EA03-00X

# Mackenzie Valley Environmental Impact Review Board

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Date: January 5/04. Pages: 10. including this page

To: Distribution. Fax:

CC:

Subject: Miramar Con Reasons for Decision.

**NOTES:**

Please find attached the Review Board's Reasons for Decision in the referral of the Miramar Con A/R plan by the City of Yellowknife. If you require any further information, please contact me.

K. Cliffe-Phillips

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Mackenzie Valley
Environmental Impact
Review Board

**MACKENZIE VALLEY ENVIRONMENTAL IMPACT REVIEW BOARD**

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| **In the Matter of:** | **The referral of the Miramar Con Mine Abandonment and Restoration Plan for Environmental Assessment by the City of Yellowknife** |
| **And In the Matter of:** | **A hearing held under section 24 of the *Mackenzie Valley Resource Management Act* to inquire into the Mackenzie Valley Environmental Impact Review Board's authority to conduct the Environmental Assessment of the Con Miramar Abandonment and Restoration Plan** |

# REASONS FOR DECISION

## BACKGROUND:

On November 14th, 2003, the Mackenzie Valley Environmental Impact Review Board (MVEIRB or Review Board) received correspondence from the City of Yellowknife (the City) attached to which was a resolution of City Council referring the Miramar Con Mine Ltd. (Miramar) Abandonment and Restoration (A&R) Plan to the MVEIRB for purposes of an environmental assessment. The City indicated that it was exercising its authority under subsections 126(2)(c) or 126(4) of the *Mackenzie Valley Resource Management Act* (MVRMA) in making this referral.

On December 1, 2003 the Review Board published notice of its decision to hold a hearing pursuant to section 24 of the MVRMA to address the question of its authority to proceed with the Environmental Assessment (EA) of the Miramar A&R Plan. This hearing was to be conducted by exchange of written briefs since the issues related to the Review Board's authority were almost exclusively legal.

Only two parties indicated interest in participating in this hearing, the City and Miramar. The Review Board posed two questions to the parties:

1. Does the Miramar Con Mine abandonment and restoration process constitute a "development" under the MVRMA?

2. Do any of the conditions set out in paragraphs (a) to (c) of subsection 126(4) of the MVRMA apply to the City of Yellowknife's referral?

In its argument filed December 11th, 2003, the City indicated that its initial referral had also relied on subsection 126(2)(c) of the MVRMA and the City presented its position on its authority to refer the A&R plan on that basis as well.

Miramar's counsel replied to the City's argument on December 19th as required by the MVEIRB's notice of hearing. Miramar also addressed the subsection 126(2)(c) issue.

The questions set out by the Review Board in its notice of December 1st do not have to be treated as exhaustive. Since both parties in the hearing have addressed the application of subsection 126(2)(c) to the referral, the Board will consider that issue in these reasons as well.

**THE ISSUES:**

The issues in this hearing relate to the Review Board's authority to conduct an EA of the Miramar A&R Plan as referred by the City in its letter of November 7th, 2003 (the letter was not received by the Board until November 14th). It must be noted that the conduct of an EA on a proper referral under either subsection 126(2)(c) or 126(4) is mandatory. If all the conditions are met for such a referral, the Review Board must conduct the EA.

The issues to be resolved are:

1. Is the Con Miramar A&R process a "development" under the MVRMA?

2. Can the City make a referral to EA under subsection 126(4) of the MVRMA?

3. Can the City make a referral to EA under subsection 126(2)(c) of the MVRMA?

**THE RELEVANT STATUTORY PROVISIONS:**

The following provisions of the MVRMA are relevant to the issues set out above:

## Definitions:

"development" means any undertaking, or any part of an undertaking, that is carried out on land or water and, except where the context otherwise indicates, wholly within the Mackenzie Valley, and includes measures carried out by a department or agency of government leading to the establishment of a park subject to the *Canada National Parks Act* and an acquisition of lands pursuant to the *Historic Sites and Monuments Act*.

"local government" means any local government established under the laws of the Northwest Territories, including a city, town, village, hamlet, charter community or settlement, whether incorporated or not, and includes the territorial government acting in the place of a local government pursuant to those laws.

## Other MVRMA Provisions:

**60.** (1) A board established for a settlement area has jurisdiction in respect of all uses of waters and deposits of waste in the settlement area for which a licence is required under the *Northwest Territories Waters Act* and may

> (*a*) issue, amend, renew and cancel licences and approve the assignment of licences, in accordance with that Act, and
>
> (*b*) exercise any other power of the Northwest Territories Water Board under that Act,

and, for those purposes, references in that Act to that Board shall be read as references to the board established for the settlement area.

**126.** (2) Notwithstanding any determination on a preliminary screening, the Review Board shall conduct an environmental assessment of a proposal for a development that is referred to it by

.....

> (*c*) a local government, in the case of a development to be carried out within its boundaries or a development that might, in its opinion, have an adverse impact on the environment within its boundaries.

.....

(4) Subsections (2) and (3) apply in respect of a development for which no preliminary screening is conducted by reason that

> (*a*) a licence, permit or other authorization is required for the carrying out of the development under a federal or territorial law other than one specified in regulations made under paragraph 143(1)(*b*),
>
> (*b*) the development is exempted by regulations made under paragraph 143(1)(*c*), or
>
> (*c*) the impact of the development is found to be manifestly insignificant pursuant to paragraph 124(2)(*a*),

but, in the cases referred to in paragraphs (*b*) and (*c*), the Review Board may only conduct an environmental assessment on its own motion if, in its opinion, the development involves issues of special environmental concern.

**157.1** 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.

## 1. Is the A&R Process a Development Under the MVRMA?

What is planned at the Miramar mine site and the activities which are the subject of the A&R Plan in issue in this proceeding must be approved by the Mackenzie Valley Land and Water Board (MVLWB) as part of Water Licence N1L2-0040 (the Licence). This includes the final abandonment and decommissioning of the Miramar Con Mine. The timing of the submission of the final A&R Plan has been extended by the MVLWB because of difficulties experienced by Miramar in completing the plan. The Review Board understands nonetheless that this A&R Plan will address abandonment and decommissioning of the site and not progressive reclamation of an ongoing mining operation.

The definition of "development" in the MVRMA includes any undertaking or part of an undertaking conducted on land or water in the Mackenzie Valley. The mine is in the Mackenzie Valley and the A&R Plan activities will be conducted on land and water. The term "undertaking or part of an undertaking" used in the definition of development is very broad. It has been interpreted in a number of cases to include not just a physical work but also the arrangements under which physical things are used.[1] The Review Board's Guidelines[2] cited by counsel for the City reflect this broad scope of this word and are consistent with the law.

The argument submitted by counsel for Miramar does not address the question of whether the A&R activities constitute a development *per se*. Rather it addresses the question of whether the A&R process is part of a new development or a new "proposed" undertaking which attracts EA. Miramar's argument is that the A&R process is part of ongoing licensed activity which is not a new "proposed" undertaking. Miramar further argues that the existing water licence was subject to environmental impact assessment at the time the licence was issued.

There is nothing in the definition of development in section 111 of the MVRMA which limits the definition to new or proposed undertakings. Other provisions of the Act and regulations address the question of which developments or parts of developments must be subjected to the environmental impact assessment process found in part 5 of the MVRMA.

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[1] The meaning of the word undertaking has been considered frequently in cases addressing ss. 92(10) of the *Constitution Act, 1867*. See the discussion in Peter Hogg's *Constitutional Law of Canada,* Looseleaf Edition (Carswell: Scarborough, ON), 1992 (updated 1997, release 2).

[2] Mackenzie Valley Environmental Impact Review Board, *Guidelines for Environmental Assessment and Environmental Impact Review,* at page 27.

As counsel for the City points out, the words of section 157.1 of the MVRMA reinforce an interpretation which holds that the A&R process is an "undertaking" since it refers to a ..."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 Review Board finds that the MVRMA definition of development is broad enough to encompass the A&R process planned for Miramar Con Mine. The MVEIRB holds that the Miramar A&R process is a "development" as that term is defined in the MVRMA.

## 2. Can the City Refer the Miramar A&R Plan Under Subsection 126(4) of the MVRMA?

In this case, the MVLWB conducted no preliminary screening. The lead in to subsection 126(4) extends the authority of those organizations listed in subsection 126(2), which would include the City[3], to allow referrals to EA for developments **"for which no preliminary screening is conducted"**(our emphasis). For the City to refer under ss.126(4), one of the cases set out in paragraphs (a), (b) or (c) of that subsection must also be met.

Counsel for the City admits that paragraphs 126(4)(b) and (c) do not apply in this case. A valid referral under paragraph 126(4)(a) may only take place if a licence, permit or other authorization is required for the carrying out of the development under a federal or territorial law other than one specified in the regulations made under paragraph 143(1)(b). These are the *Preliminary Screening Requirement Regulations* (PSRR).

The Review Board agrees that the requirements of paragraphs 126(4)(b) and (c) have not been met in this case.

In his submissions on the applicability of paragraph 126(2)(c) Counsel for the City argued that the approval of the A&R Plan is an "other authorization" as that term is used in subsection 124(1) of the MVRMA. This argument could not be sustained if the City also argued that paragraph 126(4)(a) applied to authorize the City's referral. The licence permit or other authorization cannot at the same time be one included in the PSRR and not included in the PSRR. Consequently, the City did not advance an argument for a valid referral under paragraph 126(4).[4]

The Review Board agrees with this submission as well and therefore holds that no referral can take place under subsection 126(4).

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[3] See the analysis of the City's status in the reasons set out under section 3 below.

[4] On page 9 paragraph 2 of the City's submissions, they say, "... and therefore paragraph 126(4)(a) has no application."

## 3. Can the City Refer the Miramar A&R Plan Under Subsection 126(2)(c) of the MVRMA?

Subsection 126(2) begins with the phrase "Notwithstanding any determination on a preliminary screening..." . Read as a whole, section 126 includes subsections (1) which makes it mandatory for the Review Board to conduct an EA of a development referred to is after a preliminary screening; subsections (2) and (3) begin with the phrase quoted above. Subsection (4) begins with an indication that it applies where no preliminary screening has been done. Subsection (5) is not relevant to this issue. The structure of section 126 strongly implies that the only circumstances in which a development not subjected to preliminary screening may be referred to the MVEIRB is when one of the cases set out in paragraphs (a) to (c) of that subsection apply. The City has admitted that none of them do. The City nonetheless makes an argument that it can refer the Miramar A&R Plan to EA even though no preliminary screening was done by the MVLWB.

In order to make a referral under paragraph 126(2)(c), the City must be a "local government" as that term is defined in the MVRMA, the development must be carried out within the City's boundaries and the City must have formed an opinion that the development will have an adverse effect on the environment within its boundaries.

There is no doubt, in the Review Board's view, that the City is a local government as that term is defined in the MVRMA and that the activities associated with the A&R Plan will be carried out within the boundaries of the municipality. The resolution of Yellowknife City Council attached to the November 7th letter from the Mayor clearly indicates that in the opinion of the City there will be an adverse impact on the environment within the City's boundaries.

There are, however, other requirements set out in the MVRMA which determine whether an EA can be done. For example, does a preliminary screening have to be completed before a referral can be made? The Review Board has ruled in the past that the term "Notwithstanding any determination on a preliminary screening" found in subsection 126(2) of the MVRMA meant that when a preliminary screening was underway that no EA referral should take place by a party not doing the screening until the preliminary screening was completed. In this case, the City advises that the MVLWB has indicated that it does not intend to conduct a preliminary screening on the A&R Plan approval process.

A reading of the plain language of subsection 126(2), "Notwithstanding any determination..." could lead the Review Board to conclude that if no preliminary screening is done even a referral by a party like the City, which otherwise meets all the qualifications necessary in paragraph 126(2)(c), is blocked. This in the MVEIRB's view would be a reasonable reading of this phrase in the context of section 126 as a whole.

In the circumstances and having been advised that the MVLWB does not intend to screen the A&R Plan approval, the City has chosen to advance its position to the

MVEIRB on the basis that a section 126(2)(c) referral can be made even if no preliminary screening is conducted. The Review Board is not of the view given the structure of section 126 that this position can be sustained. We will, however, give further consideration to the City's argument because in our opinion it can be dismissed for other reasons as well.

To continue with the analysis, there is one more critical issue upon which the success of the City's argument depends. The City must also convince the Review Board that the approval of the A&R Plan is the approval of a "licence, permit or other authorization as that term is used in subsection 124(1) of the MVRMA. Having abandoned its argument on subsection 126(4) that the A&R Plan approval is an authorization under a federal or territorial law not listed in the PSRR, the City now needs to convince the Review Board that the A&R Plan "authorization" is one for which screening is required.

Counsel for the City argues that the MVLWB's authority to approve the A&R plan under the existing water licence is tantamount to an "authorization" as that word is used in subsection 124(1) and in numerous other places in the MVRMA. The argument is also made that such an authorization is analogous to the "decision-making responsibility" which triggered federal EARP review in the *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3 (S.C.C.).

Counsel for Miramar takes the opposite view arguing rules of statutory interpretation which hold that the term "other authorization" must be interpreted in the context in which it is set out in the MVRMA that is as part of a list ..... "licences, permits or other authorizations".[5]

The Review Board is of the opinion that this is a key issue in the City's susbsection 126(2)(c) argument. What did Parliament intend to include under the term "other authorizations" in subsection 124(1) (and elsewhere )of the MVRMA?

There are no cases to help in this determination. The Review Board has reviewed that statutory scheme in detail and had further recourse to the PSRR and the argument of counsel in order to interpret these words.

Preliminary screening under the MVRMA is application driven. That is, the great majority of screenings are done because of the PSRR. Certainly subsection 124(2) sets out instances where screenings must be done even though no licence permit or application is required (as does ss.126(4) as discussed above) but it is fair to say that the primary triggers for preliminary screenings are set out in the PSRR.

Review of those regulations indicates a series of schedules setting out the provisions of federal and territorial acts and regulations, an application for which will require a preliminary screening. Some of these provisions refer to statutory requirements for licences or permits before certain activity can be undertaken. The best examples are

[5] Miramar cites E. A. Drieger's work on the Construction of Statutes and the *ejusdem generis* rule.

the water licences required by the *Northwest Territories Waters Act* and the land use permits required by the *Mackenzie Valley Land Use Regulations.* Not all of these instruments listed in the PSRR are labelled "licence" or "permit" in the statutes that create them. For example, Schedule 1 Part 1 Item 2 Column 3 (b) refers to subsection 5.1(4) of the *Canada Oil and Gas Operations Act* under which a development plan approval made by the National Energy Board can be subjected to preliminary screening. In the same part, Item 6 Column 3 (a) refers to subsection 18(2) of the *Indian Act* under which a Ministerial authorization for the use of land on a reserve may be given. Another example is found in Schedule 2 Part 1 Item 1 Column 3 which refers to the need for preliminary screening of forest management agreements under the NWT *Forest Management Act.* Our point is that Canada, the Government of the Northwest Territories and the Gwich'in and Sahtu First Nations developed these regulations in concert with the drafting of the MVRMA and it appears to the Review Board that the list of "triggers" set out in the PSRR was intended to be exhaustive.

In the Review Board's view, the "or other authorizations" term in subsection 124(1) is not intended to refer to a set of approval requirements not set out in the regulations. Such a list could not be identified with certainty. This would leave companies like Miramar at constant risk that the need for ongoing regulatory approval of some element or activity under an existing licence or permit could be reinterpreted to require a preliminary screening or an EA.

Further practical consideration of the subsection 126(2)(c) argument advanced by the City can identify the problems faced by Miramar and other regulated entities if the City is correct in their interpretation. All water licences require the filing of annual monitoring reports, of "as built" engineering drawings and of other studies and analyses, most often for approval by the MVLWB. These, are in addition to the A&R Plan in issue in this proceeding. If the City is right, any time the MVLWB has an approval to give in the context of its ongoing regulatory oversight of a licensee, the activity would constitute an "authorization" under the MVRMA and could trigger a preliminary screening.

The Review Board cannot accept an interpretation which could lead to this result. While the part 5 process in the MVRMA is an important contributor to sustainable development, that process must also give some certainty to companies doing business in the Mackenzie Valley. An open ended environmental impact assessment process would fail to provide that certainty.

Consequently, the Review Board accepts the narrower interpretation of the term "or other authorizations" urged upon it by counsel for Miramar. The Review Board is of the view that the licences, permits or other authorizations set out in the PSRR are the only ones that attract preliminary screening and that the term "authorizations" is a reference to those instruments set out in the PSRR which are not licences or permits.

As a result, the MVEIRB holds that Miramar's need to secure approval of it's A&R Plan from the MVLWB is not an application for a licence permit or other authorization

and consequently that no preliminary screening of the Plan is required under the MVRMA. In these circumstances, subsection 126(2)(c) cannot be used by the City to make a referral of the Miramar A&R Plan.

**CONCLUSION:**

Considering the analysis and reasoning set out above, the MVEIRB holds that the City cannot refer the Miramar A&R Plan for EA under either subsections 126(2)(c) or (4) of the MVRMA.

The Review Board therefore dismisses the City of Yellowknife referral.

**Signed on the 2nd of January 2004 for the**

**MACKENZIE VALLEY ENVIRONMENTAL IMPACT REVIEW BOARD:**

T. Burlingame

**Todd Burlingame, Chair**