



# Yellowknives Dene First Nation

P.O. Box 2514, Yellowknife, NT X1A 2P8

October 22<sup>nd</sup>, 2012

Chuck Hubert  
Mackenzie Valley Environmental Impact Review Board  
Box 938  
Yellowknife, Northwest Territories  
X1A 2N7  
Fax: (867) 766-7074

Dear Mr. Hubert:

## **Re: NICO/Fortune Closing Comments**

The Yellowknives Dene First Nation (YKDFN) would like to provide the enclosed document as the closing comments for our participation in the Fortune Minerals Environmental Assessment. The onus is on the developer to convince the Board and the Parties that they will not have significant impacts. The YKDFN is not content that Fortune Minerals can achieve “no significant impacts” without implementation of the measures outlined below. However, we would once again like to state that this project is occurring in the heart of Tlicho lands, it is their voice that must be the loudest – their concerns must be addressed in addition to those listed here. As they know this land best, if they still have unaddressed concerns at the end of this process, then YKDFN concerns will also remain.

YKDFN have tried hard to provide recommended measures on a limited scope – focusing on issues considered to be trans-boundary or potentially precedent setting – but with a strong foundation based on lessons learned from existing mining projects. This experience informs the following suggested measures.

- i) **Caribou Impacts – Direct and Cumulative:** YKDFN Traditional Knowledge strongly suggests that the existing mines have had an undeniable impact on the Bathurst Caribou herd and have contributed to the very significant decline in the herd numbers. YKDFN harvesters have been forced to make increasing levels of sacrifice while development has proceeded without any additional constraints placed on their operations. This mine does not propose any additional mitigations to minimize impacts. Of greatest concern, are the impacts associated with the construction and use of the road that may isolate parts of the traditional range of caribou. Additionally, increased and uncontrolled road access will result in a higher hunting pressure.

The level of development has increased to the point where the Fortune Mine would be one of ten mines that would exist across the Bathurst Caribou range within a five year period. YKDFN has stated that the company’s cumulative effects analysis uses insufficient criteria and very high impact thresholds by restricting the numbers of developments, at the same time while stating that the developments must have huge impacts to have any effect on the persistence of caribou. YKDFN has also argued that the significant impact to be considered is not just on the persistence

of caribou; rather it is the ability of the people to practice their traditional rights.

- ii) **Monitoring – Wildlife and Cumulative Effects:** The company stated that they will commit to a wildlife effects monitoring program, but have refused to support a Measure requiring it. The GNWT supported this Measure at the hearing, but walked away from this position in subsequent submissions (despite the fact that their new position was clearly untenable and inconsistent with Land and Water Board guidance – see attachment A, B, C). We have decades of evidence, in the form of hundreds of contaminated sites, showing why we shouldn't trust the good nature of any industrial proponent. From the proponent's perspective, there appears to be no financial benefit to addressing many of the things that First Nations consider important. An enforceable Measure that requires the collaborative development of a Wildlife Effects Monitoring Program prior to the issuance of any further authorization is a requirement to avoid significant public concern for the Yellowknives Dene First Nation. The Crown has made its position clear – they're content with the status quo – blindly stating that enforceability is the Land and Water Board's job despite indisputable evidence to the contrary. Thus, there must be some method to create an enforceable WEMP and wildlife related mitigations. This should include a clear monitoring program, appropriate resources for party participation and review, an agreed upon reporting and approval mechanism, and finally a dispute resolution system that is efficient and timely.

Though the company has made a commitment to develop a monitoring program, they have indicated that cumulative impacts are outside of the scope of this effort – that they will contribute to any programs or requirements of Government, and that is all. How the proponent gets to that point is moot – what must happen is that the GNWT and/or AANDC must develop and implement a system that addresses this concern. Impacts are happening all across the landscape and while AANDC has the Cumulative Impact Monitoring Program, this program has not provided results that address the concerns of YKDFN – we are not aware of any trans-boundary/range-wide projects that evaluate impacts to the range, consideration of thresholds of development or the development of best practices to minimize impacts. Effectively, range management is the same as it was when the Giant and Colomac disasters were last permitted. YKDFN are focused on results at this point – there is the clear need for cumulative effects monitoring and analysis, and if the Crown is not going to address this concern, this responsibility must fall to the company. YKDFN ask the Board to develop a measure that ensures that Cumulative Effects matters are being addressed – whether through a government approach, industry lead or some type of partnership – no longer can the 'players' simply say that this isn't their responsibility.

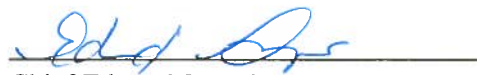
- iii) **Air Quality:** The Parties, Boards and regulators lack any legislative authority to enforce Air Quality measures. This gives a company complete freedom to emit any level of pollution up until they are releasing acutely toxic emissions. This is not acceptable and the Review Board must create a Measure that requires a collaboratively designed Air Quality Management Plan that includes regular post-commissioning stack testing. Part of this plan should be a local sediment sampling program to establish current levels of persistent pollutants.

- iv) Oversight: YKDFN have had very good experiences with independent oversight and strongly believe that when implemented correctly within an effective mechanism, they result in industrial operations of the highest calibre of environment stewardship. Given the level of concern with this project and it's proximity to area of cultural importance, YKDFN support the Tlicho request for an independent oversight body.
  
- v) Closure: The lack of component based closure objectives and criteria make it difficult to determine the company's true vision for the site. The only way to evaluate what the impacts of this development is to compare the long term site with the benefits. Until the parties have a better sense of the closure vision – details on the broad statements from the company – then this remains a concern. To address this, YKDFN recommend that the Board issue a Measure that requires the collaborative development of this information prior to the issuance of any subsequent determinations. Additionally, the Review Board should make it clear as part of the EA decision, that the maximum security will be required for this project because of the companies limited size and the continued uncertainty that exists with potential closure options.

YKDFN believe that *the majority of these matters can be best addressed through an extra-regulatory agreement* negotiated between the parties and addresses each of these matters, provides appropriate resources for the parties to participate, contains appropriate reporting, review, and approval mechanisms, and as a last resort, includes an efficient, simple, and effective conflict resolution system.

YKDFN would like thank the Board for this opportunity and all of the participants for their hard work, honest involvement, and strong presentations. If this project is approved, we hope that the strong positions and recommendations provided help to ensure that it will meet a very high bar for environmental stewardship and northern benefit to offset the impacts. Projects that meet this test are the ones that will build the North without compromising the future.

Sincerely,



Chief Edward Sangris  
Yellowknives Dene First Nation (Dettah)

## Attachments:

### **Attachment A – Land and Water Board Clarification for Wildlife Conditions in Land Use Permits (WLWB Chair of Wildlife Terms and Conditions Working Group)**

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**From:** Brett Wheler [brett@wlwb.ca]  
**Sent:** August 28, 2012 9:24 PM  
**To:** Todd Slack  
**Cc:** 'Marc Casas'  
**Subject:** RE: Wildlife and Land Use Permits

Hi Todd,

The MVLWB Terms and Conditions Working Group (WG4) is of the view that Land Use Permit conditions must be in accordance with the regulations (MVLUR). Conditions related to wildlife are thus limited to a focus on wildlife habitat.

WEMPs are focussed on monitoring of wildlife, rather than wildlife habitat, therefore, it is the view of MVLWB WG4 that conditions related to WEMPs are outside of the jurisdiction and authority of the LWBs as defined by the MVLUR.

The Proposed Wildlife Act for the NWT (consultation draft, Feb 2012) includes provisions for Wildlife Management and Monitoring Plans, which will be for approval by the Minister of ENR. MVLWB WG4 supports this proposal.

**From:** Todd Slack [mailto:tslack@ykdene.com]  
**Sent:** August-27-12 8:20 AM  
**To:** Brett Wheler  
**Cc:** 'Marc Casas'  
**Subject:** RE: Wildlife and Land Use Permits

Hi Brett. I appreciate the timeline trouble – I'm certainly suffering that myself.

However, if we could get an official answer by next Tuesday (the 4<sup>th</sup>), it would sure help inform the Gahcho Kue WEMP discussions – we're at an impasse on what is required to implement/enforce a WEMP. Technically, it would probably help on the Fortune file too, but that's less of a concern *at the moment*.

**From:** Brett Wheler [mailto:brett@wlwb.ca]  
**Sent:** August-26-12 9:48 PM  
**To:** Todd Slack  
**Cc:** 'Marc Casas'  
**Subject:** RE: Wildlife and Land Use Permits

Hi Todd, just reading this today after being away for 3 weeks. I'll be at fortune hearings this week, but I'll chat/think about your question a bit and get back to you.

You are correct that the Terms and Conditions Working Group is of the view that lup conditions must be consistent with MVLUR. This is also consistent with the legal advice we have received.

**From:** Todd Slack [<mailto:tslack@ykdene.com>]  
**Sent:** August-15-12 12:52 PM  
**To:** Brett Wheler  
**Cc:** Chisholm, Veronica; Marc Casas  
**Subject:** Wildlife and Land Use Permits

In recent discussions with De Beers, they informed me that they believe that the future WEMP will be submitted as part of the Land Use Permit and that they feel the LWB has the ability to review and enforce this. It is our understanding that there is nothing within the mandate or purview of the LWB that provide this ability in terms and conditions – much less the inspectors being empowered to enforce terms and conditions that are outside the LUR. Thus, the only statutory consideration that a wildlife effect monitoring plan will receive is at the MVEIRB stage.

I'm sending this to you as head of the wildlife working group for further clarification and confirmation. However, if you feel that this question is better directed to the MVLWB RO, I've CC'd Marc (just let me know if you're handing it off, so I understand where the answer will be coming from). If the LWB have the ability to enforce a 'WEMP' then that removes one of the significant issues before the Review Board.

## **Attachment B – Further LWB Clarification for Wildlife Conditions (MVLWB Executive Director)**

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**From:** Zabey Nevitt [[zabey@mvlwb.com](mailto:zabey@mvlwb.com)]  
**Sent:** October 12, 2012 11:35 AM  
**To:** Todd Slack  
**Cc:** 'Marc Casas'; Brett Wheler; [Stephen.Lines@debeerscanada.com](mailto:Stephen.Lines@debeerscanada.com)  
**Subject:** Re: Wildlife and Land Use Permits

Todd, thank you for your email.

Brett's email represents the views of the working groups established by the Boards. The working groups have been mandated by the Boards to develop clarity and consistency in a number of areas of Board operations.

Brett's view is entirely consistent with the Board's view. We cannot be inconsistent with any legislation, including regulations, under which we operate.

We note that WEMP (both monitoring and management plans) are a difficult area to define clear jurisdictional authority over, as drawing the line between wildlife/wildlife habitat can be tricky. However, through the work of the Board's working group and our discussions with ENR we will provide clarity on this issue and the extent to which our permit conditions can go.

I have attached for your information the Board's recent comments on the NWT proposed Wildlife legislation.

## **Attachment C – Email Correspondence to GNWT Asking for Clarity on their Position**

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**From:** Todd Slack  
**Sent:** October 3, 2012 2:03 PM  
**To:** Chuck Hubert  
**Cc:** Gavin More; Kerri Garner; Rick Schryer; Stephen Ellis  
**Subject:** GNWT undertaking response inconsistency

Hi Chuck. I've tried to be especially thorough here, sorry for the length.

### **Issue 1: Undertaking used to revise the evidence submitted to the Board – untested and unquestioned**

I've just reviewed the GNWT response to their undertaking in the NICO project (#3, August 31<sup>st</sup> Transcript – actually in reference to matters of August 30<sup>th</sup>). And frankly, it's introduced a new/different position that we were not able to ask questions about during the hearing. In the simplest terms, it does not answer the question that Mr. Donihee asked on the 30<sup>th</sup>, for which an undertaking was eventually taken, to submit the recommendations made in during the ENR presentation but were not part of the powerpoint. This is not what was contained in the response to undertaking #3. To help the conversation, I've parsed the recommendations from the transcript (p260):

- "that we would like to see a recommendation to minimize the project-related impacts on wildlife species. And the Proponent shall commit to file with the wild -- a Wildlife Protection and Management Plan to the Renewable Resources Board, regulatory agencies, and/or Aboriginal governments responsible for the management of wildlife and wildlife habitat within the North Slave region.

This plan should address general wildlife protection and specific protection of wildlife species, incorporating both Western science and traditional knowledge. We request that this be done in a timely fashion."

- "The other one that we've been -- that we would like to see either as a Proponent commitment or Board recommendation to the Proponent, that the proponent, to support the continuation of the existing harvest management plans that are ongoing with the Aboriginal communities."

The undertaking response provided is not consistent with the evidence provided to the Board at the hearing. During their presentation, ENR asked the Board to make Recommendations, which are not the same as a commitment from the company. The former must be done to avoid significant concern or environmental impacts, the latter is an unenforceable promise from the proponent. The undertaking

response not only suggests that a WEMP or continued support for harvest management are not essential to avoid significant concern and impacts, but goes on to suggest that this is not even a matter for the MVEIRB to consider – rather that it should be an issue for the LWB. Effectively, ENR is now not making any recommendations addressing wildlife to the Board.

If this were part of the hearing, YKDFN would most certainly have had further questions on this topic, especially in regards to the enforceability of the GNWT suggested approach. A commitment from the company is not enforceable, which is perhaps why GNWT wants the LWB to enshrine it as a condition in their LUP. However, this approach provides no more comfort than a commitment - wildlife related terms and conditions in a LUP are not enforceable. Had the proponent had made this statement on the record during the session, exposed to party analysis, we would have sought clarification on the credibility of the statement.

In point and fact have already shown this - on the 30<sup>th</sup>, Mr. Shafic Khouri stated that the Land Use Permit for Snap Lake showed that LUPs can be used as regulatory instruments for wildlife matters (p274). On p310 YKDFN responded – that we had already asked this very question of the LWB and confirmed that wildlife issues are not a matter for terms and conditions – only wildlife habitat is. As WEMPs are monitoring of wildlife rather than wildlife habitat, they are outside the authority of the MVLUR. During the hearing I stated that we had had this exchange with the Water Board and I'd be happy to put that on the record – had ENR provided a position such as they did in their response, I most certainly would have.

- *I have attached that email exchange and ask it to be filed to the registry.*

#### **Issue 2: Clarification of new evidence/position.**

I was tempted to ask for this to be part of the hearing next week – but I wouldn't want to take away from the people of Behchoko with a procedural issue, regardless of how important it may be. What I would like to ask for is that this response is opened to appropriate consideration and questioning from the parties.

I would like to ask for clarification from GNWT for the record:

- i) on p273, in response to a question from Board Counsel, ENR states that “such a program [the Wildlife Effects Monitoring Program] wouldn't be enforceable, I guess, by law. We - we have to rely on commitments and the good nature of the company to do that.”
- ii) However, in October 2<sup>nd</sup> [letter] filed to the registry, Mr. More states that the wildlife is within the mandate of the Land and Water Boards.

*These positions are contradictory and YKDFN ask for a clear statement on what GNWT believes and what rationale or examples they have to support that position.*

The GNWT goes on:

- iii) GNWT further states that section 26(1)(h) of the Mackenzie Valley Land Use Regulations is the appropriate tool for binding enactment of Fortune's WEMP commitment.
- iv) GNWT is parsing this section of the MVLUR, resulting in a change of the meaning: the full text is: “(h) protection of wildlife habitat and fish habitat;”. This section does not ‘consider the protection of wildlife’ - it considers the protection of their habitat – a very important distinction that has been made readily clear to GNWT over the years. It is not appropriate to simply parse legislation as they have here.

*I ask Mr. More to provide explanation and legal justification on this interpretation, especially in light of the LWB statements. Ideally, this will include examples of not just wildlife related terms and conditions, but actual examples of these being enforced absent an Environmental Agreement.*

To provide further clarification to this Board to aide their decision process, earlier today I wrote to AANDC's Operations District Manager for the South Mackenzie, asking for their interpretation. As we have stated in the past, YKDFN was informed by Darnell McCurdy (former director) during a meeting of the INAC-Akaiicho Consultation Working Group that these types of terms and conditions were not enforced. Earlier today YKDFN sought written confirmation of this for the Board [there is the possibility that this will be a moot question].

- *I would like the opportunity to file the AANDC response to the Board even if the registry has been closed for other issues.*

Chuck, I understand that this may not be best handled through email, but I'm looking for a solution and guidance here – what is the road forward? It doesn't seem that you should have the opportunity to refine answers after the hearing without the matter being tested – else parties will continuously seek this outcome. The undertaking response is inconsistent with the request and the evidence that GNWT provided during their questioning. I appreciate that it's late in the process and if necessary this could become the focus of closing comments – but it doesn't seem right to be able to submit a new position that contradicts the evidence presented during the hearing after the fact – when it can't be opened to questioning.

I've cc'd some of the parties to ensure transparency...what is important to me is that we can establish the responsibility (or lack thereof) for once and for all. It does no good for regulators and boards to play hot potato with an issue this important as this and it would only be worse if the result was that false comfort is provided. For this issue, it is not acceptable for there not to be appropriate enforceability or transparency.

If anyone has any questions or if you think I have something wrong, just call. As I said, the important thing is firmly establishing what the reality surrounding enforcement and responsibility is.