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Environment Canada (EC) has reviewed the Revised Draft Dehcho Land Use plan and offer the following comments for your consideration.

Comments: Draft Land Use Plan and Background Report

Land Use Plan:

General comments:

As presently drafted, the Land Use Plan (LUP) has many significant consequences for not only EC, but also for other government permitting authorities as well. Significant amendments to the LUP may be required and it is anticipated that interdepartmental legal reviews will be required before and after such amendments to the LUP are made.

The LUP imposes many obligations and directions upon government (e.g. "Regulatory authorities *will...*"). Furthermore, it is important to note that approval of the LUP cannot bind Parliament. The departments could only - at most - recommend to the Government in Council (GIC) or Parliament, as the case may be, such legislative changes as are necessary. As such, the strong obligations by and expectations of the Deh Cho Land Use Planning Committee (Committee) are inappropriate as Environment Canada cannot agree to do everything that is being demanded.

On page 3, "Traditional land use and occupancy" is to be recognized and protected. However, it is incorrect to say that the LUP cannot affect those activities because many authorized activities may curtail traditional uses. The LUP cannot go beyond the common law and prevent any and all impacts on aboriginal rights and uses. Furthermore, it is incorrect to say that the LUP, when implemented, cannot restrict the exercise of s. 35 rights. Again, this is beyond the protections under the common law.

There is no doubt that consultation is an important element of future development. However, it is incorrect to suggest that consultation does not require an assessment of the strength of the claim (e.g. CR3). Although this might occur after the Comprehensive Land Claims agreement (CLCA) is executed and after such rights are clearly set out, it is arguably premature to overrule the common law under the Dehcho First Nations Interim Measures Agreement (IMA).

Conservation Zones:

Environment Canada, Canadian Wildlife Service (CWS) notes and appreciates that key migratory bird terrestrial habitat sites in the Dehcho (Southwest Mackenzie Mountains, Beaver Lake) have been included in Conservation Zones or the Edehzhie Protected Areas Strategy Zone (Mills Lake). We also note that additional migratory bird habitat has been included in the Conservation Zones (Betelmea Lake, Bovie Lake, Fisherman Lake). These areas are particularly known for their supporting of nesting Trumpeter Swans, which remains a species of management concern in North America.

CWS notes that other wetland areas have been included in Special Management Zones. The wetland complexes north of Fort Liard are a particular example. Through this designation, it is CWS understanding that although certain developmental activities could be allowed in these zones, such activities will be subject to “Terms and land use restrictions” to protect the habitat and wildlife values within them.

Cumulative Effects Management :

In one very important way, the earlier version of the plan (June 2005) took a more comprehensive approach to cumulative effects management than this current version. Environment Canada generally prefers the tiered thresholds approach outlined in the earlier draft, which included the use of cautionary and target thresholds.

The use of a tiered thresholds approach (which includes cautionary, target and critical thresholds) in management of cumulative effects, presents a number of advantages. The tiered thresholds approach is:

Pragmatic – it acknowledges that human activity will continue. It takes into account the uncertainty around our understanding of complex environmental relationships.

Principled – it establishes limits which are based on social and ecological factors.

Transparent – it selects measurable indicators and sets attainable standards. It ensures all parties are aware of threshold levels and have ample time to modify their activities to stay within the set limits.

Flexible – it allows developers some flexibility in how they manage their activities to achieve the required outcomes (i.e. staying within limits). It provides the flexibility necessary for different land management zones and environmental settings, for a full range of development proposals, and for both project-specific and regional cumulative effects.

Action-oriented – it provides a framework to gather data on actual responses and modify project review and management actions as appropriate (i.e. ensures effective monitoring and facilitates adaptive management). It establishes a formal link between the thresholds and impact management.

(Adapted from: Carrying capacity and thresholds: Theory and practice in environmental management, Macleod Institute, Calgary, 2002 and Page 73: Beaufort Delta Cumulative Effects Project, Draft Report February 2005. Submitted to Environmental Studies Research Fund by Dillon Consulting Ltd. And Salmo Consulting Inc.)

In some ways the approach to cumulative effects management has been improved in this most recent draft of the plan. This includes increased clarity in some areas due to the addition of explanatory text, and improved efficiency with the addition of several new "Actions" identified under the cumulative effects heading.

Both versions of the Draft Plan indicated that Boreal Woodland Caribou are the primary focus for establishing and implementing thresholds. Whereas EC agrees that the current focus on Woodland Caribou is appropriate, we encourage the DLUPC to continue to investigate and develop further thresholds in other areas such as water quality and air quality.

Specific Comments Land Use Plan

Page iii: The clause provides that "Nothing in this LUP will impact or reduce in any way, the treaty and aboriginal rights and activities of the Dehcho Dene Descendants. Traditional Land Use, Occupancy and Harvesting will continue in all areas at all times." Arguably, the LUP cannot state this.

It is inappropriate to state that all rights or authorizations continue to exist. The government retains the right to cancel or terminate permits or authorizations when it deems appropriate.

Page iv: "Conformity Requirements" (CR) generally indicate what *must* be done. There is generally a corresponding obligation imposed on government authorities. The LUP contains many obligations that "must be met". This is inappropriate.

Page xiii: Definition for **Geophysical Operation** Replace "seabed" (*since no seabed exist in the Dehcho region*) with lake beds.

Page 2: The "legal context" is provided. It states that the LUP does not supersede any Acts or Regulations. However, this is arguably inconsistent with provisions elsewhere in the LUP. For example, as drafted, the LUP supersedes many acts and regulations by telling the government what they *must* consider and *must* amend.

Page 3: Point 5 repeats the clause discussed on page iii above. The plan does not apply to scientific research permits. Perhaps for clarification, a definition of 'scientific

research permit' should be included in the Definitions. What kind of scientific permits are being contemplated here? For example EC and ENR issue permits related to wildlife research

Page 4: Section 1.3.2 is unclear. By stating what "Terms" mean may help provide clarity.

Page 7 CWS notes and supports the addition of the "Protected Areas Strategy Zone". For clarification "...Park Management Plan." should be reworded to just "...Management Plan." since there are other protected areas designations besides National Parks.

Page 13: Recommendation 1 (R#1) appears to require conformity with Dene laws. It is inappropriate to state this - particularly when such laws may not be clearly set out.

Page 16: **CR#3** states what "regulatory authorities will require" in applications. This is inappropriate as it removes the departments' discretion.

CR#3 also appears to change the common law consultation requirement and maintains that "the degree of consultation and mitigation will be appropriate to the scale and nature of the activity and the potential to impact traditional land use and occupancy sites". As drafted, it does not involve an assessment of the strength of those rights. This is inappropriate.

The first Action item is provided. Action 1 (**A#1**) requires that departments *will* do something (in this case research and document harvest statistics). Arguably, this should only be a recommendation. In any event, each department has to decide whether it wants to participate in the work demanded by the LUP.

It is not clear how **CR#3** under "Protection of Significant Traditional Land Use and Occupancy Sites" differs from **CR#2** under "Use and Recognition of Traditional and Cultural Knowledge". Both appear to be aimed at determining the "potential to impact traditional land use and occupancy". CWS suggests that perhaps there could be some consolidation of information here.

CR#4 inappropriately deals with consultation. The reference to "fiduciary duties" to consultation is inappropriate. In addition, the obligation on the Developer to conduct "full and meaningful consultation" is arguably inappropriate.

Page 17: **CR#5** is another example of mandatory language and the loss of departmental discretion.

Page 21: **CR#11** again affects discretion as departments are required (i.e. "will manage access") to manage and decide in a particular way.

Page 22: It is unclear as to whether **CR#12** overrules the regulatory authorities in relation to the MGP (e.g. the route).

Page 23: **CR#14** and **CR#15** require management in accordance with CCME Guidelines or "best practices". As with other CRs, there is the loss of departmental discretion.

CR#16: firmly states that there will be no further hydroelectric development - in accordance with DFN Leadership Resolution. Again, the government cannot completely fetter its discretion to the DFN.

Page 24 A#7 directs that new regulations be developed, and that they be done within 4 years. Departments cannot agree to this as we cannot bind Parliament.

Page 25 CR#17 demands that a security deposit be provided and that certain conditions - including consent - are met. This is inappropriate.

Page 30 – Paragraph 3

This paragraph lists several options developers may consider once a threshold has been reached.

Option (bullet) number 3 in this list provides the developer with the option of providing "better data and studies demonstrating ... the proposed development is below thresholds". EC questions how it will be determined that the data and studies are "better" in this circumstance? Also, in the event that it cannot be clearly demonstrated that the data and studies are "better" then EC suggests that the precautionary principle should be applied and the most conservative approach taken.

Option (bullet) number 4 in this list provides the developer with the opportunity to apply to the Committee for an exception to the thresholds. EC suggests that since the plan has been revised to include the use of "critical" thresholds only, that very few if any such exceptions should be considered. It is prudent to consider the definition of a "critical threshold" – a science-based target reflecting the continuous maximum amount of stress that an environmental or social system can support without long-term harm. Exceptions to critical thresholds may result in long-term harm to the environment or social system. Further, EC suggests that this situation is much less likely to arise with the implementation of a tiered thresholds approach where all parties are made aware of an impending problem long before any critical threshold is reached. As the cautionary and target thresholds are approached, increased monitoring and (presumably) adaptive management will have been introduced thus avoiding the possibility of exceeding critical thresholds. A target threshold is more protective than the critical threshold in order to provide a margin of safety. Target thresholds can be characterized as the level that is politically and practically achievable and provides adequate long-term protection to the environment or resource of interest. Finally, the use of cautionary and target thresholds

will provide incentive for industry to use best practices from the outset rather than waiting until a critical threshold is approached or reached.

CR #25 The plan states that the cumulative effects term is to be reviewed annually. Is this practical and were other time periods considered (e.g., review every two years)?

CR#25 deals with Cumulative effects. As drafted, regulatory authorities are not allowed to approve new applications unless supported by the Committee. This is inappropriate.

Page 33 A# 13 New – EC supports the use of a tiered thresholds approach and would like to see the cautionary and target thresholds identified in the earlier draft of the plan reinstated where the Committee considers that appropriate. EC supports and encourages the Committee to assess other indicators and thresholds for inclusion in future revisions. Cautionary and target thresholds should be developed (where feasible), in addition to critical thresholds, for any new indicators included in subsequent revisions of the plan.

A#13 to A#16 impose obligations on government to do certain things within 4 years. Even though EC supports the general intent of the Action items as noted above the time frame for this requires discussion.

Page 34 CR#26 the 250 meter distance separation from "Significant Habitat Features", This distance could be problematic when given specific situations. I.e. fish spawning and the activity is 250 meters up stream. This distance may not be adequate to ensure protection of the fisheries.

Page 43 The LUP maintains that the "Committee has a shared role in monitoring conformity with those government departments". In the absence of legislation dealing with this issue, there is a concern with the suggestion that the Committee is on an equal footing with departments.

CWS suggests that perhaps a Table could be added that provides more detail as to what the specific roles and jurisdictional authorities are for these various Regulatory Authorities. For example, what kinds of permits/licences are issued under what legislation. Table 4 supplies some of this information, but not all agencies listed on p. 43 are included.

Page 44 It appears that the LUP is suggesting that legislative amendments are not necessary. However, this is arguably inconsistent with many CRs and As.

Section 3.2.1 states that "Current legislation exists to allow all Conformity Requirements and Actions to be implemented by the appropriate Regulatory Authorities", this in some cases is inconsistent with some of the CRs and As. (ie A#7)

Page 45 **Table 4** appears inconsistent with the many CRs and As. For example, A#7 deals with Air monitoring and the need for standards, but there is nothing in the Table dealing with the issue.

Page 49 **Section 3.2.3** refers to the IMA and the Committee. Does S 24 of the IMA in combination with Section 47(1) of the MVRMA actually give the Committee the authority to "check conformity on Conformity Requirements"??

Land Use Plan Background Report

Specific Comments

P. 36 – All taxonomic names (*Oreamnos americanus*) should be italicized.

P. 37 – Second para., the term 'Species of special concern' is a particular COSEWIC category. It is not clear how this is being used here. Woodland caribou and Wood bison are listed as 'threatened' by COSEWIC, and Whooping crane is 'endangered'. Moose are not a species at risk at all. Grizzly bear is the only COSEWIC 'species of special concern' in the species listed here. Some clarification on wording is required here. If the intent was species of concern to the Dehcho then the wording should reflect that.

P. 42 – We question the relevance of 50 year old data to assess agricultural potential. Recent weather patterns and possible climate change factors being at play in the north bring into question the use of old data such as this.

P. 47 – There appears to be some discrepancy between the oil and gas potential within Edehzhie depicted in Map 16 (Drummond Report) compared to the oil and gas potential indicated in a report titled "Edehzhie candidate protected area non-renewable resource assessment (Phase I)" produced as part of the NWT Protected Areas Strategy and the advancement of the Edehzhie area through that process. Figure 26 (p. 112) of the latter report indicates a considerably larger portion Edehzhie having moderate and moderate to high oil and gas potential. Presumably these reports relied on the same data base derived from earlier oil and gas drilling records and the geology of the area. It is not clear why they would have arrived at markedly different assessments of the same data.

P. 55 – Under 3.3.2 (second para.) it should read "...for managing migratory birds under....". Also, the very last line on the page should read 'americana'.

P. 56 – The first line should read "*Falco peregrinus anatum*".

P. 61 – As mentioned for the Land Use Plan, perhaps more detail on the regulatory authorities of the agencies could be presented and the legislative responsibilities.

P. 74 – In the second para., it is not reasonable to expect that the non-renewable resource assessments for candidate protected areas will identify “Oil and Gas resources previously unknown”. The non-renewable resource assessments are designed to take all the existing geological and exploration data for the area and make a determination on the oil and gas potential of the area. Only additional seismic exploration and drilling would identify hydrocarbon resources.

P. 85 – In the fourth para., Park Management Plan refers to a National Park. Within the Dehcho, however, some protected areas may be established through legislation other than the National Parks Act. It should read, therefore, “Management Plan”.

P. 107 – In the second last para., delete “...and is pursuing a National Wildlife Area designation.” should be replaced with “The Canadian Wildlife Service is the sponsoring agency meaning that once approved, designation would occur through the *Canada Wildlife Act* (National Wildlife Area).”

P. 108 – In the third para., as pointed out earlier, there appears to be a discrepancy between Map 16 and the assessment done by the C.S. Lord Centre. CWS believes some clarification is required here. In the last para., perhaps some perspective could be applied to the “high agricultural potential” in the SE corner of Edehzhie. The reality is that agricultural was encourage by government in the 1970s through homesteads being granted, but over the next 10 years or so it proved to be a dismal failure because of climate, insects, distance from markets and probably other factors. CWS believes the rating of high potential in that area needs to be tempered with the actual past experience of agriculture in that area.

P. 118 – In the third para., it should read “Peregrine Falcon (*anatum* subspecies)”.

P. 121 – Mention should be made of the well developed wetlands at Fisherman Lake and their importance, in particular, to Trumpeter swans - a species of special management concern.

P. 122 – The same comment as immediately above applies to Bovie and Betalamea Lakes.

P. 123 – It should be mentioned that Mills and Beaver Lake are considered key migratory bird terrestrial habitat sites by CWS.

P. 144 and 145 – Perhaps consideration should be given to changing the names of these Zones to better reflect local features. Although Zone 25 is in the Peel River Plateau ecoregion, the Peel River itself is a long distance to the north. It would probably be more meaningful to local people, in particular, to call this Zone ‘North Nahanni / Root River or something like this. Likewise Zone 26 could be referred to as just the ‘Liard Range’.

If you have any questions regarding the above comments please contact me at (867) 669-4733, or email at Stephen.harbicht@ec.gc.ca

Sincerely

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