



YUKON LAND USE PLANNING COUNCIL

September 2, 2011

Albert Peter, Chair
Senior Liaison Committee, Peel Watershed Planning Region
Nacho Nyäk Dun First Nation,
Mayo, YT Y0B 1M0

Re: YLUPC Review PWPC Final Recommended Peel Watershed Regional Land Use Plan

The Council structured its review around a series of questions. The SLC may want to use these questions as a basis for discussion amongst the Parties at the upcoming meeting in preparation for the last round of consultations. While the Parties clearly have some continuing concerns, it is important to remember that the Commission itself achieved consensus on its Final Recommended Plan. The onus is now on us collectively to reach a similar level of agreement on outstanding concerns so the final land use plan can be signed off and implemented in an expeditious manner.

To that end, we have included in an appendix, in summary chart form, a reference checklist that shows where the Commission made changes and what they entailed. We have also taken the liberty of identifying some options with their pros and cons around specific issues that we may collectively wish to discuss. We would suggest that the overarching matters be discussed by the SLC and the substantive detail points delegated to the Technical Working Group to resolve.

The Council concluded that:

- The Commission met its mandate by submitting a consensus based Final Recommended Plan;
- The alterations the Commission made to the Recommended Plan were largely done *without a cohesive message from all the Parties or clear and specific direction regarding the nature of changes the Parties desired to ensure its approval and implementation.* Without these, the Commission relied on their best judgment as an independent body in putting forward their Final Plan;
- The lack of a cohesive response from the Parties at the Recommended Plan stage indicates that there are still divergent opinions between the First Nations and the Yukon

Government. First Nations have made their preferences and position clear; the Yukon Government has not. The net result is an impasse that put the Peel Commission in an untenable position. They believe their Final Recommended Plan honours both the letter and the spirit of the land claim agreements;

- The Commission was told that implementation would be determined by the Parties. As a result, this section is very weak. Leaving it up to the Parties to work out the implementation process after plan approval is a mistake. It raises the very question of how committed the Parties really are to effective plan implementation.

The absence of performance metrics dilutes plan effectiveness and compromises its credibility. History repeatedly shows that plans without clear, definitive work plans and accountabilities do not get implemented;

- Despite improvements, the document would still be difficult for the lay person to understand. A summary document should be developed prior to the last round of consultations this fall. If requested, YLUPC would make staff available to assist with this task. Council's staff also has many technical comments that it will share with the Technical Working Group.

Following this last round of consultations the Parties have to decide to accept, modify or reject the plan. As no other regional plan has been significantly modified directly by the Parties, it is unclear who is responsible for preparing these changes and getting the plan signed-off.

We look forward to discussing these points further at the Senior Liaison Committee meeting September 9, 2011.

Sincerely,



Ian D. Robertson,
Chair, YLUPC

Enclosure: YLUPC Review of the Final Recommended Peel Watershed Regional Land Use Plan

Cc SLC Members: Angus Robertson, Deputy Minister, EMR, Yukon Government
Chief Wilbert Firth, Gwich'in Tribal Council
Tim Gerberding, Tr'ondëk Hwëch'in Government
Hugh Monaghan, Vuntut Gwitchin Government
Richard Nerysoo, Gwitchin Tribal Council
Pauline Frost, Vuntut Gwich'in Government
Kelvin Leary, Environment, Yukon Government



YUKON LAND USE PLANNING COUNCIL

YLUPC Review of the Final Recommended Peel Watershed Regional Land Use Plan

Done For: Senior Liaison Committee, Peel Watershed Planning Region

September 1, 2011

1. Introduction and context for review

The Yukon Land Use Planning Council has been asked by the SLC to review the *Final* Recommend Peel Watershed Regional Land Use Plan, as it did for the Recommended Plan (YLUPC submission to the Parties March 15, 2010). To bring structure to the review, the Council asked the following questions about the plan and the Commission's work:

- Did the Commission meet its mandate?
- Did the Commission respond to the concerns raised by the Parties?
- Where is their likely to be substantial differences between the Parties with respect to the plan and how might these differences be resolved?
- What are implementation implications of the plan (priorities, costs)?
- How might the plan be best presented to the public given its length and complexity?

2. Did the Commission meet its Mandate?

The Commission's mandate is defined in the General Terms of Reference:

"The Commission will develop, and recommend a regional land use plan in a manner consistent with Settlement Agreements"

The Yukon First Nation Final Agreements state that:

*"Each Regional Planning Commission shall prepare and recommend to Government and the affected Yukon First Nation **a regional land use plan...** (11.4.4). Regional land use plans shall include recommendations for the use of land, water and other renewable and non renewable resources in the planning region **in a manner determined by the Regional Land Use Planning Commission** (11.5.1)"*

By producing a Final Recommended Plan for the Peel Region by consensus, the Commission has met its mandate as prescribed in the General Terms of Reference (GTOR). Differing views, interests and concerns were recognized and considered. The Regional Plan goals described in the GTOR have also generally been met.

3. Did the Commission's Respond to the Concerns Raised by the Parties?

At the draft Recommended Plan stage, all Parties had the opportunity to accept, reject or put forward suggested modifications. Some did and some did not. The Yukon Government chose, with most of their responses, not to propose specific modifications to the plan. This made it difficult for the Commission to know exactly how to alter the plan to satisfy the Party that manages most of the region. The Commission did not receive, in many cases, consistent direction from the Parties, as shown in *Figure 1: "A Review of Responses of the Parties to the Recommended Peel Watershed Regional Land Use Plan"* prepared by the YLUPC and the PWPC (see attached). The Commission stated plainly that in the absence of clear direction on modifications required, they would take a cautious, conservative approach based upon plan principles. Without a cohesive message from all the Parties or clear proposed modifications, the Commission relied on their best judgment as an independent body in putting forward their recommendations. It is difficult for any agency to determine a viable compromise when the Parties and individual stakeholders are unwilling to put their "cards on the table".

The Commission received comments from the Parties on three levels: from the Senior Liaison Committee (SLC), individually responses from the five Parties to the agreement and one joint letter from the four regional First Nations. The Commission altered the plan based on these comments and these changes are described by the Commission in the Letter of Transmittal and the Foreword sections of their Final Recommended Plan.

The Commission generally altered the plan as recommended by the SLC. It did not (nor could not) alter the plan as requested individually by the Parties, as many of the recommended changes contradicted each other.

3. What are the substantial differences of opinion between the Parties?

The major divergent opinions amongst the Parties are:

1. % land base zoned as "Conservation Area (CA)":

The First Nations requested 100% land protection for the Peel region while the Yukon Government's position was implied rather than made explicit. The Yukon Government does acknowledge that some form of protection may be appropriate for some areas. They also indicated these areas might exclude industrial development. However, Yukon did not indicate where or on what basis that should be determined.

From public statements made since the Recommended Plan, it would appear First Nation governments can “live with” 80% Conservation Area status as a compromise whereas the Yukon Government, which is the largest land owner in the region, has not taken a position or proposed an alternative. Yukon Government representatives cannot put forward a formal position without Cabinet direction.

2. Access including road/rail access in/through “Conservation Areas” and in Integrated Management Area (IMAs). Should it be allowed and under what conditions?

The Yukon Government indicated that “a ban of surface access is not a workable scenario in a region with existing land interests” (letter: YG to PWPC, February 21, 2011, p.2) and “we would like to see a range of access options developed which consider the various conservation and resource values through the region” (letter: YG to PWPC, February 21, 2011, p.2). This indicates that while First Nations are prepared to restrict surface access in designated Conservation Zones, the Yukon Government may not accept the concept of Conservation Areas unless there are provisions that allow surface access.

The Commission also recommends that there be no bridges allowed in the major river corridors in the IMAs. This effectively negates conventional surface access since these are the logical places where roads or railways would be constructed. Industry makes it clear that without reasonable access any mineral claims are worthless. If FNs agree with some IMA zoning (which now appears to be the case), then YG will likely insist that major river corridor crossings in IMAs be allowed. It is not really clear whether the Commission’s position is based on reinforcing their position against surface access alone or is opposed to bridges etc for aesthetic reasons and concerns that such features undermine the recreation canoeing family of these river corridors.

3. Potential Conservation Areas and Existing Mineral Claims

As noted previously, the Yukon Government does accept the concept that there are areas that should be excluded from development. As there are mineral claims staked throughout most of the region, any Conservation Area proposal will likely have claims within its boundaries. The number of affected claims will be dictated by how the conservation area boundaries are set and the degree to which each use can avoid the other.

There are two types of claims present: those staked before the land use planning process began and those staked while planning was underway until the moratorium was put in place. The mining industry argues that legitimately staked claims should be compensated if the plan prevents access or further work to prove out their viability. Conservationists argue that staked claims staked after the plan process was started should not be compensated. Unless the Yukon Government can come up with innovative compromise, it is unlikely that many of the plan’s Conservation Area recommendations can be implemented.

4. How might Conservation Areas be Established When Mineral Claims Exist?

There are a variety of options available for resolving the existence of mineral claims in areas where Conservation Areas are desired. Any solution may involve applying a mix of these options depending upon the location within the planning region.

Option # 1: "Avoid all mineral claims when creating CAs"

Any Conservation Area boundaries would avoid any mineral claims that have been staked. This would limit the potential area available for CA designation, as claims have been staked in most LMUs. This would reinforce the supremacy of the "right of free entry" and infer that simply staking a mineral claim with unproven potential trumps other values present – a position clearly unacceptable to the affected First Nations.

Option # 2: "Similar to Tombstone" solution (see attachment summary)

The Peel claims would be handled in the same way as in Tombstone Park: most companies, as "good will gestures" gave up their claims once government's Conservation Area intention was made clear. All but 28 quartz claims and one placer claim were deemed valid and stayed. Those remaining claims were allowed to exist within the park, subject to the development assessment review and other regulatory processes. To date, applications for overland surface access through the park have been denied by the regulatory agencies.

Option # 3: "Mining within a CA"

Access to existing claims would be allowed but no additional staking would be permitted in SMA's. Claim holders would be obligated to continue exploration activity and all work would be closely regulated including requirements for reclamation on claim abandonment. Only if the claim holder could demonstrate mine viability would surface access through the SMA be allowed. Permits would include rigorous conditions consistent with the underlying purpose of the SMA.

An alternative to an open-ended approach would be to give claim holders a specific time limit to prove up or abandon their claims. There would be no compensation and no requirement to complete a certain level of work to keep the claims in good standing. They could also be given the option to sign a quit claim agreement now with exploration costs spent to date credited against claims held elsewhere in the Yukon.

This also implies the current staking moratorium would be made permanent in SMA's.

Option # 4: “Incentives to leave”

This solution includes immediately suspending the need for assessment work (decreasing the demand for access). In exchange for relinquishing claims in the SMA’s and major river corridors in the region, their assessment work credits could be applied to claims they hold elsewhere in the Yukon. This would need to be a time limited offer with a scale of incentives to encourage early resolution while giving claim holders a choice. These could relate to royalty payments, taxation credits or other mechanisms including purchasing the claims outright for cash or credit.

The question is whether this would apply to all claims or just those staked before the planning process started.

Option #5: “Wilderness Tracking Option”

Conservation Areas are not created but Parties agree to maintain a percentage of the region (or individual LMUs) as “wilderness” and track wilderness loss until critical levels are reached. Once a critical level is reached, development is then prohibited until enough of the area returns to a “wilderness” state. This is similar to the NYPC threshold levels concept. It would require an operational definition of “wilderness” which currently is not in the plan.

This option would not provide the land certainty that is provided by the creation of Conservation Areas and would still leave government with the challenge of prohibiting development once critical levels are reached. Perception of wilderness is in the eyes of the beholder. Many believe the concept of wilderness means there is by nature no management intervention required within these areas. The management focus is external focused on minimizing those activities and land uses that potentially undermine the wilderness attributes present.

The concept is likely to be confusing to many and unlikely to gain much traction.

5. What are the Options Available for Resolving the Issues Associated with the Final Recommended Peel Watershed Regional Land Use Plan?

There are several options available to the Parties that would allow them to resolve the major issues associated with the plan. These include:

Option # 1 “Immediate Party Negotiation”:

The Parties re-examine PWPC resource data and rank the LMUs based upon their conservation and development values. The Yukon Government then seeks consensus with affected first Nation governments on location of conservation areas and their SMA purpose. The moratorium on mining claims stays in place until this work is done and the final overall Peel Plan approved. Agreement on associated access provisions would also need to be reached as would the question of how to deal with existing mining claims.

Option # 2 “More study needed”

In this option the Parties agree that more study is needed to refine the Conservation Area locations and boundaries. This is identified as a priority task in plan implementation and a work plan developed and agreed to by the Parties. The claim staking moratorium stays in place as an incentive to get the job done. This also implies that the Parties work out a clearer and more comprehensive plan implementation strategy as preparation for the final round of consultation to give the public more confidence that all Parties are committed to efficient and timely plan implementation.

Option # 3 “Separate Lands, Separate Decision”

The Yukon Government and First Nations abandon any type of consensus on the Peel Plan and decide for themselves the % and location of the land they “own” to be designated as Conservation Areas using the SMA provisions. These modifications are then made to the plan as per Chapter 11.6.1. It could be argued that this approach defeats the overall cooperative and integrated intergovernmental management approach envisioned in the spirit of the land claim agreements.

Option # 4 “Let the Public Decide”

This could occur in two ways. The conventional approach would be a Yukon-wide referendum. (Suggestion of PWPC Chair David Loeks) Alternatively, the Parties could rely on the results of this last round of consultation to determine whether the Final Recommended Plan as written is acceptable.

There are significant risks with this approach as it is largely a win/lose proposition rather than a consensus of the Parties. It could set a bad precedent not just in dealing with this issue but also on other matters of political controversy.

Option # 5 “Dispute Resolution” (see attached Dispute Resolution summary).

The Parties would begin this process by agreeing to utilize *Chapter 26: Dispute Resolution* for resolving issues associated with plan approval. The process involves two main stages: mediation and binding arbitration, if mediation fails. Binding arbitration would also have to be agreed to by the Parties.

6. What are the Implementation Priorities and Implications (including costs) of the Plan?

The Parties have made it clear they are responsible for plan implementation. Responsibility for this oversight rests with Parties not the Commission. The Parties, in their response to the Draft Plan could have fleshed out an implementation strategy and provided it to the Commission. As such, the Commission’s Final Recommended Plan contains a very short implementation chapter.

The implementation chapter needs to be developed in more detail and it should include implementation progress measurements, key milestones and costs. The implementation strategy is also where the land use plan is linked to the land management process and work plan “action” priorities set. A solid implementation chapter forces the Parties to consider practical considerations such as cost and resource availability. For the Yukon Government in particular, this information would logically be included in the cabinet submission supporting plan approval

History clearly shows that land use plans with poorly crafted implementation chapters are rarely implemented successfully. Although all Parties have signed off on them, this lack of accountability leads to a loss of public confidence and questioning of whether the investment of time, money and energy in regional plan development is worth the cost.

By not requiring a detailed implementation chapter in these plans, the policy recommendations are not being thought through to an implementation level. For the Commission to undertake that task requires the support of the Parties themselves. Only the Parties who are charged with implementation can assess whether the plan’s policy recommendations are “implementable”, realistic or cost effective.

Based upon the policies that are proposed in the Final Recommended Plan, the priority activities that evolve from adoption of the plan appear to be:

- Preparing an Order-in-Council for a Land Withdrawal for the Conservation Areas (YG);
- Costing the resource requirements for plan implementation work including research and monitoring requirements (All Parties);
- Producing and implementing a strategy for addressing the rights of existing mineral claims in any Conservation Area while respecting the goals of the Conservation Area (Y G);
- Identifying the type of SMA that would meet the plan’s criteria after the land withdrawal, with the associated detailed boundary delineation work. This may include finishing the work of refining the operational definition of Wilderness Management Areas (WMAs) using the Environment Act as a potential tool (YG lead, FN support);
- Defining a plan conformity check process such as has been developed for the North Yukon (YG);
- Clarifying the plan variance and amendments procedures (YG lead, FN support); and
- Implementing the other policy, research and monitoring recommendations such as preparing an updated Dempster Highway Corridor Management Plan (All Parties)).

The most difficult costs to estimate are those where there is no policy framework in place such as dealing with mineral claim compensation for protected area establishment. While there are many precedents, this is also the one area which could result in significant direct and indirect costs. There are potential direct costs in buying out existing claims and also a cost consequence of foregoing economic returns if the known mineral potential is not exploited as occurred in the case of Windy Craggy in B.C. There is also a high probability of litigation around this issue.

The items most likely to be a significant cost to Government (other than potential costs associated with the mineral claims) are:

Policy Recommendations

- Creation of the Special Management Areas (after type and location identified) (pg. 6-2)
- Executing the process of designating two National Historic Sites (Policy Rec. 7)
- Producing a Dempster Highway Corridor Sub-regional Plan (Policy Rec. 8)
- Developing Uranium Exploration and Operating Policies (Policy Rec. 19)
- Developing Coal Bed Methane Exploration and Operating Policies (Policy Rec. 21)

Research Recommendations

- Fisheries Research into Overwintering and Spawning Locations (Research Rec. 3)
- Wetland Health Surveys (Research Rec. 5)
- Major River Corridor Water Quality/Quantity Monitoring (Research Rec. 4)
- Aggregate Assessment in IMAs (Research Rec. 9)

Depending upon the frequency of the plan's monitoring and research activities, the implementation costs for the plan's main policy and research recommendation appear to be less than cost of plan production. Many of the recommendations may be implemented through current government programs and projects.

7. How might the Plan be improved for Public Understanding and Presentation?

The content and presentation of the plan has been improved relative to the draft Recommended Plan. However, it is still a difficult document for the lay person and non-resource managers to understand.

YLUPC offers the following suggestions in preparing for the final round of consultations and final editing of the plan document prior to final sign-off.

Public Consultation Preparations:

- Prepare a plan summary document for the public consultation effort similar to the document the PWPC produced for the Recommended Plan (*Summary: Recommended Peel Watershed Regional Land Use Plan, PWPC, February 2010*);

- Simplify the zoning map to two colours (working landscape and protected area) before showing detailed zoning;
- Utilize maps and real landscape images to explain cumulative effects and threshold concepts prior to presenting numerical thresholds (see North Yukon Planning Commission slide presentation with cumulative effects maps);
- Use real life examples (such as North Yukon conformity check document) to illustrate how cumulative effects management can occur when linking planning and land use permitting.

Document Improvements:

- Map 2: Landscape Management Units and Land Use Categories: identify “Conservation Area” in legend as it referred to often in Plan;
- Remove much of context and explanation sections (letter of transmittal, forward, reduce plan concepts section);
- To simplify the zoning, remove Overlay Zones by making the Dempster Corridor made an IMA zone or sub-regional planning area and the Major River Corridors part of the General Management Direction, as they occur throughout the region ;
- Re-introduce the concept of “Objectives” to the plan’s Results-based Management Framework to bridge higher level goal statements with specific strategy and implementation recommendations;
- Ensure all policy recommendations are included in Policy Recommendation boxes.

8. Preparing to Modify the Plan

After this final round of consultation, the Parties still have the option to accept, reject or make additional modifications to the plan based upon the input received. At this point the Commission has completed its work and arrived at a Final Recommended Plan by consensus. If further modifications are to be made, the Parties have to decide not only what changes are to be made but who will be responsible for doing the work. This subject should be discussed at the upcoming SLC meeting.