



## REVIEW PANEL RULING

- IN THE MATTER OF:** A proposal by the Government of the Northwest Territories Department of Transportation, the Town of Inuvik and the Hamlet of Tuktoyaktuk (the “Developers”) to build an all-weather highway from Inuvik to Tuktoyaktuk (the “Project”);
- AND IN THE MATTER OF:** A referral of the Project to review by the Environmental Impact Screening Committee under s. 11(17) of the Inuvialuit Final Agreement (IFA) (the “Review”);
- AND IN THE MATTER OF:** A referral of the Project to Panel Review by the Minister of the Environment and a Substitution of the Review for the Panel Review pursuant to s. 43 of the *Canadian Environmental Assessment Act*;
- AND IN THE MATTER OF:** A Request by the Developers to file additional evidence in the Review.

### REASONS FOR DECISION

#### Background to the Current Request:

On May 25, 2012, the Environmental Impact Review Board (since reconstituted as a Panel) issued a series of Directives to ensure that all the information required to complete this proceeding would be filed in a timely fashion. Those Directives included a schedule for the completion of the Review.

On June 18<sup>th</sup>, 2012 the Developers made a Request for Ruling asking the Board to shorten the duration of the Review and in particular to ensure that public hearings were held in September, 2012. The Board, after hearing from the Parties, approved this Request and scheduled the hearings for September 18 and 19 in Inuvik and September 24 and 25 in Tuktoyaktuk, NWT. Those hearings have now been completed.

In the latter part of August, after the Technical Sessions, the Developers filed a number of studies, analyses and other documents with the Panel. Given the tight timelines before the hearing and the need for other Parties to prepare their submissions, the Panel set September 4, 2012 as the “cut-off point” for the filing of new evidence by the Developers. The rules of fairness require that interveners know the case they have to meet. This was explained to the Parties including the Developers and in the September 7, 2012 Pre-Hearing Conference there were no questions or objections raised by any Party, including the Developers.

Notwithstanding the Panel's cut-off date, the Developer continued to file new evidence with the Panel after September 4, 2012. These documents included:

- Erratum in Supplemental Cumulative Effects – Figures and Tables – submitted September 12, 2012;
- Plan/Profile Sheets (Conceptual Design) for Preferred Alignment submitted September 14, 2012;
- Erratum in Response to Information Requests Relative to Material Sources Raised at the Technical Session – submitted September 17, 2012;
- Acknowledgement of receipt by EIRB of the Archaeology Impact Assessment – Final Report – submitted September 12, 2012; and
- 17 September 2012 Kavic Stantec Inuvik–Tuktoyaktuk Highway Hydrotechnical Report (DRAFT).

In order to ensure that the hearings were fair, the Panel did not place these documents on the Record for the proceeding.

### **The Technical Hearings:**

These hearings which were intended to address the technical engineering and environmental elements of the Project, were scheduled for September 18 and 19 in Inuvik. Technical submissions from the Parties were received on September 10<sup>th</sup>, 2012 with a Reply by the Developers on September 13<sup>th</sup>. Upon review of these submissions, the Panel notes that several of the Parties did not believe they had sufficient information to form final conclusions about the impacts of the Project.

The Department of Fisheries and Oceans, for example, indicated in the Non-Technical Summary of their submission “Many aspects related to water crossings have either been unaddressed or partly addressed. ... DFO still requires site specific information related to crossings as well as a detailed habitat assessment in order to determine the extent of impacts and related regulatory information requirements.”<sup>1</sup> The Department of the Environment had similar concerns. “EC has yet to receive the Proponent’s cumulative effects assessment for Species at Risk, and therefore any issues concerning cumulative effects to Species at Risk remain to be adequately assessed ....”<sup>2</sup> The co-management organizations established by the IFA, Wildlife Management Advisory

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<sup>1</sup> Draft Technical Report Department of Fisheries and Oceans, September 10, 2012, Non-Technical Summary paragraph 3.

<sup>2</sup> Environment Canada Cover Letter submitted with Draft Technical Submission September 10, 2012, paragraph 2.

Council (NWT) and the Fisheries Joint Management Committee had similar concerns. "As to the information presented by the proponent, it is our assessment that it is insufficient to conduct an EIA..."<sup>3</sup>

The problem with the evidence submitted by the Proponent before the cut-off date and the additional but unavailable information filed after September 4<sup>th</sup> manifest itself early in the proceeding, in questioning between Environment Canada and the Developers on the first day of the hearing.<sup>4</sup>

The Developers were not allowed to answer the questions asked by Environment Canada about cumulative effects on species at risk because the information upon which these answers would have been based was not on the Record and had not been reviewed by the parties.<sup>5</sup>

During the course of the hearings, the Developers indicated that they had, or would shortly have, in hand additional reports, plans and analyses which are relevant to a variety of matters which must be decided by the Panel and which, if admitted, would address a number of the questions raised by the Parties. These documents and the dates when they may be available follow:

- Cumulative Effects Analysis – September 30, 2012:  
Provides additional/updated analysis of the cumulative effects analysis for caribou, grizzly bear and SARA-listed species, based on the updated borrow source and project information;
- Final Hydrotechnical Study – September 30, 2012:  
Will describe the criteria used for decision making for the selection of crossings and crossing types for the highway.  
Will describe the crossing development scenarios and required mitigation measures.  
An Appendix summarizing lessons learned from the design and construction of the Tuktoyaktuk to Source 177 Access Road project;
- Technical memorandum on Bathymetric Study between KM 105 and KM 120 – September 30, 2012:  
Will include bathymetric mapping of proposed water sources.  
Assesses the allowable withdrawal quantities per source.  
Updated Commitments Table – September 30, 2012;

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<sup>3</sup> Fisheries Joint Management Committee letter to the Chairperson of the EIRB September 13, 2012, paragraph 3.

<sup>4</sup> See transcript September 18, 2012 – Day 1 of 4 pages 56 to 67.

<sup>5</sup> It is to be noted that the WMAC(NWT) in particular objected to admission of this new evidence at that stage in the proceeding.

- Provide an updated commitments list, based on the results of the technical submissions and public hearings;
- Draft for Discussion Wildlife Effects Monitoring Plan – October 6, 2012:  
The plan intended to meet the requirements of a project-specific follow-up program; will include species background, predicted effects, project-specific mitigation, monitoring methodology or technology (such as collaring, etc.), the predictions to be tested and, costs;
- Draft for Discussion Wildlife & Wildlife Habitat Protection Plan – October 6, 2012:  
Will describe wildlife protection and monitoring objectives, operational and reporting procedures and roles and responsibilities to be applied by contractors and staff during project construction and operations;
- Meeting notes from the FJMC and IGC meeting, scheduled for September 28, 2012 – will submit October 5, 2012;
- Meeting notes from Tuktoyaktuk Council, Tuktoyaktuk Community Corporation, and Public, held September 20, 2012 – will submit September 28, 2012;
- Meeting notes or confirmation of meeting results from WMAC meeting scheduled October 5, 2012 – will submit October 10, 2012;
- Poster with water crossing locations and types – will submit October 5, 2012; and
- High level routing map showing the preferred alignment with designated crossing locations and types.

The question which must be decided by the Panel in response to the Developers' Request is whether to admit this new evidence and if so, how to ensure that the completion of this proceeding takes place in a manner which remains fair for all Parties.

### **Analysis of the Issue:**

The burden of proof in an environmental impact assessment rests with the developer. The developer must provide the panel and other parties sufficient evidence to convince them that there will be no significant unmitigated impacts resulting from their projects. The Developers in this case are aware of this obligation. They know as well that the Panel is bound by the Rules of Fairness.<sup>6</sup>

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<sup>6</sup> This legal context is set out in the EIRB Rules of Procedure applicable to this proceeding page 3 paragraph 3 and it was expressly referred to by the Chairperson in her opening comments. See transcript September 18, page 11.

The current timeframe for this proceeding is of the Developers' making based on a ruling made by the Board in response to the Developers' own June 18<sup>th</sup>, 2012 Request. And yet the Panel finds itself in a situation where the Developers suggest that relevant evidence - which could satisfy important concerns raised by several Parties - is not on the Record because the Developers failed to complete their work in time. Based on the Panel's review of the Record and the transcripts from the hearing it is also clear that these documents could also assist the Panel to meet its legal requirements under both the IFA and the *Canadian Environmental Assessment Act* (CEAA).

A situation very much like this confronted the Nunavut Impact Review Board in their 2004 Doris North proceeding. That Board's decision was summarized as follows:

"Pursuant to the Nunavut Land Claims Agreement (the "NLCA"), the function of the Nunavut Impact Review Board (the "Board", "NIRB") at this Hearing is to assess the extent of the regional environmental and socio-economic impacts of the Doris North Gold Mine project proposal to determine whether the Project should proceed, and if so, under what terms and conditions....[In] this matter, the Board has decided not to recommend this Project, for the reasons that follow....

[The] Board must be satisfied that the impact assessment for the Project as a whole is complete before the project can be divided into its various components for regulatory approval. That is the essential purpose of an Article 12 review. Moreover, as stated in the Preamble of the NLCA, an objective of the NLCA is to provide for the right of Inuit to participate in decision making concerning the use, management and conservation of their land, water and resources, including the offshore. Without critical environmental assessment information available to NIRB, the parties, and in particular the Inuit, risk losing this right to participate in decision making concerning the use of their land because regulatory and other approval forums may not foster and protect this right to the same extent....

[The] Board provided the Proponent with Environmental Impact Statement Guidelines (the "EIS Guidelines"). EIS Guidelines are provided to ensure that a full environmental review of the Project has been conducted and that the Board has the information necessary to conduct a review in accordance with the mandate established for the Board by Article 12, and in particular section 12.5.5. It is the responsibility of the Proponent to prepare an impact statement in accordance with these Guidelines and the burden of persuading the Board that the Project should proceed rests with the Proponent. On the basis of the Proponent's own evidence, the EIS Guidelines were not fully complied with. Generally the deficiencies at issue in this Report were not raised for the first time in the final submissions and Hearing presentations by the intervening parties....

[Based] on evidence provided in the Final Environmental Impact Statement, the supplementary documents, the submissions of intervening parties and evidence provided at the Hearings, and in particular considering the outstanding issues related to:

- the assessment of potential adverse impacts on wildlife, and related mitigation and monitoring,
- the Tail Lake water quality and water management strategy, and
- the consideration of alternatives to the use of Tail Lake,

- the jetty design, and
- deficiencies in the socio-economic impact assessment,

the Board has concluded that it has not been provided with the required information such that the Board is able to conduct a full review of the matters relevant to its mandate. The record is not complete and the deficiencies for these issues, individually and collectively, are simply so significant that the Board cannot, in accordance with the goals of informed decision making under Article 12, conduct an informed assessment of the impacts of this Project. Nor can these outstanding issues be delegated to regulatory bodies. Their mandates are different. As stated above, an important objective of the NLCA is to provide for the right of Inuit to participate in decision making concerning the use, management and conservation of their land, water, resources, and the offshore. To delegate the Board's impact assessment responsibilities to regulatory bodies without the hearing and review that Article 12 provides risks depriving the Inuit of this right."<sup>7</sup>

There are, based on even a cursory review of the Record in this proceeding, a number of gaps and deficiencies in the information filed by the Developers. The list of additional reports already in hand, or proposed to be filed by the Developers, is evidence of this fact.

Although several of the regulators in this proceeding have indicated that they can get the information they need before they issue licences and permits, the Panel finds, as did the Nunavut Impact Review Board that such a delegation or deferral to the regulators is not appropriate and not in accordance with the law. The Environmental Review process set out in sections 11 and 13 of the IFA and the CEAA are premised upon careful review of the potential impacts of a project before it goes to the regulators. The Panel also notes that the comfort available to those parties concerned about fisheries, to choose an example of a valued ecosystem component which is regulated, is not available to Inuvialuit who are concerned about wildlife, because no permits or licences are required to address and manage the Project's effects on wildlife. It is thus the Panel's view that the information gaps in the Developers' case are serious.

There are, however, important differences between the Doris North situation and this proceeding. In the Doris North case, much of the work that NIRB found wanting had not yet been completed. In this case, the Developers will have the work done and available within a matter of days. In fact some of it is already in the Panel's hands but not yet on the Record. Another difference in this case is that the Panel anticipated that the Parties' participation in the hearings might generate new information and allowed in its August 10, 2012 Directive for the filing of "Draft" Submissions in advance of the hearings - with "Final" Submissions to follow. Consequently, the parties will not be surprised by the need to review the transcripts, undertaking and other results of the hearings and to potentially revise their submissions in light of new evidence. Of much greater weight in the Panel's view and really the deciding factor in this analysis, is the fact that both the communities of Inuvik and Tuktoyaktuk were strong and clear in their support for the Project. It is important to note, however, that this support was consistently premised on

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<sup>7</sup> Nunavut Impact Review Board Final Hearing Report for the Doris North Gold Project, August 2004, page ii.

recommendations that the land, wildlife and environment had to be protected. This approach is consistent with the principles set out in s.1 of the IFA to which reference was made by a number of Parties and by Inuvialuit in the presentation to the Panel in the Tuktoyaktuk community hearings.

**Decision:**

Considering the differences between the Doris North case and the current proceeding, and the time, effort and expense required to get to this point, the Panel has decided not to dismiss the proposed Project because of the deficiencies in the Environmental Impact Statement (EIS) and supplemental materials. In order to bring this matter to a timely conclusion the Panel has instead decided to allow the Developers to file the additional information listed above to address the gaps and deficiencies in the EIS. That evidence must all be filed with the EIRB before the end of the day on October 5<sup>th</sup>, 2012.

**Procedural Implications:**

The Panel is aware of the effect that this ruling will have on the other Parties and that several of them have limited capacity. Consequently, the Panel has adjusted the time lines for this proceeding as set out in the attached Directive. The Developers' indicated that they needed a decision in this matter by Christmas. The revised time lines will result in an early January Report and are necessary to enable this process to proceed fairly. The reason for this delay relates directly to the shortcomings in the case put forward by the Developers.

In closing the Panel notes that the co-management tribunals WMAC(NWT) and FJMC are the primary non-government participants in the proceeding and that they have limited capacity to continue reviewing documents and revising their submissions. We suggest that the Developers, in particular the Government of the Northwest Territories, give consideration to assisting these interveners financially in order that they may complete the work needed to review all the additional materials to be filed and to ensure that they can continue to effectively represent Inuvialuit interests in the completion of this review.

**FOR THE ENVIRONMENTAL IMPACT REVIEW BOARD:**

Original signed by

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**Elizabeth Snider, Chairperson**

**September 28, 2012**