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October 24, 2024
VIA EMAIL

Dear Mark Cliffe-Phillips:

EA2425-02: Imperial Oil Norman Wells Operations – Response to Directive on Request for Ruling

On behalf of the Government of the Northwest Territories (GNWT), I am providing the GNWT's response to the Mackenzie Valley Environmental Impact Review Board's (MVEIRB) October 16, 2024 Directive on the Imperial Oil's October 9, 2024 Request for Ruling.

To begin, the GNWT is of the view that the MVEIRB can consider and make a decision on Imperial's Request for Ruling. However, the MVEIRB should assess whether it lacks the authority to issue the requested ruling on any basis as a starting point in its analysis.

The GNWT understands and fully agrees that the Sahtu Dene and Métis Comprehensive Land Claim Agreement (SDMCLCA) and the *Mackenzie Valley Resource Management Act* (*MVRMA*) provide the Sahtu Secretariat Incorporated (SSI) with the authority to refer proposed developments to the MVEIRB for environmental assessment. This authority is subject to certain conditions, notably that the development is not exempt from preliminary screening and environmental assessment. In this regard, the GNWT's view is that SSI's referral of Imperial Oil Resources N.W.T. Limited's (Imperial) ongoing Norman Wells Operations (ONWO) for environmental assessment by the MVEIRB is premature. The Canada Energy Regulator (CER) and the Sahtu Land and Water Board (SLWB) must first determine whether the ONWO is exempt from preliminary screening on the basis of s. 124(1)(a) of the *MVRMA*, and the associated *Exemption List Regulations*, and/or s. 157.1 of the *MVRMA*. On the basis of the respective applications made by Imperial to the CER and the SLWB for the ONWO, only the CER and the SLWB are authorized to determine whether the ONWO is exempt from preliminary screening. Given this crucial step, the MVEIRB should rule that the referral is premature. If the CER and the SLWB determine that the ONWO is exempt from preliminary screening, the ONWO cannot be referred to environmental assessment. If the CER or the SLWB determine that the ONWO is not exempt from preliminary screening, the ONWO could be referred to environmental assessment, and the environmental assessment could be reinitiated.

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The GNWT's written submissions first analyze potential exemption from preliminary screening based on s. 124(1)(a) of the *MVRMA* because:

- The analysis to ascertain the entity or entities responsible for determining exemption from preliminary screening based on s. 124(1)(a) of the *MVRMA* provides important context for and, as set out below, similar analysis applies to ascertaining the entity or entities responsible for determining exemption from preliminary screening based on s. 157.1 of the *MVRMA*; and
- Both determinations remain to be made.

The CER and the SLWB have the exclusive role of determining whether the ONWO is exempt from preliminary screening on any basis under the Exemption List Regulations

S. 124(1)(a) of the *MVRMA* gives the regulatory authority or designated regulatory agency that is responsible for issuing the authorization applied for the exclusive gatekeeping role of determining whether the proposed development is exempt from preliminary screening, and therefore Part 5 of the *MVRMA*, through regulations under which impacts on the environment are declared to be insignificant. Those regulations are the *Exemption List Regulations* SOR/99-13. The relevant part of s. 124(1)(a) of the *MVRMA* giving the regulatory authority this exclusive role is in bold text, below:

> Where, pursuant to any federal or territorial law specified in the regulations made under paragraph 143(1)(b), an application is made to a regulatory authority or designated regulatory agency for a licence, permit or other authorization required for the carrying out of a development, the authority or agency shall notify the Review Board in writing of the application and conduct a preliminary screening of the proposal for the development, **unless the development is exempted from preliminary screening because**
>
> (S) **its impact on the environment is declared to be insignificant by regulations made under paragraph 143(1)(c)…**

The regulatory authorities for the respective applications for the ONWO are the CER and the SLWB. The CER and the SLWB must therefore determine whether the ONWO is exempt from preliminary screening on any basis under the *Exemption List Regulations*.

S. 124(3) of the *MVRMA* gives SSI the ability to carry out a preliminary screening of a proposed development in the Sahtu Settlement Area only if the proposed development is not exempt from preliminary screening. S. 124(3) of the *MVRMA* states:

> The Gwich'in First Nation, the Sahtu First Nation or the Tlicho Government, as the case may be, may conduct a preliminary screening of a proposal for a development to determine whether to refer the proposal for an environmental assessment in accordance with paragraph 126(2)(b) or (c).

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S. 126(2)(b) then states (bold added for emphasis):

> **Notwithstanding any determination on a preliminary screening**, the Review Board shall conduct an environmental assessment of a proposal for a development that is referred to it by
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> > (b) the Gwich'in or Sahtu First Nation, in the case of a development to be carried out in its settlement area or a development that might have an impact on the environment in that settlement area.

Based upon these provisions, it is clear that SSI can determine if an application to a regulatory authority or designated regulatory agency is exempt from preliminary screening on any basis under the *Exemption List Regulations* only if SSI is a regulatory authority or designated regulatory agency. The lack of text in s. 124(3) of the *MVRMA* analogous to that at the end of s. 124(1)(a) of the *MVRMA*, noted in bold, above, is significant. If Parliament intended to authorize SSI to determine whether a proposed development is exempt from preliminary screening on any basis under the *Exemption List Regulations*, such text would presumably have been included at the end of s. 124(3) of the *MVRMA*. S. 126(2)(b) also does not give any indication that SSI is authorized to determine whether a proposed development is exempt from preliminary screening. S. 126(2) of the *MVRMA* begins with "notwithstanding any determination on a preliminary screening". This opening wording indicates that s. 126(2) is premised upon the proposed development being subject to preliminary screening. If the proposed development is exempt from preliminary screening, s. 126(2) does not apply and no environmental assessment is possible.

Regarding the ability to determine if a development is exempt from preliminary screening, there is no indication in the Sahtu Dene and Metis Comprehensive Land Claim Agreement (SDMCLCA) that SSI can make that determination. The extent of what the SDMCLCA states about exemption from preliminary screening is in 25.3.3:

> (a) Legislation may provide
>
> > (i) for development proposals or classes thereof which are exempt from the process of environmental impact assessment and for the amendment of any such exemptions; and
> >
> > (ii) for a preliminary screening of development proposals by any government department or board, in order to determine whether any assessment is required.
>
> (b) Legislation shall provide that a development proposal which would otherwise be exempt from assessment may be assessed if, in the opinion of the Review Board, it is considered to be of special environmental concern by reason of its cumulative effects or otherwise.

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25.3.3(a)(i) of the SDMCLCA only enables legislation. It provides no indication of what entity or entities will be responsible for determining whether proposed developments are exempt from the process of environmental impact assessment under the legislation.

Consistent with the opening wording of s. 126(2)(b) of the *MVRMA*, the opening wording of 25.3.5(a) of the SDMCLCA clearly indicates that no environmental impact assessment can occur if the proposed development is exempt from the process of environmental impact assessment. It states (bold added for emphasis):

> **Subject to 25.3.3(a)**, a development proposal shall be assessed by the Review Board in order to determine whether the proposed development will likely have a significant adverse impact on the environment or will likely be a cause of significant public concern…

The CER and the SLWB have the exclusive role of determining whether the ONWO is exempt from preliminary screening on the basis of s. 157.1 of the *MVRMA*

Only the regulatory authority that is responsible for issuing the authorization applied for has the gatekeeping role of determining whether the proposed development is exempt from preliminary screening based upon s. 157.1 of the *MVRMA*. Though s. 157.1 of the *MVRMA* contains different terminology than s. 124(1)(a) of the *MVRMA*, a similar analysis applies. S. 157.1 of the *MVRMA* states:

> Part 5 does not apply in respect of any licence, permit or other authorization related to an undertaking that is the subject of a licence or permit issued before June 22, 1984, except a licence, permit or other authorization for an abandonment, decommissioning or other significant alteration of the project.

A potentially noteworthy difference between s. 157.1 of the *MVRMA* and s. 124(1)(a) of the *MVRMA* is that s. 124(1)(a) of the *MVRMA* specifies the entity or entities that is/are to determine whether the proposed development is exempt from preliminary screening, whereas s. 157.1 of the *MVRMA* does not specify the entity or entities to make the corresponding determination. This raises the issue of whether the entity or entities to make the determination under s. 157.1 of the *MVRMA* is/are the same as under s. 124(1)(a) of the *MVRMA* or whether any additional entity or entities can do so.

The only logical conclusion that can be reached is that the entity or entities to make the determination under s. 157.1 of the *MVRMA* is/are the same as under s. 124(1)(a) of the *MVRMA* and no additional entity can make the determination under s. 157.1 of the *MVRMA*. There are three reasons for this conclusion:

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i. Both are gatekeeping roles to preliminary screening, and therefore Part 5 of the *MVRMA*. Parliament intending to have the same entity or entities make both determinations is logical.

ii. S. 157.1 of the *MVRMA* sets out an entirely objective legal test that is to be applied in each context. There is no subjective component of s. 157.1 of the *MVRMA*. There is no sound basis for more entities to be able to apply this test than is necessary. Allowing more entities than necessary to apply this test would increase the risk of inconsistent interpretations of an objective test. In contrast, the test for referral to environmental assessment under s. 125(1) and (2) of the *MVRMA* contains subjective elements. This makes it appropriate to give a number of entities, beyond the regulatory authority or authorities and designated regulatory agency or agencies, the ability to apply the s. 125(1) and (2) test, who may validly reach different conclusions.

iii. Given points i. and ii., there is nothing about s. 157.1 of the *MVRMA* that provides any reason to believe that Parliament's intention about the entity or entities to make the determination differed from s. 124(1)(a) of the *MVRMA*. Allowing more entities to be able to make the determination under s. 157.1 of the *MVRMA* than s.124(1)(a) would create an irrational distinction. As Ruth Sullivan states in p. 304-305 of The Construction of Statutes (7th Ed):

A proposed interpretation is likely to be labelled absurd if it would result in persons or things receiving different treatment for inadequate reasons or for no reason at all.

Conclusion

The MVEIRB should rule that SSI's referral to environmental assessment is premature and await determinations from the CER and SLWB. If the CER or the SLWB conclude that the ONWO is not exempt from preliminary screening/Part 5 of the MVRMA under s. 124(1)(a) of the *MVRMA* or s. 157.1 of the *MVRMA*, the environmental assessment can be reinitiated.

If MVEIRB has any questions regarding this submission, please contact me at (867) 767-9180 ext. 24020, or by email at Lorraine_Seale@@gov.nt.ca.

Sincerely,

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