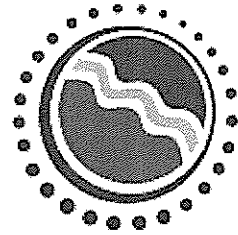


# Mackenzie Valley Review Board



## Note to file

EA 0809-002  
Canadian Zinc Corporation, Prairie Creek Mine

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November 6, 2008

### **Re: Request for Ruling from Ecojustice on behalf of Dehcho First Nations and Canadian Parks and Wilderness Society**

The Review Board has received a request for a ruling from Ecojustice on behalf of the Dehcho First Nations and the Canadian Parks and Wilderness Society (national and NWT chapters). The request is attached. The request as well as supporting information can be accessed online at the Review Board's website public registry for this file at [reviewboard.ca](http://reviewboard.ca).

The Review Board will identify timelines within which this request for ruling will be considered, including timelines for interested parties to provide comments, within the next couple of working days. For more information on how the Review Board proceeds with Requests for Ruling, see the Review Board's *Rules of Procedure*, available on its website.

As always, if you have any questions, comments or requests for information, please contact me.

Regards,

A handwritten signature in black ink, appearing to read 'Alistair MacDonald', written over a series of diagonal lines.

Alistair MacDonald  
Environmental Assessment Officer  
Mackenzie Valley Review Board  
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EA0809-002

~~EA0809-002~~

# ecojustice

formerly Sierra Legal

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November 3, 2008  
BY EMAIL AND COURIER

Vern Christensen, Executive Director, MVEIRB  
c/o Martin Haefele, Manager, Environmental Impact Assessment  
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cc: Alistair MacDonald, Senior Environmental Assessment Officer ([amacdonald@reviewboard.ca](mailto:amacdonald@reviewboard.ca),  
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cc: Nicole Spencer, Environmental Assessment Assistant ([nspencer@reviewboard.ca](mailto:nspencer@reviewboard.ca),  
[nspencer@mveirb.nt.ca](mailto:nspencer@mveirb.nt.ca))

Dear Mr. Haefele,

**Re: Request for Ruling, EA0809-002 Prairie Creek Mine**

Please find attached a Request for Ruling on behalf of Dehcho First Nations (DFN) and the Canadian Parks and Wilderness Society (CPAWS national and CPAWS-NWT) regarding the environmental assessment of the Prairie Creek Mine (EA0809-002). Could you please bring this Request for Ruling to the attention of the Executive Director in accordance with the Review Board's Rules of Procedure.

Please do not hesitate to contact me should you have any questions.

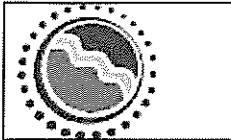
Yours truly,



Keith Ferguson, Staff Lawyer  
On behalf of DFN, CPAWS and CPAWS-NWT

cc: Laura Pitkanen, Dehcho representative ([pitkanen@csolve.net](mailto:pitkanen@csolve.net))  
Alison Woodley, Manager, National Protected Areas Program, CPAWS ([awoodley@cpaws.org](mailto:awoodley@cpaws.org))  
Lani Cooke, Executive Director, CPAWS-NWT ([lani@cpaws.org](mailto:lani@cpaws.org))





**Mackenzie Valley Environmental Impact Review Board**

**FORM 2 Request for Ruling**

Name of Proceeding:

**EA0809-002 Prairie Creek Mine**

Date of this written Request for Ruling:

**November 3, 2008**

**TAKE NOTICE that a Request for Ruling has been made to the MVEIRB by**

Dehcho First Nations ('DFN') and Canadian Parks and Wilderness Society ('CPAWS', both the national organization and the NWT Chapter)

The Request for Ruling is detailed below. DFN and CPAWS request that the MVEIRB consider this request at their earliest possible convenience.

**The Ruling requested from the MVEIRB is as follows:**

Overview

The Mackenzie Valley Environmental Impact Review Board ('Review Board') is currently in the scoping phase of the environmental assessment ('EA') of Prairie Creek Mine (EA0809-002) being conducted under the *Mackenzie Valley Resource Management Act* ('MVRMA'). The proponent, Canadian Zinc ('CZN'), has proposed that the winter access road, and its use, not be included in the 'scope of development'. We (DFN and CPAWS) are concerned that CZN's proposal is based upon two incorrect assumptions:

1. that CZN's current land use permit for the road (MV2003F0028) permits use of the winter road for the full-scale mine operations contemplated in the applications currently before the Review Board; and
2. that the 2005 NWT Supreme Court decision necessarily leads to a conclusion that use of the winter road for these full-scale mine operations is grandfathered from application of Part 5 of the MVRMA.

In contrast, and as detailed below, we submit that MV2003F0028 does not permit use of the winter road for full-scale mine operations, and that the 2005 NWT Supreme Court decision does not necessarily lead to grandfathering of the road for those operations. Thus a new land use permit for the road is required, and a grandfathering decision will have to be made in relation to it. We respectfully submit that the Review Board cannot therefore follow CZN's proposal to exclude the road and its use from the scope of development at this time, and could not do so until after an application for a new land use permit for the road and its use has been submitted, and after that application has been considered. We therefore request that the Review Board, at a minimum, delay its scoping decision until after such an application has been submitted and considered.

We recognize that this approach would postpone the Review Board's scoping decision for some time and thus introduce delay into this EA. To minimize such delay, we suggest an alternative approach is to scope the development now, such scope including the road and its use, and to postpone most subsequent parts of this EA until details on the road and its use are available in a new land use permit application. We submit that the road and its use can be included in the scope of development now

because the road meets the tests in the Review Board’s scoping guidelines to avoid project splitting, and because, although full details on the road and its use are not yet available, there is sufficient evidence to conclude that grandfathering is not available because of significant alterations. Full details on the road and its use, as provided in a new land use permit application, would however still be required for most subsequent parts of this EA, although it might be possible for some preliminary studies on other elements of this project to go ahead if it is clear they are unrelated to the road.

Relief sought

We therefore request the following rulings:

1. CZN’s current land use permit for the road (MV2003F0028) does not permit use of the winter road for the full-scale mine operations contemplated in the applications currently before the Review Board; and
2. either:
  - (a) the Review Board’s scoping decision is postponed until after an application has been made for a new land use permit for the road and its use, and after that application has been considered;or
  - (b) the road and its use are included in the scope of development, but most subsequent steps in this EA are postponed until after an application for a new land use permit for the road and its use has been submitted.

**The facts or information relevant to this Request for Ruling and which should be considered by the MVEIRB, and the authority or grounds for the Ruling which should be considered by the MVEIRB is as follows:**

CZN’s current winter road land use permit (LUP) MV2003F0028

CZN appears to be moving forward with the current water licence (WL) and land use permit (LUP) applications on the basis that transportation on the winter road to support the activities in these applications (i.e. full-scale mine operations) has already been permitted by land use permit MV2003F0028. For example, in the Executive Summary of the Project Description Report (dated May 2008) submitted in support of M2008L2-0002 and MV2008D0014, CZN states the following (at page 4):

**Concentrates and Road Haul.** The concentrates will be bagged and stored under cover until they are trucked off-site on flat-deck trailers over the winter road. CZN holds a Type “A” LUP (MV2003F0028) for the use of the winter road from the Prairie Creek Mine to the Liard Highway. This existing road has been determined to be exempt from environmental assessment (Canadian Zinc Corporation vs. MVLWB, NWT Supreme Court, 2004 [*sic*]). CZN intends to apply for Type “A” LUP’s for transfer facilities approximately mid-point along the winter road and at the junction of the winter road with the Liard Highway.

Similar statements are made elsewhere in CZN’s application and supporting materials in which CZN assumes that use of the winter road for full-scale mine operations would be permitted by

MV2003F0028. It is our view that CZN is moving forward on an incorrect assumption, and that this issue has important consequences for the Review Board's current scoping exercise.

Land use permit MV2003F0028 (dated April 11, 2007) states:

Part A: Scope of Permit

1. This permit entitles Canadian Zinc Corporation to conduct the following activities:

Rehabilitation, maintenance, and use of a winter road connecting Prairie Creek Mine site to Liard Highway, Location:

Min: 61° 06' N; 122° 50' W

Max: 61° 37' N; 124°48' "W

However, to understand exactly what use of the road this permits it is necessary to look at the application that was made for it. This is noted in MV2003F0028 itself, which states at the very beginning:

Subject to the Mackenzie Valley Land Use Regulations and the terms and conditions in this Permit, authority is hereby granted to:

Canadian Zinc Corporation

Permittee

To proceed with the land use operation described in application of:

Signature Alan Taylor	Date June 15, 2003
Type of Land use Operation Winter Road	
Location Prairie Creek Mine Site to Liard Highway	

That MV2003F0028 only authorizes CZN to undertake the activities described in the application for it is also noted in Part C of the permit. For example:

*26(1)(a) LOCATION AND AREA*

1. The Permittee shall not conduct this land use operation on any lands not designated in the accepted application. PLANS

*26(1)(c) TYPE AND SIZE OF EQUIPMENT*

11. The Permittee shall not use any equipment except of the type, size and number that is listed in the accepted application, unless authorized by an Inspector. ONLY APPROVED EQUIPMENT

More generally of course a permit issued under the MVRMA is issued in response to an application, and that application forms the basis for consideration and consultation prior to permit approval (see, for example, MVRMA s.63-64, 102-103). A permit is therefore generally limited by the application submitted for it.

Section 5(a) of the original LUP application (dated June 15, 2003) for MV2003F0028 provided the following summary of the proposed operation:

5. a) Summary of operation (Describe purpose, nature and location of all activities.) \*\*See Attached Project Description\*\*

Rehabilitation, maintenance and use of an existing approximate 165 km long by 5 m wide winter road connecting the Prairie Creek Mine to the Liard Highway near Lindberg Landing to support site clean-up through removal of surplus reagents, equipment and supplies; and supply of planned advanced exploration activity.

The application clearly states that the applied-for use of the winter road is specifically for supporting clean-up operations and advanced exploration activity. There is no suggestion of seeking approval for use of the winter road for the full-scale operation of the mine. Section 5(a) of the application also refers to the attached Project Description Report (which is dated May 23, 2003), and that report explained the applied-for use of the winter road as follows in the Executive Summary (at pages 3-4):

In order to continue with its site clean-up efforts, Canadian Zinc wishes to re-establish the existing winter road to provide access into the minesite. The road would be established in late December – early January and operated through to the end of March, at the latest, in each year of its use during the term of the Permit.

Road access will allow the Company to proceed with the removal of aging equipment, stockpiled reagents which have outlived their shelf life, and other equipment and supplies which are not expected to be required in future mining operations. Of particular note, this will include removal of the 40 tonnes of cyanide, which has been stored at the minesite since 1982.

As well, re-establishment of the existing winter road will facilitate final clean-up of the “Cat Camp” and “Grainger” fuel cache sites, both of which are located along the existing road alignment. Remaining clean-up entails removal of the bulk storage tanks, of which there are three at each site, each approximately 6.1 m high by 3.7 m in diameter, with a maximum nominal capacity of 64,000 litres each, as well as clean-up of any contaminated soils. Also located at the sites are several trailers, some smaller tanks, barrels, a supply of culverts and other materials belonging to Canadian Zinc.

In addition to the forgoing, re-established road access will also provide a more economical means of transporting equipment and supplies necessary in support of the planned advanced exploration activity to be carried out under the previously noted permit applications. This would include such things as the pilot plant for the metallurgical program and the two-boom air jumbo drill to develop the decline, as well as explosives and other supplies.

CZN summarized its intended use of the winter road under MV2003F0028 when it stated the following in the ‘Description of the Development’ section of the Project Description Report (at page 6):

Access to the minesite for the purposes of supporting planned advanced exploration activity and general cleanup of the minesite and fuel caches will require rehabilitation of the existing road alignment and re-establishment of winter snow road access into the site.

It is clear that MV2003F0028 does not authorize use of the winter road for full-scale mine operations, but rather is limited to advanced exploration activity and some clean-up activity.

This conclusion is further supported by CZN’s June 5, 2007 application for Water License MV2007L8-0026 (this water license was for the rehabilitation of the road as there had been substantial washouts at the west end of the road). This application provides the following ‘Description of Undertaking’, which describes the road use at that time in the same way as the application materials for MV2003F0028 discussed above:

Rehabilitation and maintenance of part of an existing approximately 175 km long by 5 m wide winter road connecting the Prairie Creek Mine to the Liard Highway near Lindberg Landing to support re-supply for planned advanced exploration activity and removal of surplus reagents,



equipment and supplies. Specifically, to repair eroded segments of the all season road section from the mine to Km 8.3 (see Project Description attached). [emphasis added]

We also note that as applied for by CZN, and as noted by the Mackenzie Valley Land and Water Board ('MVLWB') in its April 20, 2007 Reasons for Decision, use of the winter road under MV2003F0028 is restricted to the period from December 15 to March 31. In contrast, CZN note in the Executive Summary (at page 2) of their Project Description Report for the Tetcela Transfer Facility (dated May, 2008): "CZN's plan is to open the western half of the winter road from the Prairie Creek Mine to Km 84 by the first of December (or possibly earlier) each season". Again, land use permit MV2003F0028 would not enable the use of the road as contemplated by CZN in the current development proposal.

In conclusion, CZN does not hold an existing authorization to use the winter road for the mine operations contemplated in the applications currently before the Review Board. A new land use permit is therefore required (see, for example, MVRMA Part 3 and *Mackenzie Valley Land Use Regulations* s.4,5). This new permit is needed for the road itself (such as for any proposed rehabilitation, alteration, maintenance, and reclamation) and for use of the road so as to cover all the road activities contemplated by the applications currently before the Review Board. Further, such road activities are fundamentally different to those permitted by MV2003F0028, and thus a new application, and not merely an amendment to MV2003F0028, will be required (see *Mackenzie Valley Land Use Regulations*, s.26(4)).

Finally, we note that an application for a land use permit for the contemplated road use activities is much preferable to simply requesting information on those activities from CZN, because a new land use permit is required and it will help bring a full set of applications before the Review Board, and because an application can be expected to more completely and concretely describe the intended future activities since it will form the basis for permitting those activities, unlike a request for information.

#### Requests for rulings

Based on the above, we therefore request the following ruling:

1. CZN's current land use permit for the road (MV2003F0028) does not permit use of the winter road for the full-scale mine operations contemplated in the applications currently before the Review Board.

The lack of an application for a new land use permit for the road has implications for the Review Board's current scoping exercise. As described below, it is not possible to conclude that the road and its use are exempt under the MVRMA's grandfather provision without a new land use permit application for careful study. Only with such an application can the full scale of alterations to the road and its use be considered. Thus, at a minimum, we respectfully request the Review Board to postpone its scoping decision until after such an application has been submitted and considered. Presumably such an application would be made to the MVLWB, although we note the Review Board could immediately bring it to environmental assessment and incorporate it into this EA (see, for example, MVRMA s.126(3),(4)).

We submit the Review Board can take the next step, however, and include the road and its use in the scope of development now. As described below, we submit there is already sufficient evidence to conclude there are significant alterations and thus the road is not grandfathered, and that the Review Board's scoping guidelines designed to avoid project splitting require the road to be included. We also describe below how including the road and its use in the scope of development will have practical advantages, such as informing the conditions to be imposed on the new permit.

Thus our second request for ruling is:

2. either:
- (a) the Review Board's scoping decision is postponed until after an application has been made for a new land use permit for the road and its use, and after that application has been considered;
- or
- (b) the road and its use are included in the scope of development, but most subsequent steps in this EA that might relate to the road are postponed until after an application for a new land use permit for the road and its use has been submitted.

### The 2005 NWT Supreme Court decision

CZN has expressed the opinion that the winter road has been deemed exempt (i.e. 'grandfathered') from environmental assessment by the Supreme Court of the NWT. The 2005 NWT Supreme Court decision referred to (*Can. Zinc Corp. v. Mackenzie Valley Land & Water Bd.*, 2005 NWTSC 48) does not necessarily lead to such a conclusion, however.

That court decision noted, for example, at paragraphs 46, 50, 55, that the permit that had been applied for was for the winter access road only and not the larger mining operation. At paragraph 53 the court noted that the 'undertaking' under consideration was not solely the physical 'thing' (i.e. the winter access road) but included "the activity for which the road will be used and the circumstances surrounding its use". And at paragraphs 53,58-59,70, the court held that, because of the restricted activities applied for (i.e. clean-up and advanced exploration, as discussed above), the 'undertaking' in question was not the whole mining enterprise but rather just operation of the winter access road, and accepted at paragraph 61 that there had been no significant alteration of that operation. Indeed, the parties to the court case accepted that significant alteration was not part of the exemption issue in relation to MV2003F0028.

Today, "the activity for which the road will be used and the circumstances surrounding its use" are very different, given that CZN is applying to open the entire mining operation, that the road will play an integral part in that operation, and that that operation is now the subject of this EA because of alterations that have been made to it. The 2005 NWT Supreme Court ruling does not therefore necessarily lead to the conclusion that use of the road for full-scale mine operations will be grandfathered from Part 5 of the MVRMA.

### Significant alterations and some consequences of those alterations

CPAWS and DFN's scoping submissions described some of the significant alterations that have been made to the project as a whole in comparison to what was contemplated in the early 1980s, and we refer you to those submissions. Indeed, these changes are one of the reasons why the Prairie Creek Mine project is currently undergoing environmental assessment (EA) before the Review Board (see, for example, INAC's letter to the Review Board dated August 8, 2008). In the language of MVRMA s.157.1, the 'undertaking' or 'project' in question here, namely the mining and processing operation and transport of its product to market, has been 'significantly altered'. Thus applications in relation to that undertaking/project, including the new application required for the road, are not grandfathered by s.157.1.

We submit that this approach of looking at the whole project or undertaking is the correct way to interpret s.157.1, but the same conclusion can be reached if just the road itself is considered. Although

it is not possible to assess the full significance of alterations related to the road until an application for a new land use permit for the road is submitted, the alterations that are already evident appear significant. For example, the two proposed transfer facilities along the road not only physically alter the road but will also alter the volume, type, timing and duration of traffic on the road and thus likely also the need for maintenance and rehabilitation. So too will alterations to the mine and its operations, such as:

- o the significantly increased size of ore reserves (5.8 million tonnes inferred and indicated versus 1.6 million “proven, probable and possible” in 1980) will likely significantly increase the amount of traffic on the road; and
- o the significantly longer proposed life span of the mine (a minimum of 14 years as opposed to approximately 6) will significantly increase the duration of traffic on the road.

The combination of such alterations is relevant to issues such as noise, safety, water quality, wildlife impacts, etc. Such alterations might increase, for example, contamination by sedimentation and spills, effective habitat fragmentation, wildlife kills on the road, the impact on species at risk listed under the *Species at Risk Act* (SARA), etc (on the latter point, we would draw your attention to section 79 of SARA).

Such issues have already been raised by other parties. For example, the summary of issues raised at the Wrigley scoping session (see “Draft Meeting Report from the Wrigley Scoping Session”, October 2, 2008) includes “soil erosion of the road into the water system”, “winter road – public safety and interference with traditional peoples hunting”, and “effects of mine and road together on wildlife”. All such impacts may significantly increase if the use of the road significantly increases. Residents of Lindberg Landing have noted that the winter road approach is close to their home, and impacts on this community are likely to be significantly increased with significant increases in road traffic (see scoping submission from Stephen and Marjorie Herrett).

Parks Canada in Appendix 3 of its scoping submission (dated October 20, 2008) recommends that the Karst landscape, Spills, and Wildlife be assessed if the road is included in the scope of development, and we submit these need to be assessed due to the significant alterations discussed above.

Environment Canada in its scoping submission (dated October 20, 2008) makes a similar point that alterations to road activities can have important impacts that have not been previously considered:

Consideration should also be given as to whether there is an increase or change in usage of an existing component. For example, impacts of an airstrip or road may have been assessed based on the predicted level and timing of usage in the previous assessment. If the usage of the airstrip/road increases or there is a change in the time of year when the airstrip/road is being used, there could be new impacts to wildlife that were not previously assessed.

And finally, GNWT in its scoping submission (dated October 20, 2008) provides further comments on impacts from the road, further supporting, we submit, our argument that there are significant alterations to the road that need to be assessed:

(page 2: Wildlife Safety and the Winter Road): CZN has indicated that approximately 4800 hauls/year will take place on the proposed all weather road. There are 21 vehicles. This equates to ~3trips/day/truck. Given these figures, a 24-hour/day haulage is likely. Therefore, for a period of two and a half months during mid to late winter, continuous traffic and noise will occur along the road. Winter road use coincides with the winter range of the Nahanni Herd Complex, and given the high volume of traffic, ENR recommends that the interaction between wildlife and the winter road be addressed in this EA.

(page 8: What physical Works and activities should be considered during this environmental assessment): The potential for impacts from the transportation of hazardous materials and the increased traffic volumes should also be assessed.

(page 8: Project Emissions and Air Quality): The assessment should: ... quantify and characterize the emissions of common air contaminants (i.e. SO<sub>x</sub>, NO<sub>x</sub>, CO, VOC's and PM [as TSP, PM10 and PM2.5]) from all sources associated with the project including transportation of ore concentrate; ... quantify and characterize the emissions of greenhouse gases (as CO<sub>2</sub>, NH<sub>4</sub> and N<sub>2</sub>O; and CO<sub>2</sub>e) from all sources associated with the project ...

In conclusion, the applications currently before the Review Board envision significant alterations to the whole project. Thus the road, being a part of that project, is not grandfathered. In the alternative, looking just at the road, the current applications envision physical alterations to the road and alterations to the use of the road, and we submit the Review Board can conclude those alterations are significant despite not having all the details on road alterations. Thus either way, the road is not grandfathered and can be included in the scope of development now. At the very least, the Review Board cannot conclude that the road is grandfathered at this time, absent an application for a new permit for it – until the full scale of alterations are known and formalized in an application, such alterations cannot be deemed ‘insignificant’.

#### The need to avoid project splitting

As argued above, CZN requires a new permit under Part 3 of the MVRMA for the winter access road and its use, and that new permit application is subject to Part 5 of the MVRMA. However, there is currently no application for a new permit for the road, and so the Review Board does not have a complete set of applications before it. This therefore appears to be a case of project splitting, which goes against the Review Board’s Guidelines (“*Environmental Impact Assessment Guidelines*”, March 2004).

These guidelines provide the starting point for scoping an EA. In particular, we note they were produced according to MVRMA s.120 (see the Guidelines at page 1), and that MVRMA s.117(1) makes determination of the scope of development subject to them. These Guidelines clearly emphasize the danger and undesirable practice of project splitting and commit the Review Board to ensuring the entire development undergoes assessment. As noted in section 3.8 “Scoping the Development” (at page 27):

Practice has shown that it is both ineffective and inefficient to separately assess the many individual components of a large development, even if developers apply for these components separately. To assess these parts individually risks missing the bigger picture, by failing to recognize impacts related to scale and combined effects of the separate parts. The Review Board avoids this by ensuring that the entire development undergoes environmental assessment. [emphasis added]

Avoiding project splitting has many additional benefits, such as allowing mitigation measures to be designed with the entire development in mind, helping to ensure the assessment is not unduly limited later on (given that the range and scale of impacts are not always obvious at the start of an assessment), and more fundamentally, promoting trust in the environmental assessment process that it has fully considered the proposed project.

The Review Board’s Guidelines go on to provide further direction on how to determine what constitutes the ‘entire development’ (at pages 27-28):

In scoping the development, the Review Board will consider what is the principal development, and what other physical works or activities are accessory to the principal development.

Three criteria will be used to determine whether or not a physical work or activity is an accessory development, and therefore should be included in the development. The first test is **dependence**: that is, if the principal development could not proceed without the undertaking of another physical work or activity, then that work or activity is considered part of the scoped development. The second test is **linkage**: if a decision to undertake the principal development makes the decision to undertake another physical work inevitable, then the linked or interconnected physical work or activity will be considered part of the scoped development. The third test is **proximity**: if the same developer is undertaking two physical works or activities in the same area, then the two may be considered to form one development. [emphasis added]

These three tests all lead to inclusion of the road and its use in the scope of this assessment:

- **Dependence**: operation of the mine depends directly on the winter access road and its use, as well as on the proposed transfer facilities, to supply the operating mine and transport product to market – without these transportation facilities the mine could not operate.
- **Linkage**: the decision to operate the mine necessitates rehabilitation, maintenance and use of the winter road, as well as the construction of the transfer facilities and their use, and leads to eventual closure and reclamation of the road and transfer facilities.
- **Proximity**: the winter access road runs right to the mine.

In conclusion, the road is part of the ‘entire development’, that entire development has been significantly altered, as too has the road and its use, and thus the ‘entire development’ should be included in the scope of this EA.

#### New conditions can be imposed on a new permit

The need for a new land use permit for the road under Part 3 of the MVRMA also has the important practical implication that new conditions can be included in that permit and those conditions can be enforced (see, for example, MVRMA s.69,71,85,86,92,102, and *Mackenzie Valley Land Use Regulations*, s.26,32,35). And if the application for the new road permit undergoes assessment, as argued for above, those conditions will be much improved by the careful consideration given to them in this EA (see for example MVRMA s.62,115,117).

We therefore respectfully disagree with the statement made by Indian and Northern Affairs Canada (INAC) in its scoping submission (dated October 14, 2008), when it said (at page 3): “In INAC’s view, conditions or mitigation cannot be retroactively applied to the winter road due to its grandfathered status.” This statement:

- appears to make the same incorrect assumption as has CZN that the road is grandfathered no matter what the proposed use of it;
- appears to overlook the need for a new land use permit for the road and its use, and thus the need for a set of conditions on that new land use permit; and
- appears to overlook the fact that, as noted at paragraph 72 of the 2005 NWT Supreme Court case referenced above, even if an application for a permit for the road is grandfathered, “[CZN] has acknowledged that the [Land and Water] Board may impose conditions within its jurisdiction on the granting of the permit”.

### The benefits of including the road in the scope of development rather than as a cumulative impact

In their scoping submissions, some parties suggested that the road can be considered in the cumulative impacts phase of this EA, as opposed to including it in the scope of development. In contrast, as discussed above, we submit the Review Board's Guidelines require it to be included in the scope of development. Indeed, Appendix H: "Additional Cumulative Effects Guidance" of those Guidelines (at page 80) notes the difference between including something in the scope of development as opposed to including it in the cumulative impacts assessment:

The Review Board uses the term "cumulative effects" to refer to the effects of a proposed development in combination with other human activities. This is distinct from the combined effects of a single project, where different impacts from the same project may interact in a synergistic or additive way. Effects that arise in conjunction with other impacts from the same development should be included in the appropriate subject area in the development-specific (noncumulative) part of the assessment.

As argued above, the entire 'project' or 'development' under consideration in this EA includes the road. Simply put, the road activities contemplated are part of the development proposed by CZN – they are not some 'other development or activities' to be considered as cumulative effects. On the practical level, it is much preferable to include the road in the scope of development rather than as a cumulative effect, because:

- a more detailed examination of the proposed road activities can be conducted; and
- a more thorough consideration can be made of the implications of those activities, including impacts, malfunctions, accidents, alternatives, mitigative or remedial measures, and alternatives (see, for example, MVRMA s.117).

Often cumulative effects are taken as a given, or else assessment bodies make recommendations to government in an effort to indirectly control them, because those cumulative effects are usually outside the immediate control of the proponent of the development under consideration. But here the road and its use are under the direct control of CZN. And as discussed above, a new land use permit for the road is required which will include conditions, raising the importance of carefully considering what those conditions might be by considering mitigation measures, follow-up programs, and the like.

Furthermore, including the road in the scope of development rather than relegating it to the cumulative impacts assessment helps ensure that the cumulative impacts assessment is complete. As noted in Appendix H: "Additional Cumulative Effects Guidance" of the Review Board's Guidelines (at page 81):

Since the term "environment" is defined in the MVRMA to include biophysical, socio-economic and cultural components, scoping may identify purely social or cultural issues in addition to ecological ones. For example, if a development may affect wildlife harvesting or the well-being of families, and these are also affected by other human activities, then these may be included in a cumulative effects assessment. Scoping for cumulative effects assessment goes beyond scoping for project impacts. The latter identifies components affected by the proposed development. The former would select only those affected by the proposed development and also affected by other human activities. The components selected through scoping for cumulative effects would thus be a subset of the list of components selected for project effects.

By relegating the road to the cumulative impacts assessment, rather than including it in the scope of development, important 'valued components' that are affected by the road or its use but not by other

components of the project would be overlooked in the cumulative impacts assessment. For example, it is possible that particular aspects of the Karst landscape will be impacted by the road and its use but not by other components of the project. Similarly, particular streams or groundwaters may be impacted by road spills but not by other components of the project, and particular species or populations of wildlife may be impacted by road use (such as from increased stress, habitat fragmentation, kills, or hunting pressure) but not by other components of the project. Including the road and its use in the scope of development will ensure all such valued components are included when looking for cumulative effects from other developments or activities.

### Conclusions

CZN's current land use permit MV2003F0028 for the winter access road is limited to clean-up and advanced exploration activities. It does not cover the road activities (such as maintenance and use of the road) that are contemplated in association with the applications currently before the Review Board. We therefore request the Review Board to rule that CZN's current permit MV2003F0028 does not permit these contemplated road activities, and that a new land use permit for the road and its use is therefore required.

Although there did exist a road permit in the early 1980s, a permit issued prior to 1984 does not exempt from assessment any and all uses of that road for all time. Rather, such grandfathering is subject to there being no significant alterations. Full details of such alterations are not yet available, since no application has been submitted for a permit for the contemplated road activities. Thus it is not possible to conclude at this time that there are not significant alterations, and so it is not possible to conclude that the road activities contemplated are grandfathered. At a minimum then, we request the Review Board to delay its scoping decision until after an application for the road has been submitted and considered.

Based on the information submitted to date, however, we submit that it is possible to conclude that there are significant alterations. Thus, we request the Review Board to include the road and its use in the scope of development in this EA now, but to postpone most subsequent parts of this EA until after an application is submitted (allowing that it might be possible to conduct some preliminary studies on other elements of the project if it is clear they are unrelated to the road).

### **AND FURTHER TAKE NOTICE that in support of this Request for Ruling the following documents or information have been attached**

We attach the following documents:

- MV2003F0028 - appJun03.pdf: LUP application (dated June 15, 2003) and Project Description Report (dated May 23, 2003) for MV2003F0028
- MV2003F0028 - LUPIssued-WinterRoad-Apr07.pdf: Land use permit MV2003F0028 (dated April 11, 2007)
- MV2003F0028 - RFD-Apr07.pdf: Reasons for Decision, MV2003F0028 (dated April 20, 2007)
- MV2007L8-0026 - WLApp-Jun07.pdf: application for Water License MV2007L8-0026 (dated June 5, 2007)
- 2005 NWTSC 48.pdf: *Can. Zinc Corp. v. Mackenzie Valley Land & Water Bd.*, 2005 NWTSC 48

We understand all other documents referred to in this Request for Ruling are already in the Review Board's possession and part of the record for this EA. If any are not, please let us know and we will forward them forthwith. Please note we are assuming we do not need to provide you with legislation, such as the MVRMA and its regulations or the SARA, or the Review Board's Guidelines, for them to be part of the Review Board's consideration in this EA and this Request for Ruling – please let us know if this assumption is incorrect.

Thank you for your consideration of this Request for Ruling. Please do not hesitate to contact me should you have any questions.

Dated at Vancouver, British Columbia, on November 3, 2007,



Keith Ferguson

On behalf of the Dehcho First Nations ('DFN') and Canadian Parks and Wilderness Society ('CPAWS', both the national organization and the NWT Chapter)

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