

## **APPENDIX**

### **Outline for the Nunavut Regulatory Advisory Committee**

#### **Background**

On April 30, 2002, the *Nunavut Waters and Nunavut Surface Rights Tribunal Act* (the “Act”) received royal assent. Section 82<sup>1</sup> and section 170<sup>2</sup> of the Act authorize the Governor in Council to make regulations for a number of purposes. Subsection 82(2) requires the Governor in Council to seek the NWB’s concurrence when recommending regulations for the purposes of paragraphs 82(1)(a), (c) and (d) which relate to establishing water management areas in Nunavut, and authorizing the use of water or disposal of waste without a license.<sup>3</sup> Subsection 82(3) requires the Governor in Council to consult with the NWB prior to recommending regulations for the purpose of paragraph (1)(b) which defines “waste” for purposes of the Act.<sup>4</sup>

Regulations were not passed concurrently with the Act; however, the Act contains a number of transitional provisions. Section 173(1) provides that the regulations and orders made under sections 33 and 34 of the *Northwest Territories Waters Act* (in force on July 9, 1996) are binding on the NWB.<sup>5</sup> Section 173(2) deemed the regulations made under paragraph 33(1)(m) of the *Northwest Territories Waters Act* to authorize the unlicensed instream use of waters as applicable in Nunavut.<sup>6</sup> Section 173(3) gave the NWB the authority to cease having the provision of the regulations for the unlicensed use of water or disposal of waste made pursuant to paragraphs 33(1)(m) or (n) of the *Northwest Territories Waters Act* apply in relation to Nunavut.<sup>7</sup> The NWB removed the application of these regulations in Nunavut effective July 12, 2002.<sup>8</sup> As a result, there are currently no exemptions from licensing available for any use of water or disposal of waste except in case of emergency or domestic use; all uses of water or disposal of waste must be approved by the NWB.

Section 174 provides for the application in Nunavut of regulations made under paragraph 33(1)(c) of the *Northwest Territories Waters Act* deeming classes of applications that are exempted from the requirement of a public hearing.<sup>9</sup> Section 174(2) required the Minister to consult with the NWB and replace these regulations within one year of date upon which the Act received royal assent.<sup>10</sup>

On July 2, 2002, the NWB wrote to the Minister of Indian and Northern Affairs Canada (INAC) requesting that the consultation required by subsection 174(2) take place in order to pass regulations for classes of applications exempt from public hearing as authorized by paragraph 82(1)(f) of the Act.<sup>11</sup> In 2003 discussions took place between the NWB, INAC and other stakeholders.<sup>12</sup> The NWB proposed the development of a RAC to address the issue of regulations for exemption from public hearings.

In October 2003, Minister Nault agreed with the NWB’s proposal for a RAC to develop these regulations and further recommended that the proposed scope of the RAC be expanded to include “the full range of topics that could be included in a new set of regulations under the Act.”<sup>13</sup> While recognizing that it was important to proceed quickly

with the development of regulations,<sup>14</sup> Minister Nault outlined the importance of developing regulations in a manner that accommodates from the outset all of the steps, including broad consultation, in the regulation-making process.<sup>15</sup>

The following Outline for Regulatory Advisory Committee and Funding Proposal reflects the NWB's agreement with the direction recommended by Minister Nault, while acknowledging the need to resolve as quickly as possible the uncertainty and inefficient use of financial and human resources that is inherent with the lack of comprehensive regulations for the use of water resources in Nunavut.

### **Overview of the RAC**

The RAC is a multi-stakeholder advisory committee to the Minister of Indian Affairs and Northern Development. The goal of the RAC is to recommend to the Minister a draft set of comprehensive regulations which fully and effectively implement the Act in a manner that is consistent with the purposes of the Act and the broad principles of the Nunavut Land Claims Agreement (NLCA). The RAC is also the Minister's primary method of consulting early in the process with all affected federal, territorial and regional stakeholders, and for early consultation with the general public. Finally, the RAC is intended to meet the Minister's obligation to consult with the NWB and aid in the development of regulations that will ultimately receive concurrence from the NWB when such concurrence is required by the Act.

The RAC will be charged with developing and implementing a process to engage in open dialogue directed toward identifying different viewpoints and achieving consensus on a comprehensive set of draft regulations that are effective, workable, timely, fair, and inclusive. As a minimum, the draft regulations will address the following issues:

- Consistent and efficient application of the Act;
- Responsiveness to different types of projects, assessing the "right" projects while exempting those with known, inconsequential impacts on water resources;
- Certainty of process and consistency of approach;
- Prescribing requirements for substantive compliance, including specific standards and monitoring requirements;
- Efficiency in addressing substantive issues;
- Prescribing financial and administrative requirements; and
- Enhancing public participation.

The draft regulations must be legally binding, including consistency with the principles of the NLCA, the purposes of the Act and the authorizing sections.<sup>16</sup>

### **Committee Structure and Resource Requirements**

The RAC will encompass a broad based membership. A preliminary list of members includes one or more representatives from the following:

- Nunavut Water Board

- Indian and Northern Affairs Canada
- Environment Canada
- Department of Fisheries and Oceans Canada
- Natural Resources Canada
- Health Canada
- Government of Nunavut Department of Environment
- Government of Nunavut Department of Community and Government Services
- Nunavut Tunngavik Incorporated
- Regional Inuit Associations
- Municipal government
- General public
- Industry
- Canadian Water Resources Association

This will require working in multiple languages, including English, French, and Inuktitut, and related translation services. RAC meetings will alternate between Nunavut and Ottawa.

The initial work of the RAC will include:

- establishing a RAC work plan;
- development of operating principles and ground rules for discussion;
- issue selection criteria;
- committee organization;
- regional hearings;
- public comment period(s); and
- development of a framework for the report and recommendations.

Where there is an absence of expertise available from member organizations or differing views between members regarding scientific or other technical information, the RAC may engage subject matter expert(s) to assist with resolving such issues. During the course of its work the RAC will hear oral testimony and solicit written submissions from industry organizations, community organizations and advocacy organizations. Members of the public will be given opportunity to comment at all public meetings.

The RAC will work towards consensus, meaning there are no objections to the recommendation of the RAC proceeding, on as many issues as possible. Where agreement is not reached at formal meetings, an issue may be re-visited through ongoing dialogue facilitated by e-mail, teleconference and other informal means of communication, as well as at subsequent meetings. Where consensus cannot be reached, different views and the reasons for their position will be included with the recommendations of the RAC.

The RAC may establish terms of reference and membership for subcommittee(s) in order to address particular issues or perform specific tasks, including dealing with lack of consensus within the RAC. A subcommittee will be established in a balanced manner

to reflect the views represented on the RAC and its membership may also draw upon expertise from outside the RAC. Subcommittees will be disbanded upon completion of their assigned issues(s) or task(s).

Public meetings will be held periodically to solicit input and review recommendations with the general public. These meetings will be held in all three regions of Nunavut to ensure the values and concerns of all Inuit and Inuit organizations are reflected in the recommendations. Unless it is determined by the RAC to be confidential, all of the information before and of the RAC will be made available to the public.

A facilitator will be required to support the discussions of the Committee, including:

- identification and organization of issues;
- development of agendas;
- facilitation of discussion to ensure discussion remains on point, all views are heard and addressed and ground rules adhered to;
- network with members between meetings;
- communication between subcommittees;
- analysis of comments received during public comment periods; and
- drafting of final report, including identification of recommended regulations without full consensus and the impact.

A meeting coordinator will be required to:

- organize RAC meetings, subcommittee meetings, and public meetings;
- prepare RAC and subcommittee minutes summarizing general topics of discussion, decisions, recommendations and justification, and details of dissent;
- ensure timely circulation of documents between members;
- maintain the public record; and
- coordinate public comment periods.

The RAC will require legal experts to render legal opinion(s) on the compliance of proposed and recommended regulations with the principles of the NLCA and the purposes of the Act, and the authorizing section. Legal drafting services will also be required to prepare draft regulations.

The primary product of the RAC will be a report and recommendations to the Minister, including a draft of a comprehensive set of legally binding regulations.

The RAC, in whole or in part, will remain in place for approximately six months after the Minister's approval of the draft regulations in order to develop procedures, guidelines, and forms necessary to implement the regulations.

The anticipated schedule for completion of the RAC's work is thirty-six months.

## **Funding**

• RAC meetings	\$200,000
• RAC subcommittee meetings	100,000
• RAC Chair and members honorarium	100,000
• Public hearings (3 regions, 2 hearings per region)	300,000
• Translation services	50,000
• Facilitator	225,000
• Meeting Coordinator	150,000
• Scientific and other technical experts	75,000
• Legal services (excluding drafting) <sup>17</sup>	75,000

### **Funding Estimate**

**\$1,275,000**

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- <sup>1</sup> 82. (1) The Governor in Council may, on the recommendation of the Minister, make regulations
- (a) establishing water management areas in Nunavut consisting of river basins or other geographical areas;
  - (b) for the purposes of paragraphs (b) to (d) of the definition "waste" in section 4,
    - (i) specifying substances and classes of substances,
    - (ii) prescribing quantities or concentrations of substances and classes of substances, and
    - (iii) describing treatments of or changes to water;
  - (c) authorizing the use without a licence of waters in Nunavut, except in a national park, for the purpose, in the quantity, at the rate, during the period and subject to the conditions specified in the regulations;
  - (d) authorizing the deposit of waste without a licence in Nunavut, except in a national park, and specifying the conditions of the deposit, including the quantities, concentration and types of waste that may be deposited;
  - (e) prescribing the manner in which a report under subsection 12(3) is to be made;
  - (f) on the advice of the Board or after consultation with the Board, exempting any class of applications in relation to licences from the requirement of a public hearing;
  - (g) prescribing the criteria to be applied by the Board in determining, on an application for a licence, whether the proposed use of waters or deposit of waste requires a type A or a type B licence;
  - (h) prescribing what constitutes a material conflict of interest for the purpose of subsection 23(1);
  - (i) in relation to the security referred to in subsection 76(1),
    - (i) prescribing the form and nature of the security and the terms and conditions on which it is to be furnished and maintained, and
    - (ii) prescribing the amount of the security or the manner of determining the amount of the security or authorizing the Board to fix that amount in accordance with the regulations;
  - (j) prescribing water quality standards in Nunavut, except in a national park;
  - (k) prescribing effluent standards in Nunavut, except in a national park;
  - (l) prescribing standards for the design, construction, operation and maintenance of works used in relation to appurtenant undertakings;
  - (m) prescribing the fees to be paid
    - (i) for the right to use waters or deposit waste in waters under a licence,
    - (ii) for the filing of any application with the Board, and
    - (iii) for inspection of the register maintained under section 78;
  - (n) prescribing the times at which and the manner in which the fees prescribed under paragraph (m) shall be paid;
  - (o) requiring persons who use waters or deposit waste in waters in Nunavut, except in a national park, to maintain books and records for the proper enforcement of this Part, and to submit to the

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- Board, on a monthly, quarterly, semi-annual or annual basis, reports containing specified information on any of their operations;
- (p) requiring persons who deposit waste in waters in Nunavut, except in a national park, to submit representative samples of the waste to the Board for analysis or to analyse representative samples and submit the results to the Board;
- (q) respecting the taking of representative samples of waters or waste and respecting the method of analysing those samples;
- (r) prescribing the form of the register to be maintained under section 78 and the information to be entered in it;
- (s) respecting the duties of persons designated as analysts under section 85; and
- (t) generally, for carrying out the purposes and provisions of this Part.
- <sup>2</sup> **170.** The Governor in Council may make regulations
- (a) prescribing what constitutes a material conflict of interest for the purposes of subsection 125(2);
- (b) respecting the maintenance of public records by the Tribunal;
- (c) respecting the amount of security that may be required to be given under a term or condition of an order of the Tribunal made under this Part and the nature, form, terms and conditions of the security and the manner in which the security may be realized;
- (d) prescribing, for the purposes of subsections 140(3) and 147(3), a rate of interest or rules for determining the rate of interest that may be payable on compensation payments;
- (e) prescribing, for the purposes of paragraph 153(2)(c), limits of liability of developers, or the method for determining such limits, that are sufficient to cover reasonably foreseeable damages in relation to various development activities; and
- (f) generally, for carrying out the purposes and provisions of this Part.
- <sup>3</sup> **82(2)** For the purposes of paragraphs (1)(a), (c) and (d), the recommendation of the Minister is subject to the concurrence of the Board.
- <sup>4</sup> **82(3)** For the purposes of paragraph (1)(b), the recommendation of the Minister shall be made after consultation with the Board.
- <sup>5</sup> **173.** (1) Until they have been replaced or repealed under this Act, the regulations and orders made under sections 33 and 34 of the *Northwest Territories Waters Act* that were in force on July 9, 1996 are binding on the Nunavut Water Board from that date, and continue to apply from that date in Nunavut, except in a national park, and the Board shall exercise the powers of the Northwest Territories Water Board under those regulations and orders in relation to Nunavut.
- <sup>6</sup> **173.** (2) The regulations made under paragraph 33(1)(m) of the *Northwest Territories Waters Act* are deemed to authorize the unlicensed instream use of waters in Nunavut, except in a national park.
- <sup>7</sup> **173.** (3) During the period of one year following the day on which this Act is assented to, the Nunavut Water Board may, by order, provide that any provision of the regulations made under paragraph 33(1)(m) or (n) of the *Northwest Territories Waters Act* ceases to apply in relation to Nunavut.

Paragraphs 33(1)(m) and (n) of the *Northwest Territories Waters Act* authorizes the following regulations:

(m) subject to any order made under subsection 34(2), authorizing the use without a licence of waters in a water management area for a purpose or use, in a quantity or at a rate, or for a period, or any combination of purpose, use, quantity, rate or period, specified in the regulations, and prescribing the conditions under which those waters may be used without a licence;

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(n) subject to any order made under subsection 34(2), prescribing quantities, concentrations and types of waste that may be deposited without a licence, and the conditions under which any such waste may be deposited;

<sup>8</sup> Application of Regulations made under paragraph 33(1)(m) or (n) of the Northwest Territories Waters Act in Nunavut Order, SOR/2002-253.

<sup>9</sup> **174.** (1) The regulations made under paragraph 33(1)(c) of the *Northwest Territories Waters Act* are deemed, in relation to the use of waters or the deposit of waste in Nunavut, to prescribe, as classes of applications that are exempted from the requirement of a public hearing, the classes of applications in relation to the following:

(a) in the case of a Type A licence,

(i) any amendment that does not affect the use, flow or quality of waters or alter the term of the licence,

(ii) any amendment that affects the use, flow or quality of waters or alters the term of the licence, where the Nunavut Water Board, with the consent of the Minister, is of the opinion that an emergency exists that requires the amendment, or

(iii) one or several renewals of a total duration not exceeding sixty days; and

(b) in the case of a Type B licence, its issuance, amendment, renewal or cancellation.

(2) Within one year after the day on which this Act is assented to, the Minister shall, unless regulations have been made under paragraph 82(1)(f) before that time to replace the regulations referred to in subsection (1), consult the Board on the application of subsection (1).

<sup>10</sup> 174 (2) Within one year after the day on which this Act is assented to, the Minister shall, unless regulations have been made under paragraph 82(1)(f) before that time to replace the regulations referred to in subsection (1), consult the Board on the application of subsection (1).

<sup>11</sup> Letter from Mr. Thomas Kudloo, Chair, Nunavut Water Board to The Honourable Robert D. Nault, Minister, Indian and Northern Affairs Canada, dated July 3, 2002.

<sup>12</sup> The first annual Nunavut Water Management Workshop took place from November 4-2, 2003.

<sup>13</sup> Letter from Minister, Indian and Northern Affairs Canada, Robert D. Nault to Mr. Thomas Kudloo, Chair, NWB, dated October 23, 2003, at paragraph 4.

<sup>14</sup> “The sooner that we can put into place a set of Nunavut regulations the better it will be for all concerned.”, Letter from Minister Robert D. Nault to Mr. Thomas Kudloo, Chair NWB, dated October 23, 2003, at paragraph 4.

<sup>15</sup> “The four-month time line proposed for the passage of regulations simply cannot be accommodated by the regulation-making process. While the Water Board and INAC can come to an agreement on what we want the regulations to contain, must be drafted by the Department of Justice, published in the Canada Gazette for Public Consultation, revised and then finally promulgated. Thus, I believe it would be a more efficient use of our time and resources to develop a full set of regulations and put them through the process once rather than (sic) two or three times. In the meantime, section 174(1) of the Act sets out those classes of applications for which public hearings should be exempted.” Letter from Minister Robert D. Nault to Mr. Thomas Kudloo, Chair NWB, dated October 23, 2003, at paragraph 5.

<sup>16</sup> The importance of creating legally binding regulations for water management is illustrated in *The Dene Nation and The Metis Association of the Northwest Territories v. The Queen*, [1984] 2 F.C. 942. In that case the Federal Court held that not enough legislative guidance was given in the regulations intended to set out the requirements to be met in order to use water without a license, therefore there was an

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unauthorized delegation of legislative power to an administrator. The Court also held that had it been necessary to do so, it would have found that a paragraph in the regulation was invalid because it dealt with exemption from licensing based on time, rather than the rate or quantity of water to be used as required by the statutory authorization. The result was the Court declared the regulation invalid. Properly drafted regulations will avoid these problems.

<sup>17</sup> This budget line assumes legal drafting services will be provided by Justice Canada at no charge to the RAC budget.