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Mark Cliffe-Phillips
Executive Director
Mackenzie Valley Environmental Impact Review Board
Via email

RE: Review Board request for views of governments and organizations with referral authority

In response to the request by the Mackenzie Valley Environmental Impact Review Board ("Review Board") for the views of governments and organizations with referral authority under subsection 126(2) of the *Mackenzie Valley Resource Management Act* ("MVRMA"), Tłįchǫ Government submits the following for the Review Board's consideration on the question:

> *Does the Sahtu Secretariat Incorporated have the authority to refer Imperial's Water Licence renewal application (S24L1-005) and Operations Authorization (1210-001) to the Review Board for environmental assessment under paragraph 126(2)(b) of the MVRMA, considering subsection 157.1 of the MVRMA as well as the other arguments described in Imperial's Request for Ruling?*

In particular, we emphasize that respect for the treaty right to refer a project to environmental assessment is paramount.

In Tłįchǫ Unity,

Tammy Steinwand-Deschambeault
Director of Culture and Lands Protection

1. **The Sahtu Secretariat Incorporated ("SSI") has the authority to refer the applications to the Review Board for environmental assessment**

Tłı̨chǫ Government submits that SSI has the authority under article 25.3.4 of the Sahtu Dene and Metis Comprehensive Land Claim Agreement ("SDMCLCA") to directly refer this project to environmental assessment based on the criteria set out in the treaty:

> <u>A development proposal in the settlement area or which may impact upon the settlement area</u> may be referred for assessment to the Review Board by the Sahtu Tribal Council or any governmental authority, and by the Review Board on its own motion. [emphasis added]

The MVRMA cannot limit the scope of this provision. Even if it could be successfully argued that Imperial Oil's proposal did not reach the threshold of a significant alteration to the project, the treaty right does not require that such a threshold be met. Rather, the treaty commitments in s. 25.3.4 of the SDMCLCA is clear SSI may refer for environmental assessment any development proposal in the settlement area or which may impact the settlement area.

Should there be any inconsistency or conflict between this provision of the treaty and the legislation, the MVRMA clearly states:

> 5 (1) If there is any inconsistency or conflict between this Act and a land claim agreement, the Déline Agreement, an Act giving effect to any of those agreements or the *Indian Act*, then the land claim agreement, the Déline Agreement, the Act or the *Indian Act* prevails over this Act to the extent of the inconsistency or conflict.

Further, the MVRMA's non-derogation clause removes all doubt:

> For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.

a. Section 157.1 of the MVRMA is not a blanket exemption

Though it is clear that SSI has the authority to refer the project for environmental assessment under treaty, the Review Board specifically asks if SSI has the authority to refer for environmental assessment under s. 126(2)(b) of the MVRMA, considering s. 157.1.

The exemption of undertakings from environmental review under Part 5 of the MVRMA is not absolute, and it is important that the Review Board consider the ramifications of an overly broad interpretation of the application of the s. 157.1 exemption. Though s. 157.1 of the MVRMA grandfathers undertakings licenced prior to June 22, 1984, it is not a blanket exemption for eligible existing projects. The provision includes important exceptions in cases of "abandonment, decommissioning, or other significant alteration of the project," where a licence, permit or authorization will still be subject to Part 5, including referrals for environmental assessment from governments and organizations with referral authority under s. 126(2).

Tłįchǫ Government takes no position on whether the proposed project would constitute a significant alteration, but reminds the Review Board that the extension of a project extends the duration over which impacts will continue. The result is a change in impacts and an alteration to the project.

We note that SSI contests Imperial Oil's assertions that it "is not proposing any alterations to the NWO operational footprint or industrial processes …" and "… does not seek authorization for any new activities at NWO."

Tłįchǫ Government encourages the Review Board to confine its decision to the facts in question and to avoid making a broader statement about the scope of Part 5 of the MVRMA, including the application of s. 126(2) of the MVRMA.

b. Proposals for development are not limited to prospective developments

Imperial Oil argues that the applications are not a "proposal for a development" as contemplated under s. 126(2)(b) and that the scheme of the MVRMA restricts environmental assessments to *prospective* developments or projects that include new development. Tłįchǫ Government submits that existing operations can fall within the scope of s. 126(2) and that proposals for development encompass proposals for alterations to an existing project. Adopting the modern approach to statutory interpretation, which holds that statutes be read with an eye toward harmonizing their text, context, and purpose, a proposed development does not rule out activities involving existing operations. Section 126(2)(b) targets "a development to be carried out," and provides no indication that this is limited to prospective developments. Read in conjunction with s. 157.1, which makes clear that environmental review may occur for authorizations concerning significant alterations of a project, s. 126(2) should apply to such alterations rather than be limited to prospective developments.

The Exemption List Regulations[1] specifically contemplate developments or parts thereof that have not been modified and have previously gone through the environmental assessment process, and provide for screening exemptions at sections 2 and 2.1 of Schedule 1. If such exemptions exist it must follow that existing developments are subject to Part 5 of the MVRMA. Further, section 25.3.3(b) of the SDMCLCA, which closely resembles section 22.2.8 of the Tłįchǫ Agreement, is also instructive:

> 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.

This treaty obligation supports that existing projects are subject to Part 5 and can undergo an environmental assessment.

We note that the SDMCLCA's definition of development proposal, "a proposed development activity outside local government boundaries, or within such boundaries where the undertaking would be likely to have a significant impact on air, water or renewable resources," aligns with our interpretation and does not limit SSI's referral authority to prospective developments.

Based on our analysis, Tłįchǫ Government is confident that the proposed project constitutes a development proposal within the meaning of article 25.3.4 of the SDMCLCA and a proposal for a

[1] SOR/99-13.

development within the meaning of s. 126(2) of the MVRMA, and is not exempt from the application of Part 5 by virtue of being an existing project.

c. Procedural fairness and natural justice do not fetter referral authority

The referral authority is a modern treaty right and an act of Indigenous self-government. Principles of procedural fairness and natural justice do not fetter this decision. Imperial Oil argues that it was not provided with formal notice of SSI's intention to issue the referrals, that it was not provided an opportunity to make formal submissions regarding a potential environmental assessment referral, nor was it provided with an opportunity to provide a response to SSI's decision. However, SSI's referral authority, pursuant to its treaty and to the MVRMA, is subject to no such requirements. Only once SSI exercises its authority do the principles of procedural fairness and natural justice come into question. Imperial Oil is not entitled to procedural rights beforehand.

The Review Board is the assessment body that was developed and established by treaty partners as part of the co-management framework agreed to in the modern treaties. The ability to refer projects to the Review Board is an important treaty principle. Imperial Oil's attempt to utilize procedural fairness and natural justice to constrain referral authority is without merit.

d. The referrals are not duplicative

Tłı̨chǫ Government submits that the referrals are not duplicative of previous proceedings. Whether the referrals are necessary or beneficial is an entirely separate question; the important thing in this case is that SSI, as a modern treaty organization that holds direct referral authority, has decided to exercise its authority.

We note the Memorandum of Understanding between the Review Board and the CER, which promotes effective cooperation and coordination, including timely exchanges of information on projects and proposed developments of mutual interest within the Mackenzie Valley. The CER has paused its process and will resume it following completion of the environmental assessment, which may benefit from work done to date by the CER and SLWB.

The scope and authorities of the Review Board and of Part 5 of the MVRMA are distinct from those of the CER and Sahtu Land and Water Board (SLWB). The intention was never to limit referral authority based on other regulatory processes such as the CER and the land and water boards, and the timing of the referral is irrelevant; direct referrals can happen at any time before the authorization is issued.

Nevertheless, the CER has made clear its awareness of the OA's December 31, 2024 expiry date and "will issue an interim extension of the OA on its own initiative in due course to allow the Norman Wells operations to continue while the Review Board's environmental assessment process unfolds."

2. The treaties are paramount

Tłı̨chǫ Government supports the exercise of SSI's treaty right to refer a project to environmental assessment, which takes precedence over legislation. It strongly encourages the Review Board to respect the treaty and SSI's direct environmental assessment referral authority, notwithstanding anything other than the criteria set out in the treaty. This includes authority over projects that would otherwise be exempt from Part 5 of the MVRMA pursuant to s. 157.1.

3. The Review Board does not have the authority to rule on jurisdictional issues

Referral authority under s. 126(2), considering s. 157.1 of the MVRMA, is ultimately a jurisdictional issue. Tłı̨chǫ Government strongly encourages the Review Board to interpret the s. 157.1 exemption carefully and to avoid narrowly interpreting the scope of the important exceptions to the exemption (i.e., on whether there is a significant alteration to a project), and to interpret them liberally, with deference to Indigenous governments and in keeping with the treaties.

That said, Tłı̨chǫ Government emphasizes that the determination of whether a proposed project has been exempted is made by the referring authority, and the Review Board should defer to that authority. The request for ruling mechanism was set up to clarify procedural and legal matters in the context of environmental assessments and environmental impact review proceedings, as reflected in the Review Board's rules of procedure, not for substantive determinations on matters of jurisdiction or authority under treaties or the MVRMA. The Review Board should be mindful of the scope of its own authority in making its determination.