May 6, 2009

BY ELECTRONIC MAIL

Mr. Stephen Traynor, Director
Resource Policy and Programs Directorate
Indian and Northern Affairs Canada
10 Wellington Street
Gatineau, Québec K1A 0H3

Dear Mr. Traynor:

Re: Submission of the Exploration and Mining Industry in Response to the Proposed *Nunavut Land Use Planning and Impact Assessment Act*

We are pleased to submit on behalf of our respective organizations the written submission of the exploration and mining industry in response to the proposed *Nunavut Land Use Planning and Impact Assessment Act.*

The release of the draft legislative proposal is an important step toward achieving the full implementation of the land use, impact assessment and environmental regulatory regime contemplated by the 1993 Nunavut Land Claims Agreement (the **"NLCA"**). We are grateful for the opportunity to review the draft proposal before it is tabled in Parliament, and hope that our submission will assist you and your colleagues in advancing this key initiative, one that will have a profound impact on the future of our industry, and therefore the economic development of the territory, for decades to come.

In reviewing the legislative proposal, we were mindful of the fact that it originates in a constitutionally protected land claims agreement and therefore requires a perspective different that used to view other federal legislation. It is also clear that the legislative working group has devoted significant time, effort and resources to advance the proposal to its current state.

Against this backdrop, it is with regret that we must advise you that, in our view, the draft proposal requires substantial revision and modification before it will ready for introduction into Parliament. We therefore recommend that the federal government defer its plan to do so in June of this year before the House of Commons rises for the summer recess. Instead, we urge you to undertake the necessary amendments and allow potentially affected parties the opportunity to review a revised draft before the formal legislative process is commenced.

In support of this recommendation, we enclose a detailed synopsis of the comments, concerns and recommendations that industry representatives and their advisors have provided in relation to the April 2, 2009 draft proposal. While we believe that you will find this submission to be self-explanatory, and trust that you will consider all of the points that it raises, we emphasize a number of the key issues and concerns as follows:

1. Incomplete Nature of the Present Draft

As noted above, we are grateful for the opportunity to review the legislative proposal at this stage of the proceedings. However, the depth of our review was compromised by the absence of a number of key elements. A prime example is Schedule 3, which will essentially define the classes of permits, licences

and other authorizations, as well as the classes of works or activities that will "trigger" the application of the impact assessment provisions of the Act. An equally important example is Schedule 5, which is intended to specify the classes of physical works and activities that will be exempt from screening. As the April 2 discussion draft does not contain either of these schedules, it is not possible to determine whether the overall statutory regime will incorporate appropriate thresholds to ensure that an unnecessarily exhaustive review and assessment process will be applied to minor or inconsequential undertakings that have little or no potential impact.

In addition, the April 2 draft contains a large number of provisions that remain to be prepared in final form. In short, the document that we reviewed was clearly at the "work in progress" stage, and therefore did not allow for the comprehensive examination that is necessary to fully appreciate the immediate and long-term implications of a lengthy, complex and novel enactment. By way of further explanation, the legislative proposal lacks definitions for a number of key terms that play a pivotal role in the overall statutory scheme, including "regional interest", "significant public concern" and "ecosystemic integrity."

2. Regulatory Efficiency and Avoidance of Duplication

The Cabinet Directive on Streamlining Regulation that the federal government announced on April 1, 2007 states 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." To achieve these objectives, the federal government undertakes, among other things, to

- **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

- **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.

We respectfully suggest that the proposed legislation does not fully reflect these principles. As a result, it has the potential to increase complexity, create uncertainty and increase the time, effort and expense necessary to conduct mineral exploration and mine development in Nunavut.

By way of example, we note the issues that Agnico-Eagles Mines Ltd. raised in its letter to you dated May 1, 2009 that outline the duplication in the review process conducted by the Nunavut Impact Review Board (**"NIRB"**) in relation to the Meadowbank Project, and the subsequent process undertaken by the Nunavut Water Board (the **"NWB"**). The current legislative proposal lacks any clear mechanism to minimize such duplication. Moreover, as pointed out in the enclosed submission, it does not clearly distinguish the terms and conditions appropriate to a NIRB project certificate and those that are more properly implemented in a subsequent permit, licence or other authorization such as a Type "A" water licence.

As discussed at the industry consultation meeting held in Yellowknife on Thursday, April 30, Section 10.6.1 of the NLCA authorizes the federal government, by legislation, to consolidate or reallocate the functions of the Nunavut Planning Commission, NIRB and the NWB. The current legislative proposal presents a rare opportunity to review this aspect of the agreement and to carefully consider whether consolidating or reallocating regulatory functions could materially enhance the efficiency and effectiveness of the Nunavut regime while ensuring full respect for the principles and goals established under the NLCA. We therefore urge the federal government to avail itself of this chance to consider meaningful adjustments to the overall regulatory regime in Nunavut to the extent the NLCA allows.

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3. Discretionary Terms and Conditions

You will recall that the joint exploration and mining industry submission we made to Mr. Neil McCrank in February 2008 in response to the *Northern Regulatory Improvement Initiative* recommended 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." The industry's discomfort with ad hoc environmental agreements is related, in part, to the lack of a statutory framework to guide the scope, form and content of such documents.

We are concerned that the draft Nunavut legislation would replicate the ad hoc approach represented by environmental agreements, for example by allowing the responsible Minister to "impose terms and conditions" on a project that is otherwise exempt from a NIRB screening. The legislative proposal grants the Minister full discretion to do so, and contains no explicit requirement that such terms and conditions be related to the underlying objectives of the legislation or the requirements of the applicable land use plan.

We would therefore reiterate our previous recommendation and urge the federal government to enhance regulatory certainty by addressing any gaps in the existing legislation and regulations applicable to resource development in Nunavut, rather than taking the ad hoc, case by case approach, that the legislative proposal would apparently implement through the imposition of discretionary Ministerial "terms and conditions."

4. Approval of Land Use Plans

The process for approval of land use plans in sections 54 and 55 of the legislative proposal is significantly different from the corresponding process under Part 5 of Article 11 of the Agreement.

The Agreement specifies that the final approval of land use plans requires the endorsement of both the Minister of Indian Affairs and Northern Development and the minister of the Government of Nunavut having responsibility for renewable resources. In addition, the federal minister is required to secure the approval of the federal cabinet, and the territorial minister, the approval of the Executive Council.

If implemented, Sections 54 and 55 of the draft legislation would give the "designated Inuit organization" a role equivalent to that of the federal and territorial ministers in the approval of a land use plan, and therefore one that is comparable to that of the federal cabinet and the Executive Council. In our reading of the NLCA and the legislative proposal, in this case "designated Inuit organization" means Nunavut Tunngavik Inc. In parallel to the two sections mentioned above, sections 59 and 60 of the draft proposal would give NTI the same role in relation to the amendment of a land use plan.

We have taken careful note of the provisions of Section 11.2.1(b) of the NLCA that require, among other things, that for purposes of the development of planning policies, priorities and objectives "…special attention shall be devoted to protecting and promoting the existing and future well-being of Inuit and Inuit Owned Lands." Moreover, we are mindful of the importance of Inuit Owned Lands to the identity, economy and way of life of Nunavummiut, and fully respect the important role that NTI will naturally play in the development of land use plans for the territory.

Nonetheless, we question whether those goals and objectives require that NTI assume the same responsibilities in that process as the two levels of government. We also note that the process for approval of land use plans, as set out in the legislative proposal, is not completely clear. The draft legislation does not provide any explanation of exactly how the three parties would "jointly" accept the

draft plan, or any indication of the outcome if, for example, the territorial Minister and the designated Inuit organization found the draft plan acceptable but the federal Minister did not.

The fact that NTI is the owner of extensive surface and mineral interests in Nunavut is a further reason why granting NTI a level of authority equivalent to that of the two governments in the approval of land use plans may be open to question. If implemented, the proposed regime could potentially give rise to allegations that NTI's decision-making authority over land use plans was used to enhance the value or development potential of NTI's interests, to the detriment of interests held by, or sought by, other parties in Crown-owned lands. The result could be a divisive atmosphere discouraging to third-party investment in the territory and potentially calling into question the integrity of the overall scheme for environmental and socio-economic impact assessment to be established under the legislation.

We therefore urge you to reconsider the applicable sections of the legislative proposal and to work with NTI to identify ways to ensure a full and meaningful role in the land use plan approval process that is consistent with the NLCA and would not raise the issues, concerns or potential objections outlined above.

5. Protection of Existing Interests and "Grandfathering" of Existing Projects

Industry participants have expressed concern that the coming into force of the proposed legislation and the implementation of land use plans not result in adverse consequences for mineral claims, prospecting licences, mining leases, land use permits and other forms of authorization that are presently issued and in good standing. In the same vein, they have strongly recommended that the ultimate legislation clearly distinguish between on-going projects that will continue to be subject only to the requirements of the NLCA and pre-existing legislation, and those that will be adjudicated under the new legislation. The enclosed submission includes suggested amendments to the legislative proposal that are intended to achieve these objectives.

6. Ensuring Greater Accountability

As outlined at several points in the enclosed submission, industry representatives have strongly recommended that a number of definitive timelines be added to the legislation to ensure that decisions are made in a timely manner. While important throughout the entire mineral exploration and mining cycle, timelines are especially critical during the advanced exploration, development and construction phases where a minor delay can cause the postponement of an entire year`s program because of the logistical challenges and limitations that seasonal conditions pose at northern latitudes. We have also proposed in our submission that decision-makers be required to provide written reasons in a number of cases where that obligation is not presently incorporated in the legislative proposal.

7. Regulatory Certainty

While we understand the need for an adaptive approach to evolving circumstances, you will note that our submission takes a cautious approach to section 113 of the legislative proposal whereby NIRB is entitled to reconsider the terms and conditions of a project certificate and set in motion a process that may ultimately lead to the imposition of new or different terms and conditions for the project. In addition, the implications of this process for permits, licences and other authorizations are not entirely clear. This points to a more general need for the legislation to better define the relationship between the impact assessment phase and the regulatory phase. As pointed out above, this is an area that could potentially be addressed through the consolidation or reallocation of the functions of the Nunavut Planning Commission, NIRB and the NWB.

In closing, we stress that we have made a substantial effort to provide the responses set out in this letter and the attached submission. However, as you are well aware, only a very limited time was available to review this complex and intricate proposal, and to do so in context of the corresponding provisions of the NLCA. Therefore, while we have endeavoured to take a thorough approach, there is no guarantee that our review has been all-inclusive. As a result, we trust that you will consider any further representations that we may make after further study and reflection.

We would also like to emphasize the willingness of our respective organizations to continue to contribute to the development of this critically important statute. To that end, if the legislative working group would find it helpful to meet with knowledgeable representatives of the exploration and mining industry who can explain our perspective in greater detail and assist in identifying potential amendments to the legislation, we would be pleased to facilitate the necessary arrangements.

We trust that you will find our submission of assistance in completing this important assignment, and again express our thanks for the opportunity to contribute to this initiative.

Yours truly,

Jon Baird
President
Prospectors and Developers
Association of Canada

Gordon Peeling
President and CEO
The Mining Association
of Canada

Lou Covello
President
NWT & Nunavut
Chamber of Mines

c.c. The Hon. Chuck Strahl
Minister of Indian Affairs
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The Hon. Jim Prentice
Minister of the Environment
Ottawa

The Hon. Peter Taptuna
Deputy Premier, Government of Nunavut
Minister of Economic Development
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Minister Responsible for Mines
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Mr. Paul Kaludjak, President
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Indian and Northern Affairs Canada
Ottawa

Mr. Michael Nadler
Regional Director General
Indian and Northern Affairs Canada
Iqaluit

DETAILED RESPONSES OF THE NORTHWEST TERRITORIES & NUNAVUT CHAMBER OF MINES, THE PROSPECTORS AND DEVELOPERS ASSOCIATION OF CANADA AND THE MINING ASSOCIATION OF CANADA

IN RELATION TO THE DRAFT LEGISLATIVE PROPOSAL FOR THE

NUNAVUT LAND USE PLANNING AND IMPACT ASSESSMENT ACT

May 6, 2009

PART 2
LAND USE PLANNING

1. Section 42 – Consultation Regarding Policies, Priorities and Objectives

Section 44 of the draft legislative proposal would require the Nunavut Planning Commission (the **"Commission"**) to seek the opinions of municipal representatives, residents of the region and other interested persons when establishing the "specific objectives" for a planning region and to ensure that these objectives are "...consistent with the broad objectives established for the designated area." However, the proposal does not envisage public consultation in relation to the process to be conducted under section 42, whereby the federal and territorial governments are responsible for establishing "...broad planning policies, priorities and objectives regarding land use planning for conservation, development, management and use of land."

It is therefore recommended that section 42 be amended so that public consultation takes place to the same extent at both stages of the process. The broad policies that will be developed under section 42 will undoubtedly have a formative influence on the "specific objectives" that will follow under section 44, given that subsection 43(2) requires that the specific objectives be consistent with the broad objectives established for the territory as a whole. It is therefore suggested that they not be developed by government in isolation. Moreover, a number of provisions in Sections 11.2.1, 11.2.2 and 11.2.3 of the Nunavut Land Claims Agreement (the **"NLCA"**) suggest that an open and inclusive approach should be taken in the development of land use plans.

2. Section 43 – Meaning of Planning "Variables"

The meaning to be given to the term "planning variables" in subsection 43(1) is not clear. It should be noted that the word "variables" does not appear in the corresponding provision of the NLCA, namely paragraph 11.2.2(a). The apparent lack of a French equivalent for the word "variable", when used as a noun, is further reason to question its use in the legislative proposal.

3. Section 48 – Proposed Establishment of Offences

If enacted, Subsection 48(4) would grant the authorities responsible for establishing a land use plan the power to create quasi-criminal offences. Under this provision, they would do so by incorporating into a land use plan one or more provisions that, if contravened, would result in the commission of an offence.

Having regard to the primary role and function of a land use plan under the NLCA and as envisaged by the legislative proposal, the proposal to create offences under such plans is unexpected. Moreover, it could be potentially open to challenge as an unlawful delegation of the federal criminal law power. In addition, there is no obvious provision in the NLCA suggesting that land use plans were intended to create offences.

It is noted that paragraph subsection 69(1) of the legislative proposal prohibits the carrying out of a project if the project is not being conducted "…in accordance with any requirements identified under subsection 48(4)." However, the only provision under

which a section 48(4) offence could be addressed, at least indirectly, is paragraph 179(1)(a.1). This provision authorizes a "Designated Inuit organization" to apply to a court (yet to be identified) for "…a determination of whether a project is, or has been, carried out in contravention of paragraph 69(1)(d.1) and for any order that the Court considers necessary in the circumstances." The power to enforce a subsection 48(4) offence is not addressed elsewhere.

In summary, it appears that the proposal to make land use plans an instrument of enforcement through the incorporation of offence provisions has not been entirely thought out. It is therefore recommended that this concept be carefully reconsidered.

4. Sections 54, 55, 59 and 60 – Approval and Amendment of Land Use Plans

We have outlined our views on the proposed role of Nunavut Tunngavik Inc. in the approval of land use plans in the covering letter than accompanies this submission.

5. Section 61 – Periodic Review of Land Use Plans

Subsection 61(1) authorizes the Commission to undertake a periodic review of an approved land use plan to determine whether the plan should be amended "…having regard to the ecosystem and the socioeconomic, political and policy environment in which it exists."

The criteria by which the Commission would make this determination are not clear, and appear inconsistent with the relevant provisions of the legislative proposal. More specifically, it is questionable whether a periodic review should be undertaken in light of the then present "political and policy environment" when these criteria were not the ones that were applied when the plan was developed in the first place.

While it would seem desirable to undertake a periodic review of a land use plan, it is recommended that the effectiveness of the plan should be judged against the same standards as those that were applied in its original development, notably the purposes and objectives set out in sections 47 and 48 of the draft proposal.

6. Section 63 – Issuance of Licences, Permits and Other Authorizations

Subsection 63(1) directs each regulatory authority that issues a licence, permit or other authorization to ensure that any such document "reflects" the applicable requirements of the applicable land use plan. In turn, subsection 63(1) requires the regulatory authority to "consult" the Commission in relation to doing so.

The Cabinet Directive on Streamlining Regulation that the federal government announced on April 1, 2007 sets out a number of guiding principles for federal regulatory requirements. They include a commitment that the federal government will conduct its affairs so as to "create accessible, understandable, and responsive regulation through inclusiveness, transparency, accountability, and public scrutiny."

With these objectives in mind, it is recommended that the legislation be amended to provide that the regulatory authorities and the Commission shall provide the applicant with copies of any correspondence or other documents that they exchange under

subsection 63(1) in relation to incorporating the requirements of the applicable land use plan into the permit, licence or other authorization in question.

PART 3
ASSESSMENT OF PROJECTS IN THE DESIGNATED AREA

7. Section 68 – Application of Part 3

As noted in the covering letter that accompanies this submission, the April 2 draft provided no information in relation to the content of Schedule 3. This schedule is intended to list the federal and territorial statutes and regulations that govern the licences, permits or other authorizations required for a proposed project and would "trigger" the application of the impact assessment regime set out in Part 3. This schedule will also define the classes of works or activities that would have the same effect.

The absence of this information is a significant impediment to providing comprehensive and meaningful comments on the proposed legislative scheme as a whole.

8. Section 69 – Prohibitions Against Carrying Out a Project

(a) Paragraph 69(f) precludes the carrying out of a project "…in a way that departs significantly from the detailed description…" that the proponent has submitted to the Commission. It is recommended that this provision be reconsidered with a view to determining whether objective criteria or guidance could be incorporated to define what would be considered a "significant" departure from the detailed project description.

More importantly, consideration should be given to the possibility that, especially in the case of a large and complex project, there may be no significant difference in the overall ecosystemic and socio-economic impacts of the undertaking, irrespective of differences in how it is carried out. For example, modified industrial process techniques could still result in effluents or emissions having the same characteristics as before. In simpler language, changes to what goes on within the boundaries of the "factory fence" should not inevitably trigger a reassessment of a project provided that any changes do not result in a materially greater or different environmental and socio-economic impacts.

(b) Paragraph 69(g) states that the project shall not be carried out if "…any other requirement of this Part has not been satisfied in relation to the project."

It is recommended that this provision be revised to provide that the project shall not be carried out "…if **the proponent has failed to satisfy** any other requirement of this Part." This recommendation is based on a belief that the proponent should not be prejudiced if others who are beyond the control of the proponent have failed to satisfy their obligations under Part 3.

9. Section 76 – Assessment of a Modified Project

Section 76 provides that any work or activity that was not part of the original project proposal that has been assessed under Part 3 that would "significantly modify" the project must be assessed separately.

This provision raises the same issues as those noted in relation to paragraph 69(f), namely the necessity of including objective criteria and guidance to determine what would constitute a "significant" modification. Likewise, there is a need to ensure that modifications that do not materially alter the ecosystemic or socio-economic impacts of a project do not automatically precipitate the need for a separate assessment.

10. Sections 77, 78 and 79 – Timelines for Review of a Project by the Commission

The draft legislative proposal does not provide any timelines for completion of the work of the Commission in determining whether (a) the project is in conformity with the applicable land use plan (subsection 80(1); and, if so (b) whether the project is exempt from screening by the Nunavut Impact Review Board (the **"Board"**). In contrast, section 94(3) requires the Board to submit its screening report not later than 45 days after it receives the project proposal from the Commission. It is recommended that the work of the Commission, like that of the Board, should be subject to specific timelines, reasonably determined.

11. Section 80 – Vested Rights

Subsection 80(3) provides that if "…a project includes elements that are not in conformity with the [applicable] land use plan and the proponent has vested rights in relation to those elements, those elements are deemed to be in conformity with the plan."

The legislative proposal does not include a definition of the term "vested rights". The following definition is therefore recommended for consideration:

> **"vested rights"** in a project include any surface or mineral rights granted by the Crown or Tunngavik, any extension, renewal or replacement thereof, and new surface or mineral rights granted pursuant to those previously held in relation to that project.

12. Section 83 – Cumulative Impacts Assessment of Exempted Projects

Subsection 83(1) provides that even if a project is exempt from screening by the Board, the Commission must identify "…any cumulative ecosystemic and socioeconomic impacts that could result from its impacts combined with those of any other project."

It is recommended that consideration be giving to adopting language similar to that used in the *Canadian Environmental Assessment Act* (**"CEAA"**) in relation to cumulative impacts. CEAA incorporates a more focused approach under which consideration must be given to "any cumulative environmental effects **that are likely to result from the project in combination with other projects or activities that have been or will be carried out"**.

The major points of difference are attributable to the reference in the draft legislation to impacts that "could result" versus those that are "likely to result" as stated in CEAA, and the reference to "any other project" as contrasted with "other projects or activities that have been or will be carried" as provided in CEAA.

Federal legislative drafting policy is said to promote the use of similar definitions of the same term when used in more than one federal enactment. It also is widely recognized that the assessment of cumulative impacts presents one of the greatest challenges in the overall environmental and socio-economic impact assessment process. For these reasons, it is suggested that the wording of this subsection be reexamined as outlined above.

In addition, it is recommended that the threshold for referral of a project that would otherwise be exempt from screening to the Board under subsection 83(2) be given further consideration, with a view to ensuring an objective determination of the issues. It should also be remembered that cumulative impacts can be beneficial as well as adverse.

These concepts could be addressed, for example, by revising subsection 83(2) to provide that if "…the Commission has **grounds, reasonably determined**, **that a project that would otherwise be exempt from screening may have adverse cumulative impacts**…" the Commission shall send the project to the Board to conduct a screening.

13. Section 90 – Purpose of Screening

It is recommended that section 90 be revised to provide that the purpose of screening a project is to determine "…whether the project has the potential to result in significant **adverse** ecosystemic and socio-economic impacts…". In support of this recommendation, it should be noted that section 93 of the draft proposal refers to "…unacceptable **adverse** ecosystemic and socio-economic impacts." Similar language is also used in section 91.

14. Section 91 – Determining Whether a Review of a Project is Necessary

(a) Paragraph 91(a)(i) states that a review by the Board is necessary if the project may have both "significant adverse ecosystemic…impacts" or "significant adverse impacts on wildlife habitat". The use of both terms infers that ecosystemic impacts do not include impacts on wildlife habitat. This reinforces the need for a clear and unambiguous definition of "ecosystemic impacts", a key term that plays a pivotal role in many provisions of the legislative proposal.

(b) Paragraph 91(a)(ii) identifies "significant public concern" as one of the key factors to be taken into account in determining whether or not a project will be subject to a Board review. This emphasizes the need for the legislation to incorporate a definition of "significant public concern".

(c) Paragraph 91(a)(iii) provides that a project will require a review if it involves "…technological innovations, the effects of which are unknown." This provision should be amended to provide that a review is required where the project involves technological innovations that have the potential to result in significant adverse ecosystemic and socio-economic impacts. This approach is consistent with

section 90, which states that the purpose of screening a project "…is to determine whether the project has the potential to result in significant ecosystemic and socio-economic impacts…".

(d) Paragraph 91(b)(ii) provides that a review is not necessary where the Board determinates that, among other matters, the "…adverse ecosystemic and socioeconomic impacts are…highly predictable…". The term "highly" is not defined, and may be open to a variety of interpretations. It is therefore recommended that an effort be made to establish more definitive criteria for the purposes of this provision.

(e) Section 91(2) is particularly troubling and difficult to interpret. The intent behind stating that the "principles" (in square brackets) to be applied when determining that a project should be subject to a review "prevail over" the "principles" (in square brackets) to be applied in determining that a project should not be subject to a review is far from clear. As presently drafted, this section could be taken to mean that Board should always bias its determination of the need for a review in favour of conducting a review. It is therefore recommended that this provision be reconsidered to ensure that the need for a review will determined on an objective and impartial basis.

15. Section 94 –Submission of a Screening Report to the Minister

(a) It is recommended that paragraph 94(4) cross-reference paragraph 3(a) instead of sub-section (3). As presently written, paragraph 94(4) would appear to indicate that the Minister is entitled to extend not only the 45-day time limit mentioned in paragraph 3(a) but is also entitled to do the same in respect of any "shorter period" that allows the relevant regulatory authorities to issue a licence, permit or other authorization in accordance with a law or regulation.

(b) It is recommended that relationship between the 45-day time limit set out in subsection 94(3) and the 42-day time limit specified in section 25 of the Territorial Land Use Regulations be clarified, which reads, in part, as follows:

> 25. (1) The engineer shall, within 10 days after receipt of an application for a Class A Permit made in accordance with these Regulations,
>
> (*a*) issue a Class A Permit subject to any terms and conditions he may include therein pursuant to subsection 31(1);
>
> (*b*) notify the applicant that further time is required to issue a permit and give the reasons therefor;
>
> (*c*) notify the applicant in writing that he has ordered further studies or investigations to be made respecting the lands proposed to be used and state the reasons therefor; or
>
> (*d*) refuse to issue a permit and notify the applicant in writing of his refusal and the reasons therefor.

> (2) Where the engineer has notified an applicant that further time is required to issue a permit pursuant to paragraph (1)(*b*), he shall, **within 42 days after the date of receipt of the application**, comply with paragraph (1)(*a*), (*c*) or (*d*).

16. Section 96 – Ministerial Review of Board Determination Not to Review

Section 96 sets out the alternative courses of action that the responsible Minister is entitled to follow after receiving a report in which the Board recommends that a project proceed without a review.

The following points are noted:

(a) Paragraph 96(1)(b) does not indicate any standards or criteria that the Minister is required to apply in forming an opinion that the project should be reviewed, notwithstanding a determination by the Board to the contrary. In addition, while section 138 requires that written reasons "be provided" in support of this decision, it is not apparent that the Minister is required to provide these reasons to the proponent or to make them available on the internet.

(b) Where the Minister accepts the Board's recommendation that that a project should proceed without a review, Subsection 96(2) nonetheless entitles the Minister to "impose terms and conditions" including, in whole or in part, conditions that the Board has recommended in its report. However, the criteria or standards on which the Minister would base these terms and conditions are not specified, and there is no indication of the type of document in which they would be set out.

Once again, while written reasons are apparently required in relation to the subsection 96(2) terms and conditions, it is not clear that the proponent or other interested parties are entitled to receive these reasons

17. Section 97 – Ministerial Review of Board Determination to Amend Project

Section 97 outlines the alternatives open to the responsible Minister if the Board determines that a project should be amended. One option open to the Minister is to determine that the project should not proceed, notwithstanding the decision of the Board that it should be amended. However, once again, there is no definitive timeline for the Minister to make this decision and no apparent obligation to make the written reasons prepared in support of the decision available to the proponent.

18. Section 98 – Ministerial Review of Determination For Project Not to Proceed

Similarly, section 98 does not set out any timeline for the Minister in making a decision that a project should be amended, notwithstanding a determination by the Board that the project should not proceed, or any requirement for the Minister to provide written reasons to the proponent.

19. Section 102 – Determination of Scope of Review by the Board

Subsection 102(1) instructs the Board to determine the "review scope" of any project that it receives from the Minister

(a) following the Board's determination that the project should be reviewed and the Minister's ratification of that determination in accordance with subparagraph 95(1)(a)(iii);

(b) subsequent to the Minister's decision under paragraph 96(1)(b) that a project should be reviewed, notwithstanding the Board's determination to the contrary;

(c) as a result of the Minister's decision pursuant to paragraph 97(b)(i) that the project is in the national or regional interest and should be reviewed, notwithstanding the Board's determination that it should be amended; or

(d) following a decision by the Minister under subparagraph 98(b)(i) that the project is in the national or regional interest and should be reviewed, notwithstanding the Board's determination that it should not proceed.

In each of these cases, the project proposal will have been scrutinized by the Commission pursuant to sections 76 to 86, provided that an approved land use plan applies, and in either event will have undergone screening by the Board pursuant to sections 87 to 94.

If the Commission has evaluated the project proposal for conformity with an applicable land use plan, the proponent will have been required, pursuant to section 78, to supply any further information that the Commission deems necessary to "…**determine the scope of the project** and to carry out its review."

At the screening stage, the proponent is under a corresponding obligation to provide "…any further information that the Board considers necessary for it to **determine the scope of the project** and to carry out its screening."

Moreover, subsection 88(1) empowers the Board to include or exclude from the "**scope of screening"** any work or activity that it considers sufficiently related or insufficiently related, as the case may be. Where the Board makes a decision to include additional works or activities, the Commission is once again required to exercise its functions in relation to the entire project.

In each case, therefore, the project will have already been "scoped" at least twice, and once the applicable land use plans is in place, three times, before it reaches the review stage contemplated by sections 101 and 102.

In light of these procedures, it is difficult to understand how the scope of the project could still be sufficiently unclear to support the requirement to provide additional information under section 101 or to justify the power of the Board to once again revisit the scope of the review under subsection 102(1).

It is also important to note that the financial and logistical consequences for the proponent may be particularly dramatic if the Board makes a decision to include additional works or activities and the project, as a result, is returned to the Commission for further review under sections 76 to 86 pursuant to subsection 102(2).

It is therefore recommended that the overall process be reassessed with a view to providing for a conclusive determination of the scope of the project at the earliest stage possible so that the sequential steps contemplated by Part 3 can proceed efficiently and expeditiously. For comparable reasons, it is recommended that a project be referred back to the Commission for further review only as a result of material amendment by the proponent itself or on account of circumstances that, despite due diligence, could not have reasonably been foreseen.

20. Section 105 – Attendance of Witnesses for Project Review

As noted under Item 18 above, federal policy is said to encourage the use of consistent language when drafting similar provisions in two or more federal statutes. It is therefore recommended that consideration be given to revising the language of subsections 105(3) and 105(4) to mirror more closely the corresponding provisions of the federal *Inquiries Act.*

21. Section 106(d) – Assessment by the Board of Socio-Economic Impacts

Sections 12.2.2 and 12.2.3 of the NLCA provide important guidance for the development of the statutory provisions that pertain to the scope, nature and extent of the Board's authority to assess socio-economic impacts and establish appropriate terms and conditions in response.

Paragraph 12.2.2(d) of the agreement directs the Board "…to determine, on the basis of its review, whether project proposals should proceed and if so, under what terms and conditions…". However, it goes on to say that the Board's "…determination with respect to socio-economic impacts unrelated to ecosystemic impacts shall be treated as recommendations to the Minister."

Section 12.2.3 of the NLCA is somewhat more explicit and provides that the mandate of the Board "…shall not include the establishment of requirements for socio-economic benefits." This provision would be given effect under the draft legislative proposal pursuant to section 111 which authorizes the responsible Minister to "…reject, or amend in any manner [he or she] considers necessary, the terms and conditions recommended by the Board with respect to socioeconomic impacts that are unrelated to ecosystemic impacts."

Note should also be taken of Article 26 of the NLCA that governs the preparation of Inuit Impact and Benefit Agreements for "Major Development Projects" including those that involve development or exploitation of resources wholly or partly under Inuit Owned Lands. For similar reasons, it is relevant to mention Article 27 of the agreement, which establishes requirements for consultation on a broad range of socio-economic issues with the designated Inuit Organization in relation to the development of certain kinds of natural resources on Crown lands in the Nunavut Settlement Area.

The NLCA clearly assigns a central, although not exclusive, role to the Board in relation to the assessment and mitigation of adverse socio-economic impacts. With this in mind, it is recommended that the relevant provisions of the draft legislation be reconsidered with a view to focussing the Board's mandate more closely on the responsibilities assigned to it under the NLCA. The applicable provisions should also explain more clearly how the conclusions and recommendations of the Board will ultimately be taken into account when determining the terms and conditions intended to mitigate adverse socio-economic impacts, whether those set out in the project certificate, those imposed by the responsible Minister, or those that may be implemented in accordance with Articles 26 and 27 of the NLCA.

Over the past decade, the natural resource development projects in frontier areas of Canada have amply illustrated the significant challenges faced by proponents, governments and Aboriginal communities in coming to grips with socio-economic impacts and in arriving at fair, timely and sustainable solutions for the distribution of benefits among stakeholders.

The present legislative proposal offers the opportunity to bring clarity to this important aspect of natural resource development in the territory. If carefully developed and implemented, the relevant provisions of the legislation could confer a significant advantage on Nunavut over competing jurisdictions where socio-economic impact assessment, the mitigation of impacts and the apportionment of benefits are hampered by controversy and uncertainty.

22. Sections 107, 108 and 109 – Ministerial Decision Following a Board Report

(a) It is recommended that further consideration be given to establishing timelines for the decisions that the responsible Minister is authorized to make under sections 107, 108 and 109 of the draft proposal, whether to identify deficiencies in the assessment of ecosystemic and socio-economic impacts under subsection 107(2) or to agree with or reject a determination by the Board that a project should proceed or should not proceed.

While Ministerial review of significant determinations represents an important step in the overall project approval process, it is important that the Minister's decision be made in a timely manner. Four environmental assessments that are currently before the Mackenzie Valley Environmental Impact Review Board illustrate how long a Ministerial decision can take. In each of these cases, a "Report of Environmental Assessment" was sent to the Minister of Indian Affairs and Northern Development on September 11, 2008. However, according to publicly available information, the Minister and the other responsible ministers have not yet made a decision in accordance with section 130 of the *Mackenzie Valley Resource Management Act.*

(b) Paragraph 108(b) of the draft legislative proposal authorizes the responsible Minister to reject the determination of the Board that a project should proceed, if the responsible Minister is of the opinion that the project "…is not in the national or regional interest." Paragraph 109(b) allows the Minister to make a similar decision where the Board has reached the opposite conclusion. Neither term is

defined in the legislative proposal, nor is there any indication of the steps that the responsible Minister is required to take before forming such an opinion. These apparent gaps need to be addressed.

(c) Section 138 requires that "written reasons" be provided when the Minister makes a decision under sections 108 or 109. However, section 140(4) states that the responsible Minister need only provide "written notice" to the proponent of any decision "taken" by the Minister under these two sections.

The use of different terms in the two provisions indicates that "written reasons" and "written notice" are not the same, and strongly implies that the proponent is entitled to something less than the full written reasons. If true, this approach is at variance with the rules of natural justice and inconsistent with the April 2007 Cabinet Directive on Streamlining Regulation noted above.

It is therefore recommended that the legislation make it clear that the proponent is entitled to receive a copy of the Minister's full written reasons in this case, and in every other instance where written reasons are prepared by the Minister, the Commission, the Board or any other authority in relation to the review and approval of a project.

23. Section 111 – Ministerial Review of Socio-Economic Terms and Conditions

The reference in this section to "paragraphs 110(2)(a) and (b)" is confusing, as subsection (2) of section 110 consists only of a single sentence. It is recommended that the entire document be carefully reviewed before any further public consultation to ensure that all of the necessary cross-references have been incorporated and that each of them has been verified for correctness.

24. Section 113 – Reconsideration of a Project Certificate

It is recommended that section 113 be reconsidered to provide for safeguards to ensure that, if ultimately incorporated in the legislation, this provision does not lead to perpetual environmental and socio-economic impact review of a project.

Measures that could assist in achieving this goal include the following:

(a) the implementation of standards or criteria to ensure that reconsideration only proceeds where there is clear evidence of a need to do so;

(b) a requirement for the Board to discuss with the project operator in a timely manner the issues or concerns that could potentially lead to the opinion that a reconsideration of the project certificate is warranted, where someone other than the operator has initiated the process; and

(c) a requirement to assess whether an amendment to a permit, licence or other authorization would resolve the underlying concerns in a more timely and efficient manner than by reconsidering and amending the project certificate.

In addition, as presently written section 113 does not indicate how the terms and conditions of an amended project certificate would interact with those of any permits, licences and other authorizations that pertain to the project, for example, a Type "A" water licence granted pursuant to the *Nunavut Waters and Nunavut Surface Rights Tribunal Act.*

25. Section 115 – Agreement to Establish a Joint Environmental Assessment Panel

Section 115(2) contemplates that an agreement to assess a trans-boundary project entered into by the Minister of Indian Affairs and another reviewing authority outside of the designated area could, among other matters, include the "power" to require the proponent to supply additional information necessary for the review and the "power" to require the proponent to prepare a statement of the impact of the project according to guidelines.

It is recommended that further consideration be given to whether such "powers" can be properly established by way of an inter-governmental or inter-agency agreement. It is suggested that a more conventional approach would be to include the necessary provisions in legislation.

26. Section 116 – Aboriginal Interests

Subsection 116(3) establishes the procedure for appointing the members of a joint review panel where a trans-boundary project is proposed for an area that encompasses both a portion of the designated area and an "…adjacent area **used by** another aboriginal group". In these circumstances, the other aboriginal group is entitled to participate in the selection of the members of the joint review panel.

While it is clearly desirable to give potentially affected parties adequate representation and full opportunity to participate in the assessment process, it is recommended that words more specific than "used by" be considered for subsection 116(3).

For example, the entitlement to participate could be based on the likelihood that project-related impacts will be felt on the "traditional lands" of the other aboriginal group. Alternatively, participation could be triggered by the existence of an Aboriginal or treaty right that is held or is claimed by the Aboriginal group in relation to the adjacent area.

27. Sections 120 and 121 – Determination of Scope of Review by a Panel

It is recommended that the comments provided under Item 22 above in relation to the determination of the scope of a review by the Board also be taken into account in relation to the corresponding provisions that address the scoping of a project by a joint environmental assessment panel pursuant to sections 120 and 121 of the draft legislative proposal.

28. Section 122 – Issuance of Impact Assessment Guidelines by a Panel

(a) Subsection 122(1) states that the environmental assessment panel shall issue guidelines for the preparation of a statement by the proponent on the "…**ecosystemic and socioeconomic** impacts of the project." On the other hand,

Section 116(4) instructs the Minister of the Environment to appoint to the panel persons who have special knowledge or experience relevant to the "…anticipated **technical, environmental and social** impacts of the project." It is recommended that the terms in the two provisions be made consistent to the extent possible.

(b) Timelines are absent from subsections 122(4), 122(5) and 122(6). It is recommended that objectives for completion of these steps, if not definitive timelines, be incorporated in the legislative proposal. A similar recommendation is made in relation to subsection 122(8).

29. Section 123 – Conduct of a Panel Hearing

(a) It is recommended that subsection 123(7) be revised to ensure protection for confidential, secret or proprietary information belonging to the proponent that, if disclosed, could cause loss or damage to the proponent.

(b) The nature of the "privilege" that is mentioned in subsection 123(8) is not clear, except to note that solicitor-client privilege would be very unlikely to apply in these circumstances.

(c) It is recommended that subsection 123(11) be reconsidered to provide that a panel member is not immune from an action or proceeding commenced because the panel member has wrongfully disclosed information of the proponent that is deemed to be confidential, secret or proprietary.

30. Section 124 – Review of a Project by a Panel

While the words "community and" are enclosed in square brackets in section 124(3), it is recommended that the implications of incorporating this term into the legislative proposal be carefully considered. When doing so, there should be a proper assessment of any apparent need for this term given that "traditional knowledge", a more widely accepted term and one that is defined in the legislative proposal, is already included.

31. Section 127 – Ministerial Decision Following a Panel Report

The comments and recommendations that concern the need for definitive timelines for a Ministerial decision following the preparation of a report by the Board upon completing a review of a project apply equally to the decision of the responsible Minister under section 127 after a environmental review panel files its report in accordance with section 125.

32. Sections 134 to 137 – Implementation of Project Terms and Conditions

(a) Sections 134, 135 and 136 appear to use the terms "agency", "authority", "regulatory authority", "regulatory agency" and "independent regulatory agency" in an inconsistent manner. It is also noted that the term "regulatory authority" is the only term of this kind that is defined in the draft legislative proposal. The relevant sections should be reviewed to ensure that each of these terms, to the extent that it is necessary, is used correctly and consistently.

(b) A review of these sections highlights a more important issue that should be given serious attention in the context of the overall regulatory framework that applies to development projects in Nunavut. That issue revolves around a critical need to ensure that the impact assessment process envisaged by the draft the legislative proposal and the permitting and licencing processes that follow operate together in a harmonized and coordinated manner.

It is respectfully submitted that the detailed provisions that are set out in these three sections indicate that further work is required to achieve these goals. In doing so, it is recommended that particular attention be given to the extensive powers granted to the Nunavut Water Board pursuant to the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*¸ particularly in relation to the issuance of a Type "A" water licence.

This issue reinforces the potential merits of evaluating the benefits that could potentially be achieved by a consolidation and reassignment of the functions of the three institutions of public government as provided for in Section 10.6.1 of the NLCA and referred to in the covering letter that accompanies this submission. Particular note should be taken of subparagraph 10.6.1(a)(v) which provides that "…water approval functions…need not be discrete from development impact review functions."

It is beyond the scope of this submission to outline more precisely how this might be done. However, the letter of Agnico-Eagle Mines Ltd. dated May 1, 2009 that is noted in the covering letter strongly suggests that the a review of the approval process that was applied to Agnico-Eagle's Meadowbank Project could serve as the basis for an informative and timely case study.

(c) Subsection 137(5) is confusing and difficult to interpret. Is it illogical to say that a "regulatory agency" is deemed **not** to be subject to specific direction or control if "….its decisions are **subject to the approval of, or may be varied or rescinded** by, the Government of Canada or Nunavut"/ It is recommended that this provision be reconsidered.

33. Section 142 – Exploration and Development Activities

(a) Subsection 142(2) appears to defeat the underlying purpose of subsection 142(1) and to negate any benefit that might be derived from the exemptions to be provided by Schedule 4 and Schedule 5.

When read in conjunction with subsection 83(1), subsection 142(2) strongly suggests that any project, no matter if exempted, and irrespective of its scope, nature or impacts, can still be subject to the ad hoc imposition of terms and conditions beyond those that are provided in laws of general application.

It is suggested that this approach be reevaluated and that careful consideration be given to establishing definitive thresholds to exempt projects of a routine and inconsequential nature and are unlikely to have significant adverse impacts from the risk of impromptu review and regulation.

(b) Section 142 addresses both "exploration" and "development" activities, but provides only a definition in respect of the first term. It is recommended that consideration be given to defining the term "development".

34. Sections 161 and 162 – Monitoring

(a) Section 161 and those that following in Part 5 make significant use of the terms "ecosystemic environment" and "socioeconomic environment." Given the novel nature of these expressions, it is strongly recommended that the legislative proposal include a definition for each of them.

(b) It is recommended that subsection 162(4) be revised so as to avoid not only duplication of duties among the Board and government departments and agencies, but also to avoid duplication of the monitoring requirements that the proponent must fulfill in accordance with its NIRB project certificate or pursuant to any licences, permits or other authorizations that otherwise apply to the project.

35. Section 165 – Inspection and Seizure Powers

(a) The powers of examination, inspection and seizure outlined in section 165 appear excessive and unreasonable if exercised only on the basis of "…reasonable grounds to believe that [a work] or activity regulated by this Act is conducted or a document relating to the [administration or enforcement] of this Act is located."

It is strongly recommended that these provisions be revised to provide, as does subsection 176(1), that a designated person is entitled to exercise his or her statutory powers only when he or she "…believes on reasonable grounds that there is a **violation** of this Act."

The final words of subsection 165(3)(i), which purport to authorize the designated person to order the owner or person in charge "…stop or start an activity" should be carefully reconsidered. By way of explanation, starting or stopping an activity that is related a large and complex industrial undertaking in a precipitous manner can have serious and wide-ranging consequences for the enterprise, for the health and safety of its employees and for the surrounding environment.

36. Section 180 – Offences and Punishment

It is noted that this provision has not yet been completed. Nonetheless, it would be instructive to have an indication of the general level of penalties envisaged under this enactment to enable a comparison with those provided in other federal enactments and in the corresponding provincial legislation.

37. Part 7 – Transitional Provisions

As evidenced by the *North American Tungsten* and *Canadian Zinc* court decisions under the *Mackenzie Valley Resource Management Act*, it is desirable to strive for the greatest possible degree of clarity and certainty in relation to the treatment of projects that are already in existence when a new environmental and regulatory regime comes into effect.

Although sections 186.1 through 188 would appear to ensure that the proposed Act would not apply to existing project certificates, water licences or other authorizations, it is recommended that subsection 188(4) be revised to read as follows:

> 188.(4) Part 3 of this Act does not apply to any project that, on the day this section comes into force, is being assessed or has been approved under Article 11 or 12 of the Agreement, is being carried out following such an assessment or approval, or has been completed.

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