



Indian and Northern
Affairs Canada

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File: CIDM #257096

August 15, 2008

Mr. Richard Edjericon
Chairperson
Mackenzie Valley Environmental Impact Review Board
200 Scotia Centre
P.O. Box 938, 5102-50th Avenue
Yellowknife, NT X1A 2N7

Dear Mr. Edjericon:

Re: Giant Remediation Plan – Mackenzie Valley Environmental Impact Review Board (“MVEIRB”) Scoping Hearing, July 22nd and 23rd, 2008 – Undertaking #5

During the Scoping Hearing for the Giant Mine Remediation Environmental Assessment on July 22, 2008, the Department of Indian and Northern Affairs Canada (INAC) undertook to confer with counsel and write to the Board subsequently indicating the position with respect to section 118. This letter is in response to this Undertaking.

Undertaking #5

Confirm INAC's position regarding s.118. Are the Necessary Interim Activities sufficiently distinct so as to exclude them from the proposed development currently under review pursuant to Part 5?

Legislation at Issue

Section 118 – Mackenzie Valley Resource Management Act (“MVRMA”)

118. (1) No licence, permit or other authorization required for the carrying out of a development may be issued under any federal, territorial or Tlicho law unless the requirements of this Part have been complied with in relation to the development.

(2) Where the Gwich'in or Sahtu First Nation, the Tlicho Government, a local government or a department or agency of the federal or territorial government proposes to carry out a development that does not require a licence, permit or other authorization under any federal, territorial or Tlicho law, it shall comply with the requirements of this Part before taking any irrevocable action in relation to the development.

Section 39 - Northwest Territories Waters Act

39. (1) Where the Minister believes, on reasonable grounds, that

(a) a person has closed or abandoned, temporarily or permanently, a work related to the use of waters or the deposit of waste, and

(b) either

(i) the person has contravened or failed to comply with any condition of a licence or any provision of this Act or the regulations, whether or not the condition or provision relates to closing or abandonment, or

(ii) a danger to persons, property or the environment may result from the past operation of the work or from its closing or abandonment,

the Minister may take any reasonable measures to prevent, counteract, mitigate or remedy any resulting adverse effect on persons, property or the environment, and for that purpose may enter any area, place or premises, except one that is designed to be used and is being used as a permanent or temporary private dwelling-place.

Section 118

Subsection 118(1) makes it clear that “[n]o licence, permit or other authorization required for the carrying out of a development may be issued under any federal, territorial or Tlicho law unless the requirements of this Part have been complied with in relation to the development.” [emphasis added]

Subsection 118(2) further makes it clear that where the federal government proposes to carry out a development “that does not require a licence, permit or other authorization under any federal, territorial or Tlicho law, it shall comply with the requirements of this Part before taking any irrevocable action in relation to the development”. [emphasis added]

It is INAC’s view that what it has termed “Necessary Interim Activities” in its scoping hearing presentation, do not trigger either of the above.

The proposed development applied for and under review is the implementation of the proposed Remediation Plan.

Those activities described as Necessary Interim Activities do not form part of the proposed development which remains a future activity.

As is explored in more detail below, the Necessary Interim Activities are those activities that have been conducted since abandonment and closure of the mine and must continue throughout the duration of the environmental assessment. These are on-going activities which INAC continues to have the authority to conduct.

These activities are necessary to maintain stability of the Giant Mine site so as to protect human health and safety and the environment. As such, these activities cannot cease and therefore cannot form part of the proposed development.

The Necessary Interim Activities have not and do not involve or require an issuance of an authorization as contemplated under s.118(1), nor can they be characterized as irrevocable in nature so as to trigger s. 118(2).

The Necessary Interim Activities are otherwise authorized as reasonable measures pursuant to s.39 or are activities which do not require any form of authorization and are not irrevocable in nature, as discussed in more detail below.

Therefore s.118 has no application to the Necessary Interim Activities; the processes under Part 5, which properly pertain to the proposed development, need not be completed in order for the Necessary Interim Activities to continue as they have to date.

Section 39

Section 39 provides a statutory source of authority on the basis of which the Minister of Indian Affairs and Northern Development (the "Minister") may act.

Where the requirements of s. 39 have been deemed by the Minister to have been met, the Minister may take "any reasonable measures to prevent, counteract, mitigate or remedy any resulting adverse effect on persons, property or the environment" as dictated by s. 39. [emphasis added]

A "reasonable measure" is not a development, these concepts being distinct at law, and therefore does not trigger s.118 or other MVRMA requirements.

To be clear and as indicated by the wording of section 39, it is up to the Minister to determine what falls within the scope of s.39, and to determine what reasonable measures may need to be taken as a result.

Nature of the Necessary Interim Activities

The Necessary Interim Activities include those activities that have been conducted since abandonment and closure of the mine and must continue throughout the duration of the environmental assessment to maintain stability of the Giant Mine site so as to protect human health and safety and the environment.

Pursuant to s.39, the Minister determined that various activities needed to be carried out as reasonable measures to address dangers to persons, property or the environment resulting from the past operation, closing and abandonment of the Giant Mine Site ("s.39 activities").

Certain of the Necessary Interim Activities referred to during the scoping hearing are merely a continuation of this, the Minister having determined that s. 39 still necessitates these activities.

Those Necessary Interim Activities which are not s.39 activities comprise activities which do not require an authorization and are not irrevocable in nature. As such, they do not trigger s.118(2).

For clarification, the freeze optimization work referred to as a "necessary interim activity" during the scoping hearing is not included in this submission. This activity and its basis for exclusion is addressed in the scoping hearing presentation and in the response to Undertaking #1.

See the attached description of the Necessary Interim Activities.

The On-going Necessary Interim Activities versus the future "Care and Maintenance" - The Distinction Discussed

As discussed above, the on-going Necessary Interim Activities do not trigger s.118 and the Part 5 process. They have in the past and continue to proceed pursuant to the Minister's determination under s.39 or on the basis that authorizations are not otherwise required and the activities are not irrevocable in nature.

Many of these activities, due to their nature and purpose, will necessarily have to overlap with implementation of the proposed development which is the Remediation Plan, phasing out over time. For example, dust suppression activities will have to continue until the capping of the tailings is complete pursuant to the said plan.

In recognition of this reality, INAC has referred to the care and maintenance activities, i.e. those activities which will overlap in time with the implementation of the remediation plan, in the water licence application to ensure that both the MVLWB and the MVEIRB have knowledge of the types of activities that will be taking place on site during the implementation of the proposed Remediation Plan.

INAC also recognizes that it may be reasonable for the MVEIRB to decide to scope the activities that are going to overlap with the implementation of the proposed Remediation Plan into the environmental assessment in order to comprehensively assess the activities that will be occurring on the site at that time.

Should the MVEIRB take this approach, it should be kept in mind however that this does not affect INAC's authority to continue with the Necessary Interim Activities.

In essence the distinction between the ongoing versus future activities is temporal in nature, not one of character. This situation is not however unique in the regulatory system.

It may be useful to consider the following **analogy** so as to better illustrate the Proponent's position and choice of approach:

Consider a circumstance in which a proponent is otherwise authorized to proceed with certain activities (e.g. a Type B water licence is in effect for certain preliminary activities) and the same proponent then applies for a broader authorization to expand its work (e.g. Type A Water Licence); The application for the Type A Water Licence is then referred to EA.

The original activities being conducted pursuant to the Type B water licence would continue so long as that licence was in effect.

To the degree that these activities overlap with the expanded work being considered as part of the EA, they may however also be scoped in to that consideration. This would not however affect the validity of the existing licence, or the authority of the proponent to continue acting.

Presumably, in such case, once the Type A Water Licence is in place, there may no longer be a need for the Type B licence. However until issuance of the Type A Water Licence, the on-going activities would continue pursuant to the valid Type B Licence. The activities would not cease simply due to the EA, because this is not the intent of Part 5 of the Act, nor is this the intent or proper interpretation of sections 118 and 62.

The difference between the above noted analogy and our context is that the Necessary Interim Activities have been proceeding on the basis of the Minister's statutory authority pursuant to s. 39, and on the basis that certain activities do not require an authorization and are not irrevocable in nature.

These activities simply do not form part of the proposed development, and do not trigger s. 118. As such, though INAC feels it would be reasonable for the MVEIRB to scope in and consider the "care and maintenance" that will overlap with the implementation of the proposed Remediation Plan as part of the environmental assessment so that all of the activities that will be occurring on the site at that time may be comprehensively assessed, this does not affect the need or continuing authority of INAC to conduct the Necessary Interim Activities on site.

Alternatively, it remains open to the MVEIRB to simply scope out both the necessary interim activities and the overlapping care and maintenance activities. INAC would then simply continue to proceed to conduct the totality of these activities on the basis of the Minister's statutory authority pursuant to s. 39, and on the basis that certain activities do not require an authorization and are not irrevocable in nature. Should the MVEIRB proceed in this manner, INAC is also willing to amend its application so as to remove reference to the care and maintenance activities.

Conclusion

In conclusion, INAC is of the view that its interpretation of s.118 and Part 5 of the MVRMA and its position on the Necessary Interim Activities is clear, sound and substantiated. The Necessary Interim Activities do not and cannot form part of the proposed development for the reasons noted. In this regard, INAC trusts that the MVEIRB now has the necessary evidence to conclude, as INAC has, that the Necessary Interim Activities are properly outside the scope of this proposed development and assessment. However, should the MVEIRB have further questions or require further information, please feel free to contact the undersigned.

Sincerely,

A handwritten signature in black ink that reads "W.S. Mitchell". The signature is written in a cursive style with a large, sweeping initial "W".

W.S. Mitchell
Manager, Giant Mine Remediation Project

Attachment to Response to Undertaking #5 Description of Necessary Interim Activities

WATER MANAGEMENT

Water Management includes the continuous pumping of mine water to prevent the flooding of the mine. Large amounts of arsenic could be released into the environment if the mine was allowed to flood. Seasonal treatment of contaminated water pumped from underground and collected on surface is also required.

Pumping Mine Water – Daily inspections and routine maintenance of underground pumps, valves and pipelines. May require installation of new pumps and pipes in different locations of the underground mine to ensure the mine does not flood.

Surface Mine Water – Management of tailings ponds and surface water runoff. This includes the annual geotechnical inspections of dams associated with the tailings ponds and the polishing pond. Any seepage of contaminated water from existing dams is collected and pumped back into the water treatment system. Contaminated surface water run off around the mill and roaster complex is collected in sumps and is pumped into the mine water management system for subsequent treatment. Management of surface water is necessary to prevent release of contaminated water into Baker Creek and the surrounding environment. Surface water management also involves diverting and channelling of uncontaminated surface water run off away from the mine and other contaminated areas.

Seasonal Operation of Effluent Treatment Plant – Contaminated water pumped from the mine and contaminated surface run off that has been collected in sumps is treated in the Effluent Treatment Plant before it is discharged into Baker Creek. The treatment of the mine water is a key requirement to ensure that arsenic contaminated water is not discharged into the environment. The *Metal Mining Effluent Regulations* of the *Fisheries Act* apply to this activity.

MAINTENANCE OF UNDERGROUND AND SURFACE INFRASTRUCTURE

Heating and Ventilation Systems – Maintenance of heating and ventilation systems is required primarily to provide adequate ventilation in the underground mine for mine workers under the NWT *Mine Health and safety Act*. Mine ventilation air must be heated in winter to prevent freezing of ramp access ways to underground. In addition, surface buildings currently required to support the interim activities by contractor personnel must be heated during winter. Not maintaining these systems would cause the site to be unsuitable for worker occupation.

Electrical Distribution Systems – Includes the routine service and testing of mine site electrical systems. A reliable electrical distribution system is critical for operation of the many surface and underground pumps used in the mine water management system. Power systems supplying the effluent treatment plant and other mine infrastructure including the mine hoist also require periodic maintenance.

Surface and Underground Mine Equipment Maintenance – This includes regular inspection and maintenance of mine buildings and equipment including the hoistroom, hoist, mobile equipment garage, machine shop and pump houses. Of particular importance is the maintenance of the headframe and shaft without which INAC's ability to inspect and maintain the bulkheads would be compromised.

General Site Housekeeping – Includes the maintenance of mine site communications systems, surface roads, water and sewer services and fire fighting systems. These activities are carried out under the NWT *Mine Health and Safety Act* and ensure workers are able to conduct the necessary interim activities in a safe manner. In addition, fencing and barricades are required around open pits and roaster entrances to protect the safety of workers and the public. It may also be necessary to periodically scale loose rock from pit walls to ensure worker safety and replace the existing fuel tanks on site with double-walled tanks to ensure compliance with Environment Canada regulations.

Seasonal Application of Dust Suppressant – The application of dust suppressant on the tailings ponds and surface roads in June of each year. This activity mitigates the amount of tailings or road dust particulates being released into the air during the summer months.

SITE SECURITY

The site is patrolled 24 hours per day, 7 days a week. The mine site is very large and contains a number of hazards. Site security is required to restrict access and therefore prevent injuries to members of the public.

UNDERGROUND WORK AND BULKHEAD ACTIVITIES

The bulkheads are inspected regularly and repairs are made if required. This is a critical activity since a bulkhead failure could result in the release of arsenic into the surrounding environment and would likely jeopardize the implementation of the proposed remediation plan.

Regular checks and stabilization are carried out for all underground travel ways as per the NWT *Mine Health and Safety Act* and it is possible that backfill of the voids under the arsenic chambers and other work to increase bulkhead stability may become necessary.

SITE MONITORING

Air, groundwater, surface water, thermal and seepage (chambers) monitoring is conducted on regular basis. Sampling and monitoring activities help confirm INAC's compliance with regulatory requirements, ensure worker health and safety and provides background information to ensure the effective implementation of the proposed remediation plan.

Treated mine water monitoring is carried out as per the requirements of the *Metal Mining Effluent Regulations* of the *Fisheries Act* and includes Environmental Effects Monitoring. In addition, Environment Canada enforcement officers collect samples of the treated discharge water for testing.

Note:

The Water Management and bulkhead activities are s.39 activities. All other activities do not require authorization and are not irrevocable in nature.