



File Ad-GA-CoopLia-GD-SLUPB 01
08 October 2010

Ms. Heidi Wiebe
Plan Development Lead
Sahtu Land Use Planning Board
P.O. Box 235
Fort Good Hope, NT X0E 0H0
Via Email to: Heidi Wiebe at heidi.wiebe@shaw.ca

Dear Ms. Wiebe:

Sahtu Land Use Plan Draft 3

The National Energy Board (NEB) is pleased to provide the following comments on Draft 3 of the Sahtu Land Use Plan (the Plan), as per the Sahtu Land Use Planning Board's letter to the NEB dated 12 July 2010.

The NEB acknowledges the substantial efforts of the Sahtu Land Use Planning Board in responding to comments on earlier versions of the Plan and bringing the Plan closer to a form acceptable to all parties. The NEB also thanks the Sahtu Land Use Planning Board for its work in responding to and incorporating the NEB's comments on Draft 2 of the Plan.

Similar to the NEB's previous correspondence, the comment's here are limited to those elements within the Plan that have specific implications to the regulatory function, processes, and jurisdiction of the NEB.

General Comments:

1. In many cases, the Conformity Requirements that describe conditions upon which land uses are permitted are oriented towards Regulators (i.e., use of the phrases 'Regulators shall ensure' or 'Regulators shall consider' or 'Regulators shall assess'), when in fact the context of the Conformity Requirements relate to a proposed aspect of land use, and the obligations of an Applicant. While the current wording identifies the obligation of Regulators, it is unnecessary to do so, as Regulators are already required by subsection 46(1) of the *Mackenzie Valley Resource Management Act* to "carry out their powers in accordance with" the Land Use Plan.

Moreover, wording of this nature creates a situation where it would be impossible for either the Sahtu Land Use Planning Board or a Regulator to determine conformity of a proposed land use activity with several of the Conformity Requirements. That is, the Conformity Requirements are worded such that the Regulator bears the onus of the conformity test, and thus it would be circular and impossible for a Regulator to determine whether it itself is in conformity with the Plan prior to any issuance of authorization (as the determination of conformity with the Plan is made prior to a decision regarding authorizations).

An alternate and more pragmatic means for wording the Conformity Requirements would be to clearly place the onus on an Applicant proposing a land use activity to demonstrate their conformance with the Plan. The Regulator and/or the Sahtu Land Use Planning Board could then use its discretion to determine whether the Applicant has successfully demonstrated conformity with the Plan.

For example, in place of CR #16 - Ecological and Cultural Integrity,

“Before any land use activity is authorized in the Great Bear Lake Watershed (GBLW), Regulators shall ensure that the activity is consistent with the maintenance of the ecological and cultural integrity of the GBLW”.

The text could be revised to read (revisions underlined):

“Before any land use activity is authorized in the Great Bear Lake Watershed (GBLW), each Applicant must demonstrate to the regulator who authorizes the activity that the activity is consistent with the maintenance of the ecological and cultural integrity of the GBLW.”

In the context of Conformity Requirements that refer to Regulators ‘considering’ or ‘assessing’ aspects of a proposed land use activity, revised wording would follow a similar format. The intent of such revisions would be to ensure Applicants bring forward the appropriate information for Regulators to consider and assess within their powers and in accordance with their mandate. For example, for CR #5 (Watershed Management), the text could be revised to read (revisions underlined):

“Before a land use activity is authorized anywhere within a regional watershed containing an SMZ, CZ or PCI, each Applicant must demonstrate how it has considered the effects of the proposed activity in combination with other past, present and anticipated future land use activities, and must demonstrate that it will not substantially alter the water quality, quantity and rate of flow within a SMZ, CZ or PCI”.

These revisions would apply to Conformity Requirements #2, 3, 5, 6, 7, 12, 14, and 16.

2. The NEB notes that in Chapter 7, the Plan identifies only a Certificate of Public Convenience and Necessity issued under the *National Energy Board Act* (NEB Act) in its examples of authorizations requiring compliance verification steps and applicability of the Plan. As noted in our previous correspondence, the NEB administers the *National Energy Board Act* (NEB Act) and the *Canada Oil and Gas Operations Act* (COGOA). The NEB issues authorizations under the administration of the COGOA that would be affected by the approval of the Plan (in particular under 5(1)(b) or 5.1(4) of COGOA).

As the authorizations under the COGOA are the most likely authorizations to be sought on Sahtu Settlement lands, the NEB suggests that the table be amended to reflect that examples of application to projects under the NEB Act and the COGOA, as outlined in our previous correspondence, including:

- Geophysical or Geological Operation Authorization, and,
- Operations Authorization (for drilling and production related work or activities).

3. Within the Implementation Guide, the Direction for Conformity Determinations sometimes relate to an 'action' that the person determining conformity with the Plan would be expected to undertake, while in other cases, the text defines criteria to enable a determination.

For example, in the direction for CR #4: "*Check that no land use activities will be located within 500m of known or suspected burial, historical and archaeological sites.*" Alternatively, it could be written as follow: "*If no land use activities will be located within 500 m of know or suspected burial, historical and archaeological sites, the activity conforms.*"

And conversely in direction for CR #10: "*If there is no incidental harvest anticipated, or if the applicant intends to use all resources harvested, then the activity conforms.*"

The NEB suggests that clear criteria-based guidance is more appropriate and should be used throughout the Implementation Guide.

Specific Comments

CR #3 – Community Benefits

The NEB reiterates that it would carry out its powers in accordance with the Plan and, for any authorization the NEB may issue, the NEB would not be able to include or enforce conditions that are beyond its mandate, jurisdiction, and ability to enforce.

As relevant background, the NEB's purpose is to promote safety and security, environmental protection and efficient energy infrastructure and markets in the Canadian public interest within the mandate set by Parliament in the regulation of pipelines, energy development and trade, as well as physical activities related to oil and gas exploration and production on all non-Accord frontier lands.

The current wording of CR #3 (*Before any land use activity is authorized, Regulators shall ensure that communities will benefit from the proposed land use*), requires the Board to make a decision that it has no power to make. Subsection 46(1) only requires the Board to carry out its existing powers in accordance with the Plan. It does not give the Board powers that it does not have and which may be encroaching on the realm of usual land use planning and defining permissible land uses.

This is confounded by the guidance text associated with this Conformity Requirement (in the Interpretation Guide) that is entirely nebulous, and in no way speaks to how Regulators are to 'weigh' benefits to communities against impacts to them.

Regulators - in particular the NEB, but also the Land and Water Board - may not have a mandate to apply or enforce terms or condition related to community benefit or the socio-economic parameters described in Interpretation Guide text associated with this Conformity Requirement.

The NEB recommends the removal of this Conformity Requirement.

CR #4 - Archaeological Sites, Historic Sites and Burial Sites

CR #7 – Wildlife

CR #12 – Ecologically Significant Areas

The latest instalment of the Plan directs Regulators to ensure compliance with prescriptive measures in CR #'s 4, 7. For example, wildlife setbacks, minimum altitude flight requirements, and sensitive periods (Table 8, page 304) are highly prescriptive. While these measures may not be at all inappropriate, and may reflect current best practices, they instil a prescriptive tone to the Plan that limits the flexibility of Regulators to enforce or apply their mandates in a wide variety of situations.

Moreover, in some cases it can be impossible for a Regulator to 'ensure' (as per CR#7 subset #4) with certainty that a land use activity does not compromise a certain prescriptive parameter (and similarly, in consideration of the NEB's general comment #1 above, for an Applicant to demonstrate the same with certainty). As an example, for a linear development such as pipeline it may be impossible to achieve absolute certainty of whether bear dens may exist within 800 m of a pipeline despite intensive search efforts prior to application (as dens can be exceedingly difficult to locate over large areas, or may only be built immediately prior to snowfalls, making detection near-impossible). In almost all cases a project-specific environmental protection plan would detail the adaptive management and mitigation requirements in the event the discovery of such an environmental feature was made post-authorization.

Additionally, the scale of land use activities contemplated by the Plan would encompass the life cycle of project activities, and it may be unreasonable to impose blanket prohibitions in all cases. For example, a restriction of land use activities 2000 m from lambing areas for Dall Sheep may be inappropriate if the activities would be relatively benign and of overall benefit (for example, hand seeding of vegetation to support site reclamation in an area located some 1800 m from a lambing area).

The NEB respectfully suggests that Conformity Requirements focused on achieving goals of environmental protection can foster innovation, allow for flexibility, and result in protection measures that can be tailored to the unique circumstances that occur in the wide range of land use activities and environments of the Sahtu Settlement lands. The NEB also notes that Action #4 commits a Sahtu Working Group to develop a set of Best Practices which may replace the Plan's conformity requirements in future Plan amendments. That Action could be easily instigated at this point, and achieve the intent of many prescriptive measures in the Plan.

Hence, the NEB suggests that the prescriptive elements of the Conformity Requirements be encompassed within a "Best Practices" section of the Plan, and Conformity Requirement wording be revised such that Applicants must demonstrate compliance with a list of defined Best Practices (such as setbacks) to a reasonable extent.

For example, CR#4 (*A land use activity shall not take place within 500 m of suspected or known burial sites, historical sites or archaeological sites*) could be reworded to reflect a broad goal, and supporting prescriptive measures could be found within a Best Practices summary. Alternate wording could be as follows (revisions underlined, and in consideration of the general comment suggestion above):

"Each Applicant shall demonstrate that appropriate measures are in place in accordance with Best Practices defined in the Sahtu Land Use Plan to prevent and/or mitigate adverse from the land use activity to any suspected or known burial sites, historical sites or archaeological sites."

CR #8 - General Environmental Impacts

The NEB notes that the second sentence of CR #8 is incomplete in context, as it does not dissuade the creation of new footprint solely by the use of existing roads or seismic lines:

"Any adverse environmental impact from a land use activity shall be minimized to the extent possible. This includes but is not limited to minimizing the footprint of a land use activity, and in particular, using an existing road, seismic lines or other disturbed area wherever possible."

Suggested revision (underlined):

"This includes but is not limited to minimizing the footprint of a land use activity, and in particular, using an existing road, seismic lines or other disturbed area wherever possible, rather than alter undisturbed areas."

Action #8 - Community-Government Monitoring and Enforcement Strategy

While the Plan seeks to require Regulators to implement Actions outside of the Regulatory context and process, the Board is a quasi-judicial and independent tribunal, which acts in accordance with the principles of natural justice in all its activities. As such, implementing this Action may not be feasible by the NEB.

For context, the NEB is a lifecycle regulator, in which it regulates and enforces compliance measures throughout all phases of projects, from planning, application, construction, operation, reclamation and abandonment. The NEB is unbiased, and must be seen to be unbiased, and all aspects of its decision making, including regarding its enforcement activities. The NEB cannot conduct itself in any manner that may be perceived as biased or favouring the views of any party, including during enforcement activities.

The NEB recommends that the phrase "*where reasonable to do so*" (as it appears in Action #7) be added to Action #8 to reflect the independence required of some Regulators and subsequent inability of the NEB implement this Action.

The revised text for Action #8 would read (revision underlined): "*Within 4 years, responsible authorities with enforcement responsibilities, where reasonable to do so, shall...*"

Recommendation #2- Wildlife Monitors

The NEB suggests that wording be added to this non-binding recommendation that acknowledges the role of Regulators in resolving concerns related to land use activities conducted by a regulated company, and to not unfairly burden the Renewable Resources Council (RRC) with obligations where it may lack the appropriate regulatory or enforcement tools.

The following wording is suggested to the last sentence of this Recommendation (revision underlined): "*Any unresolved concerns should be reported to the appropriate Regulator, and*

shared with the land use inspector and the RRC, so that appropriate action may be taken to mitigate impacts.”

Thank you for the opportunity to comment on the Plan. The NEB looks forward to continued collaboration with our northern partners on matters related to the responsible development and regulatory processes in Canada’s North.

Yours truly,



Bharat Dixit
Team Leader, Conservation of Resources

- c.c. Judith Wright-Bird, Chairperson, **Sahtu Land Use Planning Board**, fax 867-598-2545
Trish Merrithew-Mercredi, Regional Director General, Northwest Territories, **INAC Executive Office Directorate**, fax 867-669-2703
Mr. Marc Lange, Manager, **INAC Environment and Conservation**, fax 867-669-2701
Paul Dixon, Executive Director, **Sahtu Land and Water Board**, fax 867-598-2325
Zabey Nevitt, Executive Director, **Mackenzie Valley Land and Water Board**,
fax 867-873-6610
Vem Christensen, Executive Director, **Mackenzie Valley Environmental Impact Review Board**, fax 867-766-7074
Leslie Whitby, Sr. Advisor, **INAC Natural Resources and Environment Branch**,
fax 819-953-8766
Matt Bender, Manager, Land Use Planning, **INAC Environment and Renewable Resources Directorate**, fax 819-953-2590
Greg Yeoman, Resource Management Advisor, **INAC Environment and Conservation Branch**, fax 867-669-2701
Joel Holder, Land and Water Unit Manager, **GNWT Environment and Natural Resources**,
email joel_holder@gov.nt.ca