

Follow-up Meeting with INAC RE: Comments on Draft 2 SLUP

Oct 23, 2009, 1:15 pm – 4 pm

Yellowknife, 9th Flr Boardroom, Bellanca Building

Participants

INAC

Matt Bender (by phone for ~ 20 minutes only)

Marc Lange (for ~ 20 minutes only)

Arthur Boutillier

Greg Yeoman

SLUPB

Stephen Kakfwi, Board Member

Heidi Wiebe, Plan Development Lead

Major Topics

Regulatory Context (p13): INAC comment that the Plan cannot establish new regulatory requirements without amending existing regulations. What does this imply in relation to Conformity Requirements, which identify new requirements that must be met before a land use permit, water licence or other authorization can be approved? Need discussion about the role and authority of the Plan in regulatory regime.

INAC Response: CRs must be consistent with existing laws and regulations. If the Plan provides more stringent requirements that do not conflict, then there is no issue. Suggested the SLUPN make references to existing requirements and how this fits in with those. If you cannot make the link to existing processes, you get further into the grey area where the fit is less clear.

Actions and Recommendations (from p5 section on Legal Issues with GBLWMP): While the comments here are directed at the GBLWMP, they raise concerns for the Board as the same comments could just as easily be made in the future in regards to the SLUP. The comments suggest 2 things:

- 1) that the Plan can only include information or direction related to determining conformity for project-specific reviews (direct linkage to S. 46 and 47 of the MVRMA), and
- 2) where the Plan says others “should” do something or are “urged” to do something, INAC comments say “it is beyond the authority of the Board to compel a First Nation, government or regulatory authority to do these things...”

These statements take a narrow view of what a land use plan may contain and effectively say that Actions and Recommendations are not acceptable in a land use plan. Is this INAC’s position or the result of a legal opinion given without a full understanding of the nature of land use plans? Similar comments

are echoed in p.8 comments on Consultation Actions. The approved Gwich'in Plan contains many Actions, some of which are phrased in mandatory language ("will/shall") with the rest phrased as recommendations ("should").

INAC Response: Government wants to be clear on what they are agreeing to by approving the Plan. GBLWMP was being targeted because there is no structure like CRs, As, and Rs so the variation in language is problematic. The structure used in the SLUP is fine and would not raise these issues.

General discussion about what the Board can compel government to do. The Board's perspective is that it recommends a Plan that includes Actions. Government considers the Plan, including Actions and will not approve something it is not prepared to do. Therefore the Board is not "compelling" the government to do anything. INAC agreed that there are no issues with using Actions and Recommendations but wants to be clear about the level of expectation. Canada's position is to use "reasonable" efforts. Heidi stated that the Gwich'in Plan uses "best efforts".

Grandfathering Existing Rights (p5, Legal Issues): The intent is to allow all existing interests/uses/activities to proceed to development, subject to the terms of the Plan except zoning (full exemption on zoning). The Board could also use its authority to grant exceptions to lift specific terms on a case by case basis where the rights holder can demonstrate that application of the term would prevent them from exercising their rights. This is a key matter for which the Board is seeking legal assistance to draft appropriate wording. INAC can assist in suggesting wording for our consideration to achieve this (legal cooperation).

Scott Duke would be pleased to help the Board with legal drafting. Heidi requested clarification on whether INAC is in agreement with the intent of the wording as described above as a starting point. INAC is willing to explore this area (application of terms to existing rights). More homework is definitely needed. Participants agreed that the lawyers can have an initial discussion and then we can go from there.

INAC comment that the map of existing uses will become out of date quickly. What method was used to identify existing rights at the time of approval of the Gwich'in Plan?

Recommendation that a separate list be developed outside of the plan during the approval stage.

Seismic activity and directional drilling in Conservation Zones (p 2, Zoning # 5): Areas are zoned for conservation because we want to protect the surface values so seismic activity is not appropriate. Directional drilling would require that the subsurface is open to development. If subsurface rights are granted, what protection exists to ensure that the surface is not disturbed, given that subsurface rights come with an automatic right of surface access?

Heidi explained that the common understanding is that subsurface rights come with an automatic right of surface access. From the Board's perspective, if INAC wants the Board to open the subsurface, then it needs to prove to the Board that legally, the surface is fully protected and will not be accessed. INAC will follow-up on this with legal. They suggested this as another area for potential legal collaboration.

GBLWMP: General discussion on INAC's review, upcoming meeting, integration options, next steps (show which parts were incorporated previously and how they evolved for Draft 2).

INAC staff drafted a response for the Regional Director General which is awaiting review and signature and will be coming soon.

They had Scott Duke (legal counsel) look at the GBLWMP. They feel there is some really good information in the GBLWMP, though should not be annexed into the Plan. The challenge is to go through the conditions and prohibitions and decide how that can best be incorporated.

INAC asked if the Board feels it can keep the intent of the terms, change them to be implementable, and still have them be recognizable to Deline? Heidi felt this was possible in some cases, though not in others.

Cumulative Effects: What do you see as appropriate direction for the Plan in relation to cumulative effects? Please provide documents/ references for best practices in cumulative effects that you are referring to. We'd like to initiate an informal working group to collaboratively build cumulative effects management into the land use plan. What type of participation would you envision? What type of information or resources (people, data, meeting support) would you be willing to provide?

Greg asked if we really wanted to tackle cumulative effects. Heidi suggested it is an important issue for a land use plan to address though the Board has no financial resources and limited time to dedicate towards specific workshops or collaborative processes. Greg suggested the Board design things that meet its goals while allowing the intended land use. INAC has agreed to the "Guidance Document" developed with GNWT and others on seismic lines in the NWT. The Parties have not agreed on cumulative effects management practices in the Dehcho. They recommend the Board be very clear on what the issue is, what the goal is, what the solution is and link those very directly. They also suggested the Board talk to industry first.

General Topics

CRs (p4): Direction to the Board to ensure that the CRs do not unnecessarily create overlapping and duplicative processes. Are there specific CRs that are problematic? Similar comments on p 6 to ensure that CRs are consistent with the SDMLCA and MVRMA. Again, please provide examples of which are inconsistent. When providing general comments of this nature, please identify concrete examples to focus our revisions.

No issues right now. It was just a motherhood statement.

MGP (p4): INAC concern about how the plan would affect the pipeline if the plan is approved first, and concern about the lack of a zone for it in the Plan. Does INAC perceive any specific barriers or issues in the Plan that would create problems for the pipeline or related infrastructure? Discussion of Board approach and rationale needed.

Greg identified that it was more an issue that Government wanted to ensure the pipeline was given adequate recognition and was clearly identified on the map, which a specific zone does. Heidi and Stephen pointed out that the proposed pipeline is clearly shown on every map. Greg will check back to see if there was something else they wanted.

(p6): *“Regarding the Mackenzie Gas Pipeline [MGP], it is important that the Board be cognizant of the federal process for responding to the Joint Review Panel Report, anticipated in late 2009. When preparing subsequent drafts of the Land Use Plan, the Board must ensure that the Plan does not conflict with commitments included in the government response.”* How can the Board ensure the Plan does not conflict with a response that does not yet exist? Do you already know what the government response will be?

No, they don't have a response prepared. It is not an issue now. INAC will give us a head's up if there is any conflict in the future as they are preparing their response.

In the Dehcho, they are using “avoid, minimize or mitigate impacts”; they will send other wording on “best technology” used in the Dehcho Plan as well. Greg will get back to us on issues with Clause C for CR 3 re socio-economic benefits.

Little Chicago (p3, Zoning Item 5): Please provide shapefiles for these infrastructure sites so we can overlay them with the zone to have discussions with Fort Good Hope on the subject.

Arthur will follow up to get shapefiles.

General Environmental Considerations (p6): Comment that applying these terms to SMZ, CZ and PCIs only gives the impression they do not apply elsewhere. Please explain.

INAC feels they overlap existing regulatory processes that do those already. Heidi asked for clarification on whether the direction was to delete them or to apply them generally to all zones to be consistent? Arthur will follow up.

Consultation (p.8): Requested to distinguish between S. 35 consultation requirements, MVRMA requirements, SLCA requirements, MVLWB requirements for public engagement, and consultation for reasons of good governance and policy. Why? What will that achieve in relation to the Terms of the Plan that deal with consultation? Has INAC developed internal consultation guidelines that could meet the intent of A#3?

Arthur: It matters because the requirements are all very different. Yes, INAC has developed consultation guidelines (Interim Approach). Arthur will send them. They are also seeking clarification on whether or not the CCU has something useful but it doesn't look like it.

Impact and Benefits Agreements (p8-9): Comments say that these are not required for mining but have written document from Malcolm Robb saying that companies negotiate Impact and Benefits Agreements before a mine can be constructed. Need clarity here.

Heidi stated that she had been given a copy of Malcolm Robb's affidavit on the SSI-INAC litigation that provides a detailed overview of the mineral exploration regime and her information on the requirement for Impact and Benefits Agreements was taken from this. Stephen stated that Ron Irwin, federal minister at the time of approval of the diamond mines, instituted the practice. Heidi sought clarification on whether INAC's issue related to the general description on p. 58 of the Plan or with R#3 on p 95. Arthur will follow-up on this question and an appropriate document to use for background information on the mineral regulatory regime.

Boundary Amendments under SDMCLCA (p11): When will the revisions be complete? Please provide the SLUPB with the most up-to-date GIS files for use in the Plan.

Arthur will follow up on timing of file delivery.

Sahtu Parcels in the Dehcho (p13): INAC request to discuss the Sahtu parcels in the Dehcho. They cannot be subject to the Sahtu Plan as this plan only applies within the SSA. They would be subject to the Dehcho Plan. Is there another possibility we're missing?

No.

Description of INAC (p17): A number of requests for changes are made to this section but not all provide clear direction on acceptable changes. For instance, we are referred to INAC's website for a discussion of mandate, but the mandate section has several pages of information relating to its very broad mandate, some of which has no relevance to land use planning. Request that INAC staff provide acceptable wording for this section as they would like to see it described in the Plan.

Arthur will follow up to get this.

Reports/Info:

- IBP Sites Report
- GIS Files from Land Admin – Surface leases, other “interests” to be considered as existing rights or interests
- Strategies/Plans for infrastructure and transportation development

INAC suggested the Board check with Transport Canada for information and list the things the Plan is trying to do to promote development.

- List of authorization types relevant to land use planning (that the Plan might apply to and/or need to be grandfathered)
- CCU consultation protocols
- GIS Files for Little Chicago infrastructure
- GIS files for Sahtu parcel boundary amendments (prefer to get a whole new complete dataset)
- Revised text of INAC mandate, description
- Traditional Knowledge Policy? None

Arthur following up on the above except where otherwise noted above or earlier under specific discussions.