SUBMISSION BY THE NORTHWEST TERRITORIES & NUNAVUT CHAMBER OF MINES, THE PROSPECTORS AND DEVELOPERS ASSOCIATION OF CANADA AND THE MINING ASSOCIATION OF CANADA

TO

MR. NEIL MCCRANK, Q.C., P.ENG.,
THE SPECIAL REPRESENTATIVE OF
THE MINISTER OF INDIAN AFFAIRS AND
NORTHERN DEVELOPMENT

FOR THE

NORTHERN REGULATORY IMPROVEMENT INITIATIVE

February 28, 2008

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1.1 Profile of the Presenters

This submission constitutes a joint presentation to the *Northern Regulatory Improvement Initiative* prepared by the NWT & Nunavut Chamber of Mines, The Mining Association of Canada and the Prospectors and Developers Association of Canada.

1.1.1 NWT & Nunavut Chamber of Mines

Established in 1967, the NWT & Nunavut Chamber of Mines (Chamber) serves as the voice of the mining industry in both territories. Its goals are to promote mineral exploration, mine development and mining activities to northern residents, to all Canadians and to the world at large.

Throughout its history, but particularly over the past two decades, the Chamber actively involved itself in legal and policy issues including those of significance to land access, mineral tenure, environmental assessment and regulatory approvals. Its membership currently includes more than 170 corporate entities as well as almost 1000 prospectors, business people and other individuals who share the Chamber's goals.

1.1.2 The Mining Association of Canada

The mission of The Mining Association of Canada / *L'Association minière du Canada* (MAC) is to promote, through the collective action of its 71 members, the growth and development of Canada's mining and mineral processing industry, for the benefit of all Canadians.

MAC is the national voice of the mining and mineral processing industry on key public policy issues notably economic affairs, energy, the environment, northern development, Aboriginal affairs and climate change. One of MAC's key initiatives is Towards Sustainable Mining (TSM), a comprehensive strategy to improve the performance of the mining industry. Under TSM, the mining industry aligns its actions with the priorities and values of Canadians by finding common ground with the industry's communities of interest, thereby building a better mining industry for today and in the future.

1.1.3 Prospectors and Developers Association of Canada

The Prospectors and Developers Association of Canada (PDAC) is a national association that represents the interests of the mineral exploration and development industry. The PDAC, which celebrated its 75th anniversary in 2007, has as its mission statement to protect and promote the interests of the Canadian mineral exploration sector and to ensue a robust mining industry in Canada.

The PDAC encourages the highest standards of technical, environmental, safety and social practices in Canada and internationally. It fulfills its mandate through a broad and varied range of initiatives in the areas of advocacy, information and networking. The PDAC has developed and administers e3, a comprehensive internet-based toolkit that offers leading examples of environmental and social responsibility in the minerals industry, for which more than 2400 users in some 40 countries have registered.

More detailed information about each of these organizations, their current initiatives and their long-range goals, can be found on their respective websites: www.miningnorth.com; www.mining.ca; and www.pdac.ca.

1.2 Background to the Submission

The three associations give the highest priority to working with other interested parties in support of the development and administration of effective, efficient and balanced regulatory regimes for environmental and socio-economic assessment in each of their respective jurisdictions. While sometimes addressing public policy and legislative matters on an independent basis, they also work in collaboration, particularly in relation to issues affecting mineral exploration and mining operations in Canada's northern territories.

The Minister of Indian and Affairs and Northern Development, the Hon. Chuck Strahl, announced the *Northern Regulatory Improvement Initiative* and the appointment of Mr. Neil McCrank, Q.C., P.Eng. as the Minister's Special Representative to lead this review at the time of most recent NWT Board Forum in Yellowknife on November 7, 2007. A copy of the news release issued that day is attached as Appendix "A". As officials of all three industry associations had been invited to participate in certain portions of the Board Forum, they were well positioned to establish immediate contact with Mr. McCrank.

A meeting was subsequently convened in Yellowknife on November 23, 2007 following the annual Geoscience Forum to discuss the November 7 announcement. In attendance were representatives of the three industry associations, individual industry representatives, representatives of Indian and Northern Affairs Canada (INAC) and representatives of the Government of the Northwest Territories. It was agreed at the meeting that that the three associations should respond to the *Northern Regulatory Improvement Initiative* in a coordinated manner by establishing a Working Group to manage the collective industry response and ultimately, the preparation of this submission.

The members of the Working Group are:

- Mike Vaydik, General Manager of the Chamber;
- Rick Meyers, Vice President, Diamond Affairs, MAC; and
- Philip Bousquet, Director, Sustainability, PDAC.

In the past, the three associations have responded to legislative and policy issues using their own internal resources and by drawing on the expertise of employees of their respective members who were knowledgeable in the relevant areas. In this instance, the Working Group has emphasized that the full support of industry participants is necessary in order to ensure a proper response to the *Northern Regulatory Improvement Initiative.* However, it was recognized that in this case additional resources would be required. The Working Group therefore engaged Michael J. Hardin, a lawyer with more than 30 years' experience in northern mining and regulatory matters, and a member of the Law Societies of B.C., the N.W.T. and Nunavut, as an external consultant for purposes of this submission.

1.3 Scope of the Submission

From the time of its formation, the Working Group has viewed the *Northern Regulatory Improvement Initiative* as a significant and welcome step toward addressing the long-standing concerns of industry participants in relation to the regimes that regulate mineral exploration, mine development and mining operations in Canada's three northern territories. While important questions need to be addressed in Nunavut as well as Yukon, the most urgent and immediate issues are those that have arisen in the N.W.T. under the *Mackenzie Valley Resource Management Act*[1] (MVRMA).

As a result, this submission will focus almost exclusively on the institutions, processes and procedures currently in place under the MVRMA, which the Working Group understands comprise the principal focus of Mr. McCrank's review. Nonetheless, the three associations and their members recommend that the federal government proceed with similar detailed reviews of the regulatory regimes in Nunavut and Yukon, and stand ready to contribute to those initiatives whenever they may commence.

2. Working Group Process

2.1 Dialogue with the Minister's Special Representative

Following an initial teleconference on December 6, 2007, the Working Group and its consultant convened a meeting on December 19, 2007 with the Minister's Special Representative and his principal contact at INAC, Stephen Traynor, Director, Resource Policy and Programs. The meeting afforded the opportunity for a detailed discussion of eight key issues that the Working Group had thus far identified for consideration under the *Northern Regulatory Improvement Initiative*. These issues are listed in Appendix "B".

To further advance the dialogue, the Working Group arranged for two site visits for the Minister's Special Representative in mid-January 2008. The first was to a producing property, the Diavik Diamond Mine in the Lac de Gras region of the NWT,

[1] S.C. 1998, C. 25

and the second, to a site north of Yellowknife where Tyhee Development Corp. is conducting a small diamond drill exploration program.

2.2 Industry Consultation and Review of Documents

During the same period, the Working Group and its consultant initiated a number of measures to canvass industry participants on their experience in working under the MVRMA to solicit their views on changes to the process that would improve its effectiveness and efficiency while keeping in mind the underlying goals and objectives of the legislation.

Two industry consultation meetings were therefore convened in Yellowknife in early January, one to identify issues specific to the three diamond mines currently in production, the other focusing on exploration-stage companies and their field programs. Subsequently, representatives of a number of individual companies and their advisors, including legal counsel, have been interviewed by telephone or in person as part of the Working Group's on-going information gathering process.

As indicated above, the three industry associations, and the Chamber in particular, have already made a number of presentations and submissions in relation to the MVRMA and its implications for mineral exploration, mine development and mining operations. This submission has taken into account the existing written materials. They include materials prepared in relation to the Industry Government Overview Committee whose mandate places a strong emphasis on addressing regulatory inadequacies and improving the overall regime in both the NWT and Nunavut.

2.3 Open Forum at Mineral Exploration Roundup

Early in its deliberations, the Working Group determined that it would be important to provide an opportunity for interested members of the exploration and mining communities to liaise directly with the Minister's Special Representative who, in turn, supported this approach. An "open forum" was therefore convened on January 28, 2008 in conjunction with the annual Mineral Exploration Roundup in Vancouver.

The forum commenced with a presentation on behalf of the Working Group that outlined its activities to that date together with an overview of the further steps that the Working Group intended to take in order to complete its inquiries and prepare this submission. A presentation by Mr. McCrank followed in which he outlined seven key questions that he wished to address during the current round of consultations. These questions are set out in Appendix "C".

Approximately 40 persons attended the open form where the program provided the opportunity for industry participants to respond to the questions raised by Mr. McCrank and for related discussion. The results of the forum were taken fully into account in preparing this submission.

BHP Billiton Diamonds Inc., the operator of the Ekati mine, has responded to each of the seven questions that Mr. McCrank posed at the forum in a letter dated February 8, 2008. A copy of this letter is attached as Appendix "D".

2.4 Industry Comments and Recommendations

The Working Group has urged industry representatives who have provided comments, whether written or oral, to express their concerns openly and candidly. More importantly, the Working Group has encouraged respondents to propose solutions to resolve the challenges that industry has encountered under the MVRMA since the legislation first came into effect in 1998.

The result has been a diverse and varied series of comments and recommendations. In turn, this submission has endeavoured to reflect as many of these contributions as possible. At the same time, however, it was recognized that, in the time available, it would not be possible to analyze the merits of each observation or proposal in detail. Nonetheless, the Working Group believes that all of the comments and proposals to improve the regulatory regime that are set out in this submission are worthy of consideration, and that each of them should assist the Minister's Special Representative in formulating his recommendations to the Minister of Indian Affairs and Northern Development (Minister).

3. Why Mining Matters

3.1 Canada and the Mining Industry

Canada's mining and metals industries employ some 368,000 people and comprise the economic backbone of more than one hundred communities. The highly skilled and high-paying jobs that mining provides help to grow and sustain these communities. Mining extraction represents $10 billion of the industry's $42 billion contribution to Canada's GDP while the remaining $32 billion comes from mineral processing and manufacturing.

Mining is also the largest private sector employer of Aboriginal Canadians and is poised to offer increased economic opportunities through direct and indirect employment and through the development of Aboriginal owned and operated businesses that support the minerals industry. The proximity of some 1200 Aboriginal communities to producing mines and exploration properties provides a natural linkage between Aboriginal Canadians and the industry.

An estimated 2500 Canadian businesses provide services and equipment to the mining industry including those engaged in the engineering, environmental, transportation, financial, legal and other areas.

According to a recent study undertaken on behalf of MAC, the extraction and value-added fabrication phases of the mining industry generated payments of $9.3 billion to

federal, provincial and territorial governments in 2005, including some $1.7 billion in corporate income taxes.

The Canadian mining industry also has an important international dimension. As well, the industry is highly international in scope. Some 62 per cent of the estimated 1440 exploration companies working worldwide are Canadian, and companies trading on the Toronto Stock Exchange have some 4500 mining projects in progress outside of Canada.

The strong fiscal position that the federal government presently enjoys is due, in no small part, to the revenues derived from companies active in the diamond, gold, nickel, copper, oil sands and other mining fields.

The Future

However buoyant current conditions may be, neither the industry nor government should become complacent. On the contrary, the federal government must do everything it can to support increased investment by the Canadian mining industry.

A central challenge facing the Canadian mining and metals industry is that of a declining base of proven and probable mineral reserves. Canadian reserves in key base and precious metals have declined by 50 to 80 per cent over the past 25 years and will likely continue to decline without continued support for the exploration efforts that are essential to ensure new discoveries.

Regulatory factors play a significant role in the determining how high-risk exploration dollars will be apportioned among competing jurisdictions. As documented in successive reports from the Fraser Institute, while the NWT may be ranked very high for its mineral potential, it consistently comes in at the bottom end of the scale for regulatory clarity and certainty.

It will be regrettable if this trend is allowed to continue to the detriment of not only northerners but all Canadians as well. The three industry associations trust that the *Northern Regulatory Improvement Initiative* will help to ensure that this will not be the case.

3.2 Northern Canada and the Mining Industry

Since the 1930s, the exploration and mining industry has been the main economic driver in the NWT. It is currently responsible for about one-half of the GDP of the NWT. In 2006, mining provided more than 10,000 person-years of direct employment as well as significant indirect employment in other industries, notably construction and transportation.

Mining has also driven infrastructure development and technical innovation to the long-term benefit of the north. The Giant, North Rankin Nickel and Con mines all pioneered the provision of piped water and sewage systems at their town sites in a

permafrost regime. The barge transportation system on the Mackenzie River was developed to serve the resource sector, notably the Norman Wells oil field and the Port Radium mine on Great Bear Lake. The Pine Point Mine, south of Great Slave Lake, was responsible for development of the NWT and Nunavut's only railway leading north from Manning, Alberta to its final terminus at Hay River, NWT.

While Pine Point ceased operations in the later 1980s, this railway still serves as a major shipping route for goods to be transported further north by road or barge. The NWT communities located along the Mackenzie River communities as well as the Arctic Coast communities in Nunavut as far east as Taloyoak that are served by the barge system continue to benefit from the operation of the railway.

Mining also provided the basis for the hydro-electric projects that continue to provide an economic and environmentally desirable source of power to communities in the NWT. The Taltson River development, south of Great Slave Lake, came about because of the Pine Point mine. The Bluefish Hydro project on the Yellowknife River and the hydro-electric facilities on the Snare River were primarily the result of the gold mines in Yellowknife.

Ice road engineering that mining operations pioneered during the 1950's and 1960's has since been adapted to provide surface access on an annual basis for a number of otherwise isolated communities throughout the NWT.

Even though mineral exploration and mining continue to form the backbone of the NWT economy and have provided extensive benefits to northerners and other Canadians, the current climate of prosperity and success should not be taken for granted. The three existing diamond mining operations are based on deposits that were discovered in the early 1990's and two of the three are now at the mid-point of their anticipated mine lives. During the past 16 years, while several smaller properties continue to show promise, virtually no new major deposits have been identified.

These circumstances do not auger well for the long-term health of the economy of the NWT. For example, the typical period from initial discovery to the commencement of operations for a large diamond mine is in the order of 10 to 12 years. This lag time reflects the need to undertake extensive exploration programs to confirm the magnitude and quality of the deposit, undertake the necessary feasibility studies, perform the required environmental assessment work, complete the permitting process, secure the required financing and complete construction of on-site facilities.

The entire cycle is dependent, however, on the appetite and ability of exploration-stage companies and their shareholders to undertake the high-risk "grassroots" programs to generate new discoveries only extremely few of which advance to commercial production. If exploration companies are unduly discouraged by a difficult, complex and inconsistent regulatory regime, the likelihood of new discoveries to replace existing operations will continue to diminish.

For similar reasons, if the NWT is viewed as a jurisdiction that imposes inappropriate or burdensome regulatory requirements on existing operations, irrespective of their environmental and social performance, the appetite for further investment in mining will likewise decline. Given the significant resource potential that the NWT is believed to hold, as well as the lack of other this would be an unfortunate outcome for northerners and for Canadians generally.

It is therefore critical to resolve the on-going regulatory controversies in the NWT before negative perceptions become further embedded and future opportunities that would have otherwise been available to the benefit of the northern economy and to Canada as a whole are deferred to the future or even lost entirely.

De Beers Canada Inc., a prominent player in Canadian diamond mining, has expressed its concerns for the future of mining in the NWT in a letter dated February 27, 2008, a copy of which is attached as attached as Appendix "E".

Agnico-Eagle Mines Ltd. is the owner and operator of the LaRonde Mine in Québec, Canada's largest gold deposit. In 2007, Agnico-Eagle acquired the Meadowbank gold project in Nunavut where production is expected to commence in 2010. Agnico-Eagle is also the largest single shareholder of Stornoway Diamond Corporation, a company with significant diamond exploration interests in Nunavut and a history of extensive diamond exploration in the NWT.

While not directly impacted by the *Mackenzie Valley Resource Management Act* at present, Agnico-Eagle has expressed in its letter dated February 20, 2008 a number of significant general observations in relation to the environmental assessment and approval process in the north. A copy of this letter is attached as Appendix "F".

4. How Should Mineral Exploration, Mine Development and Mining Operations be Regulated?

To answer this question, reference should be made to the Cabinet Directive on Streamlining Regulation that the federal government announced on April 1, 2007.

The opening statement of this document tells us that the Government of Canada "…is committed to protecting and advancing the public interest by working with Canadians and other governments to ensure that its regulatory activities result in the greatest overall benefit to current and future generations of Canadians."

The directive goes on to say that when regulating, the federal government will:

1. **protect and advance the public interest** in health, safety and security, the quality of the environment, and the social and economic well-being of Canadians, as expressed by Parliament in legislation;

2. **promote a fair and competitive market economy** that encourages entrepreneurship, investment, and innovation;

3. **make decisions based on evidence** and the best available knowledge and science in Canada and worldwide, while recognizing that the application of precaution may be necessary when there is an absence of full scientific certainty and a risk of serious or irreversible harm;

4. **create accessible, understandable, and responsive** regulation through inclusiveness, transparency, accountability, and public scrutiny;

5. **advance the efficiency and effectiveness** of regulation by ascertaining that the benefits of regulation justify the costs, by focussing human and financial resources where they can do the most good, and by demonstrating tangible results for Canadians; and

6. **require timeliness, policy coherence, and minimal duplication** throughout the regulatory process by consulting, coordinating, and cooperating across the federal government, with other governments in Canada and abroad, and with businesses and Canadians.

The cabinet directive confirms that these principles apply not only to the federal government itself, but also to entities that exercise delegated regulatory responsibilities. We therefore understand that the federal government intends that these principles apply to the boards established under the MVRMA.

5. The Current Regulatory Regime in the NWT: Challenges, Opportunities and Recommendations

Although expressed in different language, principles similar to those set out in the April 2007 Cabinet Directive were articulated in the letter of the Chamber dated October 9, 1997 to the then Minister of Indian Affairs and Northern Development in response to the First Reading of Bill C-6. This government bill was eventually enacted into law as the MVRMA.

In its letter, the Chamber listed six key principles under the heading "Standards Required of Resource Management Regulation". A copy of this letter is attached as Appendix "G". This letter has also been included as part of this submission because it anticipated many of the problems and issues that have since arisen under the legislation itself or in relation to certain elements of the regulatory process under the MVRMA that are discussed below.

5.1 Issues under the Mackenzie Valley Resource Management Act

5.1.1 Referral of Preliminary Exploration Projects to Environmental Assessment

In our discussions, many industry participants expressed disappointment and frustration with the increasing tendency for initiatives of a seemingly minor nature, notably preliminary exploration programs, to be referred to environmental assessment. In some cases, referrals have been made at the

instance of the agency responsible for preliminary screening while in others, the Mackenzie Valley Environmental Impact Review Board (MVEIRB) has exercised is power to "call up" a proposal to environmental assessment.

The concerns of industry often pertain to land use permit applications for programs that, in the past, were typically approved under the applicable regulations in a timely manner and administered pursuant to the regulations and the terms and conditions of the permit itself.

This pattern may reflect a perception among members of the public that an environmental assessment is essential to identifying the potential adverse impacts of development proposals and mitigating their effects.

Madame Justice Fraser responded to this argument in the decision of the NWT Court of Appeal in *North American Tungsten Corporation* v. *Mackenzie Valley Land and Water Board*[2] where she observed that "…Simply because an undertaking may be exempt from the full panoply of environmental assessments under Part 5 of the MVRMA does not mean that the undertaking is exempt from the applicable regulatory standards."

The court goes on to observe that in this case, which concerned the renewal of a water licence, the land and water board was empowered to impose whatever conditions it considered appropriate in the circumstances. The same could be said of many other applications, including those that concern land use permits of short duration for activities known to have minimal potential for significant or long-term adverse impacts.

Industry participants maintain that the unwarranted reference of development applications for environmental assessment is inconsistent with the Cabinet Directive in several ways, given that these referrals frequently:

- result in undue delays;
- are not always evidence-based;
- have limited potential to generate tangible results; and
- discourage investment and entrepreneurship in the mineral exploration sector in the NWT.

The delays resulting from referrals to environmental assessment can also compromise the ability of exploration companies to comply with tax-related requirements associated with "flow-through" shares. These requirements stipulate that exploration expenditures must be incurred within a limited period of time following the issuance of these shares. If regulatory delays

[2] *North American Tungsten Limited* v. *Mackenzie Valley Land and Water Board,* 2003 NWTCA 5.

prevent the exploration programs in question from proceeding, the issuer may be exposed to legal liability.

5.1.2 Ministerial Reviews under Section 130

While some similarities remain, the MVRMA represents a marked departure from the regulatory process that existed in the NWT before 1998 and 1999. Under the previous regime, the NWT Water Board, in conjunction with INAC, was principally responsible for the regulation of water use and waste disposal under the *Northwest Territories Waters Act*[3]. Land use and land access were largely regulated by INAC alone under the *Territorial Lands Act*[4]. With the transfer of almost complete authority over both areas to the land and water boards and the MVEIRB, it was evidently deemed appropriate to incorporate a limited degree of departmental or ministerial oversight over certain elements of the process. Section 130 of the MVRMA is an example of how this was done.

Under this provision, the Minister is empowered to take certain, limited actions in response to the determinations made by the MVEIRB following completion of an environmental assessment under Part 5 of the MVRMA. He or she exercises this power in conjunction with the "responsible ministers", that is, the federal or territorial ministers who also have jurisdiction over an aspect of the development proposal in question.

The so-called "consult to modify" process is one of the potential alternatives available to the ministers. If they elect this option, the ministers can adopt the board's recommendations with modifications, provided they have first consulted with the MVEIRB.

Industry participants have expressed serious concerns in light of experience to date under Section 130, including:

(a) the absence of any requirement that the ministers reach a decision within a specific period of time;

(b) the failure of the legislation to set out a transparent process by which the ministers reach a decision, including the extent, if any, to which the officials of their respective departments are entitled or required to provide information, analyses or opinions to the ministers during their review process; and

(c) the absence of any requirement that the ultimate decision of the Minister be supported by detailed written reasons.

[3] S.C. 1992 c. 39, as amended
[4] R.S.C. 1985, c. T-7

A further element of the Section 130 process that has proven problematic is the extent to which the Crown's duty to consult Aboriginal peoples and to accommodate any infringement of their interests must form part of the "consult to modify" process under Section 130. In what is often referred to as the "Paramount Resources consult to modify" case[5], the Federal Court determined that the duty to consult and accommodate did not end when the Section 130 process began. As a result, the court set aside the decision of the ministers because the absence of the consultation that should have taken place during the "consult to modify" process.

The recent Ur-Energy Inc. case highlights a number of other flaws in the Section 130 process. This decision followed the determination that the MVEIRB made after completing the environmental assessment of an application for a land use permit by Ur-Energy to conduct a preliminary exploration drill program in the Upper Thelon region of the southeastern NWT.

In its report to the Minister, the MVEIRB concluded that "…impacts of the proposed development, in combination with the combined impacts of all other past, present and reasonably foreseeable human activities are likely to have a significant adverse cultural impact on the aboriginal peoples who value the Upper Thelon."

Consequently, the MVEIRB recommended that the proposed development be rejected without an environmental impact review because, in the board's opinion, the development was likely to cause an adverse impact on the environment so significant that it could not be justified. In reaching its findings, the MVEIRB placed considerable emphasis on the definition of "impact on the environment" in Section 111.(1) of the MVRMA that states that any such impact "…includes any effect on the social and cultural environment…".

The MVEIRB made its report public and sent it to the Minister on May 7, 2007. A number of interested organizations and individuals then filed extensive written submissions with the Minister in response to the report. These submissions included two detailed letters submitted on behalf of the minerals industry, one submitted jointly by the Chamber, MAC and PDAC and a second letter submitted by MAC on its own behalf.

Despite initial indications from INAC officials that the ministers would make a decision quickly, the Minister did not release his decision until October 23, 2007. The decision is set out in a brief letter in which the Minister simply adopts the recommendations of the MVEIRB without explaining to the affected parties how he and the responsible ministers reached their ultimate conclusions.

[5] *North American Tungsten* v. *Mackenzie Valley Land and Water Board,* 2003 NWTCA 5.

In this instance, industry participants believe that the Section 130 process failed to meet several of the standards established by the Cabinet Directive, notably

- the scope, nature and quality of all of the evidence considered by the ministers is not apparent, particularly the evidence pertaining to any possible adverse impacts that the proposed development might have had on potential Aboriginal or treaty rights in the area in question;

- the absence of the inclusiveness, transparency, accountability, and public scrutiny that the federal government says it aspires to in regulatory conduct; and

- the failure to make this decision in a timely manner and in the context of a coherent public policy.

The applicant in this instance, Ur-Energy, has set out its views on this matter as well as its broader recommendations for reform of the regulatory process in a letter dated February 15, 2008. A copy of this letter is attached as Appendix "H".

5.1.3 The Need for Definitive Timelines

The delays encountered where the Minister exercises his authority under Section 130 of the MVRMA are just one illustration of the need to establish definitive timelines throughout the legislation. During the consultations carried out by the Working Group, industry participants repeatedly referred to the lack of definitive timelines throughout the MVRMA process as one of its most unfortunate inadequacies.

A number of case histories could be cited in this regard. However, the experience of Canadian Zinc Corporation in relation to its Prairie Creek mine project is particularly informative. The company has provided a full account in its letter dated February 20, 2008. A copy of this letter is attached as Appendix "I" together with the enclosed tables.

5.1.4 Absence of Statutory Definitions and Thresholds

The terms "public concern" and "significant public concern" appear in at least eight separate provisions of the MVRMA and play a pivotal role in the overall regulatory regime. However, the legislation neither defines these terms nor provides any guidance as to their proper interpretation or application. As predicted before the Act was passed into law, these gaps have given rise to significant uncertainty, inefficiency and undue effort on the part of both applicants as well as those who administer the regime.

It is widely accepted that, to meet the test of sustainability, resource development proposals must be carefully assessed to determine all of their potential impacts not only on the biophysical environment but on the social and cultural environment as well. Consistent with this approach, the definition of "impact on the environment" set out in Section 111 of the MVRMA requires regulators to consider not only the potential effects of a development on the living and non-living components of the natural environment but also its potential effects on the social and cultural environment and heritage resources.

In turn, Section 125(1) requires that a preliminary screening of a development proposal must consider the potential for "…a significant adverse impact on the environment". In other words, even without any consideration of "public concern", the preliminary screener must take into account not only potential adverse effects on the living and non-living components of the natural environment, but potential significant adverse impacts on the social and cultural environment and on heritage resources as well.

From an environmental and socio-economic assessment perspective, it might have well have been concluded that, given the comprehensive and wide-ranging definition of "impact on the environment", the scope of inquiry during a preliminary screening would have been fully satisfied by applying this definition alone.

However, Section 125(1) makes it clear that this is not the case. In addition to considering any potential "significant adverse impact" on the environment, the preliminary screener must also determine whether the proposed development "might be a cause of public concern".

Throughout the history of the MVRMA, industry participants have expressed profound reservations about the implications of the second part of the test set out in Section 125(1), the requirement to consider "public concern" in addition to "impact on the environment". The industry's concerns have focussed on the potential for this element of the legislation to distort the regulatory process, cause undue delay, effort and inconvenience on the part of applicants. Moreover, it is feared that, as a result of this requirement, applications will be rejected for reasons that are unclear, invalid or inconsistent with the principles of sound natural resource and environmental management.

When this issue is raised, it is frequently said that the need to incorporate the consideration of "public concern" into the MVRMA regime is based on provisions of the Gwich'in and Sahtu land claims agreements and therefore not susceptible to change without amending those agreements. This assertion is not entirely true.

The relevant provisions of both agreements are virtually identical and are set out in the sections entitled "Environmental Assessment and Review". Each of the Gwich'in and Sahtu agreements requires that when it conducts an environmental assessment, the "Review Board" (now the MVEIRB) determine whether a proposed development is likely to be the cause of "significant public concern". Where the Review Board determines this to be the case, the development must be made subject to an environmental impact review. Similar provisions appear in the Tli Cho land claims and self-government agreement that was signed in 2003.

The applicable provisions of the MVRMA are therefore not entirely consistent with those of the land claims agreements in two respects. First, there is no requirement under those agreements that the reviewer must determine the potential for "public concern" at the preliminary screening stage. Second, there is no apparent basis for making such a determination on the basis of mere "public concern", as distinguished from one based on "*significant* public concern".

It is important to point out that the courts have told us that the threshold for acting on *significant* public concern is very low. In the *De Beers Canada Inc.* case[6], Madame Justice Charbonneau of the Supreme Court of the NWT says this at paragraph 65 of her judgment:

> "The *Act* requires that the Review Board order an EIR if a proposed development is likely, in the opinion of the Review Board, to be a cause of significant public concern. It does not require the Review Board to be satisfied that these concerns are insurmountable and can never be appeased. Nor does the *Act* require the Review Board to be convinced that all concerns are justified. **It is the existence of the concern that forms the basis for ordering an EIR**."

The issue in the *De Beers* case was whether or not the MVEIRB had conformed to the requirements of the legislation when the board ordered that the development in question, the Gacho Kue diamond project, be subject to an environmental impact review under Sections 132 to 137.3 of the MVRMA. Nonetheless, if the determination of the court is correct, analogous reasoning would presumably apply to the proper interpretation of the term "public concern" elsewhere in the MVRMA.

If that is the case, it would follow that whenever there is the potential for a public concern at the preliminary screening stage, the law requires that the proposal be referred to environmental assessment. Adapting the words of the court in *De Beers*, the Act does not require that the public concern be insurmountable and can never be appeased. Nor does the Act require the preliminary screener to be convinced that all concerns are justified. It is the

[6] *De Beers Canada Inc.* v. *Mackenzie Valley Environmental Impact Review Board,* 2007 NWTSC 24.

existence of the concern that forms the basis for a referral of the development to environmental assessment.

Against this backdrop, it very difficult to conclude that *any* development that is subject to a preliminary screening, irrespective of its scope and nature, would not be potentially subject to an environmental assessment. All that is required is the mere expression of a "public concern". It is not necessary to determine whether the concern is justified or insurmountable or capable of being otherwise resolved.

In the view of many industry participants, this outcome would be profoundly inconsistent with the principle that the scope and nature of environmental assessment and regulation should be rationally related to the potential impacts of the development on the environment, including the social and cultural environment and heritage resources. Giving equal weight, particularly at the preliminary screening stage, to the volatile and ambiguous concept of "public concern" results in a regulatory regime that fails to conform to the standards set out in the Cabinet Directive, including:

- the requirement that decisions be based on evidence;
- the expectation that transparency and accountability are fundamental to sound regulation; and
- the principle that regulatory action should be subject to a cost-benefit analysis and should focus human and financial resources where they result in the greatest potential benefit.

5.2 Issues under the *Northwest Territories Waters Act*

During the discussions undertaken to prepare this submission, industry participants identified three key issues in relation to type A water licences granted pursuant to the *Northwest Territories Waters Act*, notably those issued to the existing diamond mining operations.

The three issues are:

(a) the continued absence of the water quality standards and effluent standards that are envisaged by Section 33 of the *Northwest Territories Waters Act*;

(b) the absence of regulatory standards under the Act for monitoring environmental effects; and

(c) the apparent reluctance of the land and water boards to issue type A licences having a duration comparable to the expected life of the mine.

Diavik Diamond Mines Inc. canvassed the same three issues in a letter dated October 26, 2007 submitted to the Minister following the renewal of the type A water licence for the Diavik diamond mine. A copy of this letter is attached as Appendix "J". The Working Group has reviewed this letter and incorporates it by reference into this submission.

The deficiencies outlined in the letter, and described by other industry participants during the discussions leading up to this submission, once again make it clear that these elements of the regulatory process under the MVRMA and the *Northwest Territories Waters Act* appear to fall short of the standards that the federal government has established pursuant to the Cabinet Directive, insofar as the water licencing and renewal process

- does not provide for a decision that is based on evidence and on the best available knowledge and science in Canada;
- fails to create a regulatory regime that is fully transparent and accountable; and
- does not advance the efficiency and effectiveness of regulation by ensuring the application of human and financial resources where they can achieve the most and by demonstrating tangible results for Canadians.

5.3 Community Engagement and the Duty to Consult

The MVRMA makes it abundantly clear that communities in the Northwest Territories, particularly Aboriginal communities, play a pivotal role in the regulatory regime established under the legislation. The principal goals and objectives of the Act therefore include:

(a) enabling residents of the Mackenzie Valley to participate in the management of its resources (Section 9.1);

(b) ensuring that the concerns of Aboriginal people and the general public are taken into account in the environmental impact assessment process (Section 114(c));

(c) protecting the social, cultural and economic well-being of residents and communities in the Mackenzie Valley (Section 115(b)); and

(d) recognizing the importance of conservation to the well-being and way of life of the Aboriginal peoples who use an area of the Mackenzie Valley (Section 115(c)).

Even though the general intent of the legislation seems clear, and despite the fact that the MVRMA regulatory regime has been in place for almost a decade, many industry

participants have expressed dissatisfaction and concern with the manner in which these objectives are given effect.

The courts have confirmed that the legal duty to consult Aboriginal people and to accommodate any infringement of their interests, being founded in the honour of the Crown, is fundamentally a duty of government. It therefore follows that government has a solemn obligation to play a strong leadership role and bring clarity, certainty and consistency to this challenging issue.

Regrettably, this is not yet the case. While the federal government appears to be directing additional resources to this area, considerable work remains. As a result, in the current climate of uncertainty, proponents and communities alike have had to define significant portions of the process themselves. Often, the result is delay, additional expense and at times acrimony, particularly in areas of unsettled land claims.

Two fundamental questions remain: giving effect to the goals of the legislation as summarized above and taking into account the landmark decisions rendered by the Supreme Court of Canada and the courts below:

(i) how should responsibility for the conduct of consultation and accommodation be apportioned among the federal government, the MVRMA boards and the proponent, in relation to resource development proposals, including preliminary exploration programs, that are subject to the Act; and

(ii) what is the appropriate kind and extent of such consultation, taking into account the nature of the development proposal, its potential impacts on the environment and the nature of any Aboriginal or other community interests that may be affected?

While governments and regulatory agencies throughout the country continue to struggle with basic questions like these, the situation in the NWT is perhaps more complex and challenging than elsewhere, given the mosaic of settled and unsettled land claims, the existence of significant statutory obligations under the MVRMA that require local decision-making and the implications of the growing array of decisions on consultation delivered by the courts.

When added to the already significant challenges of conducting mineral exploration in the NWT arising from the lack of infrastructure, the harsh climatic conditions and the significant risks and costs, many view the continued uncertainty surrounding the duty to consult and to accommodate as a highly significant deterrent to the further investment required to support the continued development of the NWT's potential mineral resources.

What communities and proponents therefore need is clear, unambiguous and comprehensive direction from government in response to the two basic questions outlined above: in simple terms, to define the role of each player in the consultation

process and to provide leadership and guidance on the conduct of each of them. Taking this approach will help to ensure that the end result is a comprehensive code of conduct that is clear and concise and properly satisfies both the requirements of the MVRMA as well as the corresponding requirements of the common law.

In the absence of such leadership, communities, proponents, regulatory authorities and interveners alike will continue to struggle with *ad hoc* arrangements that may be unfair or inadequate, result in unreasonable effort and delay and place all parties at undue risk of litigation. These conditions are clearly not compatible with the standards and objectives that the federal government has set for itself in the Cabinet Directive.

6. Requirements for Agreements Not Based in Statute

For more than 40 years, companies have entered into agreements with governments and more recently with Aboriginal groups that do not always have a clear statutory basis, but are nonetheless deemed necessary in order to proceed with responsible development of mineral resources in the north.

Appendix B of the 13th annual report of the Intergovernmental Working Group on the Mineral Industry, Sub-committee on Aboriginal Participation in Mining[7] lists the agreements of these kinds for mining operations in all of the provinces and territories that were signed up until September 2005. Notably, the first two agreements of this kind that were signed pertained to mining operations situated in what is now Nunavut. These were the Strathcona Agreement signed in 1975 in relation to the Nanisivik mine and the Socio-Economic Action Plan executed in 1981 in relation to the Polaris mine.

The mining industry has therefore long recognized the need to take an adaptive and flexible approach in order to respond to the needs and aspirations of governments and northerners in relation to mineral developments, even in the absence of specific statutory requirements. At the same time, however, industry participants have expected that governmental authorities, particularly the federal government, would fulfill their mandate by providing, in a timely manner, the comprehensive statutory framework necessary to complete the northern regulatory regime for environmental management and resource development.

Lamentably, this has not always been the case. Even where specific requirements and deadlines exist, the performance of the federal government has been disappointing.

For example, Article 10 of the Nunavut Land Claims Agreement required that Nunavut Surface Rights Tribunal be established in legislation not later than October 25, 1993 and that the Nunavut Impact Review Board, the Nunavut Planning

[7] Intergovernmental Working Group on the Minerals Industry, Sub-committee on Aboriginal Participation in Mining, 2005: Report on Aboriginal Participation in Mining in Canada—Mechanisms for Aboriginal Community Benefits, Thirteenth Annual Report; Indian and Northern Affairs Canada, 82 p.

Commission and the Nunavut Water Board be similarly established not later than May 25, 1995. In the case of the Surface Rights Tribunal and Nunavut Water Board, the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*[8] did not receive Royal Assent until April 30, 2002, virtually seven years after the deadline established by the agreement. Moreover, while legislation to establish the Nunavut Planning Commission and the Nunavut Impact Review Board is said to be under development, a Bill has yet to be presented to the House of Commons for First Reading. Consequently, the obligation to establish this key statute is almost twelve years overdue.

It is therefore evident that the federal government has found it extremely difficult to develop northern resource legislation in a timely manner even where required to do so under a constitutionally protected land claims agreement. Given this history, it is perhaps not surprising that the federal government has not yet addressed other elements of the natural resource development regime that are critical to industry, communities and the broader public interest. As a result, these issues continue to be addressed on an *ad hoc* basis by individual contracts and agreements.

To date, the agreements of this kind that have been executed fall into two principal categories: Impact and Benefit Agreements, sometimes called Collaboration Agreements, generally executed between proponents and Aboriginal communities or organizations; and Environmental Agreements, the signatories to which are usually the developer, the federal government, the territorial government and Aboriginal communities and organizations. As outlined below, at least one Aboriginal organization has now proposed a third category of non-statutory agreements, namely a form of Exploration Agreement that companies and First Nations would enter into before exploration takes place on lands traditionally used by the First Nation that are the subject of unresolved land claims.

The concerns of industry related to the absence of a statutory framework should not be interpreted as reluctance to fully engage Aboriginal communities in the development of mineral resources in the north. Nor should these concerns be taken to demonstrate a lack of commitment to protect the northern environment and to undertake development on a sustainable basis. The highly regarded performance of the mines currently operating in the NWT provides clear evidence of industry's approach to these matters.

However, given the significance of these issues to the long-term well being of northern communities, the environment and the mining industry, it seems only reasonable that they should be properly addressed, to the extent possible, in legislation. This will help to ensure that they are adequately and properly resolved through an orderly, transparent process that is fair, equitable and balanced, rather than being resolved, as they presently are, through an unstructured, case-by-case approach in which proponents may be exposed to significant expense, effort and uncertainty.

[8] S.C. 2002, c. 10.

6.1 Impact and Benefit Agreements

Despite the reservations outlined above, the mining industry has largely accepted Impact and Benefit Agreements (IBA's) as an important part of doing business in virtually all parts of Canada. These agreements serve to address environmental, socio-economic and other impacts that result from the development of mineral deposits.

Typically, IBA's are the result of direct bilateral negotiations between Aboriginal organizations and mining enterprises, with little, if any, guidance from government. Nonetheless, industry recognizes the value of such agreements in nurturing mutually satisfactory arrangements with local communities and with Aboriginal communities in particular. Indeed, there is an ever-expanding record of successful engagements of these kinds that illustrate the natural synergy between mineral development projects and Aboriginal communities resulting in meaningful and significant benefits for both parties. IBA's therefore play an important role in satisfying the corporate social responsibility objectives that many exploration and mining companies have voluntarily assumed.

Nonetheless, from a public policy viewpoint, it would be highly desirable to clarify the extent to which agreements of this kind are required by law. Were this to be done, communities, proponents and regulators alike will be better able to integrate IBA`s into the prevailing environmental and social protection regimes established by statute or under land claims agreements.

Until that is the case, however, all parties will be disadvantaged in the absence of specific guidance from governmental authorities that confirms whether IBA's are required by law, in regions where such agreements are not specifically required under land claims agreements. Guidance of this kind should also clarify the proper scope and nature of such agreements.

Unlike many of the statutory and regulatory requirements that impact on the development of natural resources, the IBA for each succeeding project is negotiated without any established structure and process. In addition, the developer often has little knowledge of the key terms and conditions that may have been agreed to for other projects, given the generally confidential nature of these agreements.

Few would argue that those whose interests are adversely affected by natural resource development should be adequately compensated for loss or damage they may suffer. Likewise, it is only reasonable that there be an equitable apportionment of the gains that are realized by developing natural resources on public lands. Indeed, IBA's have responded to these principles and provided substantial benefits to Aboriginal groups in relation to mineral developments including new businesses opportunities, expanded employment and training opportunities, and the betterment of community facilities and infrastructure.

However laudable these outcomes might be, it remains difficult to accept that they can only be achieved through bilateral, largely confidential agreements between natural resource developers and Aboriginal groups in the absence of a clear statutory basis and with little or no guidance or involvement on the part of government. And even if IBA's may incidentally serve to accommodate the infringement of Aboriginal interests resulting from natural resource development, the courts have clearly said that the duty to accommodate falls squarely on the shoulders of government, not the developer.

The existing practice therefore calls out for a full review and evaluation particularly in light of the regulatory principles articulated in the Cabinet Directive. In the view of many industry representatives, the current *de facto* requirement for Impact and Benefit Agreements:

- inhibits a fair and competitive market economy by creating unknown risks and obligations that impact adversely on entrepreneurship and investment;
- negates the principles of transparency, public scrutiny and accountability; and
- constitutes a burden on developers that should properly be discharged by government particularly given the Crown's special relationship with Aboriginal peoples.

6.2 Environmental Agreements

As outlined above, the mining industry strongly supports the goal of sustainable development. The industry therefore concurs in the need to implement the measures necessary to minimize adverse impacts and ensure protection of the environment through all phases of mineral exploration, mine development, mining operations and ultimately reclamation and closure.

Even with the enactment of the MVRMA, the successive statutory regimes in place in the NWT since the early 1970's continue to focus on water use and waste disposal and on regulating access to and occupancy of public lands. Unlike the corresponding provincial systems, the NWT regimes have failed to address other critical elements of the environment, notably the atmospheric environment.

In order to remedy these gaps, each of the three diamond mines currently operating in the NWT has been required to enter into an Environmental Agreement with the federal government, the territorial government and a number of Aboriginal groups and organizations. These agreements are intended to regulate the conduct of the operator in relation to a wide variety of environmental issues and concerns that are not presently caught by existing laws and regulations. They therefore focus on matters such as air quality, wildlife resources, groundwater management, domestic and hazardous waste management and spill contingency.

Another important objective of each Environmental Agreement is to establish and maintain, in each of the three cases, an "independent monitoring agency" separate and apart from government. The purpose of these agencies is to monitor compliance with the licences and permits in effect at the operation, the performance of the operator under the Environmental Agreement itself, and to act generally as a "public watchdog" over both the operation as well as the conduct of the regulatory authorities in relation to the operation.

Carrying out mining operations on a sustainable basis requires that the operator address many of the matters encompassed by the Environmental Agreements. To that extent, these agreements help to ensure that mining operations are carried out in a proper and prudent manner with due regard for the need to identify and mitigate potential adverse impacts on all of the elements of the environment proactively and effectively.

Given their comprehensive nature, not to mention the consequences of non-compliance, the Environmental Agreements have a stature that is equal, if not greater, than that of the permits and licences that the operation must secure under laws of general application, notably the *Northwest Territories Waters Act* and the *Territorial Lands Act.* These agreements appear to represent a regulatory anomaly given that they lack a clear foundation in statute. They therefore constitute a marked departure from normal governmental practice at both the federal and provincial levels where requirements of the kind addressed in these agreements are generally embodied in laws of general application and their associated regulations.

From the industry perspective, it is troubling to see government regulate areas that are critical to resource extraction activities and their commercial success through individual agreements on a "one-off" basis. It is difficult to understand why the necessary requirements cannot be imposed through laws and regulations that have been developed through the parliamentary process with all of the attendant considerations and safeguards, or as delegated legislation specifically authorized by statute.

In summary, however laudable the underlying intentions may be, the continued use of Environmental Agreements is difficult to reconcile with the federal government's avowed policy of "smart regulation" as well as the principles and standards set out in the Cabinet Directive.

6.3 Exploration Agreements

The form of Exploration Agreement recently proposed by the Akaitcho Dene First Nations raises issues that parallel, but also go beyond, those associated with Impact and Benefit Agreements. A copy of the proposed agreement is attached as Appendix "K".

These agreements are evidently intended to establish a detailed series of duties and obligations on the part of the signatory mining company in return for the consent of

the First Nation for the company to conduct mineral exploration on the portion of the Akaitcho Territory where the First Nation signatory asserts certain Aboriginal rights.

The agreement is bilateral and therefore contemplates execution by only the First Nation and the company. It does not envisage execution on the part of any governmental authority and makes substantially no reference to the responsibilities of government in regulating access to land or for environmental protection as well as protecting the interests of Aboriginal peoples.

By way of illustration, the agreement would impose on the signatory exploration or mining company a duty to consult on any potential infringement of Aboriginal rights together with an obligation on the part of the company to "accommodate" any such infringements through the payment of compensation. If given effect, such agreements clearly challenge the regulatory authority of the federal government. At least at first glance, they appear to assert a form of Aboriginal self-government that has not yet been recognized either by common law or by a land claims agreement.

More importantly, the proposed agreements are seemingly intended to transfer the duty to consult and to accommodate from the Crown to the developer. If implemented, they would undermine public confidence in the power of government to exercise control over lands and resource development in the NWT. Given their bilateral nature and the absence of a statutory basis, they also raise the spectre of arbitrary requirements including fees and other payments.

In addition, given that the proposed agreements provide for no involvement on the part of government in the important issues that they address, they could also prejudice the ability of the government to establish a meaningful working relationship with Aboriginal people pending the ultimate settlement of the outstanding land claims in the NWT. It is therefore difficult to imagine how agreements of this kind would be compatible with the standards established by the federal government through the Cabinet Directive.

7. Security Deposits

In the discussions with industry participants leading up to the preparation of this submission, security deposits were cited as an area of significant concern, notably in relation to existing mining operations.

One of the principal issues raised arises from the use of the Environmental Agreements to impose requirements for security above and beyond the security that is otherwise required under the applicable water licence, land lease or land use permit.

For reasons similar to those discussed above, the use of an Environmental Agreement to impose significant financial obligations is open to question. Moreover, industry participants have indicated that imposing security deposit obligations in four different instruments results in an uncoordinated, confusing set of requirements. As a result,

these obligations are susceptible to overlap, duplication and misunderstanding, as well as being costly, time-consuming and awkward to administer.

A concern pertains to the fact that some of the requirements for security have been established on the basis of "progressive reclamation". Under this approach, portions of the security deposit should be refunded once the operator has completed specific portions of its reclamation program. Nonetheless, industry participants have advised that government has sometimes been slow to live up to its part of the bargain and that the security is not returned on a timely basis.

Given past experience with certain historic mining operations in the NWT, it is not surprising to see a strong public demand for the provision of adequate financial security and a definitive response by government to the public's expectations. However, the importance of ensuring adequate security does not lower the standard for public governance. If anything, given the significant financial obligations that security requirements represent, and the potential liability to the operator and its shareholders, the standard of government conduct should be all the higher.

In summary, information provided by industry participants suggests that there is much room for improvement in this area. As a result, the current government practices for the administration of security deposits for mining operations do not always conform to the standards articulated in the Cabinet Directive.

8. Recommendations

During its internal deliberations and throughout its discussions with industry participants, the Working Group has stressed the need for respondents to identify not only the issues and concerns that affect the regulatory process under the MVRMA, but also the corresponding solutions or approaches that could remedy the existing deficiencies and thereby build a better regime.

Many of these recommendations relate to the issues and concerns discussed above while others pertain to other aspects of the regulatory regime that merit attention.

The principal recommendations of this submission are as follows:

8.1 Clarify the Meaning of Public Concern

As outlined above, the proper meaning of "public concern" and "significant public concern" has been a source of uncertainty and controversy throughout the history of the MVRMA.

Sections 83 and 109 of the Act empower the Minister to issue binding "written policy directions" to the regional land and water boards and to the Mackenzie Valley Land and Water Board, respectively, following consultation with the boards.

Recommendation: that the Minister of Indian Affairs and Northern Development develop written policy directions to the three regional land and water boards and to the Mackenzie Valley Land and Water Board on the proper meaning of the phrase "might be a cause of public concern".

8.2 Develop Thresholds for Referral to Environmental Assessment

Written policy directions from the Minister could also be used to ensure that only development proposals that truly merit a more profound examination are referred to environmental assessment by the land and water boards.

Recommendation: that the Minister of Indian Affairs and Northern Development develop written policy directions to the three regional land and water boards and to the Mackenzie Valley Land and Water Board on the proper meaning of the phrase "might have a significant adverse impact on the environment" together with more general guidance, consistent with the principles of the Cabinet Directive, on the criteria that should be applied under the MVRMA for referral of a development to environmental assessment.

8.3 Empower the MVEIRB to Decline a Referral for Environmental Assessment

The MVEIRB functions as the main instrument for the conduct of environmental assessments in the Mackenzie Valley. It is therefore reasonable to expect that the board might assume a supervisory role in determining whether or not a referral for environmental assessment is, in fact, warranted. However, the current legislation does not authorize the board to make such a determination even where the board may be of the opinion that an environmental assessment is not required.

Recommendation: amend the MVRMA to empower the MVEIRB to return a referral for environmental assessment to the regulatory authority, designated regulatory agency or department or agency of the federal or territorial government that made the referral.

8.4 Empower the Minister to Give Written Policy Directions to the MVEIRB

As noted above, The MVEIRB functions as the main instrument for environmental assessments in the Mackenzie Valley. Given the complexities of the legislation and the evolving expectations of northern communities, the board has faced ever-increasing challenges in fulfilling its mandate. Moreover, the decisions of the board are capable of having a profound and long-lasting impact on the resource development initiatives that are necessary to sustain the continued growth and development of the economy of the NWT and thereby provide a desirable standard of living for its residents.

Written policy directions from the Minister could serve as a mechanism to provide guidance to the MVEIRB in fulfilling its demanding mandate and to ensure that the overall approach of the board is harmonious with federal government policies.

Recommendation: amend the MVRMA to authorize the Minister to give "written policy directions" to the MVEIRB in relation to any of its functions and responsibilities to the same extent as the Minister is authorized to develop such policy directions after consultation with the regional land and water boards and the Mackenzie Valley Land and Water Board.

8.5 Clarify the Process under Section 130 of the MVRMA

The existing process provided under Section 130 of the MVRMA is capable of bringing value to the overall regulatory scheme. It ensures that, pending further devolution of regulatory decision-making to the local level, the Minister and the "responsible ministers" have a mechanism that allows them to reflect on the determinations made by the MVEIRB and, where appropriate, to provide guidance. However, the legislation provides little, if any, indication of the procedures that the ministers follow in fulfilling their obligations under Section 130.

Recommendation: amend the MVRMA to include a detailed protocol for the Minister and the responsible ministers to follow in discharging their responsibilities under Section 130. In the interim, the Minister should establish interim procedures in consultation with his Cabinet colleagues and make these publicly available.

8.6 Establish Definitive Timelines

The April 2007 Cabinet Directive commits the federal government and its agencies to discharging their regulatory duties in a timely manner.

Recommendation: undertake a comprehensive review of the principal steps in the current regulatory regime under the MVRMA to identify elements that should be subject to definitive time limitations and establish such timelines whether as written policy directions of the Minister or as rules and procedures of the boards. This review should take into account timelines established under other environmental and socio-economic assessment and regulatory regimes, including those in place in the other territories and in the provinces of Canada. Specific reference should be made to the timelines established under the *Yukon Environmental and Socio-Economic Assessment Act*[9], a regime that results from the Umbrella Final Agreement, a modern land claims settlement agreement.

[9] S.C. 2003, c. 7

8.7 Rationalize Requirements for Permits under the NWT *Scientists Act*

During the discussions leading up to the preparation of this submission, industry participants expressed concern in relation to the "doubling up" of permit requirements as a result of the concurrent application of the *Scientists Act*[10] of the Northwest Territories and the requirements of licences and permits issued under other legislation.

For example, water licences issued pursuant to the *Northwest Territories Waters Act* frequently require the licence holder to conduct a variety of studies and investigations. Currently, these obligations are viewed as constituting "research" under the *Scientists Act* thereby attracting the requirement for a further licence under that legislation.

The licencing process undertaken by the Aurora Research Institute, the governing authority, typically involves further community consultation on projects that have already been the subject of extensive consultation under the primary legislation.

Recommendation: that the requirement to secure a licence under the *Scientists Act* not apply to studies or investigations that must be conducted pursuant to a licence or permit issued under other legislation including water licences issued pursuant to the *Northwest Territories Waters Act.*

8.8 Develop Written Policy Directions for the Duration of Water Licences

As noted above, Section 83 of the MVRMA authorizes the Minister to give written policy directions to the regional land and water boards and to the Mackenzie Valley Land and Water Board. It should be noted that Section 13(1) of the *Northwest Territories Waters Act*, which came into effect in 1993, authorized the Minister to issue similar directions to the Northwest Territories Water Board. It is also of interest to note that in October 2007, the Yukon Water Board recently granted a licence to a mining operation with a term of 20 years[11]

Recommendation: that the Minister of Indian Affairs and Northern Development develop written policy directions to the three regional land and water boards and to the Mackenzie Valley Land and Water Board in respect of the duration of water licences issued pursuant to the *Northwest Territories Waters Act.* These policy directions should require the boards to take into account the scope, nature and expected lifespan of the licensee's operations, the financial strength and stability of the licensee, the potential adverse effects of the operation on the environment, the

[10] R.S.N.W.T. 1988, c. S-4.
[11] Yukon Water Licence QZ04-065 issued to Yukon Zinc Corporation

extent of financial security that the licensee is required to maintain, and any other relevant factors necessary to fulfill the intent of the applicable legislation in a manner consistent with federal government policies or directives on regulatory practices.

8.9 Develop Regulations for Water Quality Standards and Effluent Standards

Parliament has provided for the development of water quality standards and effluent quality standards for northern waters for more than 35 years, starting with the *Northern Inland Waters Act* and continuing with the *Northwest Territories Waters Act* from 1993 onwards. As outlined above and discussed in Appendix "J", developing such standards would greatly provide substantially increased certainty for both regulators and licence applicants alike, and would harmonize with the government's own initiatives as outlined in the Cabinet Directive.

Recommendation: proceed without further delay to develop water quality standards and effluent standards pursuant to Section 33(1)(h) and 33(1)(i), respectively, of the *Northwest Territories Waters Act.*

8.10 Implement Regulations for Environmental Effects Monitoring

As also outlined in Appendix "H", detailed requirements for environmental effects monitoring have been established for metals mines under the Metal Mining Effluent Regulations made pursuant to the federal *Fisheries Act.* However, these regulations, and therefore the environmental effects monitoring requirements, do not apply to diamond mines.

Recommendation: develop regulations for environmental effects monitoring for diamond mines pursuant to Section 33(1)(u) of the *Northwest Territories Waters Act,* building on the extensive consultation and preparatory work already completed in relation to the corresponding environmental effects monitoring requirements under the Metal Mining Effluent Regulations.

Despite the foregoing, it is recognized that the recommended initiative will not require implementation if "Diamond Mine Effluent Regulations" are developed pursuant to the *Fisheries Act*, provided that such regulations include a regime for environmental effects monitoring and would apply to diamond mining operations in the NWT.

8.11 Clarify the Requirements for Aboriginal Consultation

The need to bring clarity to the issue of community consultation in relation to resource development proposals in the NWT grows stronger each year. If left unresolved, this issue will continue to deepen divisions within the northern

community and lead to unnecessary litigation. If this is the case, there will be a profoundly negative effect on the new mineral exploration activities that are necessary to ensure that new ore bodies are discovered to replace the existing diamond mining operations, two of which have already reached the mid-point of their projected lifespan.

Recommendation: the federal government give the highest priority to developing and implementing a policy that will clarify its own role, the role of proponents and the role of the MVRMA boards in relation to responding to the requirements for Aboriginal consultation under the MRVMA that definitively addresses the requirements for consultation and accommodation under the common law. The preparation of a detailed manual of Aboriginal consultation procedure and accommodation policy should form part of this initiative.

8.12 Develop a Policy for Impact and Benefit Agreements

Impact and Benefit Agreements continue to present significant challenges for proponents, communities and regulators alike.

Recommendation: the federal government should develop immediately an official policy on the scope, nature and purpose of Impact and Benefit Agreements in the NWT that reflects an appropriate division of responsibility between government and proponents for the consequences of mineral resource development projects on northern communities. The policy should clarify the role played by Impact and Benefit Agreements in the context of the overall process for the assessment, approval and regulation of mineral resource developments.

8.13 Assess the Implications of Exploration Agreements

The mineral exploration sector recognizes the benefits to be gained by continuing to develop mutually satisfactory relations with local communities. However, profound concerns have been expressed in relation to the emergence of *ad hoc* requirements from First Nations that companies execute an Exploration Agreement with them in areas of unsettled land claims in the NWT. There is no apparent legal basis for the proposed form of agreement. It is therefore difficult to reconcile this initiative with the principles articulated in the Cabinet Directive that envisage a transparent, accountable and balanced regulatory process established in accordance with legislation.

Recommendation: the federal government should immediately review the implications of the proposed form of Exploration Agreement that First Nations have proposed for areas of unsettled land claims in the NWT and take whatever measures may be necessary to preserve the integrity of the regulatory process and protect the interests of all stakeholders.

8.14 Replace Environmental Agreements with Legislation

Environmental Agreements represent a significant departure from the mechanisms by which the federal government typically regulates the conduct of industrial and business activities within its jurisdiction.

Recommendation: that the federal government identify the gaps in existing legislation and regulations that should be filled in order to protect all elements of the natural environment to the extent required by the principles of sustainable development and give priority to the development of the necessary statutes and regulations in order to progressively eliminate the need for *ad hoc* environmental agreements on a project by project basis.

8.15 Rationalize the Requirements for Security Deposits

The security deposit requirements for existing mining operations demonstrates the need for a more comprehensive, cohesive approach that will ensure adequate funds for reclamation and restoration but not impose an unreasonable burden on the operator.

Recommendation: that the federal government initiate immediately a review of its current practices for requiring financial security for mining operations in the NWT with a view to establishing these requirements in a more orderly fashion and to eliminating duplication, overlap or uncertainty in the administration of such requirements.

8.16 Ensure Adequate Capacity and Appropriate Expertise

The dedication and diligence that members of the MVRMA boards bring to the discharge of their duties are well recognized. Nonetheless, significant concerns have been expressed as to how well government has fulfilled its obligation to ensure that the best qualified individuals are appointed to board positions and that each appointee receives the necessary instruction and training in order to properly fulfill his or her responsibilities.

Recommendation: that the federal government establish a comprehensive process to

(a) identify, in concert with Aboriginal groups, the appropriate candidates for appointments to MVRMA boards;

(b) develop a curriculum of instruction to ensure that appointees have the knowledge and understanding required to discharge their respective responsibilities under the legislation and in keeping with the applicable overarching principles of law;

(c) verify the state of readiness of each candidate, before board appointment, to confirm the capacity to discharge the applicable responsibilities;

(d) implement on-going programs to ensure that board members have the benefit of further training and instruction to expand their knowledge and expertise, taking into account significant legal, technical or other developments that may impact on the MVRMA process;

(e) assess and evaluate the performance of each board member on an on-going basis at least annually; and

(f) ensure that staff to the boards have the benefit of similar programs and initiatives.

8.17 Establish an Independent Body to Support Northern Boards

Experience suggests that a program of the kind described above will not be possible in the absence of specific, dedicated and focussed resources. While each of the three territories is the subject of separate and distinctive land claims agreements as well as its own environmental and regulatory legislation, the individuals and boards who administer these regimes face many common challenges.

Recommendation: that the federal government establish an independent, permanent body having a broadly defined mandate to oversee the process outlined in Section 8.16 in order to build the capacity and effectiveness of the northern boards, their members and their key staff. This body should be established on a "pan-boreal" basis serving all the boards established in all three territories. This approach would ensure the necessary economy of scale as well as facilitate the transfer of ideas and experience across jurisdictional lines.

8.18 Provide for a Periodic Review of the MVRMA

Section 72 of the *Canadian Environmental Assessment Act* (CEAA) provided for a "Five-Year Review" of the legislation on the following terms:

> 72. (1) Five years after the coming into force of this section, a comprehensive review of the provisions and operation of this Act shall be undertaken by the Minister.

> (2) The Minister shall, within one year after a review is undertaken pursuant to subsection (1) or within such further time as the House of Commons may authorize, submit a report on the review to Parliament including a statement of any changes the Minister recommends.

In response to this requirement, the Minister of the Environment launched the Five Year Review of the legislation in December 1999. On March 20, 2001, the Minister tabled his report to Parliament and introduced Bill C-19, *An Act to Amend the Canadian Environmental Assessment Act*. This bill ultimately died on the Order Paper but was reintroduced as Bill C-9 that ultimately received Royal Assent in June 2003.

Arguably, the MVRMA represents a more complex and innovative piece of legislation than CEAA. It is therefore surprising that the MVRMA did not include an automatic review provision comparable to s. 72 of CEAA.

Recommendation: that the federal government amend the MVRMA to provide for a periodic review of the legislation at least once every five years. In the interim, the federal government should consider a review of the MVRMA modeled after the Five Year Review of CEAA, even in the absence of a strict legislative obligation to do so.

9. Concluding Remarks

On behalf their respective associations, the members of the Working Group wish to express their thanks for the opportunity to contribute to the *Northern Regulatory Improvement Initiative.* As outlined above, the mineral exploration and mining community is deeply concerned by a number of developments, decisions and trends that have adversely affected the outlook for sustainable development of the mineral resources of the NWT over recent years, and believes that a number of short and long-term remedial measures are required. Nonetheless, we remain optimistic that meaningful changes are possible and stand ready now, as in the past, to participate in any initiative toward that goal.

APPENDIX "A" TO THE WRITTEN SUBMISSION OF THE NWT & NUNAVUT CHAMBER OF MINES, THE PROSPECTORS AND DEVELOPERS ASSOCIATION OF CANADA AND THE MINING ASSOCIATION OF CANADA TO THE *NORTHERN REGULATORY IMPROVEMENT INITIATIVE*

MINISTER STRAHL ANNOUNCES INITIATIVE AND APPOINTMENT TO IMPROVE THE NORTHERN REGULATORY SYSTEM

2-2955

Yellowknife, NWT (November 7, 2007) - The Honourable Chuck Strahl, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, today committed to helping the North to realize its true potential by announcing a new initiative that will improve the overall northern regulatory environment, as well as the appointment of Neil McCrank as the Minister's Special Representative responsible to advance this initiative.

"It is essential that we maximize the potential benefits of resource-development projects, while protecting the environment, and to do that we must have predictable, effective and efficient regulatory systems across the North," said Minister Strahl. "To achieve this, I am proud to announce the *Northern Regulatory Improvement Initiative."*

The Government of Canada's *Northern Strategy,* outlined in the recent *Speech from the Throne*,includes a commitment to promote economic development and protect environmental heritage in the North, for which effective regulatory regimes are essential.

The *Northern Regulatory Improvement Initiative* is a strategy to improve the current regulatory regime, which is a shared system with shared decision-making responsibilities among many stakeholders – federal, territorial, and Aboriginal.

Minister Strahl added: "By appointing Neil McCrank to move this initiative forward, we are helping to ensure that regulatory regimes across the North are effective and predictable, and will better equip the North to develop and benefit from its resources in the best way possible."

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Mr. McCrank will work to improve existing regulatory regimes across the North, which includes holding discussions with stakeholders in all three territories. Mr. McCrank will submit a final report to the

Government of Canada outlining proposed recommendations for advancing the regulatory regime, after which Canada will develop a strategy for action.

Today's announcement also included an investment of $6.6 million over five years to address immediate operational needs in the Northwest Territories to ensure timely review of project proposals.

The *Northern Regulatory Improvement Initiative* will build on other successful activities already underway across the North, including:

- Amendments to the *Canada Oil and Gas Operations Act* to provide the National Energy Board with the authority to regulate pipeline access;

- Amendments to the *Mackenzie Valley Resource Management Act*, to ensure the basic principle of "one project, one environmental assessment";

  - The Five Year Review of the *Yukon Environmental and Socio-economic Assessment Act*; and

  - Accelerated development of the *Nunavu tLand Use Planning and Impact Assessment Act.*

APPENDIX "B" TO THE WRITTEN SUBMISSION OF THE NWT & NUNAVUT CHAMBER OF MINES, THE PROSPECTORS AND DEVELOPERS ASSOCIATION OF CANADA AND THE MINING ASSOCIATION OF CANADA TO THE *NORTHERN REGULATORY IMPROVEMENT INITIATIVE*

PRELIMINARY ISSUES ISCUSSED WITH THE MINISTER`S SPECIAL REPRESENTATIVE AT THE MEETING HELD ON DECEMBER 19, 2007

1. Community consultation: defining the roles of the proponent, government departments and boards

2. Exploration contracts and protocols proposed by Aboriginal organizations and communities

3. Elevation of preliminary exploration programs to full environmental assessment under the *Mackenzie Valley Resource Management Act.*

3. Absence of definitions for public concern, cultural values and impacts on spiritual values

4. Length of process for initial and renewal water licences and limitations on the terms in which those licences are in effect

5. Establishment of standards for effluent quality ad receiving water quality for incorporation in water licences

6. Environmental effects monitoring

7. Impact Benefit Agreement and how they their relate to statutory and regulatory requirements for project approval

8. The role of environmental agreements in the regulatory process.

APPENDIX "C" TO THE WRITTEN SUBMISSION OF THE NWT & NUNAVUT CHAMBER OF MINES, THE PROSPECTORS AND DEVELOPERS ASSOCIATION OF CANADA AND THE MINING ASSOCIATION OF CANADA TO THE *NORTHERN REGULATORY IMPROVEMENT INITIATIVE*

QUESTIONS POSED BY THE MINISTER`S SPECIAL REPRESENTATIVE AT THE OPEN FORUM HELD ON JANUARY 28, 2008

1. Is the current regulatory regime in the Northwest Territories working well enough to allow for, or enable, responsible resource development, or should this regime be fundamentally restructured?

2. What changes would industry recommend to ensure: (a) greater accountability in decision-making; (b) consistency and predictability in decision-making; and (c) more timely decision-making?

3. Is there a need for to ensure a more coordinated response by government departments? If so, could this be addressed by establishing a body that would coordinate all of the relevant federal and territorial government departments that are involved in the regulatory regime?

4. Are there policy gaps, either major or minor, that government could fill by changes to the applicable legislation, particularly the *Mackenzie Valley Resource Management Act*? Potential examples are: (a) regulations to set effluent quality standards and receiving water standards for mining operations; (b) the establishment of technical advisory committees to assist the land and water boards; and (c) regulations to define the requirements for environmental effects monitoring by licence holders.

5. Are specific amendments or clarifications required to the governing legislation, for example, the term "might cause" as used in the *Mackenzie Valley Resource Management Act*?

6. Are there other specific issues that need to be addressed, for example: (a) the adequacy of community consultation; (b) capacity and funding issues related to the MVRMA boards; or (c) the use of regional environmental assessments in place of specific assessments of individual development proposals?

7. Are there implementation issues that need to be addressed to improve the regulatory system?