



BOARD EXCEPTION DECISION REPORT NIRB FILE NO.: 03UN114

July 12, 2007

Honourable Ed Picco
Minister of Education
Government of Nunavut
Iqaluit, NU

Via E-Mail: epicco@gov.nu.ca

Re: Board Exception Decision Pertains to Section 12.10.2 of the NLCA Regarding a Nunavut Research Institute License Application for the Bathurst Inlet Port and Road Project

Dear Honourable Ed Picco:

The primary objectives of the Nunavut Land Claims Agreement are set out in section 12.2.5 of the Land Claims Agreement. This section reads:

In carrying out its functions, the primary objectives of NIRB shall be at all times to protect and promote the existing and future well-being of the residents and communities of the Nunavut Settlement Area, and to protect the ecosystemic integrity of the Nunavut Settlement Area. NIRB shall take into account the well-being of the residents of Canada outside the Nunavut Settlement Area.

Section 12.10.1 of the Nunavut Land Claim Agreement states:

No license or approval that would be required in order to allow a proposed project to proceed shall be issued in respect of a project that is to be screened by NIRB until the screening has been completed and, if a review pursuant to Part 5 or 6 is to be conducted, until after that review has been completed and a NIRB project certificate has been issued by NIRB pursuant to these provisions.

However, Section 12.10.2 states the following:

Notwithstanding Section 12.10.1, where a project proposal has been referred for Review pursuant to Part 5 or 6, approvals or licenses for exploration or development activities related to that project proposal may be issued if:

- (a) *the activity falls within Schedule 12-1; or*
- (b) *the activity can, in the judgment of NIRB, proceed without such a Review.*

Upon receipt of a project proposal which the 12.10.1 of Nunavut Land Claim Agreement may apply, NIRB shall make its decision pursuant to 12.10.2 of Nunavut Land Claim Agreement to determine whether the proposed project should proceed without a Part 5 or 6 review by Board's judgment.

NIRB Assessment and Decision

After a thorough assessment of all material provided to the Board (please see Procedural History and Project Activities in **Appendix A**), in accordance with the principles identified within section 12.10.1 and 12.10.2 of the NLCA, the decision of the Board is:

12.10.2 (b) applies to the activities contained within this project proposal. Therefore, this research project proposal **should** proceed without being subject to the on-going Part 5 Review.

Recommended Terms and Conditions

The Board is recommending the following or similar project-specific terms and conditions be imposed upon the Proponent through all relevant legislation:

General

1. Rescan (the Proponent) shall maintain a copy of the Project Terms and Conditions at the site of operation at all times.
2. The Proponent is required to submit to NIRB and the NRI an up-to-date Spill Contingency Plan for review prior to field activities commencing.
3. The Proponent shall forward, to NIRB, copies of all permits obtained and required for the project prior to the commencement of any activities.
4. The NIRB shall be notified of any changes in operating plans or conditions associated with this project prior to any such change.
5. The Proponent shall operate in accordance with all commitments stated in the NRI application documents.

Water/Wastewater

6. The Proponent shall not use water, including constructing or disturbing any stream, lakebed or banks of any definable water course unless approved by the Nunavut Water Board.
7. Grey water pits, sumps, privies etc created for the disposal of grey water shall be located above the high water mark of any water body and constructed in such a manner as to prevent the contents from entering any water body frequented by fish.
8. Any sumps must be large enough to hold all grey water from the camp and located downwind and downhill from the camp and downstream from the water source and away from water bodies.
9. Sumps should be inspected daily to ensure there is no erosion or run-off from the sump into the surrounding environment.
10. The Proponent shall ensure that all water intake hoses are equipped with a screen with an appropriate mesh size to ensure that there is no entrapment of fish.

Waste/hazardous materials

11. The Proponent shall keep all garbage and debris in bags placed in a covered metal container or equivalent before incineration or disposal in a certificated facility
12. The Proponent is required to transport sewage and garbage ashes, incinerated on site, to a certificated disposal facility in Riley, Alberta.
13. The Proponent is advised that the DOE monitors the movement of hazardous wastes from generators and carriers to receivers through a tracking document (Waste Manifest). A Waste Manifest must

accompany any transfer of such waste and the proponent must register with the DOE. Contact Robert Eno at reno@gov.nu.ca or (867) 975-7748 if hazardous waste is generated during project activities.

Fuel and Chemical Storage

14. The Proponent shall locate all fuel and other hazardous materials a minimum of thirty (30) metres above the high water mark of any water body and in such a manner as to prevent their release into the environment.
15. The Proponent is required to use secondary containment, such as self-supporting insta-berms, as natural depressions are not always the best solution for fuel storage and will depend on the grade of the surrounding landscape. Secondary containment should be of adequate size and volume to contain and hold fluids for the purpose of preventing spills. Furthermore, appropriate spill response equipment and clean-up materials must be on hand during any transfer of fuel or hazardous substances.
16. The Proponent shall store all chemicals in such a manner that they are inaccessible to wildlife.
17. The Proponent shall report all spills of fuel, or other deleterious materials immediately to the 24 hour Spill Line at (867) 920-8130.

Wildlife

18. The Proponent shall ensure that there is no damage to wildlife habitat in conducting this operation. Deliberate feeding of any wildlife is absolutely prohibited.
19. The Proponent shall ensure that aircraft/helicopters do not, unless for emergency, touch-down in areas where wildlife are present.
20. The Proponent must avoid raptor nesting sites and concentrations of nesting or molting waterfowl by aircraft/helicopter at all times.
21. The Proponent shall restrict aircraft/helicopter activity related to the project to a minimum altitude of 610m above ground level unless there is a specific requirement for low-level flying, which does not disturb wildlife.
22. The Proponent shall ensure that aircraft maintain a vertical distance of 1000 meters and a horizontal distance of 1500 meters from any observed groups (colonies) of migratory birds and take care not to disturb nesting raptors from 15 April to 1 September by approaching them closely while on foot.
23. The Proponent shall ensure that there is minimal disturbance to any nesting birds and wildlife in the area. Harassment of wildlife is prohibited. This includes persistently worrying or chasing animals, or disturbing large groups of animals.
24. The Proponent shall cease activities that may interfere with migration or calving of caribou until the caribou have passed or left the area. Diamond drilling operation shall not be conducted within 5 km of important caribou crossings.
25. The Proponent shall make all possible efforts to avoid human-wildlife encounters, as foxes, wolves and wolverine may occur in the project area.
26. The Proponent shall follow procedures outlined in the "Safety in Bear Country Manual", and should contact the Regional Biologist or the Wildlife manager for information and advice on measures which should be taken to minimize the possibility of conflicts/interactions with bears. Consideration should be given to setting up an electric fence around the camp.

Physical Environment

27. The Proponent shall not move any equipment or vehicles unless the ground surface is in a state capable of fully supporting the equipment or vehicles without rutting or gouging. The Proponent shall suspend overland travel of equipment or vehicles if rutting occurs.

Archaeological

28. The Proponent shall ensure that any archaeological or palaeontological sites encountered are not disturbed.
29. The Proponent should be aware of the law regarding disturbance of archaeological and palaeontological sites and the removal of artifacts found. If a site is found it should remain undisturbed and its location should be reported to the Government of Nunavut Department of Culture, Language, Elders and Youth. See attached Appendix B.

Restoration

30. The Proponent shall remove all garbage, fuel and equipment upon abandonment.
31. The Proponent shall complete all clean-up and restoration of the lands used prior to the expiry date of the permit.

Other

32. The Proponent should, to the extent possible, hire local people and to consult with local residents regarding their activities in the region.

Regulatory Requirements

1. Section 36(3) of the *Fisheries Act* (<http://laws.justice.gc.ca/en/showtdm/cs/F-14//en>) which states that no person shall deposit or permit the deposit of a deleterious substance in any type in water frequented by fish or in any place under any conditions where the deleterious substance may enter such a water body.
2. The *Migratory Birds Convention Act* and *Migratory Birds Regulations* which state that no person shall disturb or destroy the nests or eggs of migratory birds, and that no person shall deposit or permit to be deposited oil, oil wastes or any other substance harmful to migratory birds in any waters or any area frequented by migratory birds (<http://laws.justice.gc.ca/en/showtdm/cs/M-7.01>)
3. *The Species at Risk Act* (<http://laws.justice.gc.ca/en/showtdm/cs/S-15.3>). Attached in **Appendix B** is a list of Species at Risk in Nunavut. The Proponent should consult the Species at Risk Public Registry (<http://www.sararegistry.gc.ca/>) to identify any Species at Risk within the project location. Further, the Proponent shall develop monitoring plans for each relevant Species at Risk in accordance with any applicable status reports, recovery strategies, action plans, and management plans posted on the Species at Risk Public Registry and in consultation with the Government Organization with Primary Management Responsibility. Monitoring plans should record the locations and frequency of observing species of special concern and note any actions taken to avoid contact or cause disturbance to the species, its residence, or its critical habitat.
4. The *Nunavut Act* (<http://laws.justice.gc.ca/en/showtdm/cs/N-28.6>) which requires that no person alter or disturb any archaeological or palaeontological sites in Nunavut unless permission is first granted through the permitting process. If any archaeological or palaeontological sites are found they should remain undisturbed and their location should be reported to the Government of Nunavut Department of Culture, Language, Elders and Youth. The Proponent must comply with the proposed terms and conditions listed in the attached **Appendix C**.

5. The *Transportation of Dangerous Goods Regulations*, *Transportation of Dangerous Goods Act* (<http://www.tc.gc.ca/tdg/menu.htm>), and the *Environmental Protection Act* (<http://laws.justice.gc.ca/en/C-15.31/text.html>) which present the requirements for the handling, storing, managing and transportation of dangerous goods, including hazardous wastes, fuel and contaminated material. The Proponent must ensure that proper shipping documents accompany all movements of dangerous goods. The Proponent must register with GN-DOE by contacting Robert Eno at 867-975-7748 or reno@gov.nu.ca.
6. Article 13.7.1 of the NLCA and Section 173(1) of the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*, state that no person shall use water or dispose of waste into water without the approval of the Nunavut Water Board (NWB). The Proponent is encouraged to contact the NWB prior to engaging in any activities to determine if a license is required (<http://www.nunavutwaterboard.org/en/home>).

Validity of Land Claims Agreement

Section 2.12.2

Where there is any inconsistency or conflict between any federal, territorial and local government laws, and the Agreement, the Agreement shall prevail to the extent of the inconsistency or conflict.

Dated July 12, 2007 at Cambridge Bay, NU.



Lucassie Arragutainaq – A/Chair

APPENDIX A

Procedural History and Project Activities

File History

On May 30, 2007, The Nunavut Impact Review Board (NIRB or Board) received the Rescan Environmental Services Ltd.'s (Rescan) Scientific Research License Application from The Nunavut Research Institute (NRI) to complete surveys in support of research required for the Bathurst Inlet Port and Road (BIPAR) project proposal. This project is currently under a Part 5, NLCA Review.

As per 12.10.1 of the Nunavut Land Claims Agreement (NLCA), no licenses, approvals that would be required to allow a proposed project to proceed shall be approved until the Part 5 review is completed and a NIRB project certificate has been issued.

However, Section 12.10.2 states the following:

Notwithstanding Section 12.10.1, where a project proposal has been referred for Review pursuant to Part 5 or 6, approvals or licenses for exploration or development activities related to that project proposal may be issued if:

- (c) the activity falls within Schedule 12-1; or*
- (d) the activity can, in the judgment of NIRB, proceed without such a Review.*

This proposed project is to provide additional baseline characterization in the project area to support BIPAR's Environmental Impact Statement. Data collected in 2007 will also be used to help plan future project infrastructure. The proposed work is to be completed between June 17, 2007 and September 15, 2007.

In order to determine whether or not 12.10.2 (b) applies to the activities contained within this project proposal, NIRB copied this project application to interested federal and territorial parties as well as the BIPAR distribution list for comments regarding whether or not this research project proposal should proceed without being subject to the on-going Part 5 Review.

On or before June 29, 2007, NIRB received comments from the following interested Parties:

- Environment Canada(EC);
- Health Canada (HC);
- GN, Department of Environment(GN-DOE);
- GN, Department of Economic Development and Transportation(GN-EDT); and
- Government of Northwest Territory, Department of Environment and Natural Resources.

The Government of Northwest Territories, Department of Environment and Natural Resources expressed concern regarding the proposal to transport incinerated waste (ashes) to a Yellowknife disposal facility. In correspondence NIRB received on July 5, 2007, the proponent has advised that the ashes will be shipped to a certificated disposal facility located in Riley, Alberta. All parties indicated that this project would not have significant adverse environmental impacts, and therefore recommended the project proceed without a Part 5 review.

PROJECT ACTIVITIES

The proposed research in this application for 2007 includes:

- Characterizing the water and sediment quality of the area in the proposed road;
- Characterizing mineral content of vegetation;
- Re-commissioning a meteorology station in order to characterize the local climate;
- Assessing the potential for metal leaching or acid rock drainage along the proposed road; and
- Marine habitat assessment at the proposed port site. This work is being done to provide additional baseline characterization in the area to support the Environmental Impact Statement.

Data collected in 2007 will also be used to help plan future project infrastructure. The proposed work is to be completed between June 17th 2007 and September 15th 2007.

APPENDIX B

Species at Risk in Nunavut

This list includes species listed on one of the Schedules of SARA (*Species at Risk Act*) and under consideration for listing on Schedule 1 of SARA. These species have been designated as at risk by COSEWIC (Committee on the Status of Endangered Wildlife in Canada). This list may not include all species identified as at risk by the Territorial Government.

- Schedule 1 is the official legal list of Species at Risk for SARA. SARA applies to all species on Schedule 1. The term “listed” species refers to species on Schedule 1.
- Schedule 2 and 3 of SARA identify species that were designated at risk by the COSEWIC prior to October 1999 and must be reassessed using revised criteria before they can be considered for addition to Schedule 1.
- Some species identified at risk by COSEWIC are “pending” addition to Schedule 1 of SARA. These species are under consideration for addition to Schedule 1, subject to further consultation or assessment.

Schedules of SARA are amended on a regular basis so it is important to periodically check the SARA registry (www.sararegistry.gc.ca) to get the current status of a species.

Updated: January 3, 2007

Species at Risk	COSEWIC Designation	Schedule of SARA	Government Organization with Lead Management Responsibility ¹
Eskimo Curlew	Endangered	Schedule 1	EC
Ivory Gull	Endangered ²	Schedule 1	EC
Peregrine Falcon (subspecies anatum)	Threatened	Schedule 1	Government of Nunavut
Ross's Gull	Threatened	Schedule 1	EC
Harlequin Duck (Eastern population)	Special Concern	Schedule 1	EC
Felt-leaf Willow	Special Concern	Schedule 1	Government of Nunavut
Peregrine Falcon (subspecies tundrius)	Special Concern	Schedule 3	Government of Nunavut
Short-eared Owl	Special Concern	Schedule 3	Government of Nunavut
Fourhorn Sculpin	Special Concern	Schedule 3	DFO
Peary Caribou	Endangered ³	Pending	Government of Nunavut
Beluga Whale (Eastern Hudson Bay population)	Endangered	Pending	DFO
Beluga Whale (Cumberland Sound population)	Threatened	Pending	DFO
Beluga Whale	Special Concern	Pending	DFO

(Western Hudson Bay population)			
Beluga Whale (Eastern High Arctic – Baffin Bay population)	Special Concern	Pending	DFO
Bowhead Whale (Hudson Bay-Foxe Basin population)	Threatened ⁴	Pending	DFO
Bowhead Whale (Davis Strait-Baffin Bay population)	Threatened ⁴	Pending	DFO
Porsild's Bryum	Threatened	Pending	Government of Nunavut
Atlantic Walrus	Special Concern	Pending	DFO
Narwhal	Special Concern	Pending	DFO
Rusty Blackbird	Special Concern	Pending	Government of Nunavut
Barren-ground Caribou (Dolphin and Union population)	Special Concern ³	Pending	Government of Nunavut
Grizzly Bear	Special Concern	Pending	Government of Nunavut
Polar Bear	Special Concern	Pending	Government of Nunavut
Wolverine (Western Population)	Special Concern	Pending	Government of Nunavut

¹ Environment Canada has a national role to play in the conservation and recovery of Species at Risk in Canada, as well as responsibility for management of birds described in the Migratory Birds Convention Act (MBCA). Day-to-day management of terrestrial species not covered in the MBCA is the responsibility of the Territorial Government. Populations that exist in National Parks are also managed under the authority of the Parks Canada Agency. EC = Environment Canada, DFO = Department of Fisheries and Oceans

² Designated as Endangered by COSEWIC in April 2006 and it is expected that the category of concern in SARA will also be changed from Special Concern to Endangered.

³ Peary Caribou was split into three separate populations in 1991: Banks Island (Endangered), High Arctic (Endangered) and Low Arctic (Threatened) populations. The Low Arctic population also included the Barren-ground Caribou - Dolphin and Union population. In May 2004 all three population designations were de-activated, and the Peary Caribou, *Rangifer tarandus pearyi*, was assessed separately from the Barren-ground Caribou (Dolphin and Union population), *Rangifer tarandus groenlandicus*. The subspecies *pearyi* is composed of a portion of the former “Low Arctic population” and all of the former “High Arctic” and “Banks Island” populations, and it was designated Endangered in May 2004. Although SARA lists Peary Caribou on Schedule 2 as three separate populations, the most current designation is the COSEWIC designation of the subspecies *pearyi* as Endangered.

⁴ The “Eastern and Western Arctic populations” of Bowhead Whale were given a single designation of Endangered in April 1980 by COSEWIC. These were split into two populations to allow separate designations in April 1986. The Eastern population was not re-evaluated in April 1986, but retained the Endangered status of the original “Eastern and Western Arctic populations”. The Eastern Arctic population was further split into two populations (Hudson Bay-Foxe Basin population and Davis Strait-Baffin Bay population) in May 2005, and both these populations were designated as Threatened. Both these populations are under consideration for addition to Schedule 1. Although SARA lists the Eastern Arctic population as Endangered (Schedule 2), the most current designation is the COSEWIC designations of the Hudson Bay-Foxe Basin and Davis Strait-Baffin Bay populations as Threatened.

APPENDIX C

Archaeological and Palaeontological Resources Terms and Conditions for Land Use Permit Holders



BACKGROUND: Archaeology

As stated in Article 33 of the Nunavut Land Claims Agreement:

The archaeological record of the Inuit of Nunavut is a record of Inuit use and occupancy of lands and resources through time. The evidence associated with their use and occupancy represents a cultural, historical and ethnographic heritage of Inuit society and, as such, Government recognizes that Inuit have a special relationship with such evidence, which shall be expressed in terms of special rights and responsibilities. [33.2.1]

The archaeological record of Nunavut is of spiritual, cultural, religious and educational importance to Inuit. Accordingly, the identification, protection and conservation of archaeological sites and specimens and the interpretation of the archaeological record is of primary importance to Inuit and their involvement is both desirable and necessary. [33.2.2]

In recognition of the cultural, spiritual and religious importance of certain areas in Nunavut to Inuit, Inuit have special rights and interests in these areas as defined by Article 33 of the Nunavut Land Claims Agreement. [33.2.5]

BACKGROUND: Palaeontology

Under the Nunavut Act¹, the federal Government can make regulations for the protection, care and preservation of palaeontological sites and specimens in Nunavut. Under the *Nunavut Archaeological and Palaeontological Sites Regulations*², it is illegal to alter or disturb any palaeontological site in Nunavut unless permission is first granted through the permitting process.

Definitions

1 s. 51(1)

2 P.C. 2001-1111 14 June, 2001

As defined in the *Nunavut Archaeological and Palaeontological Sites Regulations*, the following definitions apply:

“archaeological site” means a place where an archaeological artifact is found.

“archaeological artifact” means any tangible evidence of human activity that is more than 50 years old and in respect of which an unbroken chain of possession or regular pattern of usage cannot be demonstrated, and includes a Denesuline archaeological specimen referred to in section 40.4.9 of the Nunavut Land Claims Agreement.

“palaeontological site” means a site where a fossil is found.

“fossil” includes:

- (a) natural casts
- (b) preserved tracks, coprolites and plant remains; and
- (c) the preserved shells and exoskeletons of invertebrates and the eggs, teeth and bones of vertebrates.

Terms and Conditions

- 1) The permittee shall not operate any vehicle over a known or suspected archaeological or palaeontological site.
- 2) The permittee shall not remove, disturb, or displace any archaeological artifact or site, or any fossil or palaeontological site.
- 3) The permittee shall immediately contact the Department of Culture, Language, Elders and Youth (867) 934-2046 or (867) 975-5500 or 1 (866) 934-2035 should an archaeological site or specimen, or a palaeontological site or fossil be encountered or disturbed by any land use activity.
- 4) The permittee shall immediately cease any activity that disturbs an archaeological or palaeontological site encountered during the course of a land use operation, until permitted to proceed with the authorization of the Department of Culture, Language, Elders and Youth, Government of Nunavut.
- 5) The permittee shall follow the direction of the Department of Culture, Language, Elders and Youth and DIAND in restoring disturbed archaeological or palaeontological sites to an acceptable condition.
- 6) The permittee shall provide all information requested by the Department of Culture, Language, Elders and Youth concerning all archaeological sites or artifacts and all palaeontological sites and fossils encountered in the course of any land use activity.
- 7) The permittee shall make best efforts to ensure that all persons working under authority of the permit are aware of these conditions concerning archaeological sites and artifacts, and palaeontological sites and fossils.
- 8) The permittee shall avoid the known archaeological and/or palaeontological sites listed in Attachment 1.

9) The permittee shall have an archaeologist or palaeontologist perform the following functions, as required by the Department of Culture, Language, Elders and Youth:

- a. survey
- b. inventory and documentation of the archaeological or palaeontological resources of the land use area
- c. assessment of potential for damage to archaeological or palaeontological sites
- d. mitigation
- e. marking boundaries of archaeological or palaeontological sites
- f. site restoration

The Department of Culture, Language, Elders and Youth shall authorize by way of a Nunavut Archaeologist Permit or a Nunavut Palaeontologist Permit, all procedures subsumed under the above operations.