Northwest Territories Environment and Natural Resources

FEB 25 2011

Ms. Judith Wright-Bird, Chairperson
Sahtu Land Use Planning Board
BOX 235
FORT GOOD HOPE NT X0E 0H0

Dear Ms. Wright-Bird:

Government of the Northwest Territories Critical Issues Associated with Draft 3 of the Sahtu Land Use Plan

The Government of the Northwest Territories (GNWT) appreciates the effort the Sahtu Land Use Planning Board and their staff have made in advancing a land use plan for the Sahtu Region. Since the July 2010 release of draft three of the Sahtu Land Use Plan (SLUP) you have gone to great lengths to ensure that communities, regulators, industry and governments have had adequate opportunity to directly meet with you to clarify the plan's intent and hear comments on the draft. The GNWT has taken advantage of these sharing opportunities to better clarify our interests and relay from our perspective, what direction a final land use plan should convey.

Our detailed comments submitted October 22, 2010 still stand and will need to be addressed by the Board. However, the GNWT would like to highlight two main issues we see as critical to our approving a final SLUP. Two categories of significant issues still remain:

1. Lack of fit with the integrated system of land and water management provided for in the MVRMA; and

2. Effective and efficient implementation of the plan, including Actions and Recommendations and existing uses.

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On the first issue, the plan needs to fully recognize that an approved land use plan is one of many instruments that address conservation and development within the integrated land and water management system set out in the Mackenzie Valley Resource Management Act (MVRMA) that includes: land use planning, regulatory processes, environmental impact assessment, and Northwest Territories (NWT) environmental monitoring and audits.

A regional land use plan should highlight the values of importance to the people of the region (this has been accomplished in Draft 3) and seek to protect those values. However, Draft 3 includes a number of elements that do not recognize the role of the other instruments identified above, particularly within the conformity requirements and Chapter 4. Until such time as a draft plan clearly respects the MVRMA system and wording is sufficiently precise, the GNWT would be unable to approve a SLUP.

Secondly, on the matter of effective and efficient implementation of the plan, the GNWT again must take into account the various instruments that address social, cultural and economic well-being, including conservation and development. As you are aware, the negotiated *Sahtu Dene and Metis Comprehensive Land Claim Agreement (SDMCLCA)*, on which the MVRMA was developed, addresses economic, natural resource and environmental management matters, defining roles and how these will be carried out in an Implementation Plan.

The GNWT has multiple legislation, policy, programs and services that contribute to conservation and resource development which take into account matters referred to in the SDMCLCA, and GNWT fiscal and legislative responsibilities. By making Actions legally binding this would set an unacceptable precedent for other land use plans across the NWT. In general the GNWT does not take issue with the intent of the Actions and Recommendations but there needs to be clear wording in the plan that states both Actions and Recommendations are not legally binding or Actions and Recommendations need to be removed from the plan to correct this problem. Until this issue is addressed the GNWT would be unable to approve a SLUP.

Attached are the two overarching significant issues and specific plan examples that demonstrate our concerns. The attachment provides further clarity around text that would need to be removed or reconstructed to address these problems. It is imperative that any future final plan resolve these issues.

The GNWT looks forward to a public opportunity to discuss our concerns but offers that we are prepared to work with the Board in advance of the Hearing to resolve our outstanding issues. Should you require clarification or would like to arrange a meeting to discuss further, please contact Joel Holder, Lands Manager, Environment and Natural Resources at joel_holder@gov.nt.ca or (867) 920-3485.

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Thank you for your attention in this important matter.

Sincerely,

for Gary A. Bohnet

Attachment (1)

c. The Honourable Floyd K. Roland, Premier
Government of the Northwest Territories

The Honourable Robert R. McLeod
Minister of Industry, Tourism and Investment

The Honourable Peter Kent, P.C., M.P.
Minister of Environment

Ms. Trish Merrithew-Mercredi, Regional Director General
Indian and Northern Affairs (Northwest Territories Region)

As previously identified, the GNWT has two broad issues with Draft 3:

1. Lack of fit with the integrated system of land and water management provided for in the Mackenzie Valley Resource Management Act.
2. Effective and efficient implementation of the Plan, including Actions and Recommendations and existing uses.

With respect to the first of our two issues, it's seen that sections of Draft 3 do not fit within the existing integrated system for one or more of the following four reasons.

1. the Planning Board's activities go beyond the intended mandate in the MVRMA;
2. The plan fetters the Sahtu Land and Water Board's ability to prescribe conditions on applications by being too prescriptive in the Conformity Requirements;
3. Some text is worded to address gaps in the regulatory process that would be better corrected by government through new or amended legislation; and
4. That the draft complicates planning by duplicating already existing processes and requirements.

The next few pages support the Government of the Northwest Territories (GNWT) position concerning issue #1.

CR #2 - Community Engagement and Traditional Knowledge

p. 47 – (1) *"Regulators shall ensure that relevant community organizations (land corporation(s), first nation and/or community council, renewable resources council) and potentially affected community members have had the opportunity to meet with the applicant in person".*

Problem:

4. The draft complicates planning by duplicating already existing processes and requirements.

Rationale:

In accordance with 25.2 of the Sahtu Dene and Métis Comprehensive Land Claim (SDMCLCA) Agreement communities and Designated Sahtu Organization (DSO) shall be directly involved in the land use planning process. There is no requirement for their involvement in the review, approval or monitoring of each and every land use activity proposed once the plan is approved and implemented.

In each case it would be subjective to determine the "relevant" organizations; the bracketed list appears to be examples. "Ensure" could be construed to mean that the regulator is obliged to set up meetings or the intent could be for the regulator to monitor whether the applicant has done so. If it does imply that the regulator is the one that must set up opportunity for industry to meet, this goes beyond legislation and takes a developer responsibility promoted currently by boards away.

Proponents undertake consultation and engagement activities with communities in a manner they deem appropriate according to factors such as project size, scale and location. Conformity assessment would be difficult.

Currently, the Sahtu Land and Water Board requires that a proponent engage in community consultations early in the development process and that the proponent provide the land and water board supporting evidence of their consultations or attempts to consult.

If the GNWT were to be the applicant, it would have it's own obligations for engaging Aboriginal groups. Government has the responsibility for consultation under section 35(1) of the *Constitution Act*, 1982. Government currently makes a determination on the level of consultation required, who is to be consulted, how the consultation will be undertaken and when best to consult. CR#2 removes the duty to consult from the regulator and places it on the applicant and requires a duty to accommodate not only of the concerns of groups, but individuals as well. This far exceeds the well established legal principles of the duty to consult.

Finally, while the *NWT Tourism Act* requires full consultation on all new applications, it further provides for a system of automatic annual licence renewal where there has been no significant change to the activities of a tourism business. CR#2 as written would require tourism operations to undergo lengthy and possibly expensive consultation annually, even where there has been no change in operation.

Suggested Revision:
This Conformity Requirement should be removed given current engagement and consultation requirements in the SDMCLCA, legislation and case law.

CR #3 – Community Benefits

p. 48 - *"Regulators shall ensure that communities will benefit from proposed land use".*

Problem:

1. the Planning Board's activities go beyond the intended mandate in the MVRMA,

3. Some text is worded to address gaps in the regulatory process that would be better corrected by government through new or amended legislation.

4. The draft complicates planning by duplicating already existing processes and requirements.

Rationale:
Community "benefit" is ambiguous and subjective. What is the community? How does a regulator measure whether a community benefits? What should (or can) a regulator do if it concludes a community will not benefit?

For those permits where it is legally necessary, the Sahtu Land and Water Board's responsibility is only to ensure that an access and benefits plan is obtained. It is not within the SLWB's authority to measure the content or effectiveness of those plans. This would require amending the SLWB's authority as described under the MVRMA.

Sub-section 35 (a) of the MVRMA states as a principle that a land use plan promote the social, cultural and economic well-being of residents; thus this CR is redundant and speaks to the nature of a land use plan itself to a certain degree. Such matters as discernible "benefits" are typically addressed legislation such as COGOA or adjunct agreements stemming from the environmental assessment process. It would be extremely difficult to assess conformity with this condition.

In accordance with 22.2.1 of the SDMCLCA, any person who proposes to explore for, develop or produce oil and gas on Sahtu lands shall submit a benefits plan to the INAC Minister that contains provisions that ensure access to training and employment opportunities and to facilitate participation by Sahtu communities in the supply of goods and services.

Suggested Solution:
The GNWT suggests that this Conformity Requirement be removed and that the current system for requiring benefit plans is sufficient.

CR #4 – Archaeological Sites, Historical Sites and Burial Sites

p. 49 - *"A land use activity shall not take place within 500 m of suspected or known burial sites, historical sites or archaeological sites."*

Problem:
2. The plan fetters the Sahtu Land and Water Board's ability to prescribe conditions on applications by being too prescriptive in the Conformity Requirements

3. Some text is worded to address gaps in the regulatory process that would be better corrected by government through new or amended legislation

Rationale:
Under Prohibitions, the *Mackenzie Valley Land Use Regulations* state:

> 6. Unless expressly authorized by a permit or in writing by an inspector, no permittee shall
>
> (a) conduct a land use operation within 30 m of a known monument or a known or suspected historical, archaeological site or burial ground;

This statement provides the flexibility to consider alternate approaches to archaeological site management in specific cases, i.e. a land use activity may be able to proceed nearer than 150 m to an archaeological site if appropriate mitigation measures are used.

At present, the SLWB requires a 150 m buffer to facilitate the protection of suspected or known archaeological, historical and burial sites. The GNWT considers this buffer adequate during land use activities but to require that a 500 m setback be required in all instances across the entire Sahtu is unacceptable.

If it is concluded that a problem with the current protection for sites, it is best that this is corrected through amendments to the existing land use regulations.

Suggested Solution:
Revise wording to goal-base statement noting that all of these sites should be preserved; or an objective-based statement noting that land use activities should not encroach upon archaeological sites and burial sites, subject to existing legislation.

Possible rewording could read, "under certain circumstances, it may be determined that certain archaeological, historical or burial sites require a setback greater than 30 m" but it's thought the existing land use regulations already make this possible.

CR#10 - Incidental Harvest

p. 58 – *"Where a proposed land use activity involves the incidental harvest or removal of resources that will not be fully used by the applicant, the remaining usable resources shall be distributed to local communities wherever reasonably feasible."*

Problem:
2. The plan fetters the regulator's ability to prescribe conditions on applications by being too prescriptive in the Conformity Requirements

Rationale:
In GNWT's view this CR does not speak to a land use, but goes beyond the intent of a land use plan and speaks to the disposition of natural resources associated with land use.

Forest management and conditions for Timber Cutting Licences and Permits falls squarely within the mandate of the GNWT, Department of Environment and Natural Resources. Forest Management Division. Timber operations are required to follow all applicable federal and territorial legislation including the *Forest Management Act* and *Forest Management Regulations.*

Operators wishing to harvest timber commercially in the Northwest Territories must apply to obtain an authorization to harvest timber from ENR. Also, the Land Use Permit holder does not have the authority to transport the timber unless they obtain an authorization from ENR, Forest Management, to do so.

Suggested Solution:
This CR should be removed. The CR is too prescriptive and binds ENR in the issuance of Timber Cutting Licenses or Timber Cutting Permits. The current *Forest Management Act* and regulations provide sufficient direction.

CR #13 - Closure and Reclamation

Pg. 64 - (1) *"Financial security shall be posted and maintained with the Minister of Indian and Northern Affairs Canada for any land use activity that is not carried out by a local government or the territorial or federal government, in an amount sufficient to cover the full cost of reclamation and post-closure activities, where the amount calculated exceeds $50,000."*

Problem:
2. The plan fetters the Sahtu Land and Water Board's ability to prescribe conditions on applications by being too prescriptive in the Conformity Requirements.

4. The draft complicates planning by duplicating already existing processes and requirements.

Rationale:
Various statutes, including the MVRMA, set out requirements for deposit of financial security in association with land uses. In particular, section 71 of the MVRMA provides discretion to a land and water board on the collection of security. The proposed CR would eliminate that discretion above a certain threshold ($50,000), a matter left to the discretion of the Land and Water boards.

Suggested Solution:
Securities are matters addressed through other elements in the integrated system of land and water management, hence should not be addressed in the land use plan. Suggest removal.

Chapter 6 – Issues, Actions and Recommendations
The GNWT's second broad issue relates to Chapter 6 and the intent of Actions and Recommendations in Draft 3.

p. 263 -"*Actions are plan requirements that are to be implemented outside of the regulatory process. That is, they do not affect or relate to individual applications, though many support the regulatory process through the provision of new information or guidelines.*

Recommendations are advisory in nature. They are intended to inform users and decision-makers about community expectations, and suggest various means to advance the goals and objectives of the plan. They are not mandatory requirements."

Problem:
It is not appropriate for the GNWT to be legally bound by Actions and Recommendations.

Rationale:
In Section 46 establishes a legal requirement for the territorial government to "carry out [its] powers in accordance with the land use plan". Potentially everything contained in the Plan could be construed as a legal requirement.

Recommendations are described as being advisory in nature. However, as they form part of the SLUP and the SLUP in its entirety at this time would be legally binding. Thus, it could be argued, making recommend ations legally binding.

As worded, some Actions have unclear expectations on the GNWT as to funding and staffing commitments and would place unreal expectations on communities. The workload associated with some Actions and the prescribed timeline for satisfying the Actions are unrealistic.

Suggested Solution:
The GNWT submits that they will make reasonable efforts to fulfil Actions and Recommendations but would like to see that the Actions and Recommendations be removed from the plan and be incorporated into a separate Implementation Plan that will be produced at a later date. Until this issue is addressed the GNWT would be unable to approve a SLUP.

OTHER CONCERNS

<u>Archaeological and Tourism Authorizations</u>

p. 35 – *"All applications for the use of land (which includes water and other resources) must conform to all the Conformity Requirements applicable to the zone(s) in which the activity takes place."*

p. 54, CR #7 – Wildlife
(1) *"A land use activity shall be designed and carried out based on the most current wildlife information for species of concern (specific locations, sensitive periods, etc.) as obtained from ENR, CWS, DFO, the SRRB and local renewable resources councils (RRC's), including but not limited to..."*

p. 59, CR #11 – Species Introduction
"A land use activity shall not result in the introduction of non-native plant and animal species, or of domestic animal species or subspecies, except by special approval by ENR."

p. 59, CR #12 – Ecologically Significant Areas
(1) *"A land use activity shall be designed and carried out based on the most current information on the location of rare and may-be-at-risk plants, hot and warm springs, mineral licks and amphibian sightings as obtained from ENR, and in a manner that mitigates impacts to these features."*

Pg. 64, CR #13(1) *"Financial security shall be posted and maintained with the Minister of Indian and Northern Affairs Canada for any land use activity that is not carried out by a local government or the territorial or federal government, in an amount sufficient to cover the full cost of reclamation and post-closure activities, where the amount calculated exceeds $50,000."*

Problem:
All activities that require an authorization, permit or license need to conform to the land use plan. This includes archaeological authorizations issued by the Prince of Wales Northern Heritage Centre and all authorizations for tourism activities that the GNWT, Department of Industry Tourism and Investment (ITI) issues.

Rationale:
The GNWT sees the plan Conformity Requirements as being too onerous for tourism authorizations and archaeological authorizations which have little if any impacts. The plan is to create efficiencies in the existing integrated system; the plan is creating an unwarranted workload and possible delays in approval processes by having minor authorizations that have no significant result comply with the plan.

These CR's create a duty to consult with ENR and a number of other organizations on every potential tourism authorization. The current Tourism Act provides that ITI may consult such groups if necessary. Requiring consultation in every instance may be unnecessary and add needless delays and red-tape to the licensing process.

CR #13 would require every tourism operator to post security with the Minister of INAC. This would significantly impact and could effectively end all tourism operations in the Sahtu as these businesses are small scale and generally individually owned.

Suggested Solution:
For archaeological authorizations and tourism authorizations consultations should be on an "as needed" basis. Not required.

The GNWT would like to see that tourism and archaeological authorizations be exempted by the plan given the low level impacts these activities might have in the Sahtu.

Dual Designation

p. 22 – *"Where a sponsor of a protected area does not feel they have sufficient authority to manage the site in accordance with the goals of the protected area, the sponsoring area may request that the plan maintain the area as a conservation zone, in addition to its protected area status."*

Problem:
The GNWT is not supportive of protected areas receiving dual designation as both a protected area and as a Conservation Zone in the land use plan.

Rationale:
Early on in the PAS process the community and the sponsoring agency determine which tool will effectively manage the area in accordance with the community's wishes. The working group Recommendation Report for the protected area gives the direction to sponsors and regulators alike for management. The time to determine sufficient authority to manage land use is when selecting the protective tool for establishment.

The legislation chosen to protect areas should be chosen based on the authority of the legislation and its ability to satisfy community and sponsor needs for the proposed area. The selected legislation needs to protect the values the area is being established for. If the legislation cannot protect the values of the area then a different legislative authority should be pursued.

GNWT's position on dual designation is the same for the Sahtu plan as we have stated for the Dehcho Land Use Plan.

Suggested Solution:
The identified text on page 22 should be removed. The Planning Board should respect the decision of the PAS process and amend the zoning to reflect the identified final boundary. Those lands originally within the Area of Interest that is not included within the final PAS boundary should be rezoned to General Use or Special Management Zones.

Conformity of Pre-authorized Uses after Plan Approval

Pg. 23, 2.3.1 – *"Accordingly, a land use that has been authorized when the plan is approved may be undertaken or continued despite any nonconformity with the plan until the authorization or disposition on which it depends expires or becomes eligible for renewal or amendment. From that date forward the plan applies to the use, unless the use qualifies for an exemption."*

Pg. 23, 2.3.2 "*It is fair that the plan allow a previously authorized land use to proceed where a zone established by the plan would prohibit the use otherwise. It is also fair, however, to expect the manner of carrying out such existing uses to be upgraded in the process of renewing and amending authorizations, so that all activities contribute to achieving the plan's vision and goals for the region and operate under similar rules.*"

Problem:
It is unacceptable that once a final plan is approved previously authorized land use is expected to upgrade their activities in the process of renewing and amending authorizations.

Rationale:
Section 2.3.1 of the plan states the MVRMA and SDMCLCA *"do not give land use plans retroactive effect."* Section 2.3.2 outlines the existing uses that are grandfathered under the final plan and are *"allowed to proceed where a zone established by the Plan would prohibit the use otherwise".*

However, the exemption specified only covers CR #1- Land Use Zoning. Thus, the intent of the exemption is to allow the development to continue so long as it can meet all other conformity requirements should the developer request an extension or renewal. This requirement will significantly change the operating environment under which a developer has agreed to work and may make certain projects unfeasible and/or unfinanceable. Requiring a developer to alter their program to the extent outlined in the LUP's conformity requirements essentially forces them to work under a new set of rules which diminishes the intent of exemptions.

In effect this would amount to an amendment of Section 2, Part 1, paragraph 2 of the Exemption List Regulations, at least in the SSR. The passage in the Regulations explicitly exempts such projects from requiring even a Preliminary Screening:

"A development, or a part thereof, for which renewal of a permit, licence, or authorization is requested that (a) has not been modified; and (b) has fulfilled the requirements of the environmental assessment process established by the Mackenzie Valley Resource Management Act, the Canadian Environmental Assessment Act or the Environmental Assessment Review Process Guidelines Order...by reason that their impact on the environment of the Mackenzie Valley is insignificant".

Suggested Solution:
After a final plan is approved, exempted authorized activities should be permitted to continue to operate as previously approved even when applying for renewal or amendments of permits and authorizations. Exemptions under the Plan need to extend for all conformity requirements and renewals and extensions should also be exempt from all conformity requirements.

Progressive Reclamation

Pg. 64 - (1) *"Financial security shall be posted and maintained with the Minister of Indian and Northern Affairs Canada for any land use activity that is not carried out by a local government or the territorial or federal government, in an amount sufficient to cover the full cost of reclamation and post-closure activities, where the amount calculated exceeds $50,000."*

Problem:
For other regulatory approvals, the GNWT would like to see Progressive Reclamation more prevalent in the document and speak to the ability to reduce security deposits if progressive reclamation is done.

Rationale:
Developers should be credited for approved progressive reclamation, and the value of financial security required should be adjusted in a timely fashion.

Suggested Solution:
In the Content and Rationale section please add the following text. *"Progressive reclamation includes actions that can and should be taken during mining and mineral exploration operations before permanent closure (to take advantage of cost and operating efficiencies by using the resources available from project operations), to reduce the overall reclamation costs, and shorten the time for achieving reclamation objectives, while providing valuable experience on the effectiveness of certain measures which might be implemented during permanent closure. Progressive reclamation enhances environmental protection, minimizes the duration of environmental exposure, shortens the timeframe for achieving the reclamation goal and objectives, and reduces the financial security requirement. Any progressive reclamation should be an outgrowth of the overall stated closure objectives."*