in a significant adverse cumulative effect on grizzly bears in the South Chilcotin region and on fish and fish habitat”. [ii]
- “The fish and fish habitat compensation plan ... would neither meet Fisheries and Oceans Canada No Net Loss policy nor provide assurance to First Nations that the fish would be safe for consumption. Also, the success of re-creating a lake with adjacent spawning and rearing channels is questionable ... It is unlikely that the plan would meet the requirements for the establishment of a self-sustaining rainbow trout population, or a replacement First Nation food

¹ Further details about the Kemess North assessment available here: <http://www.ceaa.gc.ca/052/details-eng.cfm?pid=3394>.

² Further details about the Whites Point Quarry assessment are available here: <http://www.gov.ns.ca/nse/ea/whitespointquarry.asp>.

fishery. Perpetual maintenance of spawning channels and ongoing lake stocking by governments would likely be required to achieve the proposed provincial fisheries objectives ... The Panel concludes that **the Project would result in a high magnitude, long-term and irreversible effect**". [ii]

- "In the Panel's view, **the Project's effects on fish and fish habitat would be high magnitude, long-term and irreversible** and would include the loss of an area that was stated to be of value as both a First Nation food fishery and recreational fishery ... The Panel cannot recommend any measures that would mitigate the significant adverse effects of the Project on fish and fish habitat in the Teztan Yeqox (Fish Creek) watershed, should the Project be allowed to proceed" [98]
- "First Nations people of all ages told the Panel that Teztan Biny (Fish Lake) was integral to the Tsilhqot'in culture ... **The island in Teztan Biny (Fish Lake), which would be destroyed by the mine waste storage area, is a place of spiritual power and healing for the Tsilhqot'in** ... the Panel's overall conclusion is that the Project would have a **high magnitude, long term, irreversible effect on the Tsilhqot'in**" [iii].
- "The Panel heard from First Nations people ranging in age from 7 to almost 90 years old regarding their current use of the Teztan Biny (Fish Lake) and Nabas area, particularly the Xenigwet'in (Nemiah Band). Over the course of the public hearing, the Panel heard a substantial volume of information regarding how **much of the Tsilhqot'in population continue to use the Project area** for activities such as hunting, fishing, gathering of berries, plants and medicines, as well as for various cultural and spiritual ceremonies and activities". [179]
- "... the Panel concluded that the area of Teztan Biny (Fish Lake) and Y'anah Biny (Little Fish Lake) was an **important cultural and spiritual area**, and was currently used by the Tsilhqot'in for traditional purposes; this area would be permanently lost to First Nations as a result of the Project ..." [244-45]
- "One of the significant cultural heritage sites that could be affected was the island in Teztan Biny (Fish Lake). The Panel was informed that **this island was a site of spiritual power** where present-day and past generations of Tsilhqot'in conducted ceremonies to receive their spiritual powers ... During the community hearing sessions, some members of the Tsilhqot'in shared personal stories of visions or spiritual events they had experienced at Teztan Biny, and on the island". [192]
- "The Panel notes that the permanent loss of Teztan Biny (Fish Lake) would remove an existing First Nation food fishery and that the fish found in Teztan Biny were an **important source of fish for their sustenance**" [96]
- "The Panel heard from educators in many of the communities that Teztan Biny (Fish Lake) was identified as **an important teaching environment** and that many trips were made to the area to teach the Tsilhqot'in language and cultural practices to Tsilhqot'in youth. Many children identified how their families had taken them to Teztan Biny and Y'anah Biny (Little Fish Lake),

and adults and elders indicated that this was what had occurred when they were young as well” [182].

- During the community hearing sessions, the Panel heard many Tsilhqot’in describe the **importance of the Teztan Biny (Fish Lake) area for cultural gatherings**. Many people described Elders gatherings, and how adults would work with the youth to teach values, culture and language. Family and social gatherings, including camping trips, fishing trips and recreational use were also identified. Catherine Haller noted that Elders Gatherings, food gathering ceremonies, youth ceremonies, and bathing ceremonies all occurred at Teztan Biny” [193]
- “... the Panel is convinced that the **Teztan Biny (Fish Lake) and Nabas areas are unique and of special significance to the Tsilhqot’in**. The Panel heard from the Tsilhqot’in that **the loss of the area for practicing their current use, spiritual and cultural activities would be significant and unmitigable**. Additionally, the island in Teztan Biny, which has spiritual importance and the Nabas area, which has been occupied for generations and continues to be used, would be permanently lost as a result of the Project ... The Panel has determined that **the loss of the Teztan Biny (Fish Lake) and Nabas areas for current use activities, ceremonies, teaching, and cultural and spiritual practices would be irreversible, of high magnitude and have a long-term effect on the Tsilhqot’in**”. [203]
- “The Panel finds that given the substantial value of the Teztan Biny (Fish Lake), Y’anah Biny (Little Fish Lake) and Nabas areas to the Tsilhqot’in, **it cannot recommend any measures that would mitigate the significant adverse effects of the Project** on the current use of lands and resources for traditional purposes and cultural heritage by the Tsilhqot’in Nation ...” [203]
- “[Community Health Nurse] Ms. Hughson ... stated that **the mental health impacts of the Project would be devastating** and that it could turn around the recovery from trauma that the community has recently made” [200].
- “The Panel heard that the Project may have a negative impact on the personal and community healing processes that were ongoing in the First Nation communities ... the Panel finds that **the Project’s impacts on the physical and mental health of the Tsilhqot’in communities would be long term**” [202].
- “... the Project would have a **significant adverse effect on established Tsilhqot’in Aboriginal rights**, recognized and affirmed in the *William* case ... the effects of the Project on this asserted Aboriginal [fishing] right would be significant as the lake and its fishery would be destroyed and replaced with a waste rock storage area ... the effects of the Project on the potential Tsilhqot’in title would be significant” [iv]
- “... it is the Panel’s view that typical mitigation measures would be unable to provide accommodation for this infringement” [245].
- “... the Project’s effects on navigation in the absence of effective mitigation measures would be high magnitude and irreversible ... the Project would have a significant adverse effect on navigation”. [iii]

- “... the Project would likely result in high magnitude, long-term effects on the South Chilcotin grizzly bear population” [v]
- “The Panel concludes that Project would result in the inability of the fisheries resource in the Teztan Yeqox (Fish Creek) watershed and the South Chilcotin grizzly bear population to meet the needs of present and future generations” [222].
- “... the Panel has concluded that **water treatment would likely be required into the far future, thus potentially creating a future burden for governments**” [243];
- “The Panel also notes that while it has provided recommendations that should be implemented should the Project proceed, **it does not believe that these recommendations would eliminate or accommodate the significant loss First Nations would experience** as a result of the Project” [245]

The Prosperity mine review panel noted criticisms about BC’s approach to assessing the mine project

- ❖ **British Columbia decided unilaterally that it would conduct its own, separate provincial environmental assessment** for the Prosperity Mine (rather than coordinating with the federal government in a joint federal-provincial review panel). The BC Environmental Assessment Office (BCEAO) completed its review in December 2009, and a BC environmental assessment certificate was issued in January of 2010. This left the federal government to pursue its own panel review process [See Panel Report at pp. 5 and 30].
- ❖ The federal review panel noted the following:
 - **First Nations were critical about the Province’s failure to consult during its environmental assessment process;** First Nations indicated that they did not have the resources to participate separately in both the federal and provincial assessment processes, and chose to participate primarily in the federal panel review [Panel Report, p. 30];
 - **British Columbia did not participate in the federal panel review;** this meant that the mine company was often put in the position of explaining provincial policy; it also meant that the **BCEAO was not able to consider the final reviews from federal departments** on issues including water quality, fish and fish habitat, effects on migratory birds and health effects [Panel Report, p. 30];
 - **the provincial assessment process was not able to take advantage of information received from First Nations during the Panel’s public hearing process** on the current use of lands and resources for traditional purposes and effects on cultural heritage; the province reached the conclusion in its environmental assessment that there would be no effects on First Nations, but the province made this determination without the benefit of hearing key information relating to cultural heritage and current use of lands for traditional purposes (the review panel found that

the majority of this information was received from January to May, 2010, after the BCEAO had already completed its assessment report – the **review panel also found that this information was “extremely valuable for all participants to understand how the [mine] Project would impact the current use of the region by First Nations people”**); [Panel Report at pp. 30 & 174]

- **the BC environmental assessment process (unlike the federal one) did not consider potential cumulative environmental effects from a likely 13 year mine expansion** (from 20 year to 33 year mine life) announced by the mine company [Project Report, page 30].
- ❖ **The BC environmental assessment process found that the mine project would have significant impacts only on fish and fish habitat. The federal assessment process found much wider impacts** (e.g. environmental and cumulative effects on grizzly bears, environmental and cumulative effects on fish and fish habitat, impacts on navigation, impacts on First Nations traditional use and cultural heritage, and on Aboriginal rights and title).