



## Mackenzie Valley Environmental Impact Review Board

Our file: EA0506-007

Thursday, June 29<sup>th</sup>, 2006

**To:** Paramount SDL8 Environmental Assessment Distribution List.

**Re:** Opportunity for Parties to comment upon Ka'a'gee Tu First Nation's Request for Ruling

The Mackenzie Valley Environmental Impact Review Board (Review Board) received a Request for Ruling from Ka'a'gee Tu First Nation (KTFN) on the afternoon of Wednesday, June 28<sup>th</sup>, 2006. The Ruling that KTFN's has requested is composed of two parts, specifically:

- 1) *To proceed with a 2nd round of Information Requests as was originally scheduled in the Work Plan; and*
- 2) *To allocate sufficient time upon the conclusion of the IR process to allow the Ka'a'Gee Tu to effectively prepare a technical report for submission to the MVEIRB.*

The facts relevant to this request are presented in KTFN's submission to the Review Board, which is appended to this letter.

The Review Board's procedure for addressing Requests for Rulings is defined in Rules 46 – 50 of its Rules of Procedure for Environmental Assessment and Environmental Impact Review Proceedings. Pursuant to those rules, the Review Board has established the following process for the hearing of KTFN's Request for Ruling:

- 1) Parties who are interested in responding to the Request for Ruling must submit their comments to the Review Board by no later than **5:00 pm on July 10<sup>th</sup>**.
- 2) The Review Board will distribute all responses to the parties and the parties have until 5:00 pm, **July 13<sup>th</sup>, 2006** to submit any final comments on those responses.
- 3) The Review Board will consider the Request for Ruling during its meeting, **July 18<sup>th</sup>-20<sup>th</sup>, 2006**. A *Reason for Decisions* will be issued shortly thereafter.

Should you have any questions or concerns about the above-cited material, please do not hesitate to contact me at your earliest convenience by phone at (867)-766-7062 or by email at [pduxbury@mveirb.nt.ca](mailto:pduxbury@mveirb.nt.ca).

Yours truly,

A handwritten signature in black ink, appearing to read "Patrick Duxbury".

Patrick Duxbury,  
Environmental Assessment Officer

Attached: KTFN Request for Ruling



# Mackenzie Valley Environmental Impact Review Board

## FORM 2

## Request for Ruling

<b>Name of Proceeding</b>	EA0506-007 Paramount SDL8 EA
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TAKE NOTICE that a Request for Ruling will be made to the MVEIRB by

\_\_\_\_\_ Ka'a'Gee Tu First Nation \_\_\_\_\_

(name of party making the Request)

at \_\_\_\_\_ 4:30 p.m. \_\_\_\_\_ (time) in \_\_\_\_\_ Yellowknife \_\_\_\_\_ (place), in the Northwest Territories,

on the \_\_\_\_\_ 28th \_\_\_\_\_ (day) of \_\_\_\_\_ June \_\_\_\_\_ (month), 2006 \_\_\_\_\_ or as soon after that time as the Board may decide to address the Request.

The Ruling requested from the MVEIRB is as follows:

(State the relief sought as clearly as possible)

- 1) Proceed with a 2<sup>nd</sup> round of Information Requests as was originally scheduled in the Work Plan; and
- 2) Allocate sufficient time upon the conclusion of the IR process to allow the Ka'a'Gee Tu to effectively prepare a technical report for submission to the MVEIRB.

The facts or information relevant to this Request for Ruling and which should be considered by the MVEIRB are as follow: (State the information relevant to the Request in as much detail as needed)

### Request 1)

The Ka'a'Gee Tu are registered interveners in this EA and have participated in good-faith, including responding to IRs, with the expectation that the Ka'a'Gee Tu would have the opportunity to submit its own IRs to the developer and other parties. The expectation was confirmed by the 2<sup>nd</sup> round of IRs that was scheduled in the MVEIRB's work plan for this EA.

However, with no advance notice that the MVEIRB was considering such an action, the MVEIRB cancelled the 2<sup>nd</sup> IR round that was included in the Work Plan. As the 2<sup>nd</sup> IR round was not listed as an optional element of the EA process in the Work Plan, there was no indication or reason for the Ka'a'Gee Tu to anticipate that the 2<sup>nd</sup> IR round would not proceed.

In justifying this decision, MVEIRB is 1) relying on Rule 9) of its *Rules* and basically saying "we are doing it because we can" and 2) referring to the opportunity for the Ka'a'gee Tu to ask questions at the scoping hearing in Hay River.

With regards to 1), the power to do something does not mean that something should be done. There are far more important principles at play such as fulfilling Section 114(c) of the

*MVRMA* which says that the MVEIRB must ensure that the concerns of aboriginal people must be taken into account. As well, this process must meet the common law duty of procedural fairness.

This decision to not allow the Ka'a'Gee Tu the opportunity to ask questions ensures that this process will fail on both counts. By denying the Ka'a'Gee Tu of their right to ask questions, the MVEIRB is creating an unfair process in which the Ka'a'Gee Tu cannot adequately explain its concerns to the MVEIRB given that the Ka'a'Gee Tu have unanswered questions regarding this development. The inclusion of a second round of IRs in the Work Plan created a legitimate expectation on the part of the Ka'a'Gee Tu that they would have a full opportunity to obtain further information as required, consistent with the process followed in past EAs. Had the Review Board informed the Ka'a'Gee Tu from the outset that they would be denied the opportunity to submit IRs, the Ka'a'Gee Tu would have taken that into account in their participation in the EA process. The late withdrawal of the opportunity to ask IRs has accordingly prejudiced the Ka'a'Gee Tu's participatory rights as well as breached their rights of procedural fairness.

With regards to 2), the MVEIRB is taking a revisionist approach to the scoping hearing and trying to assert that the scoping hearing was somehow part of the IR process. As indicated both in the MVEIRB's Jan. 23<sup>rd</sup> letter and again in the pre-hearing conference notes, the intent of the scoping hearing was to identify key issues for the scoping of the EA, not to ask substantial questions to gather evidence upon which a decision on this project would be made. The gathering of evidence for the purpose of making a decision on this development is the role of the IR process, not the scoping hearing.

Even if the scoping hearing had been an opportunity to ask IR type questions (which it wasn't), we did not have at that time the DAR, the addendum to the DAR or the responses to the IRs from other interveners. To just assume that these documents would not produce any questions is not justifiable.

If the MVEIRB was contemplating the deletion of the 2<sup>nd</sup> IR round from this EA process, then the MVEIRB should have 1) requested the participation of the parties in the 1<sup>st</sup> round of IRs and 2) sought the views of the parties on the requirement to proceed with the 2<sup>nd</sup> round given that the parties had participated in the 1<sup>st</sup> round.

**Request 2)**

On June 26<sup>th</sup>, the MVEIRB gave the Ka'a'Gee Tu and other interveners just 8 days notice to prepare and submit closing statements for this EA. This tight timeline was further exacerbated by the fact that for 4 of those 8 days, the leaders and staff of the Dehcho communities would be in attendance at the Dehcho Annual Assembly being held in Kakisa from June 26<sup>th</sup> to 30<sup>th</sup>.

Even if the MVEIRB refuses to reverse its decision on the 2<sup>nd</sup> IR round, June 26<sup>th</sup> to July 7<sup>th</sup> is still not a sufficient and fair timeline for the Ka'a'Gee Tu to adequately prepare its closing statements for this EA. It is our view that a minimum of 4 weeks should be permitted between the end of the IR phase and the requirement for closing statements.

The authority or grounds for the Ruling which should be considered by the MVEIRB is as

follows: (State the Rules or any law or enactment relied on and the grounds for the Ruling).

Rule 11 allows the MVEIRB to do as we have requested.

AND FURTHER TAKE NOTICE that in support of this Request for Ruling the following documents or information have been attached  
(Set out all materials to be used to support the Request).

Dated at \_\_\_\_\_ Yellowknife \_\_\_\_\_, Northwest Territories, on (MM/DD/YY)  
\_06/28/06\_\_\_\_\_

\_\_\_\_\_  
Joe Acorn \_\_\_\_\_  
(Signature of Party's Representative)