September 12th, 2006

Mr. Stephen Ellis
Akaitcho IMA Implementation Coordinator
NWT Treaty 8 Tribal Corporation
Box 28
Lutsel'ke, NWT
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Dear Sir:

Re: Treaty 8 Tribal Corporation Correspondence of August 9th, 2006

Thank you for bringing your concerns and questions to our attention in the above letter. Before responding to the specific issues you raise, however, several preliminary points should be made. First, it must be noted that the Mackenzie Valley Environmental Impact Review Board (Review Board or MVEIRB) is only one of the authorities which can make decisions with respect to referrals to environmental assessment. Pursuant to s.120 and to ss.126 (3) of the *Mackenzie Valley Resource Management Act* (MVRMA), the Review Board plays a limited role in overseeing how decisions are made by those bodies with referral powers. Second, there is no guidance from the MVRMA or from the courts in respect of several of the legal interpretation questions you have raised. In these circumstances, it is difficult to provide definitive answers to your questions.

You raise several questions regarding consultation related to aboriginal rights under section 35 of *the Constitution Act, 1982.* As you are no doubt aware, the Crown is bound by the recent consultation rulings of the Supreme Court of Canada. However, in the NWT, Canada and the GNWT have not yet developed overarching policies or procedures in respect of their roles when Crown consultation may be required before a regulatory decision which may infringe aboriginal rights under section 35 of the *Constitution Act, 1982.* Although the case law does indicate that environmental impact assessment proceedings can contribute to the Crown's consultation efforts, these decisions stop short of saying that an institution of public government, like the Review Board is the "Crown" for purposes of satisfying the Crown's consultation obligation.

The MVRMA also imposes "consultation" requirements on the Review Board (for example through sections 123.1 and 127.1). In addition, the whole process of environmental impact assessment requires "consultation" with a variety of organizations and the public to obtain the best information upon which the Review Board can make a determination. Consultation in these instances is defined in section 3 of the Act and the MVEIRB works diligently to ensure that it meets that obligation.

The definition of roles and responsibilities as they relate to consultation between MVRMA boards and the Crown is still evolving. Your organization would be best served to ensure that any concerns arising from land or water use applications are thoroughly documented and raised with both the MVLWB and the Review Board and the appropriate government agencies. The Review Board decides each matter over which it has jurisdiction on the basis of the evidence before it.

To address your second question, we must mention that most of the decisions "to refer or not" cited in your letter were made by other decision makers, not the Review Board. Our role where no referral decision takes place is to decide whether or not to exercise our discretion under ss. 126(3) of the MVRMA. We do not "overrule" the preliminary screener or their reasoning. The Review Board simply makes an independent decision.

When requested to consider the outcome of a preliminary screening in cases such as the MVLWB decision not to refer the Uravan land use permit application to environmental assessment, the Review Board does so. You have the Review Board's reasons for decision in that matter. Each decision made under ss.126(3) is made on the evidence available to the Board (largely based on the record from the preliminary screening) at the time.

In response to your third question, the MVRMA provides no definition of "public concern". There is some case law[1] which provides limited guidance but, generally, part 5 MVRMA decision-makers have considerable discretion in determining what constitutes sufficient public concern to warrant a referral to environmental assessment. The test for public concern set out in section 125 of the Act is the key, but at the preliminary screening stage its application is within the discretion of the preliminary screeners, not the MVEIRB.

When the Review Board reviews a screening under ss.126(3) with a view to exercising its discretion, any available evidence of public concern is factored into that decision. Consistency is only a relevant consideration when the facts in a matter before the Review Board bear a close resemblance to those in a

[1] *Cantwell* v. *Canada (Minister of the Environment)* [1991] 41 F.T.R. 18, 6 C.E.L.R. (N.S.) 16 and *Community Before Cars Coalition* v. *National Capital Commission* [1997] F.C.J. No. 1060, (1997) 135 F.T.R. 1 for example.

previously decided matter. The Review Board, like most administrative tribunals, is not bound by previous decisions in the way that the Courts are.

I trust that these responses will be of assistance to you.

Yours truly,

Gabrielle Mackenzie-Scott
Chairperson

cc. Willard Hagen, Interim Chair MVLWB
Bob Overvold, Regional Director General INAC
Bob Bailey, DM Environment and Natural Resources GNWT