



Mackenzie Valley Environmental Impact Review Board

IN THE MATTER OF: Environmental Assessment EA1112-001: *Debogorski Diamond Exploration, Drybones Bay* pursuant to the Mackenzie Valley Resource Management Act (MVRMA).

AND IN THE MATTER OF: A Request for Ruling made by the Yellowknives Dene First Nation for a summary decision to reject the development proposal without an environmental review.

REASONS FOR DECISION

BACKGROUND:

On April 14th, 2001 the Mackenzie Valley Land and Water Board referred a land use application filed by Mr. Alex Debogorski for diamond exploration in the Drybones Bay area of the Mackenzie Valley to the Mackenzie Valley Environmental Impact Review Board (the Review Board or MVEIRB) for Environmental Assessment (EA) on the grounds of public concern.

On May 26th, the Review Board finalized a work plan for the EA and distributed the document to parties on May 27th. On May 27th, 2011 the Yellowknives Dene First Nation (Ndilo) (Yellowknives) filed a Request for Ruling (Request) with the Review Board asking that the MVEIRB make a summary decision pursuant to paragraph 128(1)(d) of the *Mackenzie Valley Resource Management Act* (MVRMA) to reject the proposal without an environmental review.

The Review Board notified interested parties of the Request on May 30th, 2011. Dates for the submission of comments and a reply by the Yellowknives were set out.

Comments were received from the Government of the Northwest Territories (GNWT), Indian and Northern Affairs Canada (INAC) and the Lutsel'ke Dene First Nation (LKDFN), Deninu Kue First Nation (DKFN), the North Slave Metis Alliance (NSMA). No reply was received from the Yellowknives Dene First Nation.

GROUNDS FOR THE REQUEST:

Following is a summary excerpted from of the grounds set out by the Yellowknives to support their Request:

GROUNDS FOR THE REQUEST:

Following is a summary excerpted from of the grounds set out by the Yellowknives to support their Request:

- a. The previous Review Board decisions should inform this process, especially in regards to the level of significance of the area and the potential for significant, irreparable impacts. YKDFN feel that the Review Board has previously recognized the value of the area and the special connection the YKDFN have with this essential part of their traditional territory.
- b. The Review Board has held six (6) previous EAs for this area (EA03-002, EA03-003, EA03-004, EA03-006, EA0506-005, EA0506-006), producing a significant number of mitigation measures aimed at ensuring the level of impacts would not be significant. For instance, in EA0506-005 decision the MVEIRB stated *"Collectively, these measures will avoid or reduce the otherwise significant impacts that would have occurred."*

There has been little follow up to evaluate these measures, suggestions and recommendations to determine not just if they have been implemented, but also to assess if they have been effective. While this is a question that can be argued (as the YKDFN believe that the measures and mitigations have not protected the area from significant impacts caused by development), what cannot be argued is that many of the mitigations advanced by the Review Board remain outstanding. Even the Measures required by the Board, the binding mitigations that must be emplaced prior to development to prevent significant impacts, have not fully implemented or enforced. YKDFN ask the Board to review the previous mitigation measures and acknowledge that in the absence of their implementation, the proposed development will continue to result in significant environmental and cultural impacts.

Of the non-binding Suggestions, every one remains outstanding, including the critical suggestion from the Board that *"No new land use permits should be issued for new developments with the Shoreline Zone and within Drybones Bay and Wool Bay proper, until a plan has been developed to identify the vision, objectives and management goals based on the resource and cultural values for the area"* has not been acted upon. YKDFN acknowledge that suggestions are not binding, but we argue that the Review Board is not issuing them without good cause. . . .

Section 117(2)(a) of the MVRMA discusses the impact of malfunctions and accidents and cumulative effects, while EA03-004 stated: *"Any activity conducted in the vicinity of burial grounds could have significant adverse impact on the social and cultural environment. The effect of the development is not physical but represents a diminished value of sacred sites because the burial sites are viewed as sacred."* Activities permitted through the Snowfield EA started a large fire which impacted one of the known cemeteries plus an unknown amount of other culturally significant sites. By the Board's words, this obviously had a significant adverse impact, not just on the cultural landscape, but also the environment as a whole. These are just the easily quantifiable impacts from development – a thousand acres, a

thousand litres – the larger impacts, as heard by the Board in the original hearings have resulted in a real change, a significant change, to the way that people see and use the land.

Section 114(c) of the MVRMA requires the concerns of Aboriginal people to be addressed in the process. If the Board and the Crown fail to implement prior Recommendations, Measures and Suggestions, then the mitigations that the Board determined were necessary to avoid significant adverse environmental impacts are absent. In their absence, the concerns of the Yellowknives Dene have not been taken into account and the Drybones Bay area has experienced adverse environmental impacts of such significance that further projects cannot be justified.

AUTHORITIES CITED IN SUPPORT OF THE REQUEST:

The Yellowknives cited the following authorities in support of their Request:

- Environmental Assessment Reports EA03-002, EA03-003, EA03-004, EA03-006, EA0506-005, EA0506-006
- Section 114, 115 of the *Mackenzie Valley Resource Management Act*
- Section 117(2)(a) of the *Mackenzie Valley Resource Management Act*
- Section 128(1)(d) of the *Mackenzie Valley Resource Management Act*

REVIEW BOARD DECISION:

The Review Board hereby dismisses the Request as premature.

REASONS FOR DECISION:

The Review Board is aware of the concerns which have been raised by the Yellowknives, other Akaitcho First Nations and the North Slave Metis about development proposals in the Drybones Bay area. The record in the EAs cited by the Yellowknives clearly indicates that this is an important and sensitive area for aboriginal people in the Akaitcho Territory. The Debogorski land use application was referred to EA precisely because of these sensitivities and public concern.

Subsection 130(5) of the MVRMA requires the federal and responsible Ministers to carry out an approved EA decision to the extent of their respective authorities. Once a report of EA is accepted as complete, the Review Board has no authority to enforce approved measures.

While sections 114 and 115 of the MVRMA offer crucial guidance to the Review Board in relation to the purposes and guiding principles of part 5 of the MVRMA, other provisions in part 5 also apply to the conduct of an EA.

Subsection 126(2) of the Act makes it mandatory for the MVEIRB to conduct an EA of a development referred to it by a regulatory authority.

Section 128 of the MVRMA was the subject of a decision by the NWT Supreme Court when the Review Board referred the Gahcho Kue development to Environmental Impact Review. The issue in that case was how much discretion the Review Board had to make an early decision under section 128.¹ The question in that case was how much the Review Board had to do to complete an EA which satisfied the requirements of the MVRMA. DeBeers argued that the Review Board had not done enough.

In that sense the DeBeers case is the opposite of the issue posed by the Yellowknives Request. They say that the Review Board can and should determine immediately that the Debogorski development will cause adverse impacts so significant that it cannot be justified and thus that it should be rejected without an environmental review.

Subsection 117(2) of the MVRMA is mandatory. It set out the factors which must be considered by the MVEIRB in an EA. In the DeBeers case the court held that although the Review Board did not have to make a determination on each of those factors that it did have to consider each of them.² At this point in the Debogorski EA, the Review Board has not even begun to compile the available evidence in relation to the ss.117(2) factors.

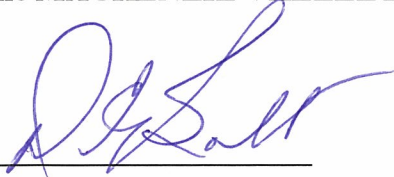
While there may be a great deal of evidence already on the record of other EAs related to the importance of the Drybones Bay area to the Yellowknives and other aboriginal peoples, the developer has had no opportunity to respond to this record or to file evidence in support of his development.

In consideration of the Review Board's obligation to be fair and the early stage of the EA process and the limited information available to the Board, it is too soon for the MVEIRB to make a decision under section 128 of the MVRMA.

For these reasons, the MVEIRB dismisses the Yellowknives Request as premature.

DATED: 27 June, 2011

For the MACKENZIE VALLEY ENVIRONMENTAL IMPACT REVIEW BOARD:



Darryl Bohnet
Vice-Chairperson

¹ *DeBeers v. Mackenzie Valley et al.* 2007 NWTSC 24.

² *Supra*, note 1 at paragraph 39.