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January 14, 2009

Mackenzie Valley Environmental Impact Review Board
Box 938
5102-50th Avenue
Yellowknife, Northwest Territories X1A 2N7

Attention: Alistair MacDonald
Environmental Assessment Officer

Dear Sir:

**Re: Canadian Zinc Corporation - Prairie Creek Mine - EA809-002
Submission for Request for Ruling - November 26, 2008**

We write to in response to the Review Board's request for submissions concerning "legal issues associated with the scope of development for the Canadian Zinc Prairie Creek Mine EA and in particular, with reference to s.157(1) [sic] of the MVRMA, for all possible elements of the proposed development at the same time." The following submission is made on behalf of the federal Responsible Ministers for the Prairie Creek Mine environmental assessment, being: the Department of Indian and Northern Affairs; the Department of Environment; the Department of Fisheries and Oceans; the Department of Natural Resources, and; the Parks Canada Agency.

Submission:

We note that the Review Board's reference to s.157(1) of the MVRMA in the above citation is incorrect as the reference should be to s.157.1 of the MVRMA. The Review Board directed the parties to the subject EA to address two questions in their submission on the Request for Ruling. The first question posed by the Review Board is:

- 1. Should the scope of development for EA0809-002 include all physical works and activities associated with the proposed winter road?**

As the Review Board is aware, Canadian Zinc Corporation ("CZC") has not yet submitted a land use permit application to propose use of the existing winter access road in connection with the proposed mining operations project. CZC has provided no explanation for its failure to do so. CZC does currently hold a land use permit for the winter road to support site clean-up and supply advanced exploration. However, as the Review Board determined in response to the original Request for Ruling submitted by Ecojustice, the Review Board does not have the authority pursuant to the MVRMA to make a ruling on the activities which may or may not be permitted by a specific land use permit issued by

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the Mackenzie Valley Land and Water Board (the "MVLWB"). Likewise, the Review Board does not have the authority pursuant to the MVRMA to require a developer to apply for new regulatory authorizations or to replace existing permits or licences. We agree with the Review Board's views of the limits of its authority in that regard. We also agree with the Review Board's view that it is responsible for determining the scope of any proposed development undergoing an environmental assessment pursuant to s.117(1) of the MVRMA.

We submit that the scope of development for EA809-002 should include all physical works and activities associated with the winter road either on the basis of the road currently being a separate and distinct development which may cumulatively contribute to the impact of CZC's proposed development on the environment or on the basis of the winter road being an integral and necessary part of the proposed mining operations development which is the subject of the current EA.

Although s.117(1) of the MVRMA provides the authority and the responsibility to the Review Board to determine the scope of a proposed project undergoing environmental assessment, the Review Board would be prohibited from conducting an environmental assessment if the project is subject to s.157.1 of the MVRMA. This is so because s.157.1 provides that Part 5 of the MVRMA does not apply in respect of any licence, permit or other authorization related to an "undertaking" (i.e. a proposed development, a project) that is the subject of a licence or permit issued before June 22, 1984.

Part 5 of the MVRMA establishes "a process comprising a preliminary screening, an environmental assessment and an environmental impact review in relation to proposals for development", (s.114). Therefore, if s.157.1 of the MVRMA applies to an "undertaking" for which a permit, licence or other authorization is sought then Part 5, including the environmental assessment process, does not apply to that undertaking. The exemption of an undertaking from Part 5 provided by s.157.1 does not occur, however, where a licence, permit or other authorization is sought for "an abandonment, decommissioning or other significant alteration" of the subject undertaking. Whether or not the Review Board is prohibited from including the winter road in the scope of the project or development which is the subject of this EA depends on whether or not s.157.1 applies to the winter road and in what context.

Application of Section 157.1 to the Winter Road's Current Operation and Use:
Section 157.1 of the MVRMA provides that:

Part 5 does not apply in respect of any licence, permit or other authorization related to an undertaking that is the subject of a licence or permit issued before June 22, 1984, except a licence, permit or other authorization for an abandonment, decommissioning or other significant alteration of the project.

The current use and operation of the winter road is the subject of a land use permit ("LUP #MV2003F0028"). As Ecojustice points out in its Request for Ruling, this permit was obtained by CZC in connection with the company's stated plans to rehabilitate the winter road and use it for site clean-up and to supply advanced exploration. When CZC applied to the MVLWB for this permit, the company asserted that the winter road was exempt from Part 5 of the MVRMA pursuant to s.157.1 because the winter road was the subject of a permit issued prior to June 22, 1984. The MVLWB ruled that s.157.1 did not apply to CZC's permit application for the winter road. CZC applied for judicial review of that

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MVLWB decision. CPAWS and the Decho First Nations were granted intervener status. We discuss the result of this judicial review below.

In the earlier *Tungsten* decision¹, the NWT Court of Appeal determined that the correct focus when interpreting s.157.1 is on the "undertaking", not on the permit or licence. In other words, to determine whether or not a project or proposed development (i.e. an "undertaking") for which a permit or licence is sought is subject to s.157.1 depends on whether that project or proposed development was the subject of a permit or licence issued prior to June 22, 1984. In *Canadian Zinc Corporation v. Mackenzie Valley Land and Water Board*² (being the judicial review of the MVLWB's decision mentioned above), Justice Schuler of the Supreme Court of the Northwest Territories adopts the Court of Appeal's interpretation but notes that, unlike in *Tungsten* where a water licence was sought for the use of water and deposit of waste for a mining operation, CZC specifically sought a permit for use of the winter road only. In that context, Justice Schuler concludes that there are three possible meanings of "undertaking" in s.157.1 of the MVRMA: the winter road itself, or the winter road and its operation and use, or the mining operation³.

The Court found that the meaning of "undertaking" in s.157.1 is not just the "physical thing", i.e. the winter road, but "includes the activity for which the road will be used and the circumstances surrounding its use."⁴ The Court determined that, in the specific circumstances before it, the "undertaking" was not the complete operation carried out by CZC (i.e. the mining operation), the application for the winter road permit was for the purposes outlined by CZC in its permit application. Because the winter road was subject to a permit before June 22, 1984 and the MVLWB found as a fact that the permit was not sought for abandoning, decommissioning or significant alteration to the winter road, Justice Schuler granted CZC's application and quashed the MVLWB's decision. Consequently, the MVLWB held a public hearing to determine the operational standards applicable to the winter road, which standards were incorporated as conditions of the permit then issued.

Scoping Option #1:

Pursuant to LUP #MV2003F0028, CZC is permitted to use the winter road for the purpose of rehabilitation, site clean-up and supply for advanced exploration. As a currently distinct development from CZC's proposed mining operations that has been judicially determined to be exempt from s.157.1 of the MVRMA, the Review Board may consider the cumulative environmental impact of the winter road, along with that of other existing or reasonably foreseeable developments, and the proposed mining operations.

We note again, however, that LUP #MV2003F0028 does not permit CZC to operate and use the winter road in connection with the proposed mining operations. Therefore, if CZC intends to operate and use the winter road in connection with the proposed mining operations then a new permit application will be required from CZC in the future. Although the Review Board may consider the winter road on a cumulative impact basis at this time, the future CZC application for a permit for operation and use of the winter road in connection with mining operations may be subject to Part 5 of the MVRMA, including another environmental assessment.

¹ *North American Tungsten Corporation Ltd. v. Mackenzie Valley Land and Water Board*, 2003 NWTCA 5 (CanLII).

² 2005 NWTSC 48 (CanLII).

³ *id* at para.46.

⁴ *Id* at para.53.

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Scoping Option #2:

Given CZC's stated intention in its Project Description Reports to use the winter road to haul ore from the mine site to the two proposed ore storage and transfer facilities and then to use the winter road to transport ore from those transfer facilities to the Liard Highway, it is reasonably foreseeable that CZC will require a land use permit to allow it to operate and use the winter road in connection with the proposed mining operations. It is our view that, like the water licence in the *Tungsten* decision, the winter road would be required for use and operation of the proposed mining operation because it appears to us that use and operation of the winter road is an integral and necessary component of the proposed mining operation.

Again, the Review Board could be prohibited from including the future operation and use of the winter road as part of the proposed mining operation if s.157.1 applies to exempt the winter road in that specific context and circumstances from the application of Part 5 of the MVRMA. We turn now to consider whether s.157.1 would exempt the winter road's use and operation as a necessary component of the proposed mining operations.

Application of s.157.1 to Future Permit for Winter Road:

The winter road was first constructed pursuant to a land use permit (#N80F249) issued by INAC in 1980 for a one-year term pursuant to the Territorial Land Use Regulations. INAC issued an annual extension of permit #N80F249 in 1981 and again in 1982. The last extension issued by INAC extended the term of permit #N80F249 to June 29, 1983. In 1980, INAC also issued a land use permit (#N80D248) for the purpose of mining exploration and development. In July of 1982, the Northwest Territories Water Board issued a water licence (#N3L3-0932) to allow for the use of water and disposal of waste in mining and milling processes and associated uses. Accordingly, CZC's predecessor was authorized by July of 1982 to commence mining operations. However, mining operations did not start up because CZC's predecessor went bankrupt in 1983 when the development was 90-95% complete.

Arguably, the mining operation (including the winter road) was an undertaking subject to permits and licences issued prior to June 22, 1984 pursuant to s.157.1 so that the proposed mining operation might be exempt from the application of Part 5 of the MVRMA. Ecojustice in its submission for the Request for Ruling states that the exception to the operation of s.157.1 applies. In other words, Ecojustice states that there has been a "significant alteration" to the mining operation which was authorized prior to June 22, 1984 and the mining operation now proposed by CZC. In our view, whether or not there is such a "significant alteration" is irrelevant in the specific circumstances. We hold this view because CZC has not asserted that s.157.1 applies to the proposed mining operation. In fact, in its letter of July 14, 2008 to the distribution list, the MVLWB refers to CZC's applications cover letter of May 28, 2008 as indicating that CZC holds the view that the undertaking which is the subject of the applications is exempt from Part 5 of the MVRMA and seeks submissions on the applicability of s.157.1. In its letter of July 18, 2008 to the MVLWB, CZC replies:

Please note that the Mackenzie Valley Land and Water Board (MVLWB) appears to have misread or misunderstood our covering letter to the above noted applications dated May 28, 2008.

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Canadian Zinc Corporation (CZC) did **NOT** indicate the view that the Water Licence and Land Use Permit Applications should be exempt from the Application of Part 5 of the MVRMA. [original emphasis]

CZC goes on to state does it does not wish to incur the delay of the MVLWB determining whether the applications (i.e. the proposed "undertaking") are exempt from Part 5 or not and that it will not oppose a MVLWB determination to submit "the applications" to environmental assessment. In our view, this is a clear statement by CZC that it does not assert that the proposed mining operations is exempt from Part 5 of the MVRMA pursuant to s.157.1. We note that CZC continues to cause misreadings and misunderstandings amongst the EA participants by expressing its views such as; "The enhancements and improvements could be argued to be "significant alterations" to the previously permitted undertaking, and as such could take the application outside of the exemption." Or, "We would like to take this opportunity to reiterate that we expect the MVLWB (and MVEIRB if applicable) to note that, if Part 5 applies to the mine Water Licence and LUP applications, it is because of the enhancements and improvements noted above....", (CZC July 18, 2008 letter to MVLWB). However, we submit that CZC has clearly not asserted that s.157.1 applies to its proposed mining operation when it had the opportunity to do so before the MVLWB.

As CZC did not assert that s.157.1 applies to exempt the proposed mining operations, it is our view that the Review Board may scope in the winter road and its use and operations as part of the proposed development now subject to environmental assessment.

Including the foreseeable future operation and use of the winter road as a necessary and integral component of the proposed mining operation during the EA may result in the Review Board recommending mitigation measures relevant to the future use and operation of the winter road as part of the proposed mining operation. Those recommended mitigation measures may be adopted by the Responsible Ministers which would result in the MVLWB being bound to incorporate those potential mitigation measures within the Board's jurisdiction as conditions of the future land use permit governing the use and operation of the winter road as part of the proposed mining operations.

Summary:

In our submission, s.157.1 has been judicially determined to apply so as to exempt the existing winter road and its current operation and use for the purpose of site clean-up and the supply of CZC's advanced exploration as a development, project or undertaking distinct from CZC's proposed mining operation. Therefore, the current permitted use and operation of the winter road can only be scoped into the EA from a cumulative impact perspective. However, we also submit that the future use and operation of the winter road as a necessary and integral component of the proposed mining operation (which is the "undertaking" that is now the subject of the EA) is not subject to s.157.1 because CZC has explicitly stated that it is not asserting that s.157.1 applies to the proposed mining operation and has explicitly stated that it does not oppose the current EA thus presenting another option.

The second question posed by the Review Board is:

2. Should the scope of the development for EA809-002 include all facilities and activities at the proposed mine site?

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In our view, this Review Board question raises no legal issues because CZC has not asserted that s.157.1 applies to its proposed mining operation. In fact, CZC has explicitly stated that it is not asserting that s.157.1 applies so as to exempt the proposed mining operation from EA as per the correspondence between the company and the MVLWB referred to above.

Section 117 of the MVRMA states that the Board shall determine the scope of the development "subject to any guidelines made pursuant to s. 120". Pursuant to this provision, the Review Board has issued its Environmental Impact Assessment Guidelines, March 2004. At p.27, the Guidelines provide that; "...the Review Board will consider what is the principal development, and what other physical works or activities are accessory to the principal development." We submit that the subject "principal development" is CZC's proposed mining operation and that the proposed mining operation includes the winter road. We reach this conclusion because CZC's Project Descriptions with respect to transfer facilities describe the winter road as an integral and necessary component of the proposed mining operation.

On p.28, the Guidelines provide that:

Three criteria will be used to determine whether or not a physical work or activity is an accessory development, and therefore should be included in the development. The first test is dependence: that is, if the principal development could not proceed without the undertaking of another physical work or activity, then that work or activity is considered part of the scoped development. The second test is linkage: if a decision to undertake the principal development makes the decision to undertake another physical work inevitable, then the linked or interconnected physical work or activity will be considered part of the scoped development. The third test is proximity: if the same developer is undertaking two physical works or activities in the same area, then the two may be considered to form one development.

We submit that the Review Board should base its determination on the scope of the proposed development in accordance with its Guidelines.

As for "scoping the issues", the Guidelines indicate that the intent is to "focus resources on assessing the important issues", at p.28. The earlier scoping submissions already submitted by the RMs and other interested parties are their attempt to provide this focus and set out what each party considers to be "the important issues" according to their specific mandate, jurisdiction or interests. The Review Board must determine the scope of the development, as set out in s.117(1) of the MVRMA, based on those submissions.

We disagree with CZC's view that the focus of the EA should only be on those components of the proposed mining operation that are different from the undertaking that existed and was authorized prior to June 22, 1984 and on those elements that have not been previously assessed. This is because CZC has not asserted that any specific physical work or activity which is a component of the proposed mining operation was exempt from Part 5 of the MVRMA or from preliminary screening (either pursuant to s.157.1 or the Exemption List Regulations). As well, in our view, any specific components of the proposed mining operation that have more recently undergone environmental assessment (such as the pilot processing plant or the decline) were assessed as separate and distinct "undertakings" and not as part of the current undertaking (i.e. the

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proposed mining operation) which is the subject of this EA. Lastly, we submit that to exclude certain components of the proposed mining operation would result in a deficient environmental assessment of the proposed mining operation. In fact, we question whether it is practically or technically even possible to exclude certain physical works and their use and operations in connection with the proposed mining operation. Therefore, we submit that the MVEIRB's Guidelines should be followed in the normal course to determine what should be scoped in as part of the proposed undertaking that is subject to assessment.

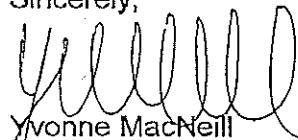
However, an EA should also be efficient and, therefore, the Review Board should take into consideration all available information that may be relevant to the proposed mining operation such as previous environmental assessments, reports and studies that will inform the parties to the EA. As well, we note that the EA of the proposed mining operation is unusual in the sense that certain physical works or facilities required for the proposed mining operation already exist and that fact should be taken into account by the MVEIRB when determining what the focus of an efficient assessment should be in the circumstances.

Summary:

We submit that there are no legal issues raised by the Review Board's second question because CZC did not assert that any specific components, physical works or facilities were subject to s.157.1 of the MVRMA and, therefore, exempt from Part 5 of the MVRMA, including environmental assessment. If we are wrong then we ask that the perceived legal issues be clearly identified by the Review Board and that we are provided the opportunity to address those issues so identified.

We trust the foregoing submission on the legal issues identified by the Review Board is of assistance.

Sincerely,



Yvonne MacNeill
Counsel

cc: Krystal Thompson
Department of Indian Affairs and Northern Development

Sarah Olivier
Department of Fisheries and Oceans

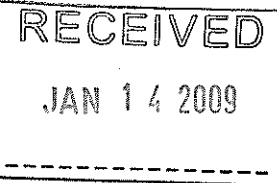
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