



# Sahtu Land Use Planning Board

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May 2, 2014

Mr. Willard Hagen, Chair and CEO  
Mackenzie Valley Land and Water Board  
PO Box 2130  
Yellowknife, NT  
X1A 2P6

Delivered Electronically

**RE: Conformity Determination to the Sahtu Land Use Plan  
Mackenzie Valley Fibre Optic Link Project**

Dear Mr. Hagen:

On March 26, 2014 the Mackenzie Valley Land and Water Board (MVLWB) referred to the Sahtu Land Use Planning Board ("SLUPB" or the "Board") the applications from the Government of the Northwest Territories - Department of Finance ("GNWT") for a Land Use Permit MV2014X0009 and a Water Licence MV2014L1-0003 for the Mackenzie Valley Fibre Optic Link Project (the "Project") for a conformity determination pursuant to Section 47(1)(a) of the Mackenzie Valley Resources Management Act and the Sahtu Land Use Plan ("SLUP").

The SLUPB provided notice of the conformity determination to the Government of the Northwest Territories- Environment and Natural Resources, Aboriginal Affairs and Northern Development Canada, the Sahtu Secretariat Incorporated, the Mackenzie Valley Land and Water Board and the public. Having reviewed and fully considered all materials and public comments submitted to the Board in the course of the conformity determination, the SLUPB decided at a special April 28, 2014 meeting that the Project as presented does not conform to the SLUP.

Reasons for the decision are attached. Any questions regarding the decision or the conformity determination process should be directed to Scott Paszkiewicz, Executive Director at [exec\\_director@sahtulanduseplan.org](mailto:exec_director@sahtulanduseplan.org) or 867-598-2055.

Regards,

Heather Bourassa, Chair  
Sahtu Land Use Planning Board

Attached: Reasons for Decision

CC: Distribution List



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## **REASONS FOR DECISION**

### **Mackenzie Valley Fibre Optic Link Project**

#### Procedure for Determining Conformity

On March 26, 2014 the Mackenzie Valley Land and Water Board (MVLWB) referred to the Sahtu Land Use Planning Board ("SLUPB" or the "Board") the applications from the Government of the Northwest Territories - Department of Finance ("GNWT" or the "proponent") for a Land Use Permit MV2014X0009 and a Water Licence MV2014L1-0003 for the Mackenzie Valley Fibre Optic Link Project (the "Project") for a conformity determination pursuant to Section 47(1)(a) of the Mackenzie Valley Resources Management Act and the Sahtu Land Use Plan ("SLUP").

On April 1, 2014 the SLUPB issued a Notice of Conformity Determination to the Government of the Northwest Territories-Environment and Natural Resources, Aboriginal Affairs and Northern Development Canada, the Sahtu Secretariat Incorporated ("SSI"), the MVLWB, and Sahtu Community Organizations. The Notice set out the procedure to request information from the proponent and allowed for public comments and an opportunity for the GNWT to respond to any comments from the public.

The SLUPB issued information requests to the GNWT on April 9, 2014. The GNWT provided its responses on April 15, 2014. The SSI submitted a letter of comment on April 15, 2014. The GNWT addressed the SSI letter in an email on April 28, 2014.

On April 28, 2014, the Board held a special meeting and, based on careful consideration of all materials submitted to the Board, reached its decision regarding the Project as presented to the Board as of April 28, 2014.

#### Information provided to the SLUPB for the Conformity Determination

Based on the information presented by the GNWT and SSI, the SLUPB understands that:

- There are on-going or proposed activities to collect information to support detailed design and construction planning. These include: Archaeological Impact Assessment, bathymetry of potential water sources, grizzly bear den surveys, and nest surveys.
- Traditional Knowledge for the Project is based on 2011 Project Description Reports for the Mackenzie Valley Highway Extension Project. Traditional Knowledge studies engaging local Renewable Resource Councils in affected communities were not conducted specifically for this project.
- The proponent is actively negotiating benefits agreements. No benefits agreements have been signed to date.



- The Spill Contingency Plan, the Waste Management Plan, and the Environmental Protection Plan that were submitted remain in draft form, and a Wildlife and Wildlife Habitat Protection Plan is underway but is not completed at this time.

#### Areas of non-conformity with the SLUP

Having carefully considered all of the materials received by the Board, there are two Conformity Requirements (CRs) the Board deems to be non-conforming. They are CR #2- Community Engagement and Traditional Knowledge, and CR #4- Archaeological Sites and Burial Sites. These reasons address each in turn.

#### *CR #2- Community Engagement and Traditional Knowledge*

- 1) *For all land use activities, community organizations and potential affected community members must be adequately engaged with respect to:*
  - a. *The proposed activities*
  - b. *Specific locations and issues of concern, including important heritage resources, and*
  - c. *Traditional knowledge that is relevant to the location, scope and nature of the proposed activities*
- 2) *The proposed activities must be designed and carried out with due regard for community concerns, and incorporate relevant traditional knowledge.*

In considering whether an activity conforms with CR #2, the Board is guided by the interpretation of “adequately engaged” and “due regard” that is set out in the SLUP:

“Due regard” implies careful consideration, not automatic compliance with community requests. Applicants are expected to exercise reasonable judgment. If community concerns cannot be addressed (e.g. conflict with physical constraints or conflicting direction from community organizations and other bodies), then a clear explanation and rationale should be provided. The Board encourages the applicant to raise any constraints with the communities directly to jointly identify solutions. The Board gives equal consideration to relevant community traditional knowledge and modern science and expects applicants to do the same.<sup>1</sup>

“Adequately engaged” requires communication between the applicant and organizations within affected communities to determine what level and nature of engagement is appropriate for the proposed land use activity. It reflects that it is not always the scale of activity, but location or potential for impacts that is the source of concern. It also allows the flexibility to determine that further engagement is not required in situations where an activity is being extended or renewed with no change, or where minor amendments may trigger further engagement requirements that are not warranted or desired. Similarly, “adequate” provides flexibility for the applicant to work with the community to determine what TK might be needed for the proposed activity.<sup>2</sup>

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<sup>1</sup> SLUP, approved on August 8, 2013 at page 36

<sup>2</sup> *ibid*



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Information provided by the GNWT to meet CR #2 included records of public meetings and references to Project Description Reports for the Mackenzie Valley Highway Extension and proposals for future engagement. These materials show that the GNWT engaged community organizations and considered Traditional Knowledge at a time when the route selection for the Project had not taken place. The SLUP is clear that adequate engagement with community organizations and Traditional Knowledge under CR #2 relates, at least in part, to engagement regarding specific locations that may be impacted by a land use activity. In the absence of route finalization, the community engagement and incorporation of Traditional Knowledge described by the GNWT does not have the specificity contemplated in CR #2. For example, absent route selection, the Board cannot determine that the GNWT has given due regard to relevant Traditional Knowledge, as there may be specific Traditional Knowledge identified once the project route is presented to community organizations.

While the Board acknowledges that the GNWT has proposed to hold meetings with community organizations in the future, the Board is unable to determine based on the materials before it that the GNWT's proposal can bring the project into conformity with CR #2. The GNWT has not provided any information to demonstrate that community organizations were involved in the development of the GNWT's approach for engaging Traditional Knowledge or are supportive of the GNWT's proposal to elicit Traditional Knowledge through meetings in the future rather than through a structured Traditional Knowledge gathering and incorporation process.

Due regard for Traditional Knowledge requires that developers engage communities and collect Traditional Knowledge specific to the development activity at issue and at every stage of that activity. The GNWT has acknowledged that it has not collected Traditional Knowledge specific to this project.<sup>3</sup> The Traditional Knowledge relied upon by the GNWT for this project is based on 2011 Project Description Reports for the Mackenzie Valley Highway Extension Project.<sup>4</sup> While the Mackenzie Valley Highway Extension Project references a fibre optic cable in relation to an infrastructure corridor, it is the Board's opinion that these are two separate projects. In this circumstance, the Board requires information demonstrating that community organizations are satisfied with the GNWT's reliance on older, non-project specific Traditional Knowledge or that community organizations have agreed that the collection of project-specific Traditional Knowledge is not necessary. The GNWT has not provided such information or any project-specific Traditional Knowledge reports guided by Renewable Resources Councils.

During the public comment period, the SSI raised a concern that there has been inadequate consultation with communities. In the absence of additional details from the SSI, it is the Board's opinion that the SSI letter is not determinative with respect to the GNWT's compliance with CR #2; however the letter is consistent with the lack of information demonstrating community support for the GNWT's approach to Traditional Knowledge. A primary purpose of the SLUP is to move from engagement towards collaboration and accommodation. Where concerns are raised by community organizations regarding the approach or regard to Traditional Knowledge by a proponent, proponents must work with communities directly to jointly identify solutions to ensure compliance with CR #2. Here, the Board is not satisfied that the GNWT has taken such steps to ensure due regard for Traditional Knowledge.

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<sup>3</sup> April 14, 2014 Information Request response from the GNWT

<sup>4</sup> *ibid*



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The Board notes that the GNWT stated in its responses to the Board's April 9, 2014 information request, that the GNWT is coordinating its approach to the Mackenzie Valley Highway Extension Project and this Project. As the GNWT referred to the process for that project in the course of this conformity determination, the Board reviewed the Mackenzie Valley Highway Project Description Reports (PDR's) and the terms of reference for the environmental assessment. While not determinative of the Board's determination in this proceeding, the Board observes that the Developers Assessment Report for the environmental assessment requires incorporation of additional traditional knowledge, community engagement, and conformity to land use plans. The Board is also concerned that the information included in the Mackenzie Valley Highway PDR's is currently being used for an environmental assessment and has not yet been deemed adequate to the Board's knowledge by any regulatory authority.

In sum, based on the review of the information provided to the Board, which includes consideration of the outstanding actions proposed by the GNWT to finalize route selection, the Board has determined that the GNWT has not demonstrated that it has "adequately engaged" or given "due regard" to Traditional Knowledge.

*CR #4- Archaeological Sites and Burial Sites*

- 1) *Land use activities must not be located within 500m of known or suspected burial sites, or within 150m of known or suspected archaeological sites, unless measures are developed in cooperation with the Prince of Wales Northern Heritage Centre, affected communities, or in the case of burial sites, with affected families where possible, to fully mitigate all impacts to the site.*
- 2) *In areas where there is a high risk of impact to known or suspected archaeological sites, as determined by the PWNHC, an Archaeological impact assessment must be conducted prior to commencement of the land use activity.*

CR #4 is engaged because there are known archeological sites<sup>5</sup> within the project area and additional sites may be identified through compliance with CR #2.

As the project has been presented to the Board, an Archeological Impact Assessment is proposed, but has not been completed. The project will not conform with CR #4 until the final route for the project has been selected and measures are developed in cooperation with the Prince of Wales Northern Heritage Centre (the "PWNHC"), affected communities, and families in the case of burial sites that are consistent with CR #4.

In light of the Board's concerns regarding the GNWT's non-compliance with CR #2, the Board is not prepared to determine that the project complies with CR #4 solely on the basis of the GNWT's undertaking to conduct an Archeological Impact Assessment with the involvement of the PWNHC. In the Board's view, such an approach in the circumstances would be inconsistent with at least two of the goals of the SLUP, in particular the goals of maintaining or enhancing the cultural integrity of the Sahtu Settlement Area and increasing community capacity and decision-making authority in land and resource management.<sup>6</sup> The Board reiterates that the proponent is expected to engage communities and collect Traditional Knowledge to identify additional

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<sup>5</sup> Mackenzie Valley Fibre Optic Link Project Description Report Section 4.9.5 and Table 4-40.

<sup>6</sup> SLUP pages 13-14, s.1.5.2.2 and 1.5.2.3



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unknown sites that may be in the project area as required by CR #2 and to adequately engage communities respecting any activities relating to CR #4.

Lack of information to determine conformity with additional Conformity Requirements

The Board finds that there are instances where the proponent has not provided sufficient information to allow the Board to determine conformity with other CRs. While the Board's conformity determination is based on non-compliance with CRs #2 and #4, the Board provides the following comments to the proponent respecting other CRs with a view to providing guidance to assist the proponent should the proponent wish to file a new application.

The Board notes that, when the SLUP is read in its entirety and in light of the purposes and goals of the SLUP, it is clear that CR #2 guides the interpretation of other CRs. Accordingly, the lack of compliance with CR #2 prevents the Board from being able to determine compliance with CR #3 Community Benefits, CR #5 Watershed Management, CR #7 Fish and Wildlife, CR #9 Sensitive Species and Features, CR #11 Project-Specific Monitoring, and CR #14 Protection of Special Values.

*CR #3- Community Benefits*

*All Applications for land use must demonstrate how residents and communities will benefit from the proposed land use. In the absence of any definable benefits to residents or communities, benefits to the broader public interest will be considered.*

The GNWT's position, as understood by the Board, is that the project will provide "broader public interests" by improving government services and support future economic development.

While the Board does not comment on that position at this time given that the Board has already determined that the project as presented does not conform to CR #2 and #4, the Board notes that the intent and priority of CR #3 relates foremost to benefits specific to residents and communities. The issue of conformity with CR #3 was raised by SSI. The Board would have appreciated a more detailed description of the concerns that SSI has. While benefits to the broader public may be considered as part of a conformity determination for CR #3, proponents must first demonstrate how residents and communities will benefit from the proposed land use. To satisfy this aspect of CR #3, proponents must demonstrate that they have taken steps to identify community-specific benefits and to work with communities to maximize those benefits. This should occur before a proponent focuses on the broader public interest. Only in the demonstrated absence of "definable benefits" to communities will the Board base its assessment on broader public interests.

The evidence before the Board shows that issues regarding community benefits were raised during Sahtu community consultation sessions and that negotiations are ongoing in one community only. It is the Board's understanding from the GNWT's April 28, 2014 email and earlier IR responses that at this time the GNWT has provided no evidence of signed benefits agreements with affected communities. While the GNWT's email of April 28, 2014 suggests that the GNWT will continue to work with communities, the GNWT is advised to work through these issues prior to filing an application that focuses on the broader public interest. In the Board's opinion, it would be inconsistent with the wording and intent of CR #3 to focus on the





broader public interest as a basis for conformity with the SLUP prior to allowing discussions regarding community benefits to take their course.

Benefit agreements are distinct and separate from what are commonly called access agreements. Access agreements deal with terms and conditions under which a developer may enter on to and work on lands owned by the District Corporations. Benefit agreements typically have a broader scope and cover a range of issues beyond access.

If the proponent decides to submit a new application, the application should contain evidence of signed benefits agreements or a record demonstrating that good faith attempts have been carried out to define benefits to the communities before the proponent asks the Board to consider broader public interests. The proponent should also bear in mind that the definition of "community organizations" that is used in the SLUP includes "district and community land corporations, the local first nation and/or community council, and the renewable resources council, or any successor organization to any of these organizations."

*CR #14- Protection of Special Values*

*Any land use activity proposed within a Special Management Zone, Conservation Zone or Proposed Conservation Initiative must be designed and carried out in a manner that protects, respect or takes into account the value of the zone as directed in the Plan's Zone Descriptions.*

As described and mapped, the preferred alignment and associated project activities are not prohibited by CR #1 (Land Use Zoning). However at this time in the absence of final route selection, Traditional Knowledge studies (CR #2) and proposed field studies there is insufficient information to determine the impacts to Special Values described for each zone.

Conclusion and Recommendations

After reviewing the material presented during the conformity determination process and considering the activities as proposed, the Board has determined that the project as presented by the GNWT is not in accordance with CRs #2 and #4 and that there is insufficient detail available to make a positive conformity determination at this time.

The Board has made its determination based on the project as presented. This decision does not preclude the proponent from filing a new application with new information, which will be considered a new activity. It is possible that an application based on the conclusion of certain proposed studies and route investigation, records of further community engagement to incorporate Traditional Knowledge into the project, and further details and/or agreements respecting the benefits to "community organizations", could conform to the SLUP.

Dated in Fort Good Hope, Northwest Territories, on May 2, 2014.

SAHTU LAND USE PLANNING BOARD

A handwritten signature in black ink that reads "Heather Bourassa".

Heather Bourassa, Chair  
Sahtu Land Use Planning Board



**Distribution List**

<b>Name/Position</b>	<b>Organization</b>
<b>Sandy Kalgutkar</b>	Department of Finance Government of the Northwest Territories (Proponent)
<b>Sean Craig</b>	Department of Finance Government of the Northwest Territories
<b>Nick Lawson</b>	Stantec Consulting Ltd.
<b>Ethel Blondin-Andrew, Chair</b>	The Sahtu Secretariat Incorporated
<b>Ernie Campbell, DM</b>	Environment and Natural Resources Government of the Northwest Territories
<b>Kathryne Bruce, RDG</b>	Aboriginal Affairs and Northern Development Canada
<b>Zabey Nevitt- ED</b>	Mackenzie Valley Land and Water Board
<b>Tyree Mullaney</b>	Mackenzie Valley Land and Water Board
<b>David Little- ED</b>	The Sahtu Secretariat Incorporated
<b>Ray Case</b>	Assistant Deputy Minister ENR, GNWT
<b>Terry Hall</b>	Departmental Devolution Lead – Lands, GNWT
<b>Katherine Conrad</b>	Environment and Renewable Resource Directorate, AANDC
<b>Paul Dixon- ED</b>	Sahtu Land and Water Board
<b>Sue Mckenzie- ED</b>	Gwich'in Land Use Planning Board
<b>Deborah Simmons- ED</b>	Sahtu Renewable Resource Board
<b>Judith Wright – ED</b>	Tulita Land Corporation
<b>Clarence Campbell – President</b>	Tulita Land Corporation
<b>Louise Reindeer – ED</b>	Tulita District Land Corporation
<b>Todd McCauley – President</b>	Tulita District Land Corporation
<b>President/Assistant</b>	Tulita RRC
<b>Eddy McPherson Junior - President</b>	Fort Norman Metis Land Corporation
<b>Carl Yakeleya - ED</b>	Fort Norman Metis Land Corporation
<b>Danny Yakeleya Mayor</b>	Hamlet of Tulita
<b>Chris Chai - SAO</b>	Hamlet of Tulita
<b>Frank Andrew- Chief</b>	Tulita Dene Band
<b>Reception</b>	Norman Wells Land Corp
<b>Paul Tan- ED</b>	Norman Wells Land Corp
<b>Cece McCauley - President</b>	Norman Wells Land Corp
<b>Norman Hodgson Senior - President</b>	Norman Wells RRC
<b>Town Manager</b>	Norman Wells
<b>Edwin Erutse- President</b>	Yamoga Land Corporation
<b>Jacinta Grandjambe</b>	Yamoga Land Corporation
<b>Winston McNeely - President</b>	FGH Metis Nation Land Corporation





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<b>Rodger Boniface – President</b>	FGH RRC
<b>Sarena Kaskamin</b>	FGH RRC
<b>Receptionist</b>	Kasho Gotine Community – FGH
<b>SAO</b>	Kasho Gotine Community – FGH
<b>Greg Laboucan- Chief</b>	Kasho Gotine Community – FGH
<b>Gina Dolphus- President</b>	Deline Land Corporation
<b>Trevor Taylor- Manager</b>	Deline RRC
<b>Assistant</b>	Deline RRC
<b>Leonard Kenny- Chief</b>	Deline
<b>SAO</b>	Deline
<b>Colville Lake</b>	Behdzi Ahda First Nation Ayoni Keh Land Corp