



Canadian Northern Economic
Development Agency

Agence canadienne de développement
économique du Nord

May 29, 2015

Alan Ehrlich
A/Executive Director
Mackenzie Valley Environmental
Impact Review Board
P.O. Box 938
Yellowknife, NT X1A 2N7

VIA EMAIL

Dear Mr. Ehrlich:

**RE: Canada's Response to YKDFN Request for Ruling in the Environmental Assessment of the
Chedabucto Mineral Exploration Development (EA1415-02)**

Please find attached the response of the Government of Canada to the Request for a Ruling submitted by the Yellowknives Dene First Nation to the Mackenzie Valley Environmental Impact Review Board on May 23, 2015. This is submitted to you in accordance with the timeline specified by Board staff by notice dated May 27, 2015.

Sincerely,

Matthew Spence
Director General
Northern Projects Management Office
Canadian Northern Economic Development Agency

cc: Mohan Denetto, Regional Director General, Northwest Territories Region,
Aboriginal Affairs and Northern Development Canada
Todd Slack, Yellowknives Dene First Nation
Ken Hansen, Project Manager NWT, Husky Oil Operations Limited

Canada

Canada's Response to Yellowknives Dene First Nation Request for Ruling in the Environmental Assessment of the Chedabucto Mineral Exploration Development

Overview

The Government of Canada ("Canada") remains committed to providing the information in its possession required by the Mackenzie Valley Environmental Impact Review Board ("the Board") for the environmental assessment ("EA") of the Chedabucto Mineral Exploration Development ("the Development") proposed by Husky Oil Operations Limited ("Husky"), and to ensuring that the Yellowknives Dene First Nation ("YKDFN") and other potentially affected Aboriginal people are adequately consulted with respect to the Development.

Ruling Sought from the Review Board

Canada seeks the following ruling from the Board:

That Canada conduct a search of its records with respect to the past developments identified by the YKDFN in their Request for Review in order to identify any non-privileged records of YKDFN use of the land in the vicinity of the Development, and then report to the Board on that search and provide any such responsive records found by Canada to the Board within one week of the Board's ruling in this matter.

Procedural History

On December 19, 2014, Husky submitted a land use application to the Wek'eezhii Land and Water Board ("WLWB") for the Development. On February 13, 2015, the Development was referred to the Board for EA. On March 17, 2015, the Board distributed the Proposed Scoping Document, wherein the Board specified that comments on that document and initial information requests ("IRs") to Husky were due by April 10, 2015. On April 2, 2015, Canada wrote to the YKDFN and other Aboriginal people to encourage their participation in this EA. On April 10, 2015, YKDFN submitted comments to the Board on the Proposed Scoping Document, along with information requests directed to Husky, the Government of the Northwest Territories ("GNWT"), and Canada. On May 1, 2015, Canada submitted to the Board responses to the YKDFN IRs direct to Canada. On May 8, 2015, the Board issued the Final Scoping Document for this EA. On May 23, 2015, YKDFN submitted a Request for Ruling to the Board with respect to the completeness of Canada's responses to the YKDFN IRs. On May 27, 2015, the Board requested Canada's response to the YKDFN Request for Ruling by May 29, 2015, which is hereby submitted to the Board.

Canada's Response

Canada is committed to providing the information in its possession required by the Board for the EA of this Development, and to ensuring that the YKDFN and other potentially affected Aboriginal people are adequately consulted with respect to the Development. Canada submits that its response to the YKDFN IRs was appropriate at that time, but that a further and focused search for any required documents in Canada's possession would now be in order. Canada also remains available to meet with YKDFN to discuss their interests and concerns directly.

When developments in the Mackenzie Valley are referred to the Board for EA, Canada assesses which of its departments and agencies have relevant statutory responsibilities or can otherwise usefully contribute knowledge to the proceedings, and participates accordingly.

Canada's objective in participating in the Board's proceedings is twofold. First, it is to ensure that the Board has the information that it requires in order to discharge its own EA responsibilities. Second, Canada participates in order to closely monitor the input of Aboriginal people, to ensure that the Board takes their rights and interests into consideration. Each of these objectives will be addressed in turn below.

Canada's Duty to Provide Information

While Canada voluntarily participates in EAs such as this one and provides relevant information to the Board, Canada's obligations with respect to the provision of information to the Board also stem from section 22 of the *Mackenzie Valley Resource Management Act* ("MVRMA"):

22. Subject to any other federal or territorial law and to any Tlicho law, a board may obtain from any department or agency of the federal or territorial government or the Tlicho Government any information in the possession of the department or agency or the Tlicho Government that the board requires for the performance of its functions.

Section 22 specifically empowers the Board to obtain any information from Canada that it "requires for the performance of its functions". Therefore, information requested by the Board from Canada must be necessary for the Board to conduct its EA of a development. The MVRMA does not contemplate the Board requesting extraneous or irrelevant information from governments.

Subsection 117(1) requires the Board to determine the scope of a development – as it has done for this Development – and that determination is fundamental to establishing what information is relevant to a particular EA.

Pursuant to subsection 117(2) of the MVRMA, the Board must consider, amongst other things, the "impact on the environment" of a development. That term is defined at subsection 111(1) to mean "any effect on land, water, air or any other component of the environment, as well as

on wildlife harvesting, and includes any effect on the social and cultural environment or on heritage resources”.

How the use of the land by Aboriginal people in the vicinity of a proposed development will be impacted by a proposed development is an “impact on the environment”. The Board requires such information for the conduct of an EA.

While the Board may request that information from Canada or another government that possesses that information, it is Canada’s view that Aboriginal people themselves are best-placed to collect, characterize, and provide information about their use of an area to the Board. Where possible, they should speak for themselves. Only where the Aboriginal people cannot do so should Canada assist in that regard in order to ensure that the Board has the information that it requires to perform its functions.

For the EA of this Development, Canada now understands from the Request for Ruling that the YKDFN are not confident in their records, and therefore they may not be able to provide information about YKDFN use of the lands in the vicinity of this Development to the Board.

In this context, Canada is prepared to conduct a search of its records with respect to the past developments identified by the YKDFN in their Request for Ruling in order to identify any non-privileged records of YKDFN use of the land in the vicinity of the Development. Canada is then prepared to report to the Board on that search and provide any such responsive records found by Canada to the Board within one week of the Board’s ruling in this matter.

Canada would also be prepared to provide any other relevant documents required by the Board for the performance of its functions. However, Canada is not currently aware of any such documents in its possession, and would require direction from the Board on specifically what further information it does require, in order for Canada to conduct a focused search for that information within the timelines of this EA, or adjusted timelines as the Board deems necessary.

In addition to impacts on the environment, in an EA the Board must also consider the need for mitigative or remedial measures. The Board is entitled to information that it requires in that regard. In IR #12, YKDFN seeks information on the number of past inspections and any evictions in the vicinity of the Development. Because the relevant records had been transferred to the Government of the Northwest Territories (“GNWT”) upon the coming into effect of the Northwest Territories Lands and Resources Devolution Agreement on April 1, 2014, Canada responded by committing to discussing those records with the GNWT. Pursuant to those discussions, on May 25, 2015, the GNWT responded to YKDFN IR #10 with specific information on the number of inspections and evictions, addressing the questions directed to Canada in IR # 12. Canada trusts that this information satisfies YKDFN IR # 12 and the requirements of the Board.

YKDFN IR # 6 specifically requests “a discussion on how Canada understands that the Yellowknives Dene use” the area in the vicinity of the Development. Furthermore, the Request for Review states that, “YKDFN are not seeking for the Crown to state how the Yellowknives use the area, but rather what Canada understands that use to be...”

As already outlined, YKDFN use of the area in the vicinity of the Development is relevant to the EA, and the Board requires such information. However, Canada submits that how Canada “understands” that information is not relevant. It is beyond the scope of this EA, and is therefore not required by the Board.

Furthermore, it is not clear what this request for Canada’s “understanding” means. Is Canada asked to provide to the Board an assessment of the validity of the general assertions that have been made by YKDFN with respect to the use of this area? Is Canada asked to appraise the accuracy of any historical reports prepared with respect to YKDFN use of this area? Is Canada asked to synthesize and summarize all available evidence on YKDFN use of this area? The request in this regard is not clear, and therefore Canada cannot confidently provide a response.

If YKDFN are asking Canada to weigh the evidence of YKDFN use of this area and draw conclusions as to its reliability, then Canada submits that this is actually the fact-finding role of the Board itself, which it will exercise through the EA process. A request for Canada to take on that role at this stage is misdirected.

What Canada can and has said is that Canada understands that the YKDFN assert Aboriginal rights of a broad nature in relation to land title, traditional land and resource use, and self-government throughout its asserted territory, which includes the location of this proposed Development, and those assertions are the subject of negotiations between Canada and YKDFN. While a further discussion of that understanding is not required in order for the Board to perform its functions, the fact that the YKDFN assert such rights is the basis for Crown consultation of the YKDFN with respect to the Development.

Canada’s Duty to Consult Aboriginal People

When proposed developments in the Mackenzie Valley are referred to EA, Canada relies on the consultative processes of the Board and other associated regulators, as well as engagement conducted by the developer, as the primary means for discharging any Crown consultation duties. Such duties arise where – as here – Crown conduct is contemplated that could impact an asserted or established Aboriginal or Treaty right.

This approach is premised on active participation by both Canada and the potentially affected Aboriginal people in the Board and regulatory processes. Each has their own distinct roles and responsibilities.

Canada’s involvement includes notifying and directly encouraging participation by potentially affected groups, closely monitoring and considering the proceedings and in some instances

participating itself, and then evaluating at the end of the process whether the concerns raised by Aboriginal people have been adequately addressed or whether further consultation or accommodation by Canada is required.

Aboriginal people have their own responsibilities in these processes, including to identify whether they anticipate that the development under consideration will adversely impact their asserted or established rights, and if so, how and how in their view those impacts can be best mitigated.

By sending notices to Aboriginal people potentially affected by a development – such as the one sent by Canada to YKDFN on May 10, 2015 – Canada is not asking Aboriginal people to “restate what they have already told the Crown in the past”, or to “start at square one” for each development. Rather, Canada is encouraging Aboriginal people to take advantage of the opportunity to tell the Board and associated regulators, in their view, which of their rights will be impacted and how in the context of the specific proposed development under consideration.

Particularly in the context of asserted rights, it is not for Canada to speculate as to the potential impacts of a proposed development on those rights, or to extrapolate from assertions made by Aboriginal people in the context of other proposed developments, even in a similar geographic area. Rather, for each development under consideration, it is the responsibility of the Aboriginal people themselves to explain their interests and how they may be impacted.

The Board must consider any impacts on the environment, very broadly defined, described by Aboriginal people participating in Board processes. The Board must then formulate recommendations on whether or how those impacts can be mitigated. This structured process is the essence of Crown consultation. It is the model, with shared responsibilities, that has been implemented under the co-management framework in the Mackenzie Valley.

In the third question of IR # 6, YKDFN ask for “examples of past developments” where Aboriginal people have asserted rights, and indicate what actions Canada undertook to review the matter, and what accommodations Canada sought to address those concerns. Canada responded by citing two specific examples that similarly proceeded to review before the Board. The response outlined how Canada’s approach to consultation was applied there, to ensure that the views of Aboriginal people were considered and taken into account in adopting appropriate mitigative measures.

YKDFN say in their Request for Review that Canada’s response to IR #6 “fails to provide a meaningful level of detail”, and that “communities had residual concerns after” those EAs. Canada submits that it provided sufficient detail to show that Aboriginal interests are considered in EA processes such as this one, which result in the adoption of appropriate mitigative measures. A more detailed examination of other developments that are not in the vicinity of this Development is beyond the scope of this EA. Furthermore, no licenses, permits or authorizations may be issued for the carrying out of those proposed developments unless

the requirements of the EA process have been complied with, which is a mechanism to ensure their ongoing compliance.

In conjunction with relying on the consultative processes of the Board and associated regulators, Canada is available to meet directly with Aboriginal people to explain this approach to consultation, and to encourage their participation in it. Canada has already extended this offer to the YKDFN in the context of this EA. While such a meeting has not yet occurred due to scheduling constraints on the part of both Canada and the YKDFN, Canada has specifically proposed such a meeting for the afternoon of Friday, May 29, 2015, and has requested a discussion there on what is meant by Canada's "understanding" of YKDFN use of the area in the vicinity of the Development. Canada is hopeful that this will be a productive engagement with an opportunity for both the YKDFN and Canada to exchange information and views.

Conclusion

Canada is committed to providing the information in its possession required by the Board for the EA of this Development. To the extent that YKDFN are not in a position to provide information on their use of the area in the vicinity of this Development, the ruling proposed by Canada and the production of any records pursuant to it could help to address that.

Canada is also committed to ensuring that the YKDFN and other potentially affected Aboriginal people are adequately consulted with respect to the Development, and that is accomplished primarily through reliance on the Board's and associated regulators' processes. Canada is available to meet with YKDFN to explain its approach to consultation in the context of this EA, and to again encourage YKDFN to participate in the Board process and identify to the Board any concerns it may have regarding impacts on the environment from this Development. Canada is confident that the board will consider such information and appropriate mitigations.