

## REASONS FOR DECISION ON THE SCOPE OF THE ENVIRONMENTAL ASSESSMENT

### *Tłıchǵ All-season Road Project – EA1617-01*

**October 28, 2016**

## 1 Background

The Government of Northwest Territories – Department of Transportation (GNWT-DOT or the developer) has proposed to construct a 94 km all-season road from kilometre 196 on Highway 3 to the Community Government of Whatı boundary. Approximately 17 km of the proposed road is on Tłıchǵ lands. The proposed road, once constructed, would be operated as a public highway and be the responsibility of the GNWT-DOT. The development proposal is referred to as the Tłıchǵ All-season Road Project.

In support of the Tłıchǵ All-season Road Project, the GNWT-DOT submitted a water licence and land use permit application, along with a detailed Project Description Report (PDR) to the Wek'èezhıı Land and Water Board (WLWB) on March 31, 2016. As part of the initial review process by the WLWB, the PDR was reviewed by parties through the WLWB's Online Review System (ORS).

On July 21, 2016, the Review Board exercised its discretion under ss. 126(3) of the *Mackenzie Valley Resource Management Act* (MVRMA) and ordered an environmental assessment (EA) of the Tłıchǵ All-season Road Project (PR#1). In its *Reasons for Decision for Referral to Environmental Assessment* (PR#2), the Review Board identified the following key areas of concern that might result in a significant adverse impact on the environment or be a cause of public concern:

- i) Change to access – new all-season access to the Community of Whatı
- ii) Changes causing stresses on existing social services – related to increased drug and alcohol addiction, and increased crime
- iii) Impacts on caribou – increased harvesting pressure, increased predation resulting from new access, increased road-induced mortality, and barrier effects to caribou – linear impediments, dust, noise, reduced air quality
- iv) Uncertainty regarding the effectiveness of mitigation measures.

During subsequent scoping activities, the Review Board held a community scoping meeting in Whatı and a technical scoping meeting in Yellowknife. Following these sessions, the Review Board issued a *Notice of Proceeding on the Review Board's Approach to the Terms of Reference* (the Notice of



Proceeding, PR#44) that describes its approach to the terms of reference and adequacy statement. As described in the Notice of Proceeding, the purpose of the approach is to:

- acknowledge the information and evidence on the public record, including the developer's Project Description Report
- avoid duplication and focus further investigation throughout the environmental assessment on those effects that have the potential for significant adverse impacts on the environment; and
- provide detailed guidance to the developer regarding what further investigation is needed at this time.

Following a review and comment period, the Review Board has now completed the terms of reference process set out in the Notice of Proceeding and issued a final *Terms of Reference* and *Adequacy Statement* for the Tłıchq All-season Road Project. The *Terms of Reference* sets out the scope of development and scope of assessment for this environmental assessment. The *Adequacy Statement* specifies the additional information that the developer needs to provide to the Board before the EA can proceed to the information requests phase (see the work plan PR#75).

As noted in the Notice of Proceeding, the scope of assessment is broader than the specific information requirements in the *Adequacy Statement* and the content of the *Adequacy Statement* does not limit future information requests (IRs), as long as IRs are within the scope set out in *Terms of Reference*.

## 2 Decision

The Review Board has determined the scope of development, scope of assessment, and additional information requirements for the environmental assessment of the Tłıchq All-season Road Project.

The Review Board's decisions regarding the scope of development and scope of assessment for this environmental assessment are set out below and in the *Terms of Reference* (PR#69). The Review Board's decision with regard to further information required prior to the information request phase is set out below and in the *Adequacy Statement* (PR#70). The relationship between the *Terms of Reference* and the *Adequacy Statement* is described in the Notice of Proceeding, as well as in the documents themselves.

The Review Board's reasons for decision are set out below.

## 3 Reasons for Decision

### 3.1 General Principles

This document includes the Review Board's reasons for the scope of development and scope of assessment, as set out in the *Terms of Reference*. This document also provides reasons for the Review Board's decisions with regard to information requirements in the *Adequacy Statement*. The *Terms of Reference* and *Adequacy Statement* aim to be, for the most part, self-explanatory. Therefore, these reasons focus the major items raised by parties during the review of the draft *Terms of Reference* and draft *Adequacy Statement*. The Review Comment Tables (PR#72) cross-reference the *Adequacy*



*Statement and Terms of Reference* and describe how all review comments were considered by the Board.

The Review Board has made the aforementioned determinations in order to satisfy the Board's statutory responsibilities and to address the issues that have arisen during the EA process to date. In coming to these determinations, the Board relied on all the material on the record, including: the developer's PDR (with appendices), the Review Board's *Reasons for Decision for Referral to Environmental Assessment*, scoping sessions, and comments submitted to the Board on the draft *Terms of Reference* and draft *Adequacy Statement*.

### **3.2 Scope of Development**

Section 117(1) of the MVRMA requires that “[e]very environmental assessment of a proposal for a development shall include a determination by the Review Board of the scope of the development, subject to any guidelines made under section 120”. For the Tłıchǫ All-season Road Project, the Review Board has decided that the scope of development includes construction, operation/use, and maintenance of the road, including borrow sources and construction camps, as well as any reclamation activities undertaken during the operations phase.

#### **3.2.1 Maintenance and Operation of the Road**

The *Terms of Reference* states that “the scope of development consists of all physical works and activities required for the Project to proceed, and includes all phases of the development... the scope of development for the construction and operations phases is based on information provided in the PDR.”

The GNWT, in its comments on the draft *Terms of Reference*, recommended separate definitions for maintenance and operation/use of the road. The Review Board accepts those definitions, but also finds it necessary to define the “operations phase” as the project phase during which both maintenance and operation/use of the road will take place. There are legitimate pathways to potential significant adverse impacts during the operations phase, such as the potential impacts on community wellbeing<sup>1</sup> and wildlife<sup>2</sup>. Impacts and mitigations are expected to differ between the construction phase and the operations phase; therefore, the EA must consider each phase separately.

After the construction of the road and the designation of it as an NWT public highway, neither preliminary screenings nor land use permits will be required for ongoing maintenance; however, such activities are an integral part of the development proposal being considered by the Board. The MVRMA is clear that it is the “development” that is subject to the environmental assessment process under Part 5, not only the parts of the development that would require permits, licences, or preliminary screening.

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<sup>1</sup> For example, increased illegal substances entering Whatı (with associated potential impacts) listed on page 8-34 of the GNWT's Project Description Report (PR#7).

<sup>2</sup> For example, the potential wildlife impacts listed on page 4 of the GNWT's draft Wildlife and Wildlife Habitat Protection Plan (PR#7, Appendix M) include: habitat degradation and fragmentation due to sensory disturbances; wildlife mortality from vehicle collisions; and increased access to harvesters.



Ultimately, the scope of development and scope of assessment set the subjects to be considered in the EA and the scope of the EA is not limited by whatever may or may not be within the jurisdiction of regulators/screeners.

### 3.3 Scope of Assessment

The scope of assessment for this EA includes all potentially significant impacts that are likely to result directly or indirectly from the proposed development, the scope of which is defined in section 2.1 of the *Terms of Reference*. The Review Board has set the scope of assessment, including prioritization of valued components and associated topics, as well as other scope of assessment requirements, based on the body of evidence on the public record to date.

#### 3.3.1 Effectiveness of Mitigation

The GNWT, in its comments on the draft *Terms of Reference* and draft *Adequacy Statement* stated: “...the ‘uncertainty regarding the effectiveness of mitigation measures’... was never formally described as being applied under the might test... should not stand as its own category. Based on the details mentioned under impacts on caribou, the ‘uncertainty regarding the effectiveness of mitigation measures’ should be applied strictly for caribou.”

The application of the ‘might test’ or the reasons for decision for referral to environmental assessment do not limit the scope of an environmental assessment. Once a project has been referred, the scope of an environmental assessment is driven by the relevant MVRMA requirements (including s.117, s.114 and 115) and the evidence on the record. Subsequently, upon completion of an EA, the test for the Review Boards determinations is set out in s. 128 of the MVRMA and is in regard to “likely” significant adverse impacts.

Standard impact assessment methodology, such as that described in the *Terms of Reference*, requires clear and explicit linkages between impacts and mitigations and demonstration of how proposed mitigations will prevent impacts, in order to produce robust predictions of residual impacts. Uncertainty in the effectiveness of proposed mitigations can limit the accuracy and confidence in residual impact predictions and leave the Review Board without adequate information to make the legal determinations about significant adverse impacts on the environment that are required under the MVRMA.

Investigation of the effectiveness of proposed mitigation is always a legitimate EA concern. As noted in the *Adequacy Statement*, the uncertainty in effectiveness of mitigation applies to a variety of impacts related to the valued components of this EA.

#### 3.3.2 Traditional Knowledge

The Tłıchq Government, in its comments on the draft *Terms of Reference*, stated that “Tłıchq Government has been fully involved in carrying out TK research in the region, and the GNWT-DOT has integrated findings in a manner that is satisfactory. The Tłıchq Government is eager to ensure there is no duplication of effort” and requested that the Review Board “please identify example TK Summary from previous Environmental Assessments, and confirm that no new work is required.” The GNWT-DOT agreed with these comments and also suggested that “...the TK summary report will apply only to new material produced during the EA process.”



The Board is encouraged by the collaboration between the Tłıchq Government and the developer and by the former's comment that the developer's work in this area is "satisfactory." Providing evidence to demonstrate how traditional knowledge was incorporated into the developer's assessment report is a standard EA requirement. Based on recent EA experience, the TK Summary asks for the evidence needed by the Board to be provided in a clear and concise manner and specifically linked to potential impacts, mitigation measures, and/or project design. This is to assist the Board in evaluating the incorporation of such evidence, and the use of traditional knowledge itself, in its determinations of significant adverse impacts. This is necessary for the Board to meet its statutory responsibilities related to subsection 115(1) and section 115.1.

The Review Board has included revised text in the *Terms of Reference* to clarify what specific information is required.

### **3.4 Information Requirements in the Terms of Reference and Adequacy Statement**

Review Board staff prepared the draft *Adequacy Statement* based on materials on the record, including scoping sessions, and following the approach described in *Notice of Proceeding* and in the introduction to the *Adequacy Statement* itself. During the review of the draft *Adequacy Statement*, several major concerns and numerous minor concerns were identified. The Review Board's reasons for decision regarding the major concerns are set out below.

#### **3.4.1 Information Requests to Community Government of Whatì and the Tłıchq Government**

The Review Board acknowledges the primary authority of the Community Government of Whatì and the Tłıchq Government over health and well-being matters in the community of Whatì and on Tłıchq lands. Both levels of Government have provided documented support for the Project and assisted the Developer with baseline data collection and analysis<sup>[1]</sup>. This includes an analysis of likely indirect impacts to Tłıchq citizens and some mitigation measures to manage the effects of certain impacts. The Review Board has identified some information gaps associated with the identified induced impacts and mitigation measures; these gaps correspond to information that is necessary to understand the potential for significant adverse impacts to socio-economic valued components.

In accordance with section 22 of the MVRMA, the Review Board is directing information requests to these governments with the intent that their responses can be submitted to the Review Board's Public Registry in time for consideration by the GNWT-DOT. Any identified potential impacts to residents of Whatì or Tłıchq citizens will assist the GNWT-DOT in selecting appropriate mitigation measures to reduce the likelihood of a significant adverse effect. See the information requests document itself (PR#73) for further explanation.

#### **3.4.2 Information held by Tłıchq Government and other aboriginal groups with an expressed interest in the project area**

The Tłıchq Government Yellowknives Dene First Nation, North Slave Métis Alliance, and Deh Gáh Got'ie First Nation have all expressed traditional interests and Aboriginal Rights in the region of the scope of assessment. Some of the potential Project impacts identified during the scoping phase of the

<sup>[1]</sup> E.g. [PR#7](#) – PDR Appendices [A](#), [B](#), [D](#), [E](#), and [O](#); Traditional Knowledge Study Report ([PR# 28](#))





environmental assessment relate to harvested species and an alteration of the land for traditional users. The Review Board is seeking information from aboriginal groups that have expressed interest in the Project area to help describe and evaluate the potential adverse impact to Aboriginal well-being and the way of life that might occur as a result of the Project, as per its mandate under sections 115(1)(c) and 115.1 of the MVRMA. Fisheries and Oceans Canada was also included in one of the information requests, given their mandate for aboriginal fisheries.

The Review Board is asking information requests from these groups with the intent that their responses can be submitted to the Review Board's Public Registry in time for consideration by the GNWT-DOT. Any identified potential impacts to harvesters or land users will assist the GNWT-DOT in selecting appropriate mitigation measures to reduce the likelihood of a significant adverse effect. See the information requests document itself (PR#74) for further explanation.

### 3.4.3 Barren-ground caribou

#### 3.4.3.1 Winter Range

The draft *Adequacy Statement* stated that the "range of barren-ground caribou is north of the project." The Review Board acknowledges the Tłıchǫ traditional knowledge study report (PR#28 p36), comments from the Yellowknives Dene First Nation (Review Comment Table ID#1) and GNWT-ENR telemetry data, which show that the project is within the winter range of barren-ground caribou. As a result, the Review Board has revised section 5.3 of the *Adequacy Statement* accordingly.

#### 3.4.3.2 Population Recovery

With regard to potential impacts and mitigations that could affect population recovery of barren-ground caribou, TG recommends that: "There are existing management strategies in place for the herds, and the Board should identify whether reference to these strategies and their mitigation measures will be accepted. The Board should also indicate if any further mitigation should be identified, given that these strategies have been developed considering the maximum harvesting pressure that the herds can sustain."

Paragraph 117(2)(a) of the MVRMA states "every environmental assessment ... shall include a consideration of (a) the impact of the development on the environment..." The additional assessment work required under Table 5-2 of the *Adequacy Statement* is specifically in relation to the activities included in the scope of development and is needed to inform the Review Board's consideration of potential significant impacts on barren-ground caribou. The Review Board encourages the developer to consider the relevance of "existing management strategies," but the onus is on the developer to: (1) demonstrate how those strategies will mitigate the potential project-specific impacts, and (2) incorporate relevant strategies into the assessment of impacts following the methodology described in section 4.1, 4.2, and 4.3 of the *Adequacy Statement*.

In the Report of Environmental Assessment and Reasons for Decision on the Ekati Jay Project, the Review Board determined that existing cumulative impacts on Bathurst caribou are already significant and additional stresses matter.

The Review Board also acknowledges the Reasons for Decision Reports prepared by the Wek' èezhìi Renewable Resources Board (WRRB) for the Bathurst and Bluenose East herds. The WRRB states



that: "Based on the available Aboriginal and scientific evidence, the [WRRB] believes the severity of the Bathurst caribou decline is unprecedented and that there is a risk that the herd will be extirpated within a few short years. Further, the [WRRB] feels that there is a risk that the Bluenose-East herd will follow the same path as the Bathurst herd and also face extirpation."<sup>[1]</sup> Where the WRRB Reasons for Decision reports provide recommendations on harvesting, or impacts and mitigations from developments, such as all season roads, and the WRRB recommendations have been accepted by GNWT and TG, these recommendations may be incorporated into the developer's assessment work, as described above for "existing strategies."

The severe decline and risk of extirpation of the Bathurst herd is the reason the requirements in the *Adequacy Statement* Table 5-2 specifically include consideration of impacts on population recovery.

#### **3.4.4 Fish and Fish Habitat**

The Board understands DFO (Review Comment Table, Government of Canada ID#1) is interested in understanding biological and physiological characteristics of each stream crossing to aid DFO in determining the significance of potential impacts to fish habitat. Having considered the habitat description provided on page 4 in Appendix X, as well as the project description, project video, Appendices S and X, and the possibility of a DFO site visit that was slated for late summer/fall 2016 (WLWB ORS DFO ID#2), combined with the DFOs previous commitment to work with GNWT-DOT and the contractor to ensure water crossings are in compliance with the Fisheries Act (WLWB ORS DFO ID#2), it is the Review Board's view that the information the developer has provided regarding both biological and physiological characteristics of crossings, as well as potential impacts, is sufficient to move on to information request phase of the EA. Therefore, the Review Board does not require additional baseline data at this time, but acknowledges that DFO may require additional baseline information related to water crossings prior to construction.

The developer has provided substantial, relevant information related to impacts on fish and fish habitat (for example, referred to in Review Comment Table GNWT-DOT ID#18,19); however, the developer has not yet clearly demonstrated how the mitigations proposed will effectively mitigate the impacts to fish and fish habitat, such as those listed in the PDR (PR#7 p. 8-29). Rather than ask the developer to provide baseline data for water crossings, the Board has decided to ask the developer to address this gap by conducting a residual effects assessment, as well as other requirements described in Section 5.1 of the *Adequacy Statement*.

#### **3.4.5 Migratory Birds**

Having considered all the material on the record to date, the Review Board has decided not to include impacts on migratory birds as an area of particular focus in this EA. As a result, the *Adequacy Statement* requires additional information on potential impacts to avian species at risk, but not separate information on migratory birds.

As noted in the *Notice of Proceeding*, the content of the *Adequacy Statement* does not limit future information requests (IRs), as long as IRs are within the scope set out in *Terms of Reference*. For greater clarity, the Review Board has updated section 2.2.1 of the *Terms of Reference* to state that: "In considering the 'impact of the development on the environment' and the MVRMA definition of

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<sup>[1]</sup> <http://www.wrrb.ca/news/wrrb-releases-reasons-decision-reports-part-b-bathurst-and-bluenose-east-caribou-herds>



‘environment,’ the scope of assessment is focussed on, but not limited to, impacts on the subset of the environment the Review Board has identified as requiring the most attention during the environmental assessment (i.e. the valued components in section 2.2.2).”

The Board also encourages dialogue between the GNWT-DOT and ECCC with regard to mitigation of potential impacts on migratory birds.

### 3.4.6 Table 3-1: Detailed schedule for project activities

How the project is built and over what period of time may affect the duration and significance of impacts on the environment. To better understand the potential impacts of the construction phase, the Review Board requires: a detailed schedule for project activities, milestones, and timing of construction based on the estimated schedule, as described in Table 3-1 of the *Adequacy Statement*. If the GNWT-DOT is considering multiple scenarios (e.g. construction from both ends), indicate the preferred scenario and provide information for both scenarios.

### 3.4.7 Economic well-being

GNWT-DOT (Review Comment Table – GNWT-DOT ID#35) asks: “Can the Review Board please provide evidence that demonstrates that the concerns related to economic well-being have been attributed to an Aboriginal people or the general public [in reference to subsection 114(c)]. If no link can be provided, the GNWT-DOT requests removal of the adequacy item.”

The Review Board does not have the obligation to provide evidence. The Review Board’s requests for additional information set out in the *Adequacy Statement* are driven by its responsibilities under the MVRMA and analysis of the material on the record to date. The Review Board requires the additional information related to economic well-being to assess the likelihood and significance of impacts on this part of the environment.

## 4 Conclusion

The Board’s reasons for decision are set out above for the following decisions:

- the scope of development and scope of assessment, as set out in the *Terms of Reference* (PR#69); and
- the requirements for further information prior to the information request phase of the EA, as set out in the *Adequacy Statement* (PR#70).

The EA process will assess the impacts of the proposed development and outline potential mitigations. It is the responsibility of the developer and regulatory agencies to implement any commitments and measures approved by the Minister at the conclusion of this EA. The Review Board expects the *Terms of Reference*, *Adequacy Statement*, and the *Reasons for Decision* to help the developer and parties focus their efforts during the EA.

JoAnne Deneron, Chairperson