

MACKENZIE VALLEY ENVIRONMENTAL IMPACT REVIEW BOARD

In the Matter of: **A Land Use Permit issued by the Mackenzie Valley Land and Water Board for the Dome Lake Camp and Quarries in support of Tibbitt to Contwoyto Winter Road**

And In the Matter of: **A consideration of conducting an Environmental Assessment pursuant to section 126(3) of the *Mackenzie Valley Resource Management Act***

REASONS FOR DECISION

On April 4, 2003, the Mackenzie Valley Environmental Impact Review Board (MVEIRB or Review Board) decided against calling for an Environmental Assessment of the Winter Road.

Background:

History of Winter Road. The winter road has been used since the early 1980s. At first, the winter road was only used to truck supplies to the Echo Bay Lupin Mine. At that time, about 700 truck loads per season were transported via the winter road. More recently, winter road traffic has increased dramatically and in 1997 Echo Bay contracted Nuna Logistics to build and maintain the road, now owned and operated by the Tibbett to Contwoyto Joint Venture of Echo Bay Mines Ltd., BHP Billiton Ltd. and Diavik Diamond Mines Inc..

The winter road begins at the end of Ingraham Trail about 70 km east of Yellowknife at Tibbitt Lake in the NWT. From there, the road is built across frozen lakes and streams for about 568 km to the Lupin Mine on Contwoyto Lake. A total of 495 km of the road is built on the surface of frozen lakes and ponds; the sections of overland winter road, which connect the lakes, make up 73 km of the road.

Construction of the winter road typically begins in December and the road is usually open for freight haulage from middle to late January until roughly mid-April; on average, the winter road operates for about 67 days each year.

The winter road is regulated by a License of Occupation (LO) issued by the Government of Canada under its *Real Property Act*. The LO includes environmental terms and conditions.

Analysis:

Statutory Goals and Objective. Under the Mackenzie Valley Resource Management Act (MVRMA), environmental impact assessment (EIA) is essentially a *planning* tool (s. 114 (b)). Section 115 of the MVRMA states that the process should be carried out in a *timely* and expeditious manner. Knowing this, to commence an environmental assessment at this point means the Review Board would be doing an evaluation of a project that is roughly 20 years old because the winter road received approval in 1983. In other words, the decision to allow the winter road pre-dated the Environmental Assessment Review Process (EARP) by one year; predated the *Canadian Environmental Assessment Act* (CEAA) by 12 years; predated the MVRMA by 15 years, and the Mackenzie Valley Land and Water Board's recent decision by roughly 20 years.

Jurisdiction. The Board has jurisdiction to conduct an environmental assessment of a project for a development that is referred to it following a preliminary screening (s. 125), or by referral (s. 126) or on its own motion (s. 126(3)). No referrals of the winter road were made.

Under the MVRMA, there are two regulations that are relevant to the Board's environmental assessment decision: the Exemption List Regulations (SOR/99-13) and the Preliminary Screening Requirement Regulations (SOR/99-12). Under the first set of regulations, the Winter Road which is a renewal of a "development", is exempted because notwithstanding the additional traffic on the winter road, there is no modification of the undertaking, which is still a road.

Section 143(1)(c) of the MVRMA empowers the Governor in Council to make regulations declaring the impact of a given development on the environment to be insignificant and exempting that development under s.124(1)(a) of the MVRMA from a preliminary screening. The Exemption List Regulations (SOR/99-13) were passed pursuant to s.143(1)(c) of the MVRMA. Section 2 of the Exemption List Regulations (SOR/99-13) under the MVRMA states the following:

"2. Proposed or existing developments set out in Schedule 1 that are situated outside a national park, national park reserve or national historic site are developments for which preliminary screenings are not required by reason that their impact on the environment of the Mackenzie Valley is insignificant."

Section 13 from Schedule 1 to the Exemption List Regulations (SOR/99-13) establishes the exemption as follows:

"13. The operation and maintenance of a highway, as defined in the Northwest Territories *Motor Vehicles Act*, R.S.N.W.T. 1988, c.M-16, or its associated culverts, that is carried out on the highway right-of-way and does not

- (a) lengthen the highway;
- (b) widen the highway by more than 15 per cent; or
- (c) entail the deposit of waste into a water body."

To complete the picture, the Northwest Territories *Motor Vehicles Act* defines “highway” as follows:

“‘highway’ means a road, place, bridge or structure, whether publicly or privately owned, that the public is ordinarily entitled or permitted to use for the passage of vehicles and includes:

- (a) a privately or publicly owned area that is designed and primarily used for the parking of vehicles, other than the driveway of a private dwelling,
- (b) where a plan of survey or other instrument establishes a highway, the area between the boundary lines of the highway as shown on the plan of survey or instrument,
- (c) a sidewalk, pathway, ditch or shoulder adjacent to and on either side of the traveled portion of the road or place and the area between the sidewalk, pathway, ditch or shoulder and the traveled portion of the road or place, and
- (d) a road on a frozen body of water or water course or a road that can be used for only a portion of a year.” (*emphasis added*)

In any event, the Preliminary Screening Requirement Regulations enumerates provisions of laws that require a regulatory authority to conduct a preliminary screening before issuing a permit. In the case of the Winter Road, the MVLWB decided that a land use permit was not required pursuant to Sections 4(a)(v) and Section 5 (again, due to the exclusion of a road) under the Mackenzie Valley Land Use Regulations, SOR/98-429.

The MVEIRB examined the License of Occupation (LO) which is a legal instrument that regulates the general route, operation, and clean-up of the road from year to year. The Review Board believes the LO is reasonably complete in its management of environmental issues. For example, sections 19 through 42 of the LO requires that the joint venture:

- Restore roads, drainage systems and the land generally;
- Dispose of waste to the satisfaction of the DIAND Minister;
- Meet several (nine) distinct environmental terms and conditions; and
- Be subject to six different terms and conditions regarding fuels and hazardous chemical handling.

Additionally, section 157.1 of the Transitional Provisions of the MVRMA states that Part 5 (MVEIRB) does not apply in respect of licenses, permits, or other authorizations related to an undertaking that is the subject of a license or permit issued before June 22, 1984. The Winter Road not only had a permit issued before 1984, but it was the subject of environmental assessments in relation to:

- Echo Bay Mines under EARP;
- the BHP project under EARP; and
- the Diavik Comprehensive Study under CEAA.

In other words, the context of the application for the Dome Lake Camp, the portages of the winter road, and the winter road, are also exempt from MVEIRB assessment on the basis of the earlier EARPGO screening of the winter road, as well as on the basis of the assessments of the Camp and the winter road included in the recent reviews of the mining projects utilizing the winter road. This previous assessment history is relevant and material to the exemption in Section 2 of Schedule 1 of the MVRMA Exemption List Regulations quoted above.

Decision:

In summary, the Board made its decision out of respect for principles of: (a) administrative efficiency, (b) non-duplication of environmental assessments, (c) respect for grandfathering of projects and (d) deference to the regulatory structure under the MVRMA. For these and other reasons including the prior approval of the winter road by Governor-in-Council (#PC 1989-844; May 11, 1989) under the *Territorial Lands Act*, the Board decided that it would not exercise its discretion under ss.126(3) of the MVRMA to conduct an environmental assessment of this development.

DATED: the 21st of May, 2003.

For the Mackenzie Valley Environmental Impact Review Board:

Todd Burlingame, Chairman