

# **NORTH SLAVE MÉTIS ALLIANCE**

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July 8<sup>th</sup>, 2010

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Re: NSMA Comments on Tlicho Request for Ruling - EA 0809-004

The North Slave Métis Alliance (NSMA) provides the following comments in response to the Tlicho Request for Ruling.

It makes no difference to the NSMA whether or not Fortune has a lease from the Crown or a land access agreement with the Tlicho. The Aboriginal and Treaty Rights of the North Slave Métis community are constitutionally protected, and cannot be unilaterally affected by the Tlicho Agreement, by Crown issued leases, by land use plans, by development moratoriums, by mineral claims, or by project approvals. North Slave Métis Aboriginal Rights include the inherent right to determine and develop priorities and strategies for the development and use of our lands and other resources. Should the NSMA decide to pioneer and build roads or construct mines anywhere within our traditional territory, including across or on so-called Tlicho lands, we would be entitled to do so. Our Aboriginal Rights and Titles and Treaty Rights continue to exist as always, despite the Tlicho Settlement Agreement, and the North Slave Region continues to be an unsettled claims area for Métis, despite the Tlicho Agreement.

The Tlicho, in their Settlement Agreement, agreed to respect Fortune's lease as a pre-existing right, but the North Slave Métis have not agreed through any claims process to respect that lease as a pre-existing right. The boundaries of so-called "Tlicho Lands" are also of no relevance to our land and resource rights or to our inherent right of self government since we were not involved in the negotiations that established them. **The Tlicho Agreement recognizes, in section 2.7.1, that nothing in the Agreement can affect the Aboriginal or Treaty Rights of any other Aboriginal People.**

It would be harmful to the NSMA to prevent a beneficial project, just as it would be harmful to the NSMA to allow a damaging project. **We expect an impact benefit agreement with Tlicho and Canada if beneficial resource developments are prevented or put on hold as a result of**

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**the Tlicho Agreement, just as we expect impact benefit agreements with proponents and Canada if harmful projects are permitted.**

Disputed property rights are one of our significant concerns with regards to this proposed project, as mentioned in our October 22, 2009 comments on the TOR, during the scoping sessions, and in our February 28<sup>th</sup>, 2009 comments to the Wek'eezhii Land and Water Board.

**The NSMA relies on the MVEIRB, as the Crown Agency responsible for assessing the adequacy of Crown Consultation and Accommodation, to ensure that NSMA's Aboriginal and Treaty Rights are respected and protected in a manner consistent with the Honour of the Crown before rejecting or recommending approval of any proposed project within NSMA's traditional territory.**

All that being said, the NSMA questions whether Fortune would or would not be able to go ahead with its proposed project if a new on-land winter road is not built. Whether using the existing winter road or a new one on land, road transport would still only occur in the winter, while air transportation, or some other better alternative, would have to be used during other times. The difference in feasibility is not apparent at first glance. Fortune should be required to state categorically whether or not their proposal is feasible without any additional public road built. If it is feasible with the currently existing road, the environmental assessment should go ahead, and if not, the assessment should be cancelled.

**We firmly believe the scope of the currently proposed project should include use of the existing winter road as well as construction, operation and use of the access road needed to connect Fortune's property to the existing road.** Alternative access roads to meet possible future public roads could be assessed now, or at a later date when the new public road gets closer to becoming a reality, if that ever happens.

**The NSMA is strongly opposed to the assessment of Fortune's project without consideration of access.** To do an environmental assessment of a portion of a project that cannot be completed without other projects being completed first is contrary to Federal policy, and harmful to the NSMA's interests.

The Canadian Environmental Assessment Agency has issued an Operational Policy Statement, just recently (<http://www.ceaa.gc.ca/Content/D/A/C/DACB19EE-468E-422F-8EF6-29A6D84695FC/scope-eng.pdf>), which is attached for your review. Of note, the policy states that the project scope should generally be expanded to include any additional components that can be considered "connected actions", such as if one is automatically triggered by the other, whether one cannot proceed without the other, or whether both are part of a larger whole which if considered separately have no independent utility (pg 3).

We expect projects to be constructed promptly after approval. Legislation, regulatory procedures, economic conditions, technological practices and even environmental conditions may all change significantly if there are significant delays in construction. In particular, socioeconomic impact assessments can become rapidly outdated. For this reason, and not because of anything required by the Tlicho Agreement, the NSMA objects to any environmental

assessment until there is certainty with regards to the proposed project description, particularly the method of access.

Given the importance of road access to economic development and harvesting in general, as well as the current particularly sensitive status of endangered species (such as caribou and bison) and their road moderated interactions, we believe it would be exceptionally irresponsible to assess the environmental impacts of this project without considering its roads and access routes.

We hope that you find these comments useful in your deliberations. Please keep in mind that the NSMA has severe and chronic capacity issues, and has prepared these comments without the benefit of legal advice.

Sincerely,



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## Operational Policy Statement

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# Establishing the Project Scope and Assessment Type under the *Canadian Environmental Assessment Act*

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### Purpose

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The purpose of this Operational Policy Statement is to provide best practice guidance in the consistent application of section 15 of the Act for the establishment of the scope of project in relation to which an environmental assessment is to be conducted.

The Operational Policy Statement also clarifies when the requirements of the Act with respect to comprehensive studies are to be followed.

The Operational Policy Statement will be supplemented shortly by guidance on how the environmental assessment of a project scoped in accordance with the direction of the Supreme Court of Canada is to be conducted, and on how course of action decisions under section 20 or 37 of the Act with respect to such a project should be made.

### Background

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On January 21, 2010 the Supreme Court of Canada released its decision in *MiningWatch Canada v. Canada*. The issue addressed in the decision was whether the environmental assessment track (screening or comprehensive study) is determined by the project as proposed by the proponent or by the discretionary scoping decision of the responsible authority.

The decision also addressed the issue of how this discretionary authority to establish the scope of the project is to be exercised.

The Court concluded that the project as proposed by the proponent determines the assessment type, and that the scope of project is at a minimum, the project as proposed by the proponent.

The Court also underscored the value of the cooperative assessment provisions set out in the *Canadian Environmental Assessment Act* (the Act), as the appropriate means to minimize duplication with provincial processes.

The Supreme Court of Canada decision provides clarity and will contribute to a more timely overall environmental assessment and regulatory process.

This Operational Policy Statement is structured to guide the reader through the process related to establishing scope of project for the purposes of environmental assessment, and sets out key roles and responsibilities. This statement sets a foundation for the conduct of both screenings and comprehensive studies, and will be supplemented by additional guidance on an as needed basis.

## **Application**

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This Operational Policy Statement replaces and supersedes all previous guidance documents released by the Canadian Environmental Assessment Agency on:

- how to establish the scope of the project to be assessed; and
- how to determine if the project is subject to the comprehensive study requirements of the Act.

The Operational Policy Statement applies to determining the scope of project for any project that may require an environmental assessment under the Act, and its regulations.

The Operational Policy Statement is primarily intended for responsible authorities<sup>1</sup>. It also provides useful guidance for all other federal authorities, proponents, provinces and other interested parties involved in the environmental assessment process.

## **Principles**

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Decisions on the scope of project advance the purposes of the Act, i.e. the careful and precautionary identification of potential adverse environmental effects and means of mitigating them prior to final decision making, by a responsible authority that would enable a project to proceed in whole or in part. (See Annex 1)

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<sup>1</sup> For the purpose of this Operational Policy Statement, the reference to responsible authorities is meant to also include any other authorities referred to in sections 8 to 10.1 of the Act, as well as the Minister of the Environment in the context of an assessment by a review panel.

Project scoping decisions are made in a manner that allows for the consideration of the adverse environmental effects that may be associated with a development proposal as described by the proponent.

Given the concurrent federal and provincial constitutional responsibilities towards the environment, including with respect to environmental assessment, inter-jurisdictional cooperation is essential to ensure that high-quality environmental assessments are conducted in a non-duplicative manner. In this regard, wherever possible, federal-provincial cooperative mechanisms must be used to conduct the required environmental assessment (see: *Operational Policy Statement – Use of Federal-Provincial Cooperation Mechanisms in Environmental Assessments pursuant to the Canadian Environmental Assessment Act*).

## **Approach**

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### **a) How to establish the scope of the project to be assessed**

At the earliest opportunity after a proposal comes to the attention of a federal authority, the authority must determine based on the proponent's proposal and any other available information whether an environmental assessment is required. (See: *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*)

Federal authorities, individually or collectively, are encouraged to develop project description guidance to assist proponents in identifying the information they should submit in order to allow for a timely determination as to whether the Act applies. Where such guidance has already been developed (for example through the

major projects regulatory improvements initiative — *Guide to Preparing a Project Description for a Major Resource Project: Dec 2008*), federal authorities and proponents should rely on it.

To take maximum advantage of the opportunities provided in the legislation for inter-jurisdictional cooperation, all federal authorities with a strong possibility of a trigger are expected to adopt an “automatically in” approach with respect to their environmental assessment obligations, rather than delaying engagement until they have certainty that an environmental assessment will be required. [“In until out” or “automatically in” approach]

The scope of project to be assessed, to be established pursuant to section 15 of the Act, must include at a minimum, and will generally coincide with, the project as proposed by the proponent. However, in some cases, the responsible authority might have to, in accordance with subsections 15(2) and 15(3) of the Act, enlarge the scope based on the particular facts and circumstances of the project.

Subsection 15(2) grants discretion to the responsible authority to combine related proposed projects into a single project for the purposes of assessment. Subsection 15(3) provides that an environmental assessment of a physical work shall be conducted in respect to every “construction, operation, modification, decommissioning, abandonment or other undertaking” in relation to the project.

Subsections 15(2) and 15(3) constitute an exception to the proposition that the project to be assessed will generally be the project as proposed by the proponent.

The Act assumes that the project will be represented in its entirety. However, and as noted by the Supreme Court of Canada, were a proponent to engage in “project splitting” by representing part of the project as the whole, or proposing several parts of a project as independent projects, the responsible authority might have to include all parts of the project in the scope of the project to be assessed.

In determining whether a project scope should be expanded beyond the project as proposed by the proponent, responsible authorities should consider how the additional components are linked to the project as proposed by the proponent. Where these components are connected actions, for instance:

- where one is automatically triggered by another;
- where one cannot proceed without the other; or
- where both are part of a larger whole and have, if considered separately, no independent utility.

The project scope should generally be expanded to include any such additional component(s). In making a final determination in that regard, it will be important to work in cooperation with any other jurisdiction involved in the assessment (e.g., a province) to ensure that all the components that may have to be included in the scope of the project have been identified and considered.

Project phasing is a common phenomenon in sectors such as infrastructure. In phased projects, details and timing of future phases may not be available and some phases may never be built as originally conceived. In the assessment of these types of projects, future phases, unless these are connected actions,

should be scoped as separate projects, but considered as much as possible as part of the cumulative effects assessment, taking into account the information that is available with respect to the final project as a whole (i.e., all the phases).

Based on the approach recommended in the preceding paragraphs, responsible authorities are expected to agree upon a single scope of project to provide the basis for a single scope of assessment and a single federal assessment process. (See: *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*)

#### **b) How to determine if the project is subject to the comprehensive study requirements of the Act**

A project will be subject to the comprehensive study requirements of the Act in either of the two following circumstances:

- I. the project, as proposed by the proponent (or any part of it), is described in the comprehensive study list; or
- II. the project as proposed by the proponent is NOT described in the comprehensive study list but the project as scoped (or any part of it), taking into account additional elements added to the scope of the project pursuant to subsections 15(2) and 15(3), is described in the list.

(See: *Comprehensive Study List Regulations*)

#### **c) Environmental Assessment Phase**

Following the scope of project determination, subsequent decisions are

required on the factors to be considered and the scope of those factors (the scope of the assessment). The scope of assessment is established in accordance with requirements set out in section 16 of the Act. (See: *Operational Policy Statement — Establishing the Scope of the Environmental Assessment [currently under development]*)

#### **d) Roles and Responsibilities**

The following list focuses on certain roles and responsibilities and is not intended to be exhaustive.

##### *Responsible Authority*

- Apply the principle of “automatically in”
- Apply this Operational Policy Statement in determining the environmental assessment type under sections 18 and 21 of the Act
- Exercise responsibilities of Federal Environmental Assessment Coordinator as determined by the Act

##### *Expert Federal Authority*

- Provide advice, on request, to the responsible authority and provincial jurisdiction in conducting the assessment.

##### *Canadian Environmental Assessment Agency*

- Act as Federal Environmental Assessment Coordinator as determined by the Act
- Support the development of effective cooperative processes with other jurisdictions that advance the concept of one project-one environmental assessment
- Manage the environmental assessment process on behalf of the

responsible authorities for projects under the major projects regulatory improvements initiative.

The role of the Federal Environmental Assessment Coordinator is to coordinate the participation of responsible and federal authorities in the environmental assessment process, and to facilitate cooperation among them, and with provinces and other participants.

## Annex

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### Role of Scoping

Reaching a scoping decision pursuant to section 15 of the Act has historically been difficult and time consuming, particularly with respect to certain regulatory triggers. Scoping is a critical phase in the environmental assessment process. It serves to directly focus the environmental assessment and supports the subsequent analysis of environmental effects and the preparation of the environmental assessment report. Establishing the scope of the project is the first step in the scoping exercise.

Effective scoping early in the project planning stage significantly enhances the ability of the federal government to cooperate with provinces and minimize duplication. It can improve the efficiency, predictability and timeliness of the assessment and promote sound decision making by:

- ensuring the assessment focuses on the relevant issues and concerns;
- helping identify federal authorities and other jurisdictions that may need to be involved in the environmental assessment;
- enabling and supporting federal-provincial cooperation in the delivery

of the environmental assessment, in order to achieve the objective of “one project-one assessment”;

- helping to identify whether there are likely to be public concerns that need to be addressed in the environmental assessment;
- establishing, for all participants in the process, clear boundaries for the environmental assessment; and
- helping determine the appropriate level of effort for the environmental assessment.

### Related Guidance

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- *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements* (<http://laws.justice.gc.ca/en/c-15.2/sor-97-181/index.html>)
- *Federal Coordination: An Overview* ([http://www.ceaa-acee.gc.ca/Content/D/A/C/DACB19EE-468E-422F-8EF6-29A6D84695FC/Federal-Coord-Overview\\_e.pdf](http://www.ceaa-acee.gc.ca/Content/D/A/C/DACB19EE-468E-422F-8EF6-29A6D84695FC/Federal-Coord-Overview_e.pdf))
- *Federal Coordination: Identifying Who's Involved* ([http://www.ceaa-acee.gc.ca/Content/D/A/C/DACB19EE-468E-422F-8EF6-29A6D84695FC/Federal-Coord-Identifying\\_e.pdf](http://www.ceaa-acee.gc.ca/Content/D/A/C/DACB19EE-468E-422F-8EF6-29A6D84695FC/Federal-Coord-Identifying_e.pdf))

### Additional Information

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For more information on this OPS or on the requirements of the Act, please contact the Agency office in your region.

#### Head Office:

<http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=16C9C18C-1>

**Regional Offices:**

<http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=12D96EC7-1>

Additional Agency policies and guidance can be found on the Agency's Web site at:

<http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=D75FB358-1>

**Disclaimer**

This guide is for information purposes only. It is not a substitute for the Act or any of its regulations. In the event of any inconsistency between this guide and the Act or regulations, the Act or regulations, as the case may be, would prevail.

To ensure that you have the most up-to-date versions of the Act and regulations, please consult the Department of Justice Web site at <http://laws.justice.gc.ca>.

**Updates**

This document may be reviewed and updated periodically by the Canadian Environmental Assessment Agency (the Agency). To ensure that you have the most up-to-date version, please consult the Guidance Materials page of the Agency's Web site at <http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=DACB19EE-1>.

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**Comments and Feedback**

The Agency would appreciate receiving comments on the content of this guide and feedback regarding whether the guidance effectively meets your needs. Comments received will be considered for future updates.

Please submit your comments to [training.formation@ceaa-acee.gc.ca](mailto:training.formation@ceaa-acee.gc.ca).