



CITY OF YELLOWKNIFE

March 23, 2020

VIA ELECTRONIC MAIL to smontgomery@mvlwb.com

Shelagh Montgomery, Executive Director
Mackenzie Valley Land and Water Board
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Dear Ms. Montgomery:

RE: City of Yellowknife Closing Statement – Giant Mine Water Licence and Land Use Permit Review (Files MV2007L8-0031 and MV2019X0019)

Introduction

The City of Yellowknife is pleased to provide our closing statement for the Department of Indian and Northern Affairs Giant Mine reclamation project (MV2019X0007 and MV2007L8-0041).

As stated at the hearing, the City generally supports the project, but believes small changes (Recommendations 1, 2, 8, 9, 10, 12) will provide for a better informed community with greater confidence, while two structural changes (Recommendation 4 and 15) will result in a better project which has a lower administrative and review burden. Lastly, a final change in approach will ensure continued community confidence and long-term risk management for the residents of Yellowknife and surrounding area (Recommendation 14).

Part 1 of our statement addresses the issues around jurisdiction, while Part 2 will update the recommendations with what we heard and how we've amended the recommendations in light of the hearing, the undertakings and what we've reviewed within the draft water license and land use permits, comments for which will be submitted to the Online Review System. As directed by the Board the City will be providing a separate update regarding its compensation claims by March 27, 2020.

Part 1: Questions Around Jurisdiction

Issue: In their response to Parties' Interventions, the Proponent made a number of unsubstantiated assertions that the Parties were seeking matters outside of the Mackenzie Valley Land and Water Board's (the Board) jurisdiction. The City rejected this position and challenged the Proponent to provide their rationale. The Board agreed and issued Undertaking #3.

The Proponent has provided a rationale for their assertions relating to City of Yellowknife recommendations 1 and 14 in their response to Undertaking #3.

The Proponent's overarching argument on jurisdiction is based on an attempt to read the Board's jurisdiction narrowly (Undertaking #3, pages 1-2). The City submits that this narrow reading of the Board's jurisdiction is inconsistent with the language of the *Mackenzie Valley Resource Management Act* (the MVRMA) and the case law related to statutory interpretation.

The leading case on statutory interpretation is *Rizzo & Rizzo Shoes Ltd. (Re)*, (1998 CanLII 837 (SCC), [1998] 1 SCR 27, <<http://canlii.ca/t/1fqwt>> [*Rizzo*]). In *Rizzo* the Supreme Court of Canada confirmed that:

[...] statutory interpretation cannot be founded on the wording of the legislation alone. [...] Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (at para 21)

In *Rizzo* the Court also relied upon a provision in the *Interpretation Act* of Ontario which provides "that every Act 'shall be deemed to be remedial' and directs that every Act shall 'receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit'" (at para 22). A similar provision, found in section 12 of the *Interpretation Act* of Canada (R.S.C., 1985, c. I-21), applies to the interpretation of the MVRMA and states:

Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

The beginning of the MVRMA states that it is "[a]n Act to provide for an integrated system of land and water management in the Mackenzie Valley, to establish certain boards for that purpose". More particular to the Board section 101.1(1) of the MVRMA states "[t]he objectives of the Board are to provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of the Mackenzie Valley." These are broad and wide-ranging intents. The interpretation of the Board's jurisdiction must be done in a manner that best ensures these objectives are met.

The City submits that the Proponent's narrow interpretation of the Board's jurisdiction does not meet the object of the MVRMA and the objectives of the Board. To meet this requirement, the Board's jurisdiction must be interpreted as allowing conditions in a licence that seek to address any activities and risks related to the proposed use of land, use of water, or deposit of waste.

Specific Jurisdiction Arguments

Recommendation 1: The City had initially recommended "that the Board require conditions in the land use permit that require the Proponent to complete an agreement that provides for City Emergency Response and appropriate engagement and training with City Public Safety officials and the Yellowknife Fire Department to ensure an effective and efficient emergency response."

What the Proponent said: "[S]uch an agreement neither involves the use of land or waters or the deposit of waste [...]" (Undertaking #3, page 5)



City response: Simply put, the Proponent's position is unjustifiable. The requirement for appropriate Emergency Response capability specific to the risks at the Giant Mine site is directly related to the Proponent's use of land and therefore well within the jurisdiction of the Board.

The Proponent provided absolutely no details on how it came to the conclusion that the recommendation does not relate to the use of land or waters or the deposit of waste and therefore the City must assume the logic the Proponent used. This is difficult as there seems to be no real world situation that supports the Proponent's position – any emissions and residues from a fire or other emergency on site or in one of the many buildings with contaminated material will enter the receiving environment. Any contaminants would be a deposit of waste occurring in relation to the Proponent's use of land.

This matter is clearly within the Board's discretion – it's about having appropriate mitigations to prevent highly contaminated waste from entering the environment, directly adjacent to the residents of Yellowknife and the drinking water supply for the City and the Yellowknives Dene First Nation communities. As a simple example: to prevent buildings from burning the simplest mitigation is to be proactive to try to ensure that this doesn't occur and the City believes that the Proponent has dedicated real effort to this. However, the second-tier mitigation would be to be able to effectively institute a response and contain the event and minimize any releases should there be an incident. As the City said at the hearing (Day 2, page 161):

... this one's a really simple one (1). If there's a big fire out there and the residues, the -- the smoke, these things enter and resi -- land on the land and water, they flow into the receiving environment, that's a clear issue for this Board.

The Proponent has failed to understand the facts and the nature of the recommendation. They have continued to adhere to their initial position without hearing and acknowledging the obvious – initially saying this recommendation was one “related to occupational health and safety fall into this category” (December 2nd, 2019 - GMRP Response to Interventions, p16). This is *also* a health and safety issue, but it should be self-evident that releasing contaminated materials into the environment is unacceptable and should be mitigated wherever possible. Requiring appropriate mitigation measures as conditions of the licence directly relate to the Proponent's use of land and water, and therefore clearly fall within the jurisdiction of the Board.

The second aspect of the Proponent's response was that “the MVLWB has no jurisdiction to dictate which, if any, service providers the GMRP must contract with”. The City agreed with this when it was presented as part of the Response to Interventions. That is why the City amended its recommendation at the hearing. While it seems obvious that the City is best positioned to provide the services to address this mitigation, the City concedes the fact that the Board cannot dictate who the Proponent must contract with. The recommendation at the hearing read (Day 2, page 162):

And the ask is that Project – that they document that they have appropriate credentials and experience staff, that they've got the right kind of training plans to deal with the contingencies,



of the level of contamination at the site and they've got sufficient equipment and apparatus and, lastly, that they've got the demonstrated ability to respond twenty-four (24) hours a day seven (7) days a week, three hundred and sixty-five (365) days a year.

This is about demonstrating the ability to mitigate and protect Yellowknife residents. At present, there is a gap and until this is resolved, there is an unacceptable risk.

In its response to Undertaking #3 under the heading “Details on how the GMRP will address the recommendation outside the MVLWB process” the Proponent states that it “made a commitment in the DAR that Memoranda of Understanding (or similar types of arrangements) will be developed with key emergency response services providers (Chapter 8.11.3), which is documented in the Report of EA.” While this may be true, it does not create an enforceable obligation on the Proponent to actually do this. Including such an obligation as a condition of the licence is necessary to ensure that the Proponent carries out this commitment and is the type of condition contemplated by section 62 of the MVRMA.

City conclusion: Firstly, not only is this matter clearly within the Board’s jurisdiction – it lies at the very centre of the Board’s purpose. It is alarming that the Proponent takes the position that establishing measures to mitigate possible damage to the environment arising from the Proponents’ use of land is not part of what the Board was created to do. The City’s concern rests squarely within the Board’s jurisdiction. Secondly, as the City is no longer asking the Board to specify who the agreement is with, the amended recommendation is wholly within the jurisdiction of the Board.

Recommendation 14: The City asked the Board to require mitigation, under the *Waters Act*, to address the financial responsibility of the applicant, particularly the Review Board arrived at a finding of fact that “Without a suitably reliable long-term funding mechanism, there is a likelihood of significant adverse impacts over the 100-year duration of the Project”

PLEASE NOTE: The City would like to acknowledge that our previous references at the hearing and in our intervention were drawn from the *Waters Act* and were misplaced. Due to the intricacies of devolution, federal contaminated sites are regulated by the MVMRA, not the *Waters Act*. The language that the City presented is the same, but the reference is MVRMA, s. 72.03 (5) (d), not *Waters Act*, s.26 (5) (d).

What the Proponent said:

- a) Security deposits are not applicable or useful when Canada is the proponent.
- b) That the Board does not have jurisdiction to require a study regarding funding nor does it have jurisdiction to require the Proponent devise a multi-year or long-term funding approach.

City response:

- a) At no point has the City requested a security deposit under section 72.11(1) of the MVRMA and section 12 of the Mackenzie Valley Federal Areas Waters Regulations, SOR/93-303. However, since the Proponent has focused much of its argument on the assertion that these sections are “aimed at private proponents, not public governments engaged in the remediation of abandoned mine sites”, the City



feels the need to refute this assertion. Part 7 of the MVRMA unequivocally states that the MVRMA is “binding on Her Majesty in right of Canada or a province, except that Her Majesty in right of Canada is not required to pay any fee prescribed by regulations made under paragraph 90.3(1)(k) or subparagraph 90.3(2)(a)(i).” The fact that this section explicitly lists sections of the MVRMA that do not apply to the federal or a provincial government essentially confirms that all other sections do apply. Therefore, the Board should entirely reject the Proponent’s assertions, on this point.

- b) The City’s comments regarding financial responsibility have always been in relation to the requirement of section 72.03(5)(d) of the MVRMA that the Proponent must satisfy the Board that:

the financial responsibility of the applicant, taking into account the applicant’s past performance, is adequate for

- (i) the completion of the appurtenant undertaking,
- (ii) any mitigative measures that may be required, and
- (iii) the satisfactory maintenance and restoration of the site in the event of any future closing or abandonment of that undertaking.

(as acknowledged above, the City had previously been referring to the same provision from the *Waters Act*)

The Proponent has failed to make any reference to the obligations of the Board in that section so the City is again forced to infer what their rationale is for why the City’s recommendation is outside the Board’s jurisdiction.

The Proponent’s failure to address the merits of the issue, laid out in the intervention and at the hearing, means that the City is only able to reiterate that appropriate funding for the term of the license is something the Board must be satisfied with prior to a license being issued.

The City would have preferred that, rather than focusing on security deposits, the Proponent actually addressed the material issue as specifically directed by John Donihee, legal counsel for the Board. On the final day of the hearing while discussing the issue of jurisdiction arguments and undertaking #3 Mr. Donihee explicitly pointed out the relevant section of the MVRMA stating:

“The second matter that’s of sort of legal import, I suppose, but which I’m encouraging all the parties to address to the extent that they’re interested in their final arguments relates to -- and I’ll give you the reference in the MVRMA. It is paragraph 72.03(5), paragraph (d). And I’m asking the -- the Giant Mine Project and -- and certainly making it open for the parties to address this provision in their arguments.” (Public Hearing Transcript Day 5 at page 33)

(NOTE REGARDING PROCEDURAL FAIRNESS: The City submits that as a matter of procedural fairness the Proponent has missed its opportunity to provide argument in relation to this section. If the Proponent



provides any further argument regarding section 72.03(5)(d) of the MVRMA the City (and all other Interveners) should have the opportunity to respond. The Proponent was well aware that this section was at issue in relation to Undertaking #3 and chose not to address it. Allowing the Proponent to address it in their final arguments without opportunity for the Parties to respond would be prejudicial to the Parties.)

The City has not asked the Board to require multi-year funding. The City has asked the Board to satisfy itself that the Proponent has adequate financial resources on hand to complete the project. This is wrapped up with long-term funding considerations, particularly as the Review Board has recognized this as a point of significant concern, which has not been mitigated since the Report of Environmental Assessment.

The City has pointed out that the Proponent admits to not having sufficient funding for the period of the proposed water license. Similarly, the City has pointed out that the Review Board found that this to be a source of likely significant adverse impacts. This is not an opinion of the City's but a finding of fact arrived at by a quasi-judicial body, arrived at after reviewing all of the evidence available. The combination of these items requires action.

As financial responsibility and funding for the life of the project is a precondition to issuance of a licence, the City feels that a special study directed by the Board – introduced as a mitigation for an collectively acknowledged limitation – is clearly within the jurisdiction of the Board. Moreover, it's a reasonable and proportional step.

City conclusion: The City has again tried to find a way forward, while seeking to ensure that our concerns are addressed. The City is not insisting that the Proponent return to Ottawa or amend their project – it is seeking mitigation to address the obvious gap created by the differences in license term and available funding.

The facts are clear – the Proponent has provided evidence that they do not currently have sufficient funding to complete the actions under this license. This is material for the Board and finding approaches that address funding is not only within the Board's jurisdiction it is a legislative requirement.

In Closing

If the Proponent felt that the above issues – neither of which could have been considered new or surprising – were outside the jurisdiction of the Board, then they should have pursued this matter through conversations with the parties and Board representatives or, failing that, through a request for ruling. It is procedurally dishonest to leave these matters to the hearing.

The City is disappointed that the Proponent has persisted with this effort after the hearing. Its response to City recommendation #1 rests on an idea that release of contaminated material would be of no effect, while their response to recommendation #14 primarily responds to a matter that no one brought up at the hearing (security deposits).



In both cases, the Proponent's undertaking addresses things that were not raised, while ignoring the evidence and testimony that was provided. The City raises this with the Board, asking them to keep this in mind when considering all those matters where the Proponent has said that they will engage with Parties and do the work later – that Board 'checks and balances' are unnecessary.

The City submits that the fact that these jurisdictional matters continue to be left unaddressed is further supporting evidence that the license for this project must have clear and unambiguous conditions with strong direction pertaining to any future commitments by the Project.

Part 2: Closing Comments Regarding Recommendations

Recommendation #1: After reading the Proponent's response to interventions, the City had slightly modified the recommendation. Rather than requiring an agreement with the City, the City requests the Board to:

- Impose a deadline for the Proponent to remedy the identified gap around the provision of emergency services, demonstrating that they have:
 - o Appropriately credentialed and experienced staff,
 - o Appropriate training plans to deal with a range of contingencies at the site, considering they expected levels of contamination
 - o Sufficient equipment and apparatus to address these contingencies
 - o The demonstrated ability to respond twenty-four (24) hours a day seven (7) days a week, three hundred and sixty-five (365) days a year."

The City submits that this is an important and essential mitigation for this project. Considering that the Proponent has recognized the gap and is in negotiations, the City submits that this request is relatively minor, particularly considering the City's amended recommendation. Despite this amended recommendation the City maintains that the City of Yellowknife is best positioned to assist the Proponent with the identified gaps.

Recommendation #2: The Proponent has agreed to this recommendation. As stated at the hearing, the City appreciates this and looks forward to reviewing it at the earliest opportunity.

Recommendation #3: Please see comments below regarding Recommendation 15.

Recommendation #4: The City remains confident that an updated closure plan, aligned with the "Guidelines for the closure and Reclamation of Advanced Mineral Exploration and Mine Sites in the Northwest Territories, November 2013" (the Closure Guidelines), is a critical aspect of a successful closure.

Issue 1: Applicability



- i. *What we heard:* The Proponent sought to advance their theory that the Closure Guidelines that the City relied on were not created considering this particular project.
- ii. *City Response:* The Closure Guidelines were not created specifically for this or any other project. They were created to address all closure projects regardless of the proponent.

There is no exception within the Closure Guidelines for governments or any other party. They were created specifically to address the types of issues in front of the Board now: consistency, transparency, and certainty. These themes that the City is asking the Board for are exactly why the Closure Guidelines exist. The Closure Guidelines state that they “*clearly outline closure and reclamation expectations for all parties*” (Closure Guidelines, page 10, emphasis added)

The introduction of the Closure Guidelines describes their purpose:

Over the last decade, proponents have submitted a wide range of closure and reclamation plans (CRPs) to the Boards with varying levels of detail and information. The inconsistencies are primarily a result of the lack of specific direction regarding the preparation of a CRP and have resulted in varying interpretations of what should be included in a plan[...]

Had this guidance or these best practices, issued by the Boards and Canada been heeded by the Proponent, then the very issue that concerns the City would have been resolved.

As a final consideration, Canada was one of the primary authors on the Closure Guidelines. If such an exemption was envisioned, surely a note would have been included to that effect. The authorities behind the Closure Guidelines could have created such an exemption but chose not to. AANDC accepted that the Closure Guidelines are intended to apply across the Mackenzie Valley, across projects and across developers.

- iii. *Final Recommendation:* There is no ‘us’ and ‘them’ under best practices for Closure in the Mackenzie Valley. This project has been proceeding with closure planning for twenty years – longer than the opening and closing of Snap Lake mine. It’s of a similar vintage as the Ekati and Diavik mines. There is simply no good reason that the Proponent has not completed a final closure plan in accordance with the Board’s past direction. They have unilaterally chosen this route. Canada should not receive preferential treatment and there is no reason to change or decrease the requirements expected of a Final Closure Plan.

Issue 2: Need for a complete plan

- i. *What we heard:* The Proponent needs certainty to complete design. The Proponent cannot provide closure criteria (certainty) or reclamation research plans (response to uncertainty) until they have design.



- ii. *City Response:* The City concern remains, and the circular reasoning of the Proponent provides no comfort and should not be accepted by the Board. The standards that Canada sets out for others should clearly be applied to Canada itself. Rather than following the Closure Guidelines, which they helped to create, and completing a final closure plan, they are proposing further engagement as an alternative. This is a great concern to the City, as parties have sought to pursue this very thing in the years leading up to license submission, only to be ignored by the Proponent.

The City ask is simple: Tell us what you're going to do (criteria) and how we will know when you're done (monitoring). The Proponent has responded that they can't, or more precisely, they won't. Establishing clear closure criteria should have been achievable – Parties have been asking for this since the Environmental Assessment – with a Proponent commitment to provide it that dates back years.

Since that commitment, the Proponent has de facto refused to develop a complete rubric for evaluating this project's progress. Their concerns over delay are simply a consequence of their choice not to work with willing parties or to employ any method other than their chosen approach.

Rather than a single final closure plan, the Proponent's preference is that the Parties will be returning to the Board over and over again in the next few years, with a series of site wide management plans, then 12 design plans – not for modification or minor changes, but for substantial reviews for the closure that the residents of Yellowknife will live with every day of their lives.

Parties will repeatedly be entering this adversarial process. It will continue to require large amounts of Board procedure - at an increasing tempo with no forgiveness for any upset. Reviews and hearing processes will continue over unsettled issues, while failing to provide much value to anyone other than the staff and consultants working this file. Worse, given the current status of the positions around this matter, it will unnecessarily prolong the potential for disputes between parties. All this for something that the Proponent should, but chose not to, have completed prior to the hearing.

- iii. *Final Recommendation:* The City stands behind its recommendation to the Board to require a final closure plan, including a complete set of Closure Objectives and Criteria. The City submits that this approach makes the most sense administratively as it provides clarity and certainty for the reviewers, while minimizing risks of disputing interpretations and conflict between the Proponent and parties.

Should this recommendation be accepted, it has the effect of resolving the City's concerns underlying Recommendation 6, while creating space for improvement on Recommendations 5, 7, 8. Lastly, it provides the Proponent with the time and space to be able to complete their tasking without the risk of losing field seasons for simple and entirely predictable delays.



Recommendation #5 (i): Please see comments above regarding Recommendation 4.

Recommendation #5 (iii): The City broadly accepts the Proponent’s proposed approach, though asks the Board to encourage the Proponent to separate the target setting (criteria) and the design approvals.

Recommendation #5 (iv): The City has repeatedly taken issue with the approach the Proponent applied to setting their criteria. Generally speaking, the Proponent places more emphasis on design rather than achievement. The City acknowledges that design is an important part of the closure process, but when it comes to Closure Criteria, the City submits that what is achieved matters far more. If the Board requires an updated closure plan as the City suggested, we ask that there be a renewed focus on conditions on the ground rather than what’s on the drafting board. Design criteria should be used as a criterion of last resort.

Recommendation #6: Standard for Baker Creek.

- i. *What we heard:* Canada asserts that closure planning for Baker Creek that features aiming at the status quo and allowing for ‘natural rehabilitation’ is sufficient.
- ii. *City Response:* The promise from the Environmental Assessment was clear – “Restore Baker Creek to a condition that is as productive as possible”. As the City outlined at the hearing, the current criteria and objectives proposed will simply not achieve that.

Canada, as a whole, seems fine with this. The Department of Fisheries and Oceans (DFO) did not even begin to address the closure objectives or criteria. They simply submitted recommendations that will ensure that the habitat that exists will not be further degraded. DFO’s comments on the draft water license continues to show the limited scope of their interest – preventing further harm. They seem unaware that this is an opportunity to improve the environmental conditions of this contaminated watercourse. Reliance on the Fisheries Authorization process is misplaced.

Environment Canada is content to wait for hindsight. They too have provided no recommendations regarding the objectives or criteria for Baker Creek. On the other hand, we note that in addition to the City, the Yellowknives Dene First Nation recommended something similar and Baker Creek is the focus of three of the nine issues that the North Slave Métis Alliance brought forward. On the surface, it appears that the residents are forced into seeking improvement as part of the reclamation while Canada is content with come what may.

In lieu of their more active participation, the City is reassured that there is a co-management body for the north that can require both adherence to the promised standard, but also to encourage Canada’s expert advisors to participate in a more forthright manner, respecting the jurisdiction of the Board.

When faced with the question of how to remedy our concern, the City fully acknowledges that it cannot act as a substitute for this expertise – developing criteria that will deliver on the promise requires knowledge and nuanced experience. The City is forced into the aquatic engagement effort,



which is a more detailed duplicate of an unfulfilled commitment from the Environmental Assessment hearing (to have been commenced in 2014).

- iii. *Final City Recommendation:* The City asks the Board to direct the 'Aquatic Engagement Group' to incorporate its results into an updated closure plan, featuring improved Closure Criteria that will deliver on the promises that the Proponent made in the Developer's Assessment Report – maximizing the productivity of Baker Creek.

Recommendation #7: The City has reviewed the draft license and is satisfied that there are appropriate mechanisms to ensure that the Quantitative Risk Assessment outcomes can be brought forward.

Recommendation #8: Environmental Management Plans

- i. *What we heard:* The Proponent asserts that timelines based on historical precedents are satisfactory. They also state that there will be significant amounts of pre-engagement prior to submission.
- ii. *City Response:* The City is disappointed that the Proponent has not agreed to any mechanism that would ensure the concern is addressed. The City would be satisfied if the Board required pre-engagement to be meaningfully completed. However, this will require stronger direction from the Board in the license – requiring them to complete the work rather than simply reporting.

As we've seen over the years – the commitment of the Proponent to effective engagement has varied, up to an including their ability to listen and engage on the jurisdiction issue as discussed above. The City is less confident on the Proponent's commitment to actually engage with parties on Closure Criteria. This is something that Parties actively requested of the Proponent, but they chose not to act. Beyond this, given what we've seen in recent months, the City sees little to suggest that the Proponent's engagement regarding Closure Criteria will be any more meaningful. Only Board direction will move them.

- iii. *Final City Recommendation:* The City proposes two options for the Board to consider for the site wide programs – the first is to apply a longer time period as originally requested in the City's intervention and hearing; the second is to apply an adequacy check of the 'pre-engagement' to these submissions, verifying that the Proponent has included parties and provided materials with appropriate timelines.

The City would support the latter approach, as it would promote collaboration, while ensuring sufficient procedural time for review. It also ensures that should there be a failure in the engagement, all parties understand that the onus and the resulting risk associated with poor listening or failure to address reasonable concerns rests with the Proponent.



The City does not support reliance on any pre-engagement to develop Closure Criteria. Given past behaviour, only Board direction to revise and resubmit will motivate the Proponent to meaningfully engage.

NOTE: The City notes with concern the Proponent's comments on the extremely tight timeline currently envisioned. The Proponent's comments on the record have indicated that even a 60-day delay would result in lost field seasons. Given the history of this project, where delays have been part of the process, this suggests that the timeline being considered is extreme. The City supports ambitious targets, but as with setting criteria and the socio-economic effects, all parties should focus on reasonability.

Recommendation #9: Annual Water License for Approval

- i. What we heard:* The Proponent does not believe the water license should be for approval and has proposed no interim approval mechanism for the closure.
- ii. City Response:* As stated at the hearing, there is no mechanism for the closure while the remediation activities are underway. Working from the "Proposed Regulatory Process for Criteria Workshop" documents submitted by the Proponent at the 2nd Technical Session, there will be an approval at the design stage (in the next few years depending on which component) and there will be Board approval of the Performance Assessment Reports, submitted after the active closure of a component has been completed and initial performance monitoring (normally another 5 years) is completed.

This is simply too long of a period between Board mandated check ins where the parties have a role in evaluating the progress and implementation of the project – particularly when we don't have full clarity on the commitments at this point.

As stated at the hearing, the City remains open to solutions that meet the City's interest - whether through a type of multi-year review, as originally conceived in the City's response to the Water License submission, or the amended recommendation of using the water license (after it became the primary reporting mechanism for the closure rubric) or through the Annual Water License Report, the City is not particular.

However, in the absence of something else, the City submits that this recommendation is the best means for providing parties a voice into the implementation – it addresses that interest, bringing together Board approval, party participation and evaluation of the project.

- iii. Final City Recommendation:* While the City is flexible, our recommendation remains consistent: In the absence of another mechanism approved by the Board, the annual water license should be subject to Board approval.



Recommendation #10: Notifications

- i. What we heard:* The Proponent does not believe that any additional notifications are required, viewing the emergency communication plan as sufficient.
- ii. City Response:* Precedents that the Proponent referenced in their response are for projects that are not of the significance (one of the largest contaminated sites in Canada) or the proximity (within a community boundary) that the Giant mine site has.

The City interest is simply to be better informed on the events at the site. Our interest is to ensure the flow of information is occurring long before any type of emergency. This interest is balanced against the cost of achieving this, which is negligible (adding an email to the distribution list).

- iii. Final City Recommendation:* As part of the attached review of the permit and license, the City has recommended being added to the distribution list.

Recommendation #11: This recommendation was an attempt to find a way to facilitate early reviews for aspects of the Closure Plan to help ensure that operations were not compromised. Given the Proponent's refusal of any approach other than their own, the City takes the view that there is little value in commenting further on this recommendation.

Recommendation #12: The City has reviewed the Draft Land Use Permit and Water License and has offered suggestions, thoughts, and concerns in a spreadsheet which has been uploaded separately to the Board's Online Review System. The beginning of the spreadsheet relates to the more general conditions found throughout the documents, while the last portion of the spreadsheet relates to the direction from the Board to the Proponent on improvements to the Closure and Reclamation Plan, particularly the Closure Criteria.

Recommendation #13: Following review of the draft license, the City is satisfied that there are sufficient provisions within the draft license to ensure that the Board will have appropriate discretion to compel action on the Dams should it be warranted.

Recommendation #14: Project Funding

- i. What we heard:* The Proponent has acknowledged that they lack sufficient funding for the term of the license. The Proponent has failed to act to address the concern and submitted nothing to the record to contest the City's position.
- ii. City Response:* As the jurisdictional argument is mis-founded and there has been no additional submission from the Proponent, the City's position remains constant. Under the MVRMA the Board must be satisfied that the Proponent has sufficient financial resources to complete the task. Given



the Proponent acknowledgement that it does not have sufficient funding and the Mackenzie Valley Environmental Impact Review Board analysis and finding of fact that insufficient funding was a source of significant concern, this state cannot be allowed to persist without mitigation.

- iii. *Final City Recommendation:* The City's recommendation stands. The City submits that a Board mandated special study looking at long term funding approaches represents a reasonable and proportional first step to satisfy the Board's need with regard to its MVRMA obligations.

Recommendation #15: Management Gaps – Land Use Planning

- i. *What we heard:* The Proponent has agreed to work with the City and the other Intervenor to commence and deliver the Land Use Planning effort.
- ii. *City Response:* It was reassuring to the City to get this commitment on the record. This site is too large and important to leave to some future, uncommitted to, and undefined process. It was reassuring to see the commitments made during the EA hearing of 2012 updated and reconfirmed for this new closure plan.

There's the question of whether the City could unilaterally use its authorities to arrive at a general plan and zoning that suits our interests. The City acknowledges that this could be done, but as with the promises secured in the Environmental Assessment, the City wants to work with the other levels of government. In any event, this effort would ultimately be subject to the GNWT's approval – one of the proponents of this project.

As this site is no longer going to be the simple, consistent, site wide industrial standard promised at the DAR, a more nuanced and collaborative approach will be needed to even understand the starting conditions for considerations on what values the land holds to each of the parties. Different areas will feature unknown and variable levels of contamination – likely with different possible uses.

While we have the Proponent's commitment at the hearing, the depth of that commitment is uncertain. In an interview with CBC the Monday following the hearing the Proponent seemed to omit the complexities of the final site conditions, specifically providing incorrect information to the public (CBC North – Trailbreaker, January 27, 2020 - <https://www.cbc.ca/listen/live-radio/1-129-the-trailbreaker/clip/15757694-closure-and-remediation-plan-for-giant-mine>)

Q (CBC): And with regards to the use of the space, its expecting and industrial standard, residential? I've heard those two words being kind of thrown around, what's the answer there?

A (Natalie Plato): It's both actually. The core area of the site, where the thermosyphons and freeze is, that will certainly be fenced off and be an industrial area. People will not be allowed in that area. But the remainder of the site, including the townsite, could have use. We know the townsite area – we're going to remediate to residential soil criteria, so that opens the possibilities. The remainder of the site will be industrial as well.



This is simply not correct. The reality is that the area outside the townsite and the core area will have a predicted average contamination of 714 ppm of arsenic. This greatly exceeds the industrial standard. The Proponent goes on to state that they believe they've presented a clear vision of the site – deliberately ignoring the views of a number of parties. They state that they've "never not had the funding" to complete the work they wanted to do, which is not consistent with the messages they were providing to the working group in recent years. In short, the Proponent refuses to acknowledge that the concerns held by the parties have credibility or legitimacy.

The Proponent's commitment remains to be determined – which gives the City an uncertain level of comfort, and we remain convinced that Board direction is required to facilitate effective planning for the future. Though this is a large area within the City boundary, we must remember the key facts: GNWT is the landowner and Canada is the developer. All three levels of government need to collaboratively work towards a plan that will be viable with the end state of this development.

Although the Proponent had previously argued that land use planning was not under the Board's jurisdiction the Proponent failed to address the City's recommendations regarding land use planning in their response to Undertaking #3. Again the City was left to try to infer the Proponent's position. The City notes that the Proponent responded to Slater Environmental Consulting Recommendation #1 by asserting that land use planning is covered under Part 2 of the MVRMA and not under the Board's jurisdiction. However, section 34 of the MVRMA reads:

*Subject to subsection 46(2), this Part does not apply in respect of lands in a settlement area that comprise a park to which the Canada National Parks Act applies, that have been acquired pursuant to the Historic Sites and Monuments Act **or that are situated within the boundaries of a local government.** (Emphasis added)*

The City is not seeking land use planning as envisioned by Part 2 of the MVRMA. Part 2 of the MVRMA relates to higher level land use plans for an entire region. Perhaps use of the term 'land use planning' has led to some confusion. At issue here is determining and planning for the possible uses of the Giant Mine site following completion of the project – which is one of the four core principles of the Board's Closure Guidelines. The City's position is that all levels of government involved in this project need to work collaboratively to determine future uses, including the GNWT, who clarified at the hearing that it is participating in this process as a 'whole of government' (see comments by Ms. Diep Duong, Hearing Transcript Day 2, page 111).

Determining how the Giant mine site can and should be used is not a unilateral exercise. The City cannot and should not be leading this effort without the Canada and the GNWT as part of the process. Though it would have been beneficial for this to have been completed long ago, now is the next best time to commence the types of work required to fulfill the Board's guidance and principles for closure regarding future use under the Closure Guidelines where it is one of four core principles for closure, with specific future considerations around anticipated uses.

- iii. *Final City Recommendation:* The City has remained flexible in its approach to this concern. The concepts from 2006 and 2012 must be left behind – the changes to the closure plan have passed those idealistic concepts by – and a new approach is required. While pleased with the Proponent's agreement to work together, we cannot leave this matter to an unenforceable Proponent



'commitment', particularly as we may have seen a weakening of that commitment the very first business day after the hearing.

With this in mind, the City requests the Board to direct the Proponent (which includes GNWT as a whole) to initiate the design of a land use planning process, to be commenced within 8 years of the license issuance. This will initially feature a clear vision of the site at the end of this project, detailing arsenic levels, land use constraints, and identification of known hazards – essentially setting forth the starting point for the residents of Yellowknife, Ndilo and Dettah to begin to consider what value this area can or will have in our collective future. Subsequent steps will be determined by the participants.

This recommendation is entirely within the jurisdiction of the Board because it directly relates to use of land and the Board's objective, as set out in section 101.1(1) of the MVRMA, "to provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of the Mackenzie Valley."

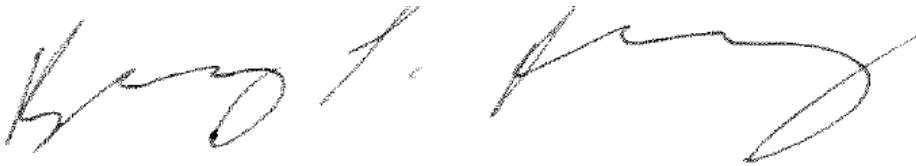
Recommendation #16: With a small change to Schedule 4, Condition 1, requiring the Proponent to act if the results of Waste Stream Auditing are unacceptable, the City submits that this issue would be resolved.



Part 4 – Closing

The City is pleased to provide our closing statement to the Board, the Proponent and the Parties. We recognize the hard work and dedication that all have put into the cleanup of this site. The City has not lost sight that the outcome will represent an improvement on the current state of the site. We have attempted to be flexible and recognize those matters that are resolved and look forward to working together to continue to improve the closure plan in the future.

Sincerely,

A handwritten signature in black ink, appearing to read "Kerry Penney". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Kerry Penney
Director, Economic Development and Strategy

