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October 12, 2002

TO: All parties subject to the jurisdiction of the NIRB (Board or NIRB); full distribution list including federal, territorial, and local governments, IPGs, NTI; Honourable Robert Nault.

Subject: **Requirements of a Part 5 Review under the Nunavut Land Claims Agreement (NLCA) and proposed Memorandum of Guidance**

Background

Under the NLCA, once the Board determines that a public review be conducted, it will proceed subject to the prerogative of the Minister to specify the type of public review that follows. For Part 5 Reviews, the process involves NIRB-only panels that conduct an environmental impact statement (EIS)-based public review. Over the last year, several questions have arisen over the content of the review, the procedures, specifics of the EIS, need for cumulative and trans-boundary effects studies and etcetera.

Ultimately, the Board wants an EIS that is thorough but not endless; focused on real issues and not vague topics; our goal is to provide a Report to the Minister that is unbiased and well-documented from the record of interventions filed; we want up-to-date perspectives on Inuit culture, customs, and knowledge. Among other things, the Board expects project Applicants to carefully identify and consider the resources that would be impacted by the project and in some cases irretrievably lost; evaluate from an interdisciplinary approach and assess those same impacts; avoid and mitigate significant primary, secondary, and cumulative impacts; explain to the Board and public through a significant public review process its conclusions; and eventually, help NIRB and governments monitor the impacts and their predictions through the entire project life cycle if the project is recommended for approval.

Upon reflection, and based on 6 years' experience, the Board is increasingly of the view that its mandate for Part 5 Reviews is broad and all-inclusive. The environmental keystone for this broad perspective is Article 12.2.5, which states:

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 residents of Canada outside the Nunavut Settlement Area.

The nature of an ecosystem analysis arises from its definition. According to Environment Canada:

The ecosystem concept, though often difficult to operationalize in environmental planning and management, helps us to understand and analyze the natural environment in relation to human activity. Several related concepts are similarly useful:

Interdependence: everything is connected to everything else. Few connections are significant, however. Discovering the key ones and determining their strength is the problem.

Unintended effects: you cannot do just one thing. Interdependence means that changes in one factor are likely to reverberate throughout the system. ...

Stability (homostasis): ecosystems have an historical quality. They are self-regulating as they evolve toward a state of equilibrium. More stable systems tend to be more complex. Complexity in turn is associated with diversity. ...

Resilience: the ability of a system to bounce back, to absorb continuous stress and still persist, within certain *limits* or thresholds. Where ecosystem stress is man-induced, resilience may be more significant than stability/diversity in understanding and predicting the functioning of the system.

Development. Evolution, often in stages and through differentiation/integration, leads to a more advanced and complex stage where new properties and potentials emerge: ...

Carrying capacity. Closely related to resilience is the concept of carrying capacity. Originally drawn from ecology, it meant the maximum number of a species that could be supported indefinitely by a particular habitat without degrading the environment or diminishing future carrying capacity. Applied to human activities, carrying capacity relates human and economic interventions to resulting changes in the resources base and environment of a given area.¹

Therefore, the contents of an EIS, as proposed below, should embrace such things as significance, interdependence, resilience, and carrying capacity. The Board takes comfort in amalgamating these observations into all of our Reviews; and we can refer to one of the many protective thresholds used for referring to the Minister a project for public review: Section 12.4.2(a) of the NLCA is based on the *possibility* for effects, not proof of them. According to the NLCA:

- (a) NIRB generally shall determine that such a review is required when, in its judgement,
 - (i) the project **may** have significant adverse effects on the ecosystem, wildlife habitat or Inuit harvesting activities,
 - (ii) the project **may** have significant adverse socio-economic effects on northerners,
 - (iii) the project will cause significant public concern, or
 - (iv) the project involves technological innovations for which the effects are unknown;

In summary, whenever a panel review is called, the ecosystem objectives must form the basis of a well-documented EIS, which forms the basis of the Board's ecosystem review and subsequent report to the Minister. See 12.4.4(a) of the NLCA.

¹ Environmental Planning Resource Book, 109-110 (Env. Canada 1980, En 72-4/1980)

NLCA Requirements for a Part 5 Review

There are several elements of a Part 5 EIS-based Review. These items are found in NLCA section 12.5.2 (a) - (j):

- (a) project description, including the purpose and need for the project;
- (b) anticipated ecosystemic and socio-economic impacts of the project;
- (c) anticipated effects of the environment on the project;
- (d) steps which the proponent proposes to take including any contingency plans, to avoid and mitigate adverse impacts;
- (e) steps which the proponent proposes to take to optimize benefits of the project, with specific consideration being given to expressed community and regional preferences as to benefits;
- (f) steps which the proponent proposes to take to compensate interests adversely affected by the project;
- (g) the monitoring program that the proponent proposes to establish with respect to ecosystemic and socio-economic impacts;
- (h) the interests in lands and waters which the proponent has secured, or seeks to secure.
- (i) options for implementing the proposal; and
- (j) **any other matters that NIRB considers relevant.**

From this list, NIRB proposes that NLCA item 12.5.2(j) - “any other matter NIRB considers relevant” now be fully clarified. For the reasons that follow, NIRB’S PROPOSED

MINIMUM REQUIREMENTS FOR ALL PART 5 REVIEWS are:

Consultation Principles and practices, including pre-project consultations with locally affected persons that meet or exceed the broadest definition of consultation practices in Canada. This means information must be collected and distributed, and differences resolved. Discussions should focus on land uses, policies, resource uses, archaeological areas, infrastructure, terrain sensitivities, etc., and highlight Inuit cultural concerns. Eventually, all comments from the public must be summarized, documented, and presented in the EIS.

A proper definition of the project. Connected projects (e.g. ice or other roads and mines) should be discussed together to reveal the primary purpose of complex or multi-staged related proposals.

A statement of the need for, and the purpose of the project, based on the precautionary principle and sustainable development. Where economic development is needed, the Board would expect the deficiencies in the economic status quo to be stated. These issues can be assembled at the time of scoping.

A comprehensive impact assessment approach including but not limited to 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. Following the broad parameters of 12.5.2 (a) - (i), as stated above, the EIS eventually focuses on adverse impacts or effects and their mitigation. By mitigation, we expect the analysis to include how the impact could be avoided, minimized, cured, eliminated, or even compensated. See e.g., NLCA section 12.5.2(f). By anticipated impacts (see NLCA sections 12.5.2 (b-c)) we mean short and long-term direct and indirect, positive and negative, and cumulative impacts as set out below. Socio-economic, archaeological and cultural impacts are included too.

Cumulative effects analysis (CEA). A project proposal causes a cumulative effect if, when added to other projects in the region, or projects reasonably foreseeable in the region, will cause an additive effect. These effects, which are studied as part of an ecosystem analysis, must be studied for all Part 5 Reviews.

Significance effects analysis. Not all impacts are significant and do not have to be studied. Therefore, the proponent and government should advise the Board which impacts are significant, based first from the project setting (how unique is the area of the project, for example), and second, based on how *severe* the impacts will be, taking into account public health, land use plans, protected areas, habitat, or species, public concern, etc. Ultimately, the Board will decide which effects are significant and report to the Minister accordingly.

Alternatives to the project. This 'Alternatives assessment' comes from numbers 2 and 3 above and must include listing the "no-go" alternative, as well as the proponent's "preferred" alternative. This requirement includes, but goes *well* beyond, alternative means of carrying out the project that might be economically and technically feasible and the environmental effects of those alternative means. The "no-go" alternative is not only a potentially stand-alone option (i.e. the no-build may be the best option); it also serves as a baseline for comparison with other development alternatives that might reasonably be proposed in the circumstances.

The ability of renewable resources affected by the project to sustain current and future generations in Nunavut and Canada.

Monitoring or post-project analysis (PPA). See NLCA section 12.7.2. The purposes of this PPA is:

- (a) to measure the relevant effects of projects on the ecosystemic and socio-economic environments of the Nunavut Settlement Area;
- (b) to determine whether and to what extent the land or resource use in question is carried out within the predetermined terms and conditions;
- (c) to provide the information base necessary for agencies to enforce terms and conditions of land or resource use approvals; and
- (d) to assess the accuracy of the predictions contained in the project impact statements.

10) Where relevant, an assessment of all significant adverse ecosystemic or socio-economic trans-boundary effects.

11) Submission of a *Draft* versus a Final EIS. It has been a practice of the Board to: (a) require the filing of a Draft EIS, (b) followed by a 60 day public comment period, (c) then a Final EIS that will incorporate parties' comments that, in the judgment of the NIRB, should be reflected in the Final EIS. The preferred alternative can then be identified, based upon the public comments, cost and feasibility estimates, and concurrence or not by governments and land managers, severity of the effects and impacts on northerners and the residents of Canada outside of Nunavut.

12) Any other matter that the Board might consider relevant for a particular application. In other words, the Board reserves the right to impose additional requirements for a given application, based of course on site-specific and citizens' concerns. See again section 12.5.2(j) of the NLCA.

Justification for these Comprehensive Part 5 Review requirements

In addition to the precautionary requirements inherent in the ecosystem analysis generally, the NLCA (section 12.5.5) allows NIRB to take the following into account for all Part 5 Reviews:

- a) whether the project would enhance and protect the existing and future well-being of the residents and communities of the Nunavut Settlement Area, taking into account the interests of other Canadians;
- b) whether the project would unduly prejudice the ecosystemic integrity of the Nunavut Settlement Area;
- c) whether the proposal reflects the priorities and values of the residents of the Nunavut Settlement Area;
- d) steps which the proponent proposes to take to avoid and mitigate adverse impacts;
- e) steps the proponent proposes to take, or that should be taken, to compensate interests adversely affected by the project;
- f) posting of performance bonds;

- g) the monitoring program that the proponent proposes to establish, or that should be established, for ecosystemic and socio-economic impacts; and
- h) steps, which the proponent proposes, to take, or that should be taken, to restore ecosystemic integrity following project abandonment.

We note that the ecosystem is mentioned in almost half of these subsections.

The Supreme Court of Canada has endorsed a precautionary approach to potential environmental harm and the Board would like to take a similar cautious approach at least in the sense of being overly broad in its application requirements and prioritization of ecosystem protection in the expanded information and Part 5 project review requirements. To analogize this proposed NLCA Part 5 Review policy with the Spraytech case (*114957 Canada v. Hudson [Ville]*, 40 CELR (NS) 1, 23-25 (SCC), the Board is "addressing a need of [its] community" in that the Board believes all steps including these expanded Part 5 Review requirements become not only be the best environmental assessment standard in Nunavut where the ecosystem is so fragile, but also in Canada. By requiring this information, we can ensure that development decisions are made with the fullest of information; with the expectation that all environmental issues including alternatives are studied; with the end result that the Board and Minister as decision-makers have the best information before them to objectively review project proposals and decide the best future development in Nunavut. Finally, consistent with the *Spraytech* case, we believe the best form of prevention of environmental degradation occurs at the environmental assessment stage of development. This is why we propose expanding the Part 5 Review Requirements to encompass the requirements as set out above.

Comment Period

Before finalizing this important Memo of Guidance, the Board would like to give you an opportunity to comment on these new Part 5 Review pre-requisites. Your comments must be recorded **in writing on or before November 12, 2002**, following which the Board will finalize the threshold procedural requirements for all NLCA Part 5 Reviews.

If you have any questions, please call me at (867) 983-2593.

Sincerely,



Stephanie Briscoe
Executive Director