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NUNAVUT WATER BOARD
NUNAVUT IMALIRIYIN KATIMAYINGI
OFFICE DES EAUX DU NUNAVUT

November 30, 2016

1BR-CLI0914, 1BR-LOR0813

By Email

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Re: Response to Questions from the Contaminated Sites Program Regarding Regulatory Process Applicable to the Nunavut Water Board's Processing of Applications for *De Minimus* Water Uses

Dear Mr. Dewar and Ms. Allen

In discussions with you both regarding the Contaminated Sites Program's upcoming monitoring and remediation plans for the two sites that had formerly been governed by Type "B" Water Licences 1BR-CLI0914 and 1 BR-LOR0813 and more generally sites included under the scope of Indigenous and Northern Affairs Canada's (INAC) *Abandoned Military Site Remediation Protocol* it has become apparent that there is a lack of understanding regarding the regulatory process applicable to these projects. In particular, it appears from guidance provided to you by Erik Allain

in INAC's Field Operations Group and also from within INAC's regional office generally that there is confusion regarding how monitoring and remedial programs involving *de minimus* water uses (water uses approved by the Board without a licence) should be processed since the amendments to the *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada (Nunavut Agreement)* came into force in July 2015. The Nunavut Water Board (NWB) is providing this correspondence to clarify the NWB's views regarding the regulatory process applicable to these types of applications to the NWB, as well as to address some of the misconceptions that may be a source of confusion.

While the NWB notes that INAC is planning a multi-stakeholder workshop tentatively scheduled for February 2017 to discuss this and other regulatory process issues arising from the combined implementation of these amendments to the *Nunavut Agreement* and the *Nunavut Planning and Project Assessment Act*, S.C. 2013, c. 14 (*NuPPAA*), as it is unclear whether there will be any direction or solutions resulting from the workshop in the short term, the NWB is providing you with this clarification on the basis solely of the current situation. Following the workshop the NWB may be able to provide you with additional guidance on these issues and will certainly let you know if that is the case.

Having had the benefit of reviewing the response you received from Erik Allain in INAC's Field Operations Group regarding how to proceed under *NuPPAA* the NWB points out that it is not actually the NWB or the Nunavut Planning Commission's (the Commission) application of the definition of "project" under *NuPPAA* that has resulted in a wide category of developments with minimal effects having to be received and reviewed by the Commission. Rather, it is the amended wording in the *Nunavut Agreement* (as amended in 2015 to support the implementation of *NuPPAA*) that is the trigger for these *de minimus* types of water uses to be subject to conformity assessment by the Commission and possible project assessment by the Nunavut Impact Review Board (NIRB). Specifically, the NWB refers you to Article 11, and the addition of Section 11.5.9A to the *Nunavut Agreement* which requires the following:

11.5.9A

The proponent of any project proposal shall submit the project proposal to the NPC.

The definition of "project proposal" under the amended *Nunavut Agreement* is as follows:

"project proposal" means a physical work that a proponent proposes to construct, operate, modify, decommission, abandon or otherwise carry out, or a physical activity that a proponent proposes to undertake or otherwise carry out, such work or activity being within the Nunavut Settlement Area, except as provided in Section 12.11.1 but does not include the construction, operation or maintenance of a building or the provision of a service, within a municipality, that does not have ecosystemic impacts outside the municipality and does not involve the deposit of waste by a municipality, the bulk storage of fuel, the production of nuclear or hydro-electric power or any industrial activity

The amended *Nunavut Agreement* does not currently have a definition of "project" and does not reference the definition of "project" under *NuPPAA*. As a result, the *Nunavut Agreement* does not prescribe a threshold that would allow project proposals with *de minimus* impacts to be excluded from being processed under Articles 11, 12 and 13 of the *Nunavut Agreement*. In addition, the provisions of Article 13 of the *Nunavut Agreement* that govern the NWB's place in the integrated

regulatory process were also amended to state that a project proposal “requiring an application to the NWB” must be received by the Commission and the application should only proceed to the NWB for processing once the Commission (and if applicable) the NIRB have completed the required land use planning and project assessment processes as set out in Article 13, Sections 13.4.2-13.4.7 and 13.5.2 of the amended *Nunavut Agreement*.

As set out under s. 3 of the *Nunavut Waters Regulations*, SOR/2013-69 (*Regulations*), the NWB’s approval of a use of waters or deposit of waste without a licence is clearly stated to require an application to the NWB. On the basis of the framework established under the amendments to the *Nunavut Agreement* and the *Regulations* the regulatory process applicable to an activity such as using water for the purposes of sampling and remedial monitoring as proposed by the Contaminated Sites Program is as follows:

- submission of a project proposal to the Nunavut Planning Commission under the new Article 11, Section 11.5.9A of the *Nunavut Agreement*;
- the Commission (and if applicable) NIRB completing the applicable land use planning and project assessment requirements under Article 13, Sections 13.4.2-13.4.7 and Section 13.5.2 of the *Nunavut Agreement*; and
- following completion of the required land use planning and project assessment requirements, the NWB receiving an application under s. 3 of the *Regulations* for the NWB approval without a licence of *de minimus* water use and/or limited types of waste deposit as set out in the *Regulations*.

Although a recent Expert Report filed with the Commission as part of INAC’s submissions in respect of the Draft Nunavut Land Use Plan suggests that it is INAC’s view that there is a *de minimus* threshold of some sort that must be read into the *Nunavut Agreement* and that the definition of “project” under *NuPPAA* is not inconsistent with the broader definition of project proposal when this implicit threshold is read in, no guidance expressly addressing this issue has been provided to the NWB directly. In the absence of a direct response to the NWB’s specific queries as identified in discussions with INAC in November 2015, expressed in an NWB discussion document provided to INAC in December 2015 and reiterated again by the NWB in early September 2016 in correspondence to S. Van Dine and D. Rochette, it remains the NWB’s view that the express wording of the *Nunavut Agreement* as amended dictates that the first step in the regulatory process even for a *de minimus* water use is submission of a project proposal to the Commission.

Further, the NWB finds that the approach put forward in INAC’s Expert Report, which is essentially that the amendments must be viewed through the lens of a general interpretive aid to the effect that the law does not “concern itself with trifles” is insufficient to read into the amended *Nunavut Agreement* any form of meaningful threshold for determining which project proposals that require an application to the NWB would constitute a “trifle” and should, therefore, be excluded from the definition of project proposal and the land use and project assessment requirements set out in Articles 11, 12 and 13 of the *Nunavut Agreement*. As there is no clear threshold or other objective basis for excluding (on the basis of minimal impacts or any other factors) works, activities or undertakings that would otherwise fit within the definition of “project proposal” from the requirements of Article 11, Section 11.5.9A of the *Nunavut Agreement*, it continues to be the NWB’s view that all physical works and activities that meet the definition of “project proposal” and require an application to the NWB, must, as set out under the amended *Nunavut Agreement*, be submitted to the Commission.

The NWB points out that compliance with Article 11, Section 11.5.9A is required, even if the project proposal is not a “project” to which *NuPPAA* applies. Consequently, as the guidance provided to the Contaminated Sites Program by Mr. Allain on behalf of Field Operations only addresses the question of whether *NuPPAA* applies, it is incomplete and is inadequate to provide the Contaminated Sites Program with an accurate picture of the applicable regulatory process for dealing with these types of projects. I also note that the NWB’s view of the regulatory path forward created by the amended *Nunavut Agreement* is shared by the Commission and the NIRB, as expressed in their correspondence with INAC this fall and as discussed amongst the IPGs during various implementation and co-ordination meetings we have had since the amendments came into force in July 2015.

In closing, the NWB wishes to emphasize to you both that the NWB recognizes that the practical implementation of several recent amendments to Nunavut’s integrated regulatory process has created uncertainty and perhaps complexity for project proponents in determining the regulatory path forward. In that respect the NWB encourages all parties to engage as early as possible in the regulatory process directly with the NWB, the Commission and the NIRB to discuss process and timing issues as soon as possible. All of the participants in Nunavut’s integrated regulatory process are committed to doing what we can within our respect mandates and reflecting the current regulatory framework to improve the efficiency, effectiveness and certainty in Nunavut’s regulatory system. The NWB will make ourselves available to engage in further discussions with you, with INAC’s Field Operations Group and with the Commission and NIRB in respect of these and other files associated with the Contaminated Sites Program if it would be useful. In the meantime, please contact me directly with respect to any questions or comments you have regarding the NWB’s views in respect of this matter. I can be reached at: 867-360-6338, ext: 22 or via email at: stephanie.autut@nwb-oen.ca.

Regards,

Stephanie Autut, Executive Director
Nunavut Water Board

cc. Erik Allain, Manager, Field Operations, INAC Regional Office