

Mackenzie Valley Review Board



EA0809-002: Canadian Zinc Corporation – Prairie Creek Mine

Meeting Minutes from the Pre-Hearing Conference for the Request for Ruling on Scope of Development Issues

Compiled by: Mackenzie Valley Review Board (“Review Board”) staff

Location: Mackenzie Valley Land & Water Board offices in Yellowknife & teleconference

Date of Meeting: December 17, 2008

INTRODUCTION

Review Board staff and legal counsel co-chaired a Pre-Hearing Conference for the Request for Ruling process regarding the appropriate scope of development for the environmental assessment of the Prairie Creek Mine.

While these meeting minutes are as comprehensive as Review Board staff could make it, this is not a verbatim document. It is based on notes by Review Board staff. If you identify any inaccuracies, report them to the Review Board and a note will be placed on the public record for this file.

Interested parties are reminded they can submit comments to be placed on the public record of the Environmental Assessment at any time. A digital recording of the session is stored in the Public Record at the Review Board’s Yellowknife offices and is also available online via the Review Board’s website public registry.

Contact Alistair MacDonald at the Review Board with any questions or comments:

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ATTENDEES

In attendance (in person):

Alistair MacDonald – Review Board
Nicole Spencer – Review Board
John Donihee – Review Board legal counsel
Tyree Mullaney – Mackenzie Valley Land and Water Board
Yvonne McNeil – federal Department of Justice
Gavin More – Environment and Natural Resources (GNWT)
Krystal Thompson – Indian and Northern Affairs Canada
Anne Wilson – Environment Canada
Joe Acorn – consultant to the Nahanni Butte Dene Band
Lorraine Sawdon – Department of Fisheries and Oceans
Jane Fitzgerald – Environment Canada
Kris Johnson??? – Industry, Tourism and Investment (GNWT)
Loretta Ransom – Environment and Natural Resources (GNWT)

In attendance (via teleconference):

David Harpley – Canadian Zinc Corporation
Kevin O’Callaghan – Canadian Zinc Corporation legal counsel
Leigh??? Service – Canadian Zinc Corporation
John Kearney – Canadian Zinc Corporation
Alan Taylor – Canadian Zinc Corporation
Keith Ferguson – Ecojustice Canada (on behalf of CPAWS and Dehcho First Nations)
Katherine Cumming – Parks Canada

Meeting Minutes

The pre-hearing conference commenced at 1:30pm. Alistair MacDonald of the Review Board staff went over the agenda first (see the agenda on the Review Board’s website at http://www.mveirb.nt.ca/upload/project_document/1229447308_16296.pdf) and asked if there was any business to add. No one had anything to add to the agenda.

Alistair then provided a brief overview of the history on this request for ruling (and supporting Information Request responses) to this point. Summary points included:

- This meeting was being held as a pre-hearing conference under the Review Board’s *Rules of Procedure*, available at reviewboard.ca. The request for ruling on the scope of development for this environmental assessment is being treated as a written hearing, also according to the *Rules of Procedure*.
- The pre-hearing conference is meant to identify remaining information gaps on the historic activities and proposals for activity at the Prairie Creek Mine and

winter road, as well as to identify the legal issues that will be addressed in submissions to the Board prior to it making a ruling on the scope of development

- On November 6, the Review Board placed the Ecojustice Request for Ruling on its public registry. Ecojustice applied for the ruling on behalf of the Dehcho First Nations and the Canadian Parks and Wilderness Society. The request focused largely on whether the winter road should be scoped into the development for this EA – the applicants felt it should be scoped in and that the existing winter road permit did not apply to full scale mine operations of this magnitude (see submission at http://www.mveirb.nt.ca/upload/project_document/1225988972_16062request%20for%20ruling.pdf).
- The Review Board considered the Request for Ruling at its November Board Meeting, and identified on Nov. 26, 2008, in a Directive to all interested parties, that it was expanding the Request for Ruling to deal with two questions (paraphrasing):
 1. Should the scope of development include all physical works and activities associated with the proposed winter road?
 2. Should the scope of development include all facilities and activities at the proposed mine site?(The full text of the Review Board's expanded Request for Ruling is available at http://www.mveirb.nt.ca/upload/project_document/1227812730_16142.DOC).
- The Review Board issued four Information Requests on November 26, 2008, geared toward getting additional historic information about the mine and winter road on the public record. As of Dec. 16, 2008, responses had been received from Canadian Zinc, INAC, Environment Canada, the DFO, Parks Canada and the Canadian Parks and Wilderness Society (CPAWS). The latter four went directly on to the public record, while the Review Board was still compiling material from Canadian Zinc and INAC at the time of the pre-hearing conference and planning to place it on the public record in the form of organized groupings of numbered "RfR" documents related to specific license or permit applications. The RfR documents are designed so that interested parties have access to all potentially relevant historic information about the proposed mine and winter road. (RfR's # 36-55 went on the public registry on December 19, 2008. The Review Board issued a weblinked table of all the new submissions on the same date - http://reviewboard.ca/upload/project_document/1229728502_16328.pdf. A late file, RfR #56, went on the public registry December 23, 2008.)
- The Review Board set dates for submissions from parties on the request for ruling of January 6, 2009, with a reply date of January 12, 2009 for the original applicant, Ecojustice Canada. The Review Board's intention was to make a ruling at its January 24-25, 2009 Board Meeting.

Discussion on procedural and legal issues ensued. Summary notes are provide below (NOTE: they are by issue and not always in chronological order):

Right of Reply on Submissions

- Legal counsel for Canadian Zinc Corporation noted that the request for ruling has been altered by the Review Board in two ways. One is to eliminate the question of whether additional permits need to be applied for prior to the environmental assessment moving forward if the Board determines the winter road to be in the scope of development. Canadian Zinc Corporation felt this issue had been handled properly by the Review Board.
- The second change was the Review Board adding the question of whether all existing and proposed facilities and activities at the mine site should be included in the scope of development. This differs fundamentally from the request from Ecojustice – therefore, there should be no special right of response to Ecojustice to either question (winter road and mine site), and that all submissions should go in at the same time from all interested parties with no specific right of final reply to Ecojustice. Canadian Zinc counsel also suggested there was no need for any replies by any interested parties.
- Legal counsel for Ecojustice agreed that consideration of question #2 – Mine Site, could see a different process – everyone getting a chance to reply or no one. However, it was pointed out that question #1 (winter road) clearly is derived from the original Ecojustice request and therefore the right of reply to Ecojustice should be maintained. Ecojustice also pointed out that everyone has had a chance, from reading the original Ecojustice submission on the winter road issue, to include consideration of that in their submissions, so it would only be fair for Ecojustice to see others' submissions and reply accordingly. That way all interested parties have a right of reply.
- Canadian Zinc Corporation asked in the interest of fairness to have a right of reply on all submissions on both questions.
- Review Board legal counsel observed that it is true the Review Board added the second question (Mine Site) in, and therefore fairness might indicate that no party should have special right of reply on that issue – either nobody should be able to reply or all should. On the first question, Ecojustice has already provided its rationale, the Board wants to hear from other parties, and then fairness might dictate Ecojustice have a right of reply.
- Legal counsel from the Department of Justice felt the process should not be split up into Question #1 and Question #2 with different response dates and that if that occurred the Review Board would not be able to look at the issue in January.
- Canadian Zinc was of the strong view that the issue need be addressed in January with a ruling from the Review Board. To some extent, the company has stated its evidence in its original applications and therefore they should have a right of reply on all issues. Canadian Zinc did not feel they need much time to reply.
- Review Board counsel noted that traditionally, the applicant for the request for ruling gets a right of reply. That might only apply to question #1 in this case. The real issue relates to question #2, and whether any reply or a reply for all is

required for that question. It was also noted that only a very short reply period would likely be allowed after initial submissions, but that fairness likely would have priority over timelines.

Potential Extension of Deadlines

- Discussion on the INAC request for extension for initial submissions from January 6 to January 12 ensued. INAC legal counsel (DoJ) noted that with the holiday season and the fact that the federal government is attempting to do a joint submission the extension was perhaps required. DoJ indicated flexibility to meet required dates, however, but was concerned about the mass of new information on the public record – going through that.
- Discussion of extensions to January 12 and January 16, respectively, were considered, as was January 19 for final replies.
- A representative of Canadian Zinc felt that, upon looking at new information on the public record from IR responses, there was little relevant new information for the request for ruling, and that mass of material should not be used as an excuse for extending the process. The big concern for Canadian Zinc was whether the Review Board could still meet in January to make its decision.

Adequacy of Information on the Public Record

- Review Board staff asked the question of whether the public record now adequately reflected the history of the mine and winter road – whether it was sufficient for interested parties to submit their opinions on scope of development.
- DoJ wanted to know what legal issues the Board wants parties to focus on in order to determine whether the information on the public record is adequate yet or whether additional material referred to but not provided by Environment Canada and the DFO is required on the public record.
- Review Board legal counsel noted there is a lot of new information to go through so there are competing pressures between expedience and adequacy of information.
- Review Board staff noted that Environment Canada and the DFO provided lists of documents in their IR responses of December 12, 2008, but not the documents themselves - (see the lists attached to the meeting agenda: http://www.mveirb.nt.ca/upload/project_document/1229447308_16296.pdf). Parties were asked whether any of that information was required on the public record. No party identified that any of that information was pertinent to the current scope of development consideration. Canadian Zinc identified that some of the listed material may be of use during latter parts of the environmental assessment, especially in relation to considerations of water quality and fish habitat during the development of the Terms of Reference for this EA, but does not relate to the current scope of development consideration. Review Board staff informed interested parties that it is their responsibility to identify any additional information that may be pertinent to the request for ruling and let the Review

Board know. The Review Board wants the historic record to be as exhaustive as necessary.

- Canadian Zinc identified some of the correspondence on the public record related to discussions and information flows between Cadillac (the original mine developer) and INAC may be considered relevant during submissions on the scope of development.
- Review Board staff also reiterated that additional RfR materials would be going on the public record by December 19, 2008.

Adequacy of Questions and Jurisdictional Issues

- A representative of Canadian Zinc noted that the winter road is permitted in its entirety. Ecojustice wanted it known on the public record that this was still a contentious issue.
- A representative from the GNWT asked if the Review Board was planning to change the questions from potential “Yes/No” answers to more specific questions, and asked why the term “proposed” was used in reference to the winter road, when there is an existing land use permit for a winter road.
- Review Board counsel noted that the Review Board wants to have full explanations and rationales behind any responses to the proposed questions. The term “proposed” may have been an inadvertence but likely was placed there because of new facilities and activities along the road. Review Board staff has no instructions to reformulate the questions and staff reminded the interested parties to provide evidence to support their opinion.
- Review Board staff clarified that the original questions from Ecojustice from its Nov. 6 submission were no longer the ones that needed to be addressed in submissions. The Review Board’s two questions posed on November 26 (at page 2, noted above) are the ones that need to be submitted on.
- Review Board counsel asked if any parties had concerns about the two questions.
- The consultant for the Nahanni Butte Dene Band raised concerns about whether the Review Board has the legal capacity to act on the responses to these questions. If the Review Board answers yes to question #1 – that the winter road should be scoped into the development – will it then be forced to state that it has no legal authority to consider the road in the EA because either – A) it is already permitted; or B) no land use permit application has been filed. What is basis of the legal ability to implement a positive response to question #1?
- Review Board counsel felt it was important to disentangle regulatory from environmental impact assessment. From a cumulative effects assessment perspective, even if the road was not scoped in, its cumulative effects might be considered. The real question in front of the Review Board might be whether the environmental assessment of the transfer facilities should include the entire

winter road, not only from cumulative, but also direct impacts. Section 157.1 of the MVRMA is obviously going to play a key role in submissions. Part of the difficulties with the original request for ruling was that the Review Board does not have the authority to tell the Land and Water Board what to do, but the determination of the scope of development is within the Review Board's capacity, so that is why the original question was altered.

- The consultant for the Nahanni Butte Dene Band felt that the Review Board should have posed the original question on adequacy of the applied for or held permits to the Land and Water Board to get clarity on this issue. Eventually, the Land and Water Board will need to answer this question – so why not deal with it now prior to the EA being completed. Review Board legal counsel simply replied that the determination has been made to alter the question to focus on scope of development.
- The DoJ representative felt that the question of whether the winter road CAN be scoped in is one of the purely legal questions that should be addressed in submissions by interested parties for the Review Board's consideration.
- The consultant for the Nahanni Butte Dene Band felt the questions could be altered to focus on a) Should the winter road be scoped in; and b) can this be done legally? DoJ felt that discussion of s. 157.1 will come up in responses and will deal with whether the Board can scope the winter road in.
- Review Board legal counsel noted that if the Board determines that the road should be scoped in, and that legally that is possible, the scope of development for this EA will include the winter road. That is as far as the Review Board can go – it cannot go back and require the LWB to ask for additional permit applications from Canadian Zinc at this time.
- A representative from Canadian Zinc felt that the Land and Water Board had effectively already spoken because when the transfer facilities were applied for the applications were deemed complete without asking for new information on the winter road. The representative from the DoJ disagreed, noting that completeness of applications is different from the questions being posed here.
- A GNWT representative noted that not all applications need to be put forward for the Review Board to make a determination on the appropriate scope of development. The Land and Water Board can make a determination at a later time on what permits are required. The GNWT representative argued that cumulative effects of the road, at minimum, will have to be considered anyway. Why the developer did not want to have other aspects of the winter road considered was a point of confusion – perhaps related to the lack of willingness to look at issues like the impacts of winter road and activities on it on karst and other features?
- The consultant for the NBDB felt that the breadth of the initial applications should cover the entire project. A representative of Canadian Zinc felt that this issue has been covered in the Supreme Court already and a decision made so the

developer is stuck with that original ruling. Canadian Zinc feels the Review Board can decide the scope of development for the applications in front of it only.

- Ecojustice legal counsel for the record felt it was contentious whether the Supreme Court decision exempted the road for any and all uses. They also noted that the Ecojustice original submission looks at the difference between the likely to be required cumulative effects assessment including the winter road versus what they feel more properly should be a direct impact assessment.
- In the end, Canadian Zinc legal counsel felt the current questions are adequate, as did legal counsel for Ecojustice and DoJ. Ecojustice appreciated splitting the response information up into two categories – 1) should this element be scoped in; and 2) can it legally be scoped in – for each question.
- Review Board staff identified that it is up to the individual party to decide exactly which legal questions to address and how and that parties have received the Review Board's directives on what issues it will and will not consider when actually making its ruling.

Final Thoughts

Alistair MacDonald and John Donihee concluded with a note of thanks to all participants and noted that the Review Board would be meeting on December 18 to consider the feedback from the pre-hearing conference and report back immediately via a Note to File on the public registry any decisions about timelines for submissions.

The Review Board met on December 18 and its decision was to alter the submission deadlines to January 14th, 2009 and January 19th, 2009 – see http://reviewboard.ca/upload/project_document/1229645216_note%20to%20file%20on%20extension%20of%20request%20for%20ruling%20submissions.pdf for more details.

The pre-hearing conference adjourned at approximately 2:50pm.