

Dehcho Resource Management Authority and MVRMA: A Discussion Paper

The following discussion paper consolidates the various DFN position papers on the DCRMA, and outlines a rationale for a DCRMA in the Dehcho territory, based on DFN's objectives in the Dehcho Process and noted issues with the current regulatory regime.

DCRMA: Summary

A Dehcho Final Agreement will contain provisions for the creation of a Dehcho Government. The draft Dehcho Constitution outlines the proposed division of jurisdiction between the Dehcho Government and local governments, and includes provisions for a Dehcho Resource Management Authority (DCRMA). The draft Dehcho Constitution states that DFN will explore "governing lands and resources" under a DCRMA, however DFN discussions have clarified the DCRMA authority as the "management and administration" of lands and resources, in recognition that true legislative jurisdiction would be retained by the Dehcho Government, or as agreed upon by the Parties.

The DCRMA is proposed to be a quasi-judicial body, whose primary function is the regional management and administration of surface and subsurface lands and resources outside of community municipal boundaries.^[1] DFN have proposed that the Dehcho Government will have jurisdiction to enact legislation and regulations concerning lands, waters, and resources including surface and subsurface lands, waters, renewable and non-renewable resources. The DCRMA will be the primary vehicle through which lands and resources legislation and regulations are managed and administered. The DCRMA will function at arms-length from the Dehcho Government and the Government of Canada.

A key function of the DCRMA will be the implementation of the Dehcho Land Use Plan. The DCRMA will ensure that lands and resources activities within the Dehcho territory conform to an approved Land Use Plan. The Final Agreement will result in amendments to the Dehcho Land Use Plan, as necessary to ensure consistency with provisions of the Final Agreement. Similarly, the Dehcho Government provisions, and Implementation Agreement should be part of the Final Agreement, and not be negotiated in subsequent, piecemeal formats, as per the Gwich'in and Sahtu Dene and Metis Comprehensive Land

Claim Agreements. Final Agreements that leave Self-Government provisions and Land Use Plans for later negotiations effectively delay the implementation of First Nations jurisdiction, and in some instances, leave lands and resources vulnerable to further third-party dispositions.^[2]

Municipal Boundaries

The role of the DCRMA in managing and administering lands and resources within municipal boundaries requires further discussion. It is proposed that each local government established in a Dehcho Final Agreement will have the jurisdiction to administer and manage surface lands within community municipal boundaries, as well as jurisdiction pertaining to local affairs (see Dehcho Constitution, Rolling Draft #6).^[3]

In the MVRMA, land and water regulation (mostly use of surface lands) within community municipal boundaries is regulated by the community government, however it is the respective land and water board and the Minister who “jointly determine the extent to which local government regulates the use of land within its boundaries.”^[4] To maintain the DFN objective of strong local community control over community lands, the Dehcho Government and the Dehcho communities should jointly make this determination, not the DCRMA and/or the Minister.

Regardless of whether the Dehcho Government or local government is delegated the management and administration of subsurface lands within community boundaries, these decisions should be subject to the consent of the community government.

Rationale for a DCRMA

Land and Resource Management in NWT Final Agreements:

Canada clearly prefers that a Final Agreement for the Dehcho First Nations adopt the jurisdiction, regulation, and management of lands and resources, as per the existing government and regulatory structures. However, the regulatory regime established by the Gwich'in and Sahtu Comprehensive Land Claim Agreements was imposed upon the Dehcho First Nations, and does not reflect their values, goals and objectives in the Dehcho Process. For example, they do not provide for actual, substantive First Nations' jurisdiction affecting lands and resources. Significant issues with the current regime include: the ultimate jurisdiction of the Federal and Territorial governments over lands and resources; the lack of actual decision-making powers for First Nations; the cumbersome, fragmented, inefficient and ineffective regulatory processes; the lack of integration between the various governmental and regulatory components; and the lack of transparency in Minister-Board functions.

The Gwich'in and Sahtu Comprehensive Land Claim Agreements, based on land selection and the regulatory regime established under the *MVRMA*, were negotiated without the finalization of Self-Government Agreements and Land Use Plans. The “use, management, control, administration and protection” of First Nation lands were categorized as additional subjects for negotiation.^[5] Furthermore, subsequent Self-Government Agreement-in-Principle documents for the Gwich'in and Inuvialuit, and Deline are framework agreements that also leave the “use, management, control, administration and protection” of First Nations settlement lands as subjects for future negotiations.^[6] In contrast, clarity and certainty over lands and resources are at the heart of the Dehcho Process, and form the substantive component of negotiations between the Dehcho First Nations and Canada.

The regulatory regime established under the Gwich'in and Sahtu Comprehensive Land Claim Agreements resulted in the continuing jurisdiction of the Minister over lands and resources. The combination of the *MVRMA* regulatory regime with a land selection model has resulted in a patchwork of land blocks with numerous boards, councils, and government bodies responsible for managing various components of lands and resources. This system is unnecessarily complicated and fragmented, and lacks effective integration between regulatory boards. Separate boards, councils, and government departments all have different mandates, with often competing or conflicting objectives for lands and resources. Furthermore, the various First Nations and government organizations do not share coordinated databases. The majority of organizations do not even have up-to-date, accurate, and usable GIS databases of lands and resources and activities, nor can they accurately assess past, present, and pending development activities.^[7] It is therefore impossible for these agencies to fully analyse the potential impacts of a proposed activity, nor assess the cumulative impacts of current and proposed development activities.

In addition to the various departments of the GNWT and Canada,[\[8\]](#) who retain significant jurisdiction over lands and resources in the settlement areas, the following boards, councils, and agencies administer lands and resources in the Sahtu settlement area:

- Tribal Council and Corporation;
- Renewable Resources Board (*Government appointed, wildlife and forestry management, policy and regulation, decisions subject to veto by Minister*);
- Renewable Resources Council (*community based advisory body for local involvement in wildlife and forestry; limited forestry decisions subject to RR Board veto*);
- National Park Management Committee (*advisory body for new parks, recommendations subject to Ministerial approval*);
- MV Land and Water Board and regional Sahtu Panel (*Sahtu representation on LWB; Minister appointed Chair and binding policy direction on LWB and Sahtu panel*);
- MV Environmental Impact Review Board (*Sahtu representation; Minister appointed Chair; decisions and recommendations subject to Ministerial approval*);
- Land Use Planning Board (*Plan is subject to Ministerial approval*);
- Surface Rights Board (*access, entry and compensation only*);

In the above boards, committees, and organizations, the Sahtu only have provisions for representation and consultation on government drafting, amending, or implementing legislation. The Federal and Territorial governments “retain the ultimate jurisdiction for the regulation of land and water”[\[9\]](#) and the “ultimate jurisdiction for the management of wildlife and wildlife habitat,” as well as final authority over forestry, plants, National Parks, and Protected Areas in the settlement areas. [\[10\]](#) The majority of Sahtu selected lands do not include rights to mines and minerals (including oil and gas); the control and management of these non-renewable resources remain with the Crown, and are intended to be devolved to the GNWT.[\[11\]](#) On all selected lands, the Sahtu only have jurisdiction for “the development and administration of land management programs and policies”, i.e. not “the regulation of land and water.” Regulation of land and water is achieved through the various boards, agencies and government departments, in which the First Nations only have representation. Therefore, the First Nations have little substantive decision-making powers over the regulation of lands and resources (protection and/or development) in their settlement areas. Combined with ultimate Federal government jurisdiction over oil and gas, and mineral rights, and associated legislation, it is the Federal and Territorial governments who control actual surface and subsurface activities on the land.

While the Tlicho Agreement includes provisions for Self Government, the regulation and management of Tlicho lands are still encumbered under the existing *MVRMA* and regulatory regime. In the Tlicho Agreement, and the subsequent consequential amendments to the *MVRMA*, the Tlicho gained marginal improvements in decision making authority, compared to the Gwich'in and Sahtu Comprehensive Land Claim Agreements. However, the regulation, management and administration of lands and resources, under the Tlicho Agreement, are still fragmented between various boards:

- The Wek'eezhii Renewable Resources Board (*wildlife management, commercial wildlife activities, forest and plant management, protected areas; some decisions subject to GNWT and Canada veto*);
- The Surface Rights Board (*similar to Gwich'in and Sahtu*);
- The Mackenzie Valley Environmental Impact Review Board (*Tlicho representation; status quo Ministerial veto over decisions and recommendations*);
- The Wek'eezhii Land and Water Board (*Tlicho representation on LWB; regional panel with jointly appointed Chair*);
- National Park Committee;
- Land Use Planning Board;
- Protected areas committee (optional)

Under the Gwich'in and Sahtu Comprehensive Land Claim Agreements, the Minister appoints the Chair of both the MVLWB and MVEIRB, and this issue has proven to be a flaw in the transparency and function of the Boards, as the Minister's appointments have been controversial.[\[12\]](#) The boards also share the same legal counsel, which has resulted in difficulties in clarifying the roles, jurisdiction and authorities of the boards.

Under the *MVRMA*, the MVLWB has jurisdiction for land and water regulation and is established as an institution of "public government." The Gwich'in, Sahtu, and Tlicho regional panels (regional Land and Water Boards) are all established as institutions of public government. Importantly, government means Federal or Territorial government, not First Nations government, and this language is reflected in NWT Final Agreements.[\[13\]](#) In practice, these panels are 'mini-panels' of the MVLWB, as the panels become members of the MVLWB, which has a Minister appointed Chair. Furthermore, the regional panels only process applications that are located entirely within their respective settlement areas, but as members of the MVLWB, they participate in the processing of all applications for the rest of the Mackenzie Valley. For example, the Wek'eezhii Land and Water Board, established under the Tlicho Agreement, only processes applications located entirely within the management area of Wek'eezhii. Developments affecting any lands outside Wek'eezhii are under the jurisdiction of the MVLWB.

The Chair of the Gwich'in and Sahtu panels is appointed by the Minister, and the Tlicho have a joint Chair appointment.[\[14\]](#) The remaining members of the Gwich'in and Sahtu panels are appointed by the Minister, including the First Nations' representatives. The Tlicho panel (Wek'eezhii Land and Water Board) has 50% members appointed by the Tlicho Government.[\[15\]](#)

In the Tlicho Agreement, the structure of the Wek'eezhii Renewable Resources Board also has 50% members appointed by government (Federal and Territorial) and 50% members appointed by the Tlicho Government, with a joint appointment of the Chair.[\[16\]](#) The joint appointment of the Chair is the most significant issue, as the Chair may render a binding decision, in the event of the Board being unable to achieve consensus.

A significant issue with lands and resource management under the Tlicho Agreement is the continuing jurisdiction of the Minister to give binding policy direction on decisions of the Wek'eezhii Land and Water Board,[\[17\]](#) and to have a veto over authorizations requiring the use of water, or the deposit of waste. While the Tlicho Government may also provide binding policy direction on the board that is paramount over policy direction from the Minister, this provision only applies to Tlicho lands, not to Wek'eezhii.[\[18\]](#) Furthermore, all federal and territorial legislation is subsequently paramount over any policy direction from the Tlicho Government.[\[19\]](#)

The Tlicho Agreement also contains a provision that legislation “may provide for the reallocation of functions” among the Mackenzie Valley Environmental Impact Review Board, Wek'eezhii Land and Water Board and a Land Use Planning body, yet stipulates that the environmental assessment function must remain with the Mackenzie Valley Environmental Impact Review Board.[\[20\]](#) At first glance, this provision may appear to provide a greater role for the Tlicho First Nations in the management of lands and resources, however the environmental assessment function is a significant way in which decisions regarding lands and resources are developed, and projects may be modified, or even rejected. Furthermore, the provision is vague, and does not discount the possibility that the Tlicho First Nations could lose functions to the Mackenzie Valley Environmental Impact Review Board. Also, the 2004 consequential amendments to the MVRMA do not contain this provision.

Only on selected lands, called “Tlicho Lands”, may the Tlicho Government enact laws “in relation to the use, management, administration and protection of Tlicho lands, and

the renewable and non-renewable resources found thereon, including, for greater certainty, laws respecting:[\[21\]](#)

- a. the granting of interests in Tlicho lands and the expropriation of such interests by the Tlicho Government;
- b. land use plans for Tlicho lands;

- f. the requirement for an authorization from the Wek'eezhii Land and Water Board for use of Tlicho lands where legislation provides an exemption from such a requirement.

The above powers are concurrent with those of Canada, and, in the event of conflict between a Tlicho law and federal legislation (except legislation of general application), the Tlicho law prevails, to the extent of the conflict. These legislative powers pertain only to the Tlicho selected lands, and do not apply to Wek'eezhii, or to the larger Mowhi Gogha area. In relation to other legislative powers pertaining to lands and resources, the Tlicho Agreement prohibits the Tlicho Government from making laws enacted in relation to access to Tlicho lands from imposing any conditions on the exercise of existing interests, and from establishing a permitting system for the use of surface of Tlicho land.[\[22\]](#) These provisions are relevant as they affect the use of surface and subsurface lands. The lack of legislative powers over the establishment of permitting systems, further binds the Tlicho under the MVRMA and broader MVLWB.

The Tlicho Agreement only provides that “at least one member” of the Mackenzie Valley Environmental Impact Review Board be a nominee of the Tlicho Government.[\[23\]](#) This is marginal representation on a board with the significant function of assessing the environmental and socio-cultural impacts of projects, and with the responsibility to recommend binding mitigation measures, for Ministerial approval.

The Tlicho Agreement, and the consequential amendments to the Act contain clauses that weaken the effect of environmental assessment. In the Tlicho Agreement, the MVEIRB can only “recommend that the authorizations impose such measures it considers necessary to prevent the significant adverse impact.”[\[24\]](#) While the wording difference is subtle, this is a significant departure from the original letter and intent of environmental assessment under the Act, in which the MVEIRB recommendations were clearly intended to be imposed and binding on the MVLWB and regulatory authorities. Despite subsequent sections of the Act that require regulatory authorities to incorporate conditions arising from an environmental assessment,[\[25\]](#) this clause provides

considerable discretionary authority to Land and Water Boards to alter or omit recommendations. Finally, under the *MVRMA*, the Minister has final approval authority over the recommendations of an environmental assessment. The Dehcho Government will require full approval authority over the recommendations of an environmental assessment.

Issues with MVRMA

The *MVRMA* and regulatory regime pose additional problems in the Dehcho territory. While the *MVRMA* is intended to provide for an “integrated” system of land and water management in the Mackenzie Valley, DFNs experience working within this system has found significant flaws in the Act, and in the function and integration of both Boards.

DFNs core issues with the regulatory regime and the Act cannot be resolved within existing structures and legislation. DFNs experience in working with the Act during recent years has also determined that the evolving interpretation and application of the Act has been increasingly narrow and further from the interests of the Dehcho First Nations. These issues are intertwined and are considered below.

Among the flaws in the regulatory regime and the *Act*, the following core issues have been particularly frustrating for the Dehcho First Nations: the interpretation and application of the Act, the effectiveness of environmental assessment, the role and jurisdiction of First Nations, and the jurisdiction of the Minister.

Environmental Assessment referral powers

One significant issue for DFN has been the exclusion of the Dehcho First Nation communities from the interpretation and application of the definition of “local government”, and the subsequent refusal of the Minister and the MVEIRB to recognize the Dehcho First Nation communities in referring development applications to environmental assessment.^[26] “Local government” has been interpreted by the MVEIRB to only include communities established under GNWT legislation: *Cities, Towns and Villages Act*, the *Charter Communities Act*, the *Hamlets Act*, or the *Settlement Act of the Northwest Territories*.^[27] The interpretation of the MVEIRB also excludes

First Nations in unsettled regions, First Nations who are established or recognized as local governments by federal law, the *Indian Act*, and s. 35 of the Constitution. The heart of this issue is a deliberate narrow interpretation that effectively limits the Dehcho First Nations' participation over development projects that have direct impacts upon Dehcho lands. DFN correspondence on this issue includes:

“Clearly federal laws, including the Indian Act, which recognizes our communities, and common law, are also “laws of the NWT”. Likewise, the Canadian Constitution, which specifically recognizes Aboriginal and Treaty rights of our people, is also a law of the NWT... I do not understand the basis for your narrow interpretation of the Act as meaning that only local governments established under GNWT laws can be “local governments” for the purpose of making referrals. Not only is your interpretation legally questionable, it makes no sense from a policy perspective. What rationale could explain an arbitrary exclusion of many First Nations councils from a key function of local governments under the Act?”[\[28\]](#)

As an interim measure, the recent Dehcho Settlement Agreement provides that the Minister will refer projects to environmental assessment, on the request of the Dehcho First Nations.[\[29\]](#) Despite this Dehcho Settlement Agreement clause, the Minister has arbitrarily refused to refer a project to environmental assessment when requested by a Dehcho community.[\[30\]](#) Furthermore, it does not resolve the definition or interpretation of “local government” under the *Act*.

DFN have proposed that the Dehcho Government will have jurisdiction over environmental assessment and delegate the environmental assessment function to the DCRMA. *The Dehcho Act* will require clear language on the definition of community and regional governments, and clear direction that all communities in the Dehcho territory will have equal referral authority to the DCRMA. The Final Agreement and *The Dehcho Act* should also include referral authority for the regional Dehcho Government and the DCRMA in respect of transboundary projects. Also, for the purposes of integrating with the *MVRMA* for transboundary projects, the current definition of “local government” in the *MVRMA* will need to be amended, such that the Dehcho communities are recognized as local governments for the purposes of exercising rights.

Issues with Environmental Assessment

DFN have experienced a real lack of integration between the environmental assessment and the regulatory components of the Act. For environmental assessments, the recommendations of the MVEIRB, which are subject to Ministerial approval, are intended to be binding on the MVLWB and other regulatory authorities that issue authorizations.^[31] In DFNs experience, the recommendations do not get effectively integrated into the regulatory permits and licenses. In fact, the MVLWB has omitted, altered, or diluted MVEIRB recommendations in permits and licenses. While this is extremely poor environmental assessment practice, it is also contrary to the intent and letter of the *Act* regarding environmental assessment. Therefore, the MVLWB is exercising more discretionary powers than stipulated or intended in the Act.

Disappointingly, the Attorney General has recently argued for discretionary powers for the MVLWB, while preserving the broad powers of the Minister.^[32] Legal counsel for the Attorney General argued that the MVLWB does not have to “incorporate” recommendations into authorizations, rather the MVLWB has to “act in conformity to the extent of their authority.” Indian and Northern Affairs also recently stated that the MVLWB “must have some defined degree of discretion in fashioning license terms that adequately reflect the Review Board’s recommendation and associated mitigative measures.”^[33] While both boards do have independent statutory roles under the Act, the MVLWB is legally bound by decisions rendered under Part 5. This issue remains contentious for the DFN. A Dehcho DCRMA with delegated authority for both environmental assessment and the drafting of authorizations would solve this ongoing issue.

The MVEIRB does not always draft the recommendations in clear and concise language, and this has led to numerous problems with the interpretation of an environmental assessment. Despite requests from DFN and other parties, the MVEIRB has referenced ‘developer’s commitments’ in a vague way, rather than explicitly listing these commitments for clarity and ease of reference. Furthermore, the MVLWB has demonstrated an unwillingness to consult the MVEIRB to clarify the meaning and intent of MVEIRB recommendations. The MVLWB has also not referred to the original environmental assessment documents for factual knowledge and correct interpretation of recommendations. Instead, when drafting the Terms and Conditions for permits and licenses, the MVLWB has held meetings with the developer, without the knowledge of other parties to the environmental assessment. The result has included authorizations that depart from the project assessed by the Review Board.^[34] Staff reports to the MVLWB have been found to be vague and inaccurately summarize reviewers, including DFNs, technical comments.

The MVEIRB has noted this lack of coordination and failure of the MVLWB to incorporate recommendations into permits and licenses.^[35] Indeed, the need for increased coordination and clarity between the Boards is an issue identified in the MVEIRB's 2004-2005 Annual Report.

Combined with the Minister-appointed Chair of the MVLWB, there is a perceived lack of transparency in the regulatory regime. The 2004 amendments to the Act, as a result of the Tlicho Agreement, also weaken the effect of the MVEIRB's recommendations for mitigative measures.^[36] Due to these issues, the effect of environmental assessment under the Act is at risk of becoming meaningless. Ironically, DFN have been forced to use the Courts as a means to enforce provisions of the Act, in order to protect their interests.^[37]

Ministerial powers

Under the Act, the Minister retains significant jurisdiction and powers to impose binding policy direction on the MVLWB and regional panels, and has final jurisdiction over approving Type A water licenses. The Minister also has jurisdiction to approve the Report of Environmental Assessment and accompanying recommendations, and to accept, modify, or reject the recommendations. Importantly, this power includes the authority to reject projects outright. The Gwich'in and Sahtu do not have any authority to approve, modify, or reject environmental assessment recommendations: the Minister retains this authority under the Act. As an example of an improvement over the authorities the Gwich'in and Sahtu, the Tlicho Government does have the authority to accept, modify, or reject recommendations of an environmental assessment, but not reject the project itself.^[38]

The following provision from the *Act* that allows for project rejection is absent from the Tlicho Agreement chapter regarding environmental assessment:

“where the development is likely in its opinion to cause an adverse impact on the environment so significant that it cannot be justified, recommend that the proposal be rejected without an environmental impact review.”^[39]

The *Act* further clarifies the lack of powers for the Tlicho Government regarding environmental assessment, as the authority to reject projects is also absent.[\[40\]](#)

The Minister has recently interpreted authorities over environmental assessment as broad discretionary powers to significantly modify and omit recommendations of the Review Board, without triggering an environmental impact review, as intended by the *Act*. This process, termed “consult-to-modify” by the Minister, has been most troubling with the WesternGeco river seismic project, the Paramount Resources project in Cameron Hills, and Imperial Oil Winter Geotechnical project.[\[41\]](#) In DFNs view, the Minister removed provisions that affect Aboriginal and Treaty rights, without consultation or accommodation of First Nations. The Minister has also narrowly interpreted the *Act*, in determining that First Nations are to be excluded from the “consult-to-modify process.”[\[42\]](#) In doing so, the Minister ignored current case law regarding duty to consult First Nations on decisions affecting Aboriginal and Treaty rights. In DFNs view, the Minister has also narrowly interpreted provisions of the *Act* and weakened the integrity of environmental assessment, by removing or significantly modifying recommendations beyond their intended meaning, without ordering an environmental impact review.

Prior to ordering an environmental impact review under the *Act*, the Minister only has to consult with the Tlicho Government, but not the Gwich’in or the Sahtu. [\[43\]](#) The Gwich’in, Sahtu, and Tlicho do not have authority to refer projects to environmental impact review: the Minister retains this authority. One increase in decision-making authority for the Tlicho Government, beyond that of the Gwich’in and Sahtu, is concurrent authority to accept, modify, or reject recommendations of an environmental impact review.[\[44\]](#) On a cautionary note, any decisions of the Minister or the Tlicho Government regarding environmental impact reviews may be disregarded by an “independent regulatory agency”[\[45\]](#), i.e. the National Energy Board (NEB). This provision is significant as the NEB has paramount authority for oil and gas, and pipelines.

Grandfathering

The *Act* contains a clause that grandfathers developments from Part 5 of the *Act*, if the development was the subject of an authorization issued prior to June 22, 1984.[\[46\]](#) This grandfathering clause is intended to exempt developers from significant expense and duplication of processes, when resources had been expended in the past. For example, a project that underwent environmental assessment under the *Canadian Environmental Assessment Act*, should not have to undergo environmental assessment again, for the same project simply because time had passed, or a permit had lapsed. In practice

however, the Courts and the MVLWB are interpreting the *Act* such that developments are being exempt from Part 5 of the *Act* that have never undergone environmental assessment, or environmental impact review. DFN has initiated or intervened in Judicial Reviews that challenge the grandfathering of projects in the Dehcho territory.[\[47\]](#)

Monitoring, Inspection, and Enforcement

Under the current regulatory regime, monitoring, inspection, and enforcement is under the jurisdiction of DIAND, and carried out by field staff. There are no provisions in the *Act* for the MVEIRB to monitor, inspect and enforce what are intended to be binding recommendations from an environmental assessment. Once the “Report of Environmental Assessment” goes to the MVLWB for permitting, the MVEIRB has no recourse whatsoever if the MVLWB does not incorporate the recommendations into the permit or license. The only recourse is for an affected party, such as DFN, to challenge the decision of the MVLWB in a Judicial Review. The misinterpretation of environmental assessment recommendations is an ongoing issue for DFN, and this is a very serious gap in the *Act*. The MVEIRB and MVLWB also rely heavily upon the same legal counsel, and this has been noted to affect the interpretation of the *Act* in the event of disagreements.

The MVLWB has limited provisions for monitoring and enforcing the Terms and Conditions of permits and licenses which they issue. Their role is generally limited to reviewing and approving reports, plans, and programs, according to scheduled timeframes within a permit or license. In DFNs experience, once permits and licenses are issued, developers do not submit adequate information to the MVLWB in a timely manner and very little recourse is taken. The MVLWB generally issues deficiency statements and extends the timeframe for compliance. In DFNs experience, the lack of consequences for filing inadequate information in a timely manner constitutes a disincentive to developers. It also results in lengthy delays, during which developers may be allowed to operate without important plans and reports being approved, such as Abandonment and Restoration Plans, Emergency Closure Plans, and Minewater Contingency Plans. Although the MVLWB has authority to suspend or revoke permits and licenses for non-compliance under the *Mackenzie Valley Land Use Regulations* and *NWT Waters Act*, DFN have no knowledge of the MVLWB ever exercising this authority.

DIAND staff inspects and enforces the Terms and Conditions of permits and licenses. In DFNs experience, DIAND field monitoring of developments does not include all components of site operations. DIAND also inspects sites infrequently, and generally

responds to requests by other parties for inspections, rather than actively inspecting on their own volition. DIAND staff do not enforce provisions of permits and licenses in a forceful manner, rather, developers who breach Terms and Conditions are not charged, fined, or have permits revoked. Developers who breach provisions are only “encouraged” by DIAND to come into compliance with their permit or license. This approach to monitoring and enforcement is substandard, in part, as it does not provide positive incentives to developers to comply with permits and licenses. DIAND has noted that part of the problem in laying charges is that the onus is on DIAND to demonstrate negligence provable in a court of law, which they find difficult.

The Tlicho Agreement provides that the Tlicho Government may also monitor and inspect compliance with authorizations, providing they do not conflict with existing systems. This Tlicho provision is inadequate to make any concrete changes to developments on the ground. A Dehcho Government will require the authority to cancel and suspend authorizations, and the powers to lay charges and levy fines for non-compliance. All these functions could be assigned to the DCRMA.

DCRMA: Improvements over current system

Since the signing of the IMA in 2001, DFN have participated in the *MVRMA* and regulatory regime on an interim basis. This has given DFN a significant opportunity to have a “trial run” under the current system. DFN’s experience in this regime has been difficult, and strengthened DFNs resolve to continue to negotiate for a stand-alone DCRMA.

The current regime separates lands and resource management components into separate functions managed and administered by separate boards, agencies, and organizations. DFN are not disputing that each component in a regulatory regime has a discrete function and process. Rather, DFN is advancing options to amalgamate discrete, but inextricably linked functions under one administrative body, while ensuring that the Dehcho First Nations have substantive jurisdiction with regards to lands and resource management.

The consolidation of discrete functions into fewer administrative bodies is not a new concept. In the Nunavut Land Claim Agreement, planning policy, land and water use approval, project screening, and impact review must also be preserved as discrete functions. Importantly, however, there is a provision in which the Legislative Assembly

or Canada may reallocate or consolidate the various lands and resource management bodies that manage and administer these functions, providing that the combined powers, objectives, functions and duties are preserved, and not diminished or impaired. Therefore, in the Nunavut Agreement, the following institutions of public government: Surface Rights Tribunal, Nunavut Impact Review Board, Nunavut Planning Commission and Nunavut Water Board, may consolidate their functions.^[48] Consolidated functions are a key objective of the DFN in forming a DCRMA.

A further example of a system different from the MVRMA is the Nisga'a Agreement, in which the Nisga'a have their own Environmental Assessment process, and may make laws in respect of environmental assessment on Nisga'a lands.^[49] It is noteworthy that these laws are not paramount over federal or provincial laws of general application. Regardless, there are no similar environmental assessment authorities for the Gwich'in, Sahtu, and Tlicho under the *Act*. The regional Nisga'a Lisims Government may also make laws regarding the "use, management, planning, zoning, and development of Nisga'a lands." These laws do prevail over federal or provincial laws, in the event of an inconsistency or conflict.^[50] Licenses, permits, and authorizations are still issued under federal or provincial law,^[51] however Nisga'a jurisdiction to enact laws respecting the use and management of lands can certainly be used in determining substantial aspects of development projects. While the Nunavut and Nisga'a examples apply to selected lands, they are examples in which these First Nations appear to have more jurisdiction than the Gwich'in, Sahtu and Tlicho under the *MVRMA*.

DFN need a substantial role in decisions affecting lands and resources, and this cannot be achieved under the current regulatory regime. The lack of First Nations' jurisdiction in lands and resource management are solid enough grounds for DFNs position in the Dehcho Process. However, the ineffective operation and lack of integration of the current regulatory regime provides DFN with additional reason to continue to insist on an integrated DCRMA. The Dehcho Government will require the jurisdiction to enact, co-enact, and have veto over, specific laws applicable to lands and resources management.

In the Dehcho territory, the DCRMA will be a single body with delegated jurisdiction for the management and administration of all lands and resources. As a single body, the DCRMA will have a clear, legislated mandate that ensures the process leading to decisions, and the decisions themselves are integrated, transparent, and cohesive. This integrated approach will increase the efficiency of operations and administrative functions, by coordinating the management of lands and resources under one organization.

A single resource management body will utilize a centralized database that contains GIS data of all past and present lands and resources developments, thereby ensuring that future development applications are considered in their appropriate context. The centralized digital database of all land and resource activities will be updated and maintained by qualified staff dedicated to this task, as per a legislated schedule. This database will contain all data pertaining to the approved Dehcho Land Use Plan, appropriate Traditional Land Use and Occupancy data, and data on all permits, licenses, dispositions and other land use activities. As an integral component of land and resource management decisions, all new applications for land, water, and resources will be assessed using this database as an analytical tool.

A DCRMA will integrate the various functions currently under the jurisdiction of the Dehcho Land Use Planning committee, the MVLWB, and the MVEIRB. A DCRMA will not require the formation of a Renewable Resources Board, a Renewable Resources Council, a Surface Rights Board, a National Park Management Committee, and a Protected Areas Committee. The function of these superfluous boards can easily be integrated into an integrated decision-making authority. Specific technical requirements and portfolios can be delegated to departmental staff within the organization. The DCRMA can participate in external lands and resource programs in which DFN have a vested interest. For example, the DCRMA staff can identify a mechanism, such as a panel, or staff division, to participate in the Protected Areas Strategy, as it pertains to DFNs interests only, as in Edehzhie. Decisions affecting Aboriginal and Treaty rights can also be addressed by the appropriate body(s).

A DCRMA will require sufficient capacity to manage and administer all components of lands and resource management. A DCRMA will require a well-coordinated staffing structure, including 'board members', managerial, administrative, financial, technical, GIS, and specialized departmental staff. A single, integrated body will reduce the duplication of staffing, resources, services, and functions, and overhead required for numerous, separate boards, thereby increasing the efficiency of operating budgets, administrative overhead, and human resources.

DCRMA: Land Use Planning

The DCRMA will monitor land and water use and all applications for development for conformity with an approved Land Use Plan. All decisions of the DCRMA will conform to an approved Dehcho Land Use Plan, however the DCRMA could have the authority to approve minor exceptions (not exemptions) that do not alter the intent of the Plan. These decisions could be subject to affected community consultation and support. The DCRMA could play a key role in assessing cumulative effects, initiating research, and

recommending amendments to Zoning, Terms and Conditions, and Monitoring and Enforcement provisions to better manage cumulative effects in the Dehcho territory. The DCRMA will also have the mandate to consult Dehcho communities, the Dehcho Government, and interested planning partners, and draft the revised Plan, according to a 5-year amendment cycle. The revised Plan will be subject to approval by the Dehcho Government.

DCRMA: Land Use Permits and Water Licenses

The DCRMA will require the capacity to manage and administer applications for land use permits and water licenses in the Dehcho territory. This will require technical staff (currently termed ‘Regulatory Officers’ at the MVLWB) with an environmental and scientific background, solid communication skills, and skills in the analysis and integration of technical information. Technical staff will play a key role in coordinating and reviewing applications, and assessing conformity with an approved Land Use Plan. The technical staff will play a key role in communicating the potential impacts of proposed developments to the DCRMA, and in drafting Terms and Conditions for DCRMA approval.

The DCRMA will be required to have an ongoing role in the monitoring and enforcement of permits and licenses. Currently, MVLWB staff only monitor compliance with the timely submission of Reports, Surveillance Network Programs, Geotechnical Certification, Fuel Spill Contingency Plans, Abandonment and Restoration Plans, and other authorization reports. The DCRMA will require authority to suspend and cancel authorizations; or to recommend these options to the Dehcho Government, who will retain this jurisdiction.

DFN have consistently argued that security deposits should cover the entire project footprint. Presently, the amount of security deposit is never enough to cover the costs of a third-party site remediation. This is a serious issue as the actual cost to remediate contaminated sites may fall on government. A DCRMA should have the authority to determine the amount of security deposit, which should reflect the entire project footprint, and be sufficient for third-party remediation, should developers default. The DCRMA will be required to assess the necessary Security Deposit to incorporate into the permit or license. Standard security deposit templates will be required, such as the RECLAIM model, currently used by the MVWLB.

DCRMA: Environmental Assessment

Environmental Assessment is a distinct function from preliminary screening and the issuance of permits and licenses. In negotiating to take on the environmental assessment function, DFN are generally proposing to undertake comprehensive analyses of the potential impacts of proposed developments, and to develop mitigative measures to reduce or eliminate those impacts. A DCRMA with authority for both the regulatory and environmental assessment processes would not suffer from the lack of integration and lack of transparency demonstrated by the MVLWB and the MVEIRB. A one-house DCRMA would also not have to interpret the decisions of an external body. The DCRMA would conduct the environmental assessment in a coordinated and transparent manner, and then incorporate the recommendations directly into the permit or license, in clear, accurate, and decisive language. The DCRMA should also have authority to monitor and enforce authorizations.

The Dehcho propose that the DCRMA will have authority to refer projects to environmental assessment, to conduct environmental assessments on development proposals that are located entirely within the Dehcho territory, and to recommend the binding mitigation measures that will be imposed upon projects. The DCRMA will also have the authority to conduct the more rigorous environmental impact reviews. The DCRMA will have the authority to recommend that projects are rejected. Decisions of the DCRMA will be subject to the approval of the Dehcho Government. Transboundary projects for development projects that have impacts partially in the Dehcho territory will require harmonization with relevant regulatory authorities.

For reasons of increased transparency and accountability, the DCRMA should not hold private consultation meetings with the developer, post-environmental assessment. Should any post-environmental assessment meeting be necessary, it must be open to all environmental assessment participants and meeting transcripts should be available to the public. Similarly, the Dehcho Government, in considering the recommendations of an environmental assessment, should not hold private consultations with the developer, in the absence of First Nations and other parties to the process. The acceptance of recommendations by the final decision-maker (Dehcho Government, or their designate), must be transparent, and seen to be transparent, by all parties.

Experienced and knowledgeable technical staff (termed Environmental Assessment Officers at the MVEIRB) will be required to conduct the technical components of environmental assessments, including the reviewing and drafting of technical documents,

advising the DCRMA of potential impacts and recommending mitigative measures to eliminate or reduce the impacts. Technical staff for environmental assessments could also draft the wording of mitigative measures that will be incorporated into land use permits and water licenses.

The DCRMA will be reducing the duplication of services, overhead, and personnel among various boards, agencies, organizations, and departments, and only processing applications in the Dehcho territory. Therefore, the efficiency of services, personnel and finances will be maximized.

DCRMA: Transboundary Developments

Under the current regulatory regime, the MVLWB and MVEIRB review, assess, and permit developments throughout the entire Mackenzie Valley. Regional panels process applications solely within a settlement area, and also participate in the MVLWB for applications affecting more than one settlement area.

DFN accept the need to harmonize with the existing regulatory regime for development applications and activities that are located, or affect, the Dehcho territory **and** areas outside the Dehcho territory. DFN do not need to participate in any processes that have no effect on the Dehcho territory.

The DFN local community governments, Dehcho Government and DCRMA will require the legislated authority to refer transboundary development applications to environmental assessment and environmental impact review. Similar to transboundary applications, DFN should retain equal representation in any transboundary environmental assessment. DFN will also require a legislated mechanism to accept, reject, or modify recommendations, and to refuse projects that will affect the Dehcho territory.

[1] Community municipal boundaries should be delineated and confirmed in a Final Agreement, and included in the Dehcho Land Use Plan. Should Dehcho communities choose to preserve the right to expand community boundaries over time, the Final Agreement will need to provide for these changes.

[2] An example is the Sahtu settlement area, in which numerous mining interests were recorded in 2004 in areas identified by the Sahtu Secretariat as lands being considered for conservation.

[3] This is consistent with *The Dehcho Proposal*, January 1998 and the DFN paper, *Towards a Dehcho Government: Rolling Draft #6*. 2005.

[4] *Mackenzie Valley Resource Management Act*. Part 4: Land and Water Regulation. s. 53.2.

[5] *Sahtu Dene and Metis Comprehensive Land Claim Agreement: Volume 1*: “Matters for Negotiation.” Appendix B, page 3;

[6] *Gwich'in and Inuvialuit Self-Government Agreement-in-Principle for the Beaufort Delta Region*: Additional Subjects for Negotiation. Chapter 29, page 108; *Deline Self Government Agreement in Principle*: “Subjects for Future Negotiations”. Chapter 27, page 79.

[7] Indian and Northern Affairs, Environment and Conservation, does not have up-to-date accurate databases of lands and resources permits, licenses, and developments, and have noted this deficiency in their department. The Mackenzie Valley Land and Water Board does not have a searchable, up-to-date GIS database. GIS files are recommended in applications, but this provision is not legally enforceable, and Developers are only required to provide a ‘sketch’ of the development location.

[8] Including INAC Lands Administration and Supervising Mining Recorder; DIAND (Inspection and Enforcement); GNWT Environment, Energy and Resources (wildlife and forestry); GNWT Tourism; GNWT Aurora Research Institute; GNWT Prince of Wales Northern Heritage Centre.

[9] *Sahtu Dene and Metis Comprehensive Land Claim Agreement: Volume 1*. “Land and Water Regulation.” Page 107.

[10] *Sahtu Dene and Metis Comprehensive Land Claim Agreement: Volume 1*. “Wildlife Harvesting and Management.” Page 44, s. 13.3.1 and Page 60-61, s. 13.8.25-13.8.29; “Forestry”. Page 70, s. 14.1.10; “Plants”. Page 71, s. 15.1.3; “National Parks. Page 72, s. 16.2.3, s. 16.3.3, s. 16.3.4, s. 16.4.3, “Protected Areas”. Page 77, s. 17.2.1-17.2.3.

[11] *Ibid.* Subsurface Resources. s. 22.1.2-22.2.3.

[12] Todd Burlingame, former Minister-appointed Chair of the MVEIRB, was also later appointed as Chair of the MVLWB, in direct opposition to the nominations of the MVLWB under the *Mackenzie Valley Resource Management Act*. This issue has led to speculation regarding the Minister’s direct powers over the boards, as well as internal problems in the functions of the MVLWB.

[13] *Sahtu Dene and Metis Comprehensive Land Claim Agreement*. Land and Water Regulation. Page 107. s. 25.1.3(a); *Tlicho Agreement*. Chapter 22: Land and Water Regulation. Page 186. s. 22.3.2

[14] *Mackenzie Valley Resource Management Act*. Part 4: Land and Water Board. s. 108-109.

[15] *Tlicho Agreement*. Chapter 22: Land and Water Regulation. Page 189. s. 22.3.15.

[16] *Tlicho Agreement*. Chapter 12: Wildlife Harvesting Management. Page 110.

[17] *Tlicho Agreement*. Chapter 22: Land and Water Regulation. Page 188. s. 22.3.10.

[18] *Mackenzie Valley Resource Management Act*. Part 4: Land and Water Board. s. 83(5).

[19] *Ibid.* s. 83(6).

[20] *Tlicho Agreement*. Chapter 22: Land and Water Regulation. Page 180. s. 22.1.5.

[21] *Tlicho Agreement*. Chapter 7: Tlicho Government. Page 52. s. 7.4.2.

[22] *Tlicho Agreement*. Chapter 7: Tlicho Government. Page 56. s. 7.5.10.

[23] *Tlicho Agreement*. Chapter 22: Land and Water Regulation. Page 181. s. 22.2.3.

[24] *Tlicho Agreement*. Chapter 22: Land and Water Regulation. s. 22.1.12(c).

[25] *Mackenzie Valley Resource Management Act*. s. 62, s. 118, s. 130.

[26] *Mackenzie Valley Resource Management Act*. Part 5, s. 126(2c) allows ‘local governments’ to refer projects to environmental assessment.

- [27] Mackenzie Valley Environmental Impact Review Board. February 26, 2004. *Letter from Vern Christensen to Chief Lennie, Pehdzeh Ki First Nation*.
- [28] Dehcho First Nations. June 30, 2003. *Letter from Grand Chief Michael Nadli to Vern Christensen, MVEIRB*.
- [29] *Dehcho Settlement Agreement*. June 15, 2005. Article 12: Mackenzie Valley Environmental Impact Review Board. S. 12.1.
- [30] Ka'a'gee Tu First Nation. Paramount Resources project.
- [31] *Mackenzie Valley Resource Management Act*. s. 62, s. 118, s. 130.
- [32] Counsel for Attorney General. Oral arguments. BC Supreme Court. August 2005. *Nahanni Butte Dene Band et al v. MVLWB and CZN*, BC Supreme Court. Court File No. T-1892-03
- [33] Bob Overvold. Regional Director General, NWT. Indian and Northern Affairs. *Letter to Grand Chief Norwegian*. March 10, 2006.
- [34] Example. CZN. MV2001L2-0003 and MV2001C0023 *Environmental Assessment for Pilot Plant and Decline*. MVLWB omitted MVEIRB recommendations. MVLWB staff reports and emails document the processes behind these events.
- [35] Mackenzie Valley Environmental Impact Review Board. *Draft Meeting Agenda*. November 24, 2003. Proposed Action on Item 5.3: “motion to confirm direction to obtain a legal opinion on the Board’s responsibility or authority to ensure that’s [sic] its own binding recommendations are not disregarded.” Page 2. This is in reference to the MVLWB’s omitted recommendations for the CZN Pilot Plant and Decline environmental assessment that was the subject of a DFN court challenge.
- [36] *Mackenzie Valley Resource Management Act*. Consolidated March 2004. Part 5, s. 117(2d). Change: “the imposition of” mitigative measures to “the need for” mitigative measures.
- [37] See *Nahanni Butte Dene Band et al v. MVLWB and CZN*, BC Supreme Court of Canada. Court File No. T-1892-03.
- [38] *Mackenzie Valley Resource Management Act*. Part 5, s. 131.
- [39] *Ibid.* Part 5, s. 128(1)(d).
- [40] *Mackenzie Valley Resource Management Act*. Part 5, s. 131(1)(1)(a).
- [41] Ka'a'gee Tu First Nation filed a Judicial Review regarding this decision. *Ka'a'gee Tu First Nation v. Minister of INAC, MVLWB, Paramount Resources, and Todd Burlingame*. Supreme Court of NWT. S-0001-CV-2005.
- [42] Hon. Andy Scott, Minister of Indian and Northern Affairs. *Letter to Grand Chief Herb A. Norwegian*. March 24, 2005; see *Mackenzie Valley Resource Management Act*. Part 5: Mackenzie Valley Environmental Impact Review Board. S. 130(1)(b)(ii); see John Donihee, legal counsel for MVEIRB. *Draft*

Outline of Procedure for s. 130(1)(b)(ii) Consultations, in which he describes this “consult-to-modify” process as a “procedural minimum” and the MVEIRB and INAC may include other parties.

[43] *Mackenzie Valley Resource Management Act*. Part 5, s. 130, s. 130(1.1).

[44] *Tlicho Agreement*: Chapter 22: Land and Water Regulation. s. 22.2.29; *Mackenzie Valley Resource Management Act*. Part 5, s. 137(1).

[45] *Tlicho Agreement*. Chapter 22: Land and Water Regulation. s. 22.2.33; *Mackenzie Valley Resource Management Act*. Part 5, s.

[46] *Mackenzie Valley Resource Management Act*. Part 5. s. 157.

[47] North American Tungsten. Water license for CanTung Mine; Canadian Zinc Corporation. Prairie Creek winter road.

[48] *Nunavut Land Claim Agreement*. Article 10: Land and Resource Management Institutions. s. 10.1.1-10.6.1. Note: similar to the Sahtu and Tlicho, these are also institutions of public government, where “government” is defined as the federal or territorial government.

[49] *Nisga’a Agreement*. Chapter 10: Environmental Assessment and Protection. s. 1-10.

[50] *Ibid.* Chapter 11: Nisga’a Government. s. 47-49.

[51] *Ibid.* Chapter 2: General Provisions. s. 14.