NWT & NUNAVUT CHAMBER OF MINES

S-6 - An Act to amend the Yukon Environmental and Socio-economic Assessment Act and the Nunavut Waters and Nunavut Surface Rights Tribunal Act

Presented to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development
by the NWT & Nunavut Chamber of Mines
March 26, 2015

Executive Summary

The NWT & Nunavut Chamber of Mines ("the Chamber") is pleased to provide this submission for consideration regarding the proposed amendments to the *Yukon Environmental and Socio-economic Assessment Act and the Nunavut Waters and Nunavut Surface Rights Tribunal Act*. Our comments will focus on proposed amendments to Part 2, the *Nunavut Waters and Nunavut Surface Rights Tribunal Act* (the "Act"). We very much appreciate this opportunity given the proposed amendments will have important impacts on a number of exploration and mining projects in the territory.

The following aspects, in particular, are relevant to increased investor certainty in Nunavut:

- ***Cost Recovery is inconsistent with and costly to Nunavut***: Cost Recovery has been added to propagate regulatory consistency, however this presents a concern to Industry, as was raised with Bill C-15 and Cost Recovery under the *Mackenzie Valley Resource Management Act* (MVRMA) review in the NWT. Nunavut is already a high cost jurisdiction. Initiatives like Cost Recovery only further increase the cost premium of working in the North.

- ***Administrative Monetary Penalties should be made consistent with other regimes***: Administrative Monetary Penalties (AMPs) are new to the North and their implementation creates unease for Industry. Specifically, the proposed quantum of AMP fines in the Act appears higher than similar regimes that have been implemented elsewhere in Northern Canada and the provinces. If the AMP regime is to be implemented in Nunavut, the range of fines should be commensurate with similar regimes (as an example, those currently applicable in NWT).

- ***Monetary fines create investment uncertainty by being too open ended***: Increasing Monetary Fines is not a primary issue for good operators. We understand that the increase is related to the Government of Canada's approach to ensure fine increases align with other federal regulatory legislation. However, the current two year limitation period under the Act should remain and not be extended to five years, as proposed in section 92. Extending the period of uncertainty after a non-compliance incident could have the effect of discouraging investment in Nunavut while not offering any additional environmental protection. A two year limitation period would continue to provide sufficient time for the Crown to investigate an incident and to determine whether to proceed with charges under the Act. The Act also now indicates that the two year limitation period begins on "the day on which the Minister becomes aware of the acts", a vague starting point.

- ***Water Use interpretation has become unnecessarily restrictive and must be changed***: Nunavut is losing competitiveness because of recent policy and regulatory changes around the definition of water "use". Aboriginal Affairs and Northern Development Canada ("AANDC") created a policy direction on the definition of water used in exploration drilling that is now unnecessarily stringent, and will delay projects and increase costs for proponents as they try to address them. While the issue began as an effect on drilling activity, companies have now identified further additional ramifications on the construction of snow and ice roads, adding further challenges to another aspect of exploration. This change in policy was made with no consultation with Industry, and no transition period for its application has been applied to Nunavut's advanced projects.

- ***Security Management Agreements are good in principle but more details are needed regarding their content***: Recognition of negotiated Security Management Agreements between the Crown and Designated Inuit Organizations (DIOs) by the Nunavut Water Board (NWB) is a step toward resolving the current duplicative and unnecessary "double bonding" issue for mineral development projects that are situated on both Crown and Inuit Owned lands throughout the territory. However, the amendment only provides a solution on a proponent-driven, case by case basis.

- ***Decisions on short-term Water Licences are better made locally***: Establishing beginning-to-end time limits for Water Licence applications allows for more predictable and timely reviews. However, the decision to allow short term two month licence extensions should be made by the NWB rather than the Minister.

- ***Life-of-Mine Water Licences are welcome***: Issuing Water Licences for the life of the mining operation removes the requirement to complete an entirely new application and public review process for a Water Licence simply based on time. This amendment promises process efficiencies not only to Industry, but to the NWB, and other Regulatory Agencies.

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Overview

The NWT & Nunavut Chamber of Mines ("the Chamber") is pleased to provide this submission for consideration regarding the proposed amendments to the *Yukon Environmental and Socio-economic Assessment Act and the Nunavut Waters and Nunavut Surface Rights Tribunal Act*. Our comments will focus on proposed amendments to Part 2, the *Nunavut Waters and Nunavut Surface Rights Tribunal Act* (the "Act"). We very much appreciate this opportunity given the proposed amendments will have important impacts on a number of exploration and mining projects in the territory.

We have structured our comments around seven thematic areas. Where appropriate, we have included the proposed new section numbers taken from the proposed amendments with the understanding that these section numbers may well change. These issues significantly concern a number of our members, some of whom may also make further submissions in response to the proposed amendments.

1. Cost Recovery is inconsistent with and costly to Nunavut

One of the principles behind the government's regulatory reform is to make Nunavut consistent with other Canadian jurisdictions. Cost Recovery for the consideration, renewal, amendment, or cancellation of a licence is proposed for Nunavut to align with the Canadian Environmental Assessment Act (2012) in southern Canada. However, we argue against this for two reasons: the legislative framework for the North is very much inconsistent with southern Canada, and adding additional costs to investors in Canada's highest cost region will drive away investment.

Industry strongly opposes new cost recovery measures as they are a clear disincentive to investment in the North. Companies in Nunavut are already disadvantaged with higher operating costs. Cost Recovery represents an added impediment to an already costly operating regime. There is added cause for concern as well in today's marketplace, where junior exploration activities and investment in Nunavut is low. Introducing Cost Recovery measures now will only serve to further dampen investor interest in the territory.

Through Aboriginal land claim negotiations, Northern Canada has taken a very different regulatory track than southern Canada through the creation of a host of Institutions of Public Government (IPGs). These IPGs are represented by a variety of Boards, including the NWB, Nunavut Impact Review Board, Nunavut Planning Commission, and the Nunavut Surface Rights Tribunal. These Boards comprise members appointed by land claim groups and governments to create significantly public, inclusive, transparent,

and consultative processes. Transferring or assigning costs of these processes to investors struggling to deal with already high operating costs will further erode Nunavut's competitiveness.

Recommendation

1a. Cost Recovery should either be removed from the legislation, or the Committee should recommend that it not be invoked at this time.

2. Administrative Monetary Penalties should be made consistent with other regimes

A definition of "penalty" means "an administrative monetary penalty imposed under the Act for a violation" (We note "violation" is not a defined term). Under section 13 of the draft legislation or under the proposed subsection 94.01 (1), it appears that it is left for the Minister to designate the types of violations. Therefore, we assume the details with respect to the types of violations may be set out in Regulations. However, Industry cautions that the Minister's power with respect to the Regulations may be too broad as it relates to: contraventions of any specified provisions under the Act, contravention of any order/decision of a specified class under the Act, and failure to comply with a term or condition of a licence under the Act.

It appears that the Minister (with GIC approval) has wide powers in setting the details in the Regulations. However the amount that may be determined under any Regulations made as the penalty for each violation is capped at $25,000 for an individual and $100,000 "in the case of any other person". We are unclear what "person" may include as it is not defined. Perhaps it is a term that is meant to include different structural organizational entities, but needs to be clarified nonetheless.

The proposed scheme attaches liability to directors, officers, and any agents of the corporation that may have committed a violation under the Act (s.94.04). It appears that these individuals may be held liable whether or not "the corporation has been proceeded against in accordance with the Act". This section provides for broad exposure to liability for these individuals, which is a concern to Industry.

It appears that an inspector can proceed with either a violation (AMP system) or criminal offence but not both for any "act or omission" (section 94.09). As well, a violation is not an "offence". Presumably, if there are multiple acts, each act can either be pursued as an offence or violation but not both. This should be clarified. Industry is very concerned that individual inspectors, often inexperienced in the field, will be granted too much authority in making the determination between issuing a violation or criminal offence, with potentially serious ramifications to the company.

There is also a two year limitation period with respect to issuing notices of violations after the day on which the "Minister becomes aware of the acts or omissions" that constitute a violation (section 94.1). This leaves a company potentially in a state of uncertainty until such time as the decision is made whether to issue an AMP, once an inspection is complete.

Subsection 94.15 is vague: "If the facts of a violation are reviewed, the inspector who issued the notice of violation shall establish, on a balance of probabilities, that the person named in it committed the violation". It is unclear whether the Minister would actually review the facts in every instance that a request for review is made. It seems that when the Minister does review the facts then this burden of proof will apply.

Industry had the opportunity to meet with Aboriginal Affairs and Northern Development Canada (AANDC) officials for an initial review of the changes on April 1, 2014. During the overview, AANDC indicated that having the power to issue an AMP does not affect the ability of inspectors to issue

directions (remedial powers under the current Act). We do not see this clearly highlighted in the proposed amendments under the AMP scheme.

Recommendations

2a. Define the terms "violation" and "person".

2b. Clarify whether an inspector can proceed with either a violation (AMP system) or criminal offence but not both for any "act or omission" (section 94.09).

2c. Clarify the time at which the Minister "becomes aware of the acts or omissions" that constitute a violation (section 94.1).

2d. Clarify whether the Minister would actually review the facts in every instance that a request for review is made (subsection 94.15).

2e. Highlight whether or not having the power to issue an AMP affects the ability of inspectors to issue directions (remedial powers under the current Act).

3. Monetary fines create investment uncertainty by being too open ended

The proposed amendments to the offences and punishment under the current scheme differ from the current version of the *Mackenzie Valley Resource Management Act* (MVRMA). The MVRMA provides for up to a $15,000 fine for a principal offence and a prison term not exceeding six months. Unlike the proposed Nunavut amendments, obstructing and providing false statements to an investigator is not a principal offence but a separate summary conviction offence punishable for up to $2,000 and for a prison term not exceeding six months (or to both).

Recommendation

3a. Change this section to be more closely aligned, and consistent, with MVRMA c25.

4. Water Use interpretation has become unnecessarily restrictive and must be changed

Water has to serve communities, the environment, and Industry for social and economic needs. While respecting the natural environment, there remains the need to optimize the economic potential for the use of water in mining and exploration. Existing federal Regulations fail to recognize the unique realities of northern Canada, most notably its climate, which is subject to large fluctuations in seasonal temperatures, from -40° in January to 20° in July. For exploration and drilling programs in the North, circulating water through piping on equipment solely for the purposes of keeping equipment from freezing and then releasing that (unused or impacted) water into the water body or watershed from which it was withdrawn, has been a normal and necessary practice for many years. Moreover, this activity does not have any significant impact on the environment (i.e. fish habitat).

Since June, 2013, the Chamber has had several discussions with staff from AANDC about a recent decision to include circulated water, utilized for no other purpose than to prevent pipes from freezing, as a "use" of water under the Act. Over the past 18 months, the Chamber has expressed its concerned about this re-interpretation, and the serious implications this change in policy implies. Including the volume of circulating water in the calculations of water used by a licensee is contrary to previous practice, and is now having a major impact on Northern exploration and drilling activities.

We are very concerned with this re-interpretation of the term, as we believe the Act and Regulations do not properly reflect the realities of mineral exploration in the North, where circulation of water may be the only practical means of keeping pipes and hoses from freezing. We also believe these Regulations and their interpretation are particularly restrictive in Nunavut, relative to other jurisdictions. Already, Nunavut requirements have deviated from those in the NWT, and are now inconsistent with the application of water use. This is affecting competitiveness by increasing costs through unnecessary modifications.

These changes could have profound implications on short and long term exploration and drilling activity in Nunavut. Drilling programs may now have to be scaled back or curtailed due to this change in interpretation of water use. In some circumstances, holders of Type B Water Licences now have to apply to convert to Type A Licences to allow them to continue exploration activities as previously planned. This could delay planned activities by an additional year, as the Type A Water Licence application process timeline is approximately 12 months. The cost to the proponent for such a permit application, including public hearings, would be approximately $1 million. This could be a prohibitive factor in the decision making process, regardless of how capital markets are performing, and will almost certainly reduce exploration spending in the territory. Moreover, the changes could further stretch NWB capacity and resources, adding financial burden to the Government of Canada for years to come - for little added benefit overall.

This water definition has affected the way exploration companies look at Nunavut. Our members point to this new interpretation of water use as indicative of the huge (and in their view still growing) administrative and cost burden on conducting exploration in Nunavut, especially when compared to what they face for similar exploration work anywhere else in Canada. Interest has definitely shifted away from Nunavut to new targets in Ontario and Quebec where the rules are less burdensome and thus less costly.

The concern is not whether exploration companies will begin to look elsewhere – they already are. Exploration expenditures in Nunavut have dropped significantly in recent years. This latest decision by the AANDC has only exacerbated an already frustrated junior exploration climate in the territory.

It is not helpful to force exploration projects into environmental assessment processes and public hearings just because a newly created definition of water use pushes them into a Type A level of scrutiny. This policy change adds unnecessary costs to both government and Industry, delays projects, and negatively affects competition.

Given the enormous mineral potential in Canada's North, there should be serious consideration of the effect this change will have, not only on exploration activities, but also on research permits, communities, dew line site cleanups etc. This proposed change is arbitrary and does not address an undesired effect – there is no negative impact. Fisheries and Oceans Canada regulatory requirements already stipulate the maximum allowable drawdown, which manages any potential effects. What presents itself as a simple administrative change could have a disastrous impact on an industry already in decline.

During the consultation phase of the *Draft Nunavut Waters Regulations* review in 2011, Industry was encouraged by the proposal to allow low-level use of water without a licence in Nunavut, though we remain concerned that the maximum permissible limit of 50 cubic metres for unlicenced use is unduly restrictive. We maintain that the applicable threshold should be made consistent with the limit in effect in the Yukon and NWT (i.e. 100 cubic metres per day).

Recommendations

4a. The current standards by which Type A and Type B Water Licences are defined needs to be reviewed. In particular, the threshold of 300 cubic metres per day for a project moving from a Type B to a Type A Licence requirement needs to more accurately coincide with the transition of a project from exploration to development.

4b. The Act and Regulations should demarcate between "exploration" and "mining", by requiring Type A Licences for mining and Type B Licences for larger exploration projects.

5. Security Management Agreements are good in principle but more details are needed regarding their content

Given the significant amounts of financial security that may be required by large-scale mining operations, "double or over bonding" acts as a significant deterrent to the investment necessary for the development of the mineral resources of Nunavut. It adds an unwarranted financial cost that cannot be justified by any reasonable measure and places the territory at a competitive disadvantage in relation to other jurisdictions.

The amendments to subsection 56(1) may address some interpretation issues with regard to who performs the issuance, amendment, renewal and cancellation of licences. The additional section with respect to providing permissive authority for the Minister to enter into written arrangements with proponents and the Designation Inuit Organization (DIO) to provide for the amount of security, form and nature of the security, and a period of review of the security (subsection 76.1(1)) is a welcome provision. We agree that the periodic review of the security should take into account any material changes to the undertaking or the risk of environmental damage. Our understanding is that, under the proposed section 76.1(2), the Minister is to provide a copy of the arrangement to the NWB which in turn must take the arrangement into account when it determines the amount of the security under the licence.

Industry is pleased to note the addition of section 76(1). This amendment is a positive step toward addressing the issue of "double bonding". However, agreements would be formulated only on a case by case basis.

Successfully resolving the "double bonding" issue entirely will help to maintain Nunavut's growing reputation as an attractive destination for investment. Doing so now will strengthen the confidence needed to make the significant investments that are required to advance the many mineral development projects that are situated on both Crown and Inuit Owned lands throughout the territory.

Recommendation

5a. Broaden section 76 to clarify what elements Security Management Agreements should contain.

6. Decisions on short-term Water Licences are better made locally

Industry has no major concerns with the proposed amendments adding several provisions with regard to the timing of reviews under section 55. In fact, establishing time limits for the evaluation and approval of Water Licence applications will allow for more predictable and timely reviews.

The inclusion of an express power for the NWB to issue 60 day extensions to Water Licences on application by a licensee would be a practical initiative that is entirely consistent with the *Nunavut Land Claim Agreement*. However, it seems that the only option currently under consideration is to permit 60 day short term extensions of Type A Water Licences, but "only on the recommendation of the Minister".

In our view, a decision to allow short term 60 day licence extensions should be made by the NWB (rather than by the Minister). A short term extension would have very limited potential for impacts on water or waste, and the Minister's office is not the appropriate level for such a decision. The practical utility of a short term extension would be limited if the Minister's decision was delayed. The considerations that would need to be weighed in determining whether an extension should be granted are well within the expertise of the NWB and its technical staff.

Recommendation

6a. Allow the NWB the authority to grant 60 day extensions on existing Water Licences.

7. Life-of-Mine Water Licences are welcome

The mining industry acknowledges the importance of ensuring that Water Licences address environmental risks associated with mining processes, as well as responding to community and socio-economic issues. The traditional practice of issuing Water Licences in Nunavut for a period of only five to seven years, means that most operations are required to go through a completely new application and public review process for a Water Licence renewal at considerable cost and time, not only to the company, but also to the NWB staff, and other Regulatory Agencies as well as the DIO. We therefore agree that Water Licences should be issued for the life of the mining operation, with scheduled, periodic reviews to ensure water-related requirements are addressed through up-to-date permit conditions without the current costly process of a full re-application and review process.

Conclusion

The Chamber of Mines is the leading advocate for responsible and sustainable mineral exploration and development in the NWT and Nunavut. Our key objectives are to encourage, assist and stimulate prosperous, orderly and environmentally responsible development and growth of mining and mineral exploration, in all modes and phases, in the NWT and Nunavut; inform the public of matters relating to mining and minerals exploration, and; seek the cooperation of all persons, associations, corporations and authorities, both public and private, to attain these objectives.

The Chamber appreciates the opportunity to comment on the proposed amendments. Passage of Bill S-6 marks the completion of the government's *Action Plan to Improve Northern Regulatory Regimes*, which in our view, is an ambitious initiative to modernize northern legislation and create consistency with broader Canadian legislation.

We are pleased with a number of the legislative changes proposed by Bill S-6, and expect they will be an incentive for increased mineral investment in Nunavut. The Chamber looks forward to future dialogue with the Federal Government as accompanying Regulations are created.