Brief to the Standing Committee on Aboriginal Affairs and Northern Development Regarding Section 4 of Bill C-15

Submitted by: Alternatives North and Ecology North

Alternatives North

ECOLOGY NORTH

Submitted: January 17th, 2014

Table of Contents

Introduction to the Brief

This Brief to the Standing Committee on Aboriginal and Northern Affairs focuses on Part 4 of Bill C-15, which consists of proposed amendments to the *Mackenzie Valley Resource Management Act* (*MVRMA*).

Alternatives North and Ecology North strongly believe that those amendments associated with board/panel restructuring, increased Ministerial authority, and direct federal involvement in the time management of environmental assessments and regulatory processes will be counter-productive in the long run to Aboriginal governments and land claimant groups, industry, and the general public. These changes will undermine the existing integrity of the environmental management system in the Northwest Territories and will not make the system more efficient, timely, or effective.

In fact, Alternatives North and Ecology North believe that the proposed amendments to board structure -- particularly the elimination of the regional boards/panels -- will create a more adversarial rather than cooperative environmental assessment and regulatory system that will be a detriment to environmental management and sustainable northern development. We also believe that increasing Ministerial authority over chair appointments, policy direction, and environmental assessment and regulatory timelines – where that authority continues to be held by the federal Minister -- counters the political and legislative intent of devolution, which is to transfer greater authority over land and resource decisions to the North and to northerners. Furthermore, any form of increased Ministerial authority, whether to a federal or territorial Minister, undermines the independence of the boards and increases the potential for political interference in board decisions.

Lastly, Alternatives North and Ecology North oppose the inclusion of the *MVRMA* amendments in what is primarily a devolution bill, as it means that our legislators cannot improve or change the *MVRMA* amendments without appearing to oppose devolution. This bundling of legislation is inappropriate, and undermines the ability of northerners to have legitimate input into what are significant changes to the legislative framework in which we live.

This Brief reviews the legislative basis for the *MVRMA*; summarizes the issues associated with *MVRMA* implementation, as documented by a number of different parties; and then examines the specific amendments proposed to the *Act* that are problematic. We also identify amendments we support and provide some conclusions and recommendations.

The Legislative Foundation: Integrated Co-Management

The political and legislative base for the *Mackenzie Valley Resource Management Act* is co-management of the NWT's lands and waters, through an integrated regional- and territorial-level system of environmental planning and assessment and regulatory review. In its Citizen's Guide to the *MVRMA*, the Government of Canada states that "[the *MVRMA*] creates an integrated co-management structure for public and private lands and water throughout the Mackenzie Valley… As institutions of public government, the boards regulate all uses of land and water while considering the social and cultural well-being of residents and communities in the Mackenzie Valley" (INAC-AINC, 2007).

This integrated co-management model arises from federal commitments made in the Sahtu and Gwich'in Comprehensive Land Claims Agreements in the early 1990s. The current version of the *MVRMA* (1998/2005) states in its preamble that "the Gwich'in Comprehensive Land Claim Agreement and the Sahtu Dene and Metis Comprehensive Land Claim Agreement *require the establishment of* land use planning boards and *land and water boards for the settlement areas* [i.e. regional boards] referred to in those Agreements and the establishment of an environmental impact review board for the Mackenzie Valley, *and provide as well for the establishment of a land and water board for an area extending beyond those settlement areas*… [i.e. a territorial board]" (p 1; underlining and italics added).

The relationship between the regional land and water boards and the territorial land and water board is clearly articulated in the land claims agreements and in the *MVRMA*. Section 24.4.6(b) of the Gwich'in Comprehensive Land Claim Agreement (1992), section 25.4.6(b) of the Sahtu Dene and Metis Comprehensive Land Claim Agreement (1993), and, subsequent to the enactment of the *MVRMA*, section 22.4.3 of the Tlicho Land Claims and Self-Government Agreement (2003) all state that where a territorial board is established that also has jurisdiction within the respective settlement areas, the regional boards become 'panels' of the territorial land and water board, which is how the system currently operates.

These respective sections of the Gwich'in and Sahtu land claims agreements are linked to the *MVRMA* through Part 4, section 99(2), which came into force in 2000, which states that "On the coming into force of this Part, a board established by section 54 or

56 [referring to the Gwich'in and Sahtu land and water boards] continues as a regional panel of the [Mackenzie Valley Land and Water] Board under the same name and in respect of the same management area…" (p. 42). The Wek'eezhii Land and Water Board established under the Tlicho agreement is linked to the *MVRMA* as a panel of the territorial board through Part 4, section 99(2.1) of the *Act*.

In essence, this integrated co-management model, since its legislative inception, has embraced regional planning boards, regional land and water boards/panels, an environmental impact review board, and a territorial land and water board through which the regional boards/panels operated. The model also includes an adaptive management component through section 148 of the *MVRMA*, which calls for an independent environmental audit every five years to assess environmental trends and the integrity of the environmental management system.

This integrated co-management system, founded in land claims agreements legislation and the *MVRMA* and actualized through public government institutions, has operated successfully for over a decade in the Mackenzie Valley, to the benefit of all NWT residents. Although there have been implementation problems and issues arising from the *MVRMA*, which are documented and discussed below, none of these have been or can be specifically and legitimately linked to the regional-territorial board/panel structure or to a lack of Ministerial authority.

Alternatives North and Ecology North strongly believe that the current legislative structure for the integrated co-management of lands and waters in the NWT, while needing some clearly identified improvements in implementation (see MVRMA Implementation and Assessment section below), is efficient and effective as is. This system was designed to reflect and accommodate NWT land claims agreements and the regional context in which lands and waters in the NWT must be managed. Tampering with this integrated structure will likely create more uncertainty and animosity in the Mackenzie Valley and will inevitably result in an increasingly adversarial rather than co-operative approach to land and water use management. Furthermore, as examined below, there is no evidence to suggest that eliminating regional board/panels and increasing Ministerial authority over appointments, policy direction, and assessment and regulatory timelines will make the system more effective, timely, or efficient.

MVRMA Implementation and Assessment

A number of parties have carried out reviews of the *MVRMA* since it was enacted. The main reviews include the environmental audits, as required under section 148 of the *Act*; a federally-initiated regulatory review; and an internal assessment by the Mackenzie Valley Land and Water Board.

The 2005 and 2010 Environmental Audits

Section 148 (1) of the current MVRMA (which section remains unchanged under Bill C-15) states that "The federal Minister shall have an environmental audit conducted at least once every five years by a person or body that is independent". Two environmental audits have been carried out since the enactment of the *MVRMA*: in 2005 and 2010. Given that these audits are the only formal and legally-mandated assessments of the Act, their conclusions and recommendations should be the primary driver for any proposed amendments and/or changes in operational procedure relating to effective implementation of the *Act*. Alternatives North tabled this position to government in its 'Response to the Road to Improvement Report' of 2008 and in a letter to the Federal Negotiator, John Pollard, in 2010 -- and continues to maintain this position today. However, in spite of the environmental audits being legislated requirements under the *MVRMA*, both the federal and territorial governments have failed to formally respond or commit to the recommendations made in these audits. This lack of federal commitment to and active engagement in the environmental audit process is a very significant barrier to improving the environmental management system in the NWT.

The main conclusions arising from the 2005 environmental audit were as follows:

- The lack of completed land use plans adds "increased complexity and uncertainty to the environmental management process" (SENES, 2005, p. S-2) and therefore all regional land use plans should be "developed as soon as possible" (p. S-2);
- Regulatory and institutional gaps need to be addressed with respect to:
- Management of air quality,
- Management of social and cultural impacts;
- Compliance and enforcement;
- Meaningful participation of communities in management processes due to limited capacity, and
- Timely nomination and appointment of board members;

- Although the use of traditional knowledge (TK) "was apparent in all stages of the NWT environmental management system" (p. S-4)… more training is necessary at all levels to ensure that TK is collected and used effectively; and
- The lack of implementation of the *MVRMA*-mandated Cumulative Impacts Monitoring Program (CIMP) "was identified as one of the most common reasons that projects are referred to Environmental Assessment" (p. S-5), therefore detailed planning and implementation of this program "should be an immediate priority" (p. S-5).

The 2005 audit also concluded that the environmental impact assessment regime is, overall, "protective of the environment within a consultative process" and "allows for input for all potentially affected parties" (p. S-4). In total, the 2005 Environmental Audit made 50 specific recommendations. None of these recommendations had to do with board restructuring, imposing environmental assessment or regulatory timelines, or increasing Ministerial authority.

The 2010 environmental audit (SENES, 2010) reviewed and built on the recommendations base established in the 2005 audit, while noting that most of the 2005 recommendations had not been completed, or, in a large number of cases, even acted upon. The audit reiterated the need to "solidify the foundations of a fully integrated system of land and water management" (p. ES-2) in the Mackenzie Valley. It summarized the key actions that still needed to be taken to provide a solid foundation for an effective and efficient land and water management system:

- Completion of land claim/self-government negotiations;
- Completion and implementation of land use plans;
- Clarification of community engagement and consultation requirements, including the Crown's consultation responsibility as required under s. 35 of the *Constitution Act, 1982*;
- Development of clear processes and effective systems to manage and monitor socioeconomic, cultural and air quality impacts associated with development;
- Full integration of traditional knowledge in monitoring and decision making;
- Adequate and stable funding of *MVRMA* boards, including funding for improvement initiatives and variable workloads; and,
- Adequate and stable funding to facilitate the full participation of Aboriginal organizations and communities. (SENES 2010, p. ES-3).

In response to criticism, particularly from industry, about the length of time it took for project approval in the Mackenzie Valley, the 2010 environmental audit included a chart to illustrate land and water board performance (Table 3.1, p. 3-2). This data showed that for Type A and Type B land use permits and water licences, the application-to-approval time, in almost all cases, was significantly shorter for the regional land and water boards than for the MVLWB itself. In fact, the audit stated that "The vast majority of *MVRMA* applications are processed in a timely manner" (p. 3-1) and that "the timelines for an application in settled [land claims] regions (e.g. GLWB, SLWB, and WLWB statistics) are shorter and can be more reliably predicted than for unsettled regions (e.g. MVLWB statistics)" (p. 3-3).

The data leads Alternatives North and Ecology North to conclude that the land and water boards/panels set up under concluded land claims agreements are, in fact, both efficient and timely, and that concluding land claims agreements in the other regions (the Dehcho and Akaitcho/South Slave) and establishing regional boards/panels in those regions would likely have greater positive impact than eliminating the current regional boards/panels. Although the environmental audit did not analyze why timelines are appreciably longer in the unsettled regions, we suggest that a regionally-integrated regulatory system in which communities have a greater sense of ownership and involvement is much more effective and efficient than a rather remote and disengaging centralized board system.

The 2010 audit continued to emphasize the need for Canada to "develop, properly fund, and carry out a program to monitor cumulative impact in the NWT" (p. ES-3). According to the audit, lack of progress on this matter "has hindered land use planning and the ability of *MVRMA* Boards, regulators and the public to properly assess the cumulative impact context within which project-specific decisions need to be made" (p. ES-3). We agree.

The McCrank Report

The McCrank Report (2008), formally titled 'Road to Improvement: The Review of the Regulatory Systems Across the North', was and is the first and only review to recommend a restructuring of the regional board structure in spite of strong and ongoing opposition to this approach from all of the Aboriginal governments and land claimant groups.

The McCrank Report, for the most part, made recommendations consistent with the 2005 and 2010 environmental audits, by calling for:

- Completion of regional land use plans (three of five have since been completed);
- The filling of legislative and regulatory gaps to protect all elements of the natural environment (in progress, according to the 2010 audit);
- A full federal commitment to the Cumulative Impact Monitoring Program (in progress, according to the 2010 audit);
- The provision of better orientation and training to board members (ongoing and improved according to the 2010 audit);
- More timely nomination and appointment processes for board members (in progress, but still subject to federal government delays);
- Establishment of an agency to coordinate federal and territorial engagement in regulatory processes (CanNor has been established with a related mandate, but its role is not fully developed).

McCrank also added new recommendations to clarify and improve relationships among stakeholders and clarify some key aspects of the regulatory system, such as:

- Developing an official policy on the purpose, scope, and nature of impact benefits agreements (this has not been done to date);
- Establishing clearer financial security requirements for mining operations (this has not been done to date);
- Developing a policy on the free entry system (this has not been done to date and the free entry system has, in other jurisdictions, been the subject of court actions);
- Developing performance measures that result in effective timelines for regulatory disposition, including varying timelines depending on project circumstances (the proposed *MVRMA* amendments impose timelines but without having established or applied performance criteria);
- Establishing standards for water and effluent quality (the Mackenzie Valley land and water boards have taken the initiative to develop this policy)
- Amending legislation to set out clearer criteria for the triggering of more extensive environmental reviews (the proposed *MVRMA* amendments do this to some extent);
- Resolving difficulties in accessing surface lands (the recent *Surface Rights Board Act* has addressed this matter); and
- Developing an MOU among boards, regulators, and government to implement and enforce all recommended and accepted project measures or conditions (the Mackenzie Valley land and water boards have established a Standard Process for New Conditions, and the proposed Development Certificate approach in the amended *MVRMA* may help capture those measures that in the past have not been enforceable).

Significantly, the most contentious of McCrank's recommendations -- restructuring the board system -- was the one recommendation that the federal government acted on most quickly, in spite of ongoing Aboriginal government opposition and in spite of evidence showing there was no problem with the existing structure, in that land and water use permits moved through the regional land and water boards more quickly than those handled by the MVLWB (see the Environmental Audits section above).

Also significant is the fact that McCrank clearly stated in his report that "Any fundamental restructuring would require the agreement of all of the parties to the comprehensive land claim agreements" (p. 14). This unanimous agreement has not been achieved, and the Standing Committee will hear decisively that Aboriginal governments and land claimant groups oppose the proposed changes to the regional land and water board structure as well as increased Ministerial authority and Ministerial control over EA and regulatory assessment timelines.

Finally, as Alternatives North previously noted in its 2008 response to the McCrank report, there was no factual basis for McCrank's recommendation on restructuring; no analysis of timelines (in fact, his conclusion was countered by 2010 environmental audit data); and no discussion of the MVLWB's initiatives to develop consistent standards and operating procedures among the boards, which would significantly improve inter-board operations.

The MVLWB Perspective

In 2011, the Mackenzie Valley Land and Water Board released its own report entitled 'Perspectives on Regulatory Improvement in the Mackenzie Valley'. In the executive summary, the MVLWB stated:

> We maintain that the regulatory process in the Mackenzie Valley itself is not complex; it is indeed different from regulatory regimes familiar to those working in the provinces. Born from negotiated comprehensive land claim agreements, the system is different by design. As such, we feel that the land use permit and water licence system in

> the Mackenzie Valley is not broken; rather, the system that is meant to support it is incomplete. Predictability, clarity, and understanding are the outcomes of complete and mature finalized systems, thus completing the system is paramount to its success. (p. i)

From this perspective, the MVLWB (which includes the regional Gwich'in, Sahtu, and Wek'èezhìi land and water boards as panels of the MVLWB) acknowledged that it was committed to addressing internal governance, administrative, and procedural issues through working groups. The Board also identified some critical issues beyond its control that affected its ability to be more effective. The external issues identified included, not surprisingly:

- The settling of outstanding land claims and land use plans;
- Development of a federal s.35 consultation policy that works within the context of the *MVRMA*;
- Full implementation of the Cumulative Impact Monitoring Program (CIMP);
- Clarification of responsibilities for wildlife, air quality, and socio-economic measures;
- Consistent board and intervener funding; and
- Timely board appointments by the federal government.

Significantly, the MVLWB stressed the "need to carry on with the vision that has been established in the comprehensive land claim agreements – the creation of an integrated system of land and water management" (p. 13). The Board suggested "that the regulatory system… as it pertains to the jurisdiction of the Boards, is not broken; rather, it is unfinished and still being implemented" (ibid). Alternatives North and Ecology North strongly agree with this 2011 MVLWB perspective.

The Pollard Initiative

John Pollard was appointed as an INAC/AANDC Federal Negotiator in 2010 and was apparently given the mandate to implement the land and water board restructuring recommended in McCrank's report, in spite of opposition from Aboriginal governments and land claimant groups and therefore contrary to McCrank's own recommendation. Although none of Mr. Pollard's work has been publicly documented, Alternatives North and Ecology North understand that Mr. Pollard's primary message was that the regional board/panel structure was unsustainable given that it could result in upwards of 50 MVLWB members if all of the outstanding land claimant groups, including those in northern Alberta and Saskatchewan and those pursuing community-based claims, got their own board or panel. This assertion is fallacious as the Minister is aware of the fact that only two other claimant groups, the Dehcho First Nations and the Akaitcho Territory Government, are considering or pursuing land and water board authorities through current land claims processes.

Alternatives North met with Mr. Pollard in 2010 and subsequently sent him a letter that called for the federal government to improve *MVRMA* implementation by simply acting on the recommendations of the MVRMA's own environmental audits!

It is untenable that the dismantling of an effective, engaging, integrated, albeit still-evolving co-management system of land and water management in the Mackenzie Valley is premised on Pollard's and the Minister's misapplication of a recommendation by McCrank (i.e. moving forward on board restructuring without claimant group agreement) and on a fallacious argument put forward by Pollard who has not tabled a single document to support the amendments he was appointed to implement.

Problematic Amendments to the *MVRMA*

Below, Alternatives North and Ecology North have identified and commented on specific amendments in Part 4 of Bill C-15 that are problematic and will likely cause more inefficiencies than they remedy. These comments are organized around our three main areas of concern: restructuring of the board/panel system, increased Ministerial authority, and imposition of federally-controlled EA and regulatory timelines. A few other specific amendments of concern are also identified.

Board/Panel Restructuring

First, the proposed amendment to the Preamble of the *MVRMA* is a significant reinterpretation of the Gwich'in and Sahtu Land Claim Agreements, and therefore the Tlicho agreement, in that it drops a key phrase. Instead of stating that "[these Agreements] *require* the establishment of land use planning boards *and land and water boards* for the settlement areas…" (italics added), the amended Preamble states that the Agreements "require the establishment of land use planning boards for the settlement areas".

Canada has essentially unilaterally reinterpreted the intent and scope of these agreements by reneging on its commitment to regional boards. Alternatives North and Ecology North question the legality of this unilateral reinterpretation of these agreements, without the explicit consent of Aboriginal governments. We are all parties to these land claims agreements through our public governments and believe that honouring these land claims agreements is a public policy requirement and obligation. Alternatives North and Ecology North further believe that eliminating regional boards will result in considerable damage to the relationship between public and Aboriginal governments, to the detriment of all parties, including governments, industry, and the general public. These changes are counter-intuitive, counter-productive, and will not achieve the desired and intended effect: a more effective, efficient, and timely land and water use management system. These changes will certainly not result in better environmental management within the Mackenzie Valley as environmental and regulatory decisions become more distant and disconnected from the people and communities they affect.

Second, the definition "management area" in section 51 of the current *Act* which refers to the respective land claims settlement areas, is being repealed (p. 100). This amendment means that Canada and the *MVRMA* no longer recognize the distinct nature of settlement areas within the NWT. One would think that each settlement area would continue to be considered a unique environmental management area within the terms of the *MVRMA* given the distinct resource management systems and commitments that continue to apply within these respective settlement areas through land claims agreements, which, again, are a matter of public policy.

Third, sections 54 through 57.2 and 58 through 68 of the current *Act*, which establish and define the role of the Gwich'in, Sahtu, and Wek'èezhìi Land and Water Boards are replaced by sections that consolidate land and water management roles and authorities in a centralized Mackenzie Valley Land and Water Board (pp. 105 and 107). These amendments dislocate land and water management authorities from the respective land claims regions and diminish the sense of ownership and engagement Aboriginal regions currently have in land and water use decisions. This is the opposite of the intent of the devolution agreement, which is to bring decision-making regarding lands, waters, and resource use closer to home. It is not even clear yet whether regional board staff will be maintained. If not, smaller developers within each region will no longer have the opportunity to obtain local advice on the process and requirements for their application by regional staff, which has been a helpful role of the regional boards.

Fourth, section 54(2) of the amended *Act* establishes an 11 member central board with 1 member each nominated by the concluded land claims regions, 2 members nominated from the unsettled land claims regions, 2 members nominated by the territorial government, and 3 members (excluding the chairperson) appointed by the federal minister (p. 105). Section 12(2.1), 12(2.2), and 12(4) (pp. 96-97) also grants the federal Minister the right to unilaterally appoint the chairperson, which is not the current case, where the board nominates a chairperson for appointment (see increased Ministerial authority below). Section 56 of the amended *Act* calls for project panels of three members, to be determined by the federally-appointed chair, which may or may not include a member from the region in which a project is to occur (p. 106).

In the Mackenzie Valley -- where there are five geo-political regions and/or settlement areas (Gwich'in, Sahtu, Tlicho, Dehcho, and Akaitcho/South Slave), each of which have negotiated or are negotiating claims based on a federal commitment to co-management of lands and waters -- this centralized structure undermines the essence of an integrated co-management system. For the claimant regions, a single representative on an 11 member board, and the possibility that no representative from a respective region may sit on a project panel for that region, is a significant step backward. The more removed these regions feel from the decision-making process, the more likely land use and water licence applications will be addressed from an adversarial rather than cooperative approach.

As well, the question arises: How will the work of 11 board members be coordinated to handle the hundreds of land use and water licence applications that have to be processed each year? Maintaining consistent panels and quorums for each project that requires review will be difficult, particularly in the face of restricted timelines. Having only 3 panelists per application, with only 2 of these needed to make decisions, will certainly pose logistical, political, and legal problems. If one panelist cannot make a meeting or hearing for health or transportation reasons, decisions may be made by 2 members, neither of whom may represent the region in which the project is taking place. Legal issues may also arise if a claimant region is not adequately represented in land and resource management decisions affecting Aboriginal and/or Treaty rights. This last point is significant in that the regional boards/panels currently fulfill a significant role in the procedural aspects of s.35 consultation.

In essence, the procedural aspects of s.35 consultation, which are facilitated under the current structure for the finalized claimant regions, may have to be addressed through other processes under the amended board structure. Although Canada claims that it has the legal right to override the regional board structure and create a central board, the legal implications and tests of that decision may ride on the territorial board's ability to fulfill the procedural aspects of consultation that the current regional board structure

manages quite well. Alternatives North and Ecology North believe that there will be more court challenges of board decisions under the proposed amendments than under the current structure – at high cost and additional risk to all parties, including industry.

Increased Ministerial Authority

Given that the *MVRMA* amendments are contained in Bill C-15, which has been put forward as a bill to implement the devolution of land and water management authorities to the Government of the Northwest Territories, it is baffling how certain sections of Part 4 of Bill C-15 result in increased authority for the federal government at the cost of territorial and Aboriginal government authority and/or the authority of northern boards! This appears to be devolution in name only, but not in practice.

Along with the structural changes noted above, which unilaterally override existing commitments under land claims agreements, the following amendments increase federal Ministerial authority considerably. Where that authority may be delegated to a territorial Minister under section 4(1) of the amended *MVRMA*, the increased Ministerial authority diminishes the authority and independence of the *MVRMA* boards (including the planning boards, the MVEIRB, and the MVLWB):

- Sections 12(2.1), 12(2.2), and 12(4) of the amended *MVRMA* ensure that the federal Minister has the sole authority and discretion to appoint the chairperson of the centralized MVLWB. Currently, the chairperson is appointed from nominations made by the board itself. Even if that authority to appoint is transferred to a territorial Minister, the diminishment in MVLWB control over the appointment of the chair remains;
- Section 50.1(1) of the amended *Act* extends the federal Minister's authority over regional planning boards as it provides the Minister with the authority to "give written policy directions that are binding on the planning board with respect to any of its functions under this Act" (p. 100). Delegating this authority to a territorial Minister, if and when that may occur, does not override the fact that the potential for political direction and interference in decision-making increases;
- Section 142.2(1) of the amended *Act* allows the Minister to "give written policy direction" to the Mackenzie Valley Environmental Impact Review Board (p. 203). Again, delegating this authority to a territorial Minister, if and when that may occur, does not override the fact that the potential for political direction and interference increases;
- Section 72.13 (p. 127) and section 81 (p. 149) of the amended *Act* require that issuances or amendments to type A water licences and to type B water licences where a hearing has been held must be approved by the federal Minister, whereas now only type A licences require Ministerial approval. Even if approval of Type A licences is transferred to a territorial Minister as per section 3.17 of the NWT Lands and Resources Devolution Agreement (p. 33), transferring authority for Type B licence approval (where there is a hearing) from MVLWB to either the federal or territorial Minister diminishes Board authority and increases the potential for political interference in decision making;
- Section 111.1 of the amended *Act* (p. 174), consolidates federal Ministerial authority with respect to environmental assessments in the hands of the AANDC Minister and removes authority from other federal Ministers, including the Fisheries and Environment Ministers;
- Section 144.1 of the amended *Act* allows the Minister to set the terms of reference for and appoint the members of a regional study committee (p. 215). This unilateral authority allows the Minister, whether federal or territorial, to control the nature, scope, and perspective for cumulative impact studies, which undermines current co-management principles within the *Act*; and
- All of the sections dealing with environmental assessment and regulatory timelines (see below) remove important discretionary authority away from the boards and transfer considerable discretionary authority to the federal Minister and to the Governor in Council (cabinet).

Again, there is significant irony in the process of devolution where the federal Minister ends up with more authority under the amended *MVRMA* than he had pre-devolution! And where the federal Minister chooses to delegate these authorities to a territorial Minister, this new territorial government authority is at the expense of Aboriginal government and/or northern board authority. In both cases, more decisions become political decisions rather than independent (or even quasi-independent) board decisions. This raises the simple question: Why?

In the formal implementation reviews carried out with respect to the *MVRMA* it is apparent that many of the delays associated with the timely and effective operation of the *MVRMA* regime can be attributed to the federal government, including lack of clarification on some regulatory issues (such as air quality), delays in nominating/appointing board members, making post REA decisions, resourcing Aboriginal and public engagement (e.g. participant funding), carrying out s.35 consultation, properly resourcing and supporting board operations, and implementing the Cumulative Impacts Monitoring Program (SENES, 2010; pp. A-6 to A-12; 2005 audit recommendations 10, 22, 23, 31, 34, 35, 38, 49, 50). To assume that this system will be 'fixed' by granting even more decision-making authority to the federal Minister is counter-intuitive.

Significantly, increased Ministerial authority over individual environmental assessment and regulatory operational processes themselves, through the imposition of Ministerial-controlled timelines on project assessments and approvals (see below), creates a situation where the federal Minister, as a politician, will have greater day-to-day involvement in operational decisions as well as in policy decisions. The proposed amendments, in effect, create a micro-managed system.

There is no justifiable reason for increased Ministerial authority over land and water management in the Mackenzie Valley, particularly increased federal Ministerial authority at a time of devolution. Where increased authority is held by the federal Minister, decision-making will become more distant, disconnected, inefficient, adversarial, colonial, and counter-productive. Even where some of these Ministerial authorities are delegated to a territorial Minister, the decision-making process becomes more centralized and political, counter to the original MVRMA goal of having an integrated co-management system. The proposed amendments to the *MVRMA* either undermine the intent of the devolution process (to devolve authority and not just responsibility) or reduce the independent and arms-length authority of the boards. In both cases, a more centralized, less integrated and collaborative approach, will likely make environmental and regulatory processes proceed in a less timely and less efficient manner than they currently do today.

Imposition of Timelines

The proposed *MVRMA* amendments include the imposition of environmental assessment and regulatory approval timelines in a number of sections, including sections 72.18 to 72.24; 128 to 131; 134; 136 to 138; and 140 to 141. In all cases, a similar pattern is followed. There is:

- a 'base' timeline for environmental assessments with or without hearings;
- an option for the MVEIRB (or other panels) to extend timelines for a short period of time;
- an option for the federal Minister to extend timelines for a short period of time; and
- the option for the Governor in Council to extend timelines at its discretion.

There are caveats to these timelines, the most important being that the time required for a proponent to carry out research in order to fulfill its information requirements is not included in the timeline – in other words the clock stops while a proponent carries out its required research, some of which can be quite time consuming.

While, on the surface, these timelines may seem straightforward, they pose some problems. First, based on the previous *MVRMA* reviews, it appears that there is no need for fixed timelines -- other than for ones for the federal Minister to make his/her decisions, which is where the longest delays have occurred.

Second, the imposition of timelines will affect the procedural aspects of s.35 consultation. Previous *MVRMA* assessments have noted that a current weakness in the system has been the inability of many Aboriginal governments to fully and effectively participate in EA and regulatory processes, due to time restrictions and lack of resources. Tightening time restrictions while not added any new resources for these governments will simply exacerbate this problem and may make separate, more thorough, s.35 consultation processes more necessary (and, perhaps, costly).

Third, by the fact that it is the federal Minister and Governor in Council that gain the greatest discretionary control over these timelines, particularly environmental assessment timelines, the ability of the MVEIRB and MVLWB to adjust or modify timelines in order to accommodate particularly complex projects, including projects in which there is considerable public interest and concern, will be undermined.

Finally, pushing projects forward without full and thorough assessments will affect and limit the ability to modify project design (which is a valuable function of EAs) in order to reduce environmental risks and to establish effective measures and conditions for specific developments. This diminishment of environmental oversight poses a significant threat to the environment and the long-term sustainability of the Mackenzie Valley. Residents of the Mackenzie Valley are already aware of the consequences of poor environmental decision-making in the past, as we have a significant number of dangerous and costly contaminated sites to deal with, including Giant Mine, which are costing taxpayers huge amounts of tax dollars to clean up and maintain (in some cases, in perpetuity).

Other Specific Amendment Concerns

There are other specific amendments proposed to the *MVRMA* that Alternatives North and Ecology North are concerned with. They are as follows.

Sections 51 and 90.3(1)(m) of the amended *Act* (pp. 102 and 160) create the situation where the Minister can allow water use and waste discharge *without* a licence in 'federal areas' (those lands maintained under federal authority post-devolution). It is not clear why this exemption would be necessary and what purpose it would serve. This amendment needs to be reviewed.

Section 51 (p. 102) adds a definition for an "instream user" which includes "a person who uses water… to *earn income*…" (italics added). This is a rather vague definition and is open to wide interpretation. As such, the definition should be clarified and/or tightened.

Sections 72.03(2) and 72.12(1)(a) (pp. 118 and 126) allow for 25 year water licences, which would eliminate the adaptive management function that is inherent to water licence renewal applications. Water licence renewals allow for the evaluation of monitoring provisions, identification of changes to the natural environment that may affect safe operations, formation of new waste discharge standards, introduction of new technologies, and many other adaptive management features inherent to sustainable project implementation. The intent and implications of these particular amendments should be reviewed carefully.

Section 137.4(1)(b) of the amended *Act* (p. 191) requires the MVEIRB to issue a development certificate in those instances where the board has rejected a project proposal on environmental grounds but has had that rejection overturned by the Minister. In this case, who establishes the conditions for the development certificate and what timeline is required for a development certificate to be properly prepared? Without clarification, this amendment will create procedural problems.

Positive Amendments

Without detracting from the seriousness of the proposed amendments respecting board restructuring, Ministerial authority, and imposed timelines, Alternatives North and Ecology North acknowledge some positive aspects to Part 4 of Bill C-15. In brief, these include the following:

- Timeline violations do not terminate existing authorities or documents [s. 5.2(1)];
- Boards other than the MVLWB continue to nominate their own chair [s. 12(1)];
- The *Act* continues to recognize the value of traditional knowledge [s. 53(2)];
- Adherence to approved land use plans is paramount [s. 61(1) and 61(2)];
- Enforcement authorities for inspectors is increased (assuming there will be a corresponding increase in inspector funding) [s. 85];
- Increased fines for offenses [s. 92(1), 92(4), 92.02, and 92.03];
- Cost recovery with respect to some review processes [s. 142.01]; and
- Use of development certificates to better capture and enforce permit/licence conditions [s. 131.3/131.4].

However, there are also some areas that should have been covered including participant funding and mandatory responses to the environmental audits.

Conclusions and Recommendations

In this Brief on the proposed Bill C-15 amendments to the *Mackenzie Valley Resource Management Act*, Alternatives North and Ecology North have reviewed previous assessments on *MVRMA* implementation, reviewed Part 4 of Bill C-15 in detail, and brought their own collective knowledge and experience in environmental management to bear on issues of particular concern. We have concluded that if it is the intent of the federal government to ensure a land and water management system in the Mackenzie Valley that is timely, efficient, and effective, the government has taken a decidedly wrong turn.

Rather than simply following through on the 2005 and 2010 environmental audits that are built into the *MVRMA* for adaptive management purposes, the federal government has proposed sweeping changes to the *Act* that undermine the original co-management intent of the *Act* as an extension of commitments made under existing land claims agreements; increase federal Ministerial authority counter to the intent of the land and resources devolution agreement with the GNWT; increase Ministerial authority generally (whether federal or territorial) at the expense of northern boards; and impose assessment and regulatory timelines that do not reflect and respect the complexity of the northern geo-political context, northern projects, and the northern ecosystem.

The results of these proposed changes will not make the current land and water management system more timely, efficient, or effective. Rather these changes will create a more disconnected and adversarial management regime that will likely result in

greater need for separate s.35 consultation processes, more legal challenges of environmental assessment and regulatory decisions, and much greater potential for long-term environmental damage, at great cost to the general public. For this reason, our organizations make the following recommendations to the Standing Committee:

1. Remove Part 4 from Bill C-15 and address it separately;
2. If Part 4 remains in Bill C-14
    a. Remove those amendments that dismantle the regional land and water boards;
    b. Remove those amendments that increase federal Ministerial authority over land and water management in the Mackenzie Valley;
    c. Where timelines need to be applied based on existing evidence, grant greater discretionary authority to the boards, not the Minister, in the application of those timelines; and
3. In order to make the current Mackenzie Valley land and water managements system more timely, efficient, and effective, ensure that responsible authorities, particularly the federal government, actively implement the recommendations of the 2005 and 2010 environmental audits.

Thank you for the opportunity to submit this Brief.

Bibliography

Alternatives North. A Response to the 'Road to Improvement" Report by Neil McCrank. Yellowknife, August 2008. http://www.alternativesnorth.ca/Portals/0/Documents/Regulatory%20Affairs/2008%2008%2001%20AN%20Response%20to%20the%20McCrank%20Report.pdf

Alternatives North. Submission to John Pollard. June 2010. http://www.alternativesnorth.ca/Portals/0/Documents/Regulatory%20Affairs/2010%2006%2009%20Submission%20to%20Pollard%20Regulatory%20Review.pdf

Bill C-15, *Northwest Territories Devolution Act*. Minister of Aboriginal Affairs and Northern Development, Ottawa. December 2013.

Indian and Northern Affairs Canada. The *Mackenzie Valley Resource Management Act*: A Citizen's Guide. 2007.

Gwich'in Comprehensive Land Claim Agreement, Volume 1. 1992.

Mackenzie Valley Land and Water Board. Perspectives on Regulatory Improvement in the Mackenzie Valley. Yellowknife, May 2011.

Mackenzie Valley Resource Management Act, S.C 1998, c. 25. Minister of Justice, Ottawa. August 2005.

McCrank, Neil. Road to Improvement: The Review of the Regulatory Systems Across the North. Indian and Northern Affairs Canada. May 2008.

Sahtu Dene and Metis Comprehensive Land Claim Agreement, Volume 1. 1993.

SENES Consultants Limited. Northwest Territories Environmental Audit 2005: Main Report. December 2005.

SENES Consultants Limited. 2010 Northwest Territories Environmental Audit. March 2011.

Tåîchô Land Claims and Self-Government Agreement. 2003.