

Sent by Email

August 28, 2024

Mackenzie Valley Land and Water Board
7th Floor – 4922 48th Street
PO Box 2130
Yellowknife, NT X1A 2P6

Attention: Kathy Racher, Executive Director

Dear Ms. Racher,

Re: MV2023L2-0001 Reply to Information Request Number Three Responses

North American Tungsten Corporation Ltd (“NATC”) is pleased to provide this reply to the responses submitted to the Mackenzie Valley Land and Water Board (“MVLWB”) by parties to the MV2023L2-0001 proceedings (“**IR Responses**”) with respect to NATC’s Information Request number three (“**IR#3**”) response dated February 23, 2024.

NATC appreciates the complex nature of the questions posed in IR#3 and thanks all intervenors for their thoughtful and detailed responses and replies. This document is split into three separate appendices which deal with separate types of responses:

- 1) Appendix A responds to the substantive issues raised by the parties responding to IR #3;
- 2) Appendix B, NATC provides clarification on matters relating to the regulatory process raised by various parties; and
- 3) Appendix C sets out NATC’s response to points raised that, while worthy of further discussion (either bilaterally or in subsequent processes related to this proceeding), are outside the scope of IR#3 and should not be considered by the MVLWB when making its ruling with respect to IR#3.

NATC understands that the next steps in this proceeding are for the MVLWB to review the submission and render a legal decision. As NATC explains in Appendix A, the issuance of a water licence to NATC would not be precedent setting and aligns with both the *Mackenzie Valley Resource Management Act* (“**MVRMA**”) and previous decisions of the MVLWB. NATC believes that this is an important issue, that warrants significant consideration by the MVLWB. NATC trusts that the MVLWB will continue its adherence to evidence-based decision making in determining whether a type B licence is sufficient under these circumstances. Regardless of the type of licence, NATC looks forward to a robust and effective licencing process.

Yours truly,
North American Tungsten Corporation Ltd.
by its Monitor, Alvarez & Marsal Canada Inc.
acting in its capacity as Monitor of NATC and not
in its personal capacity



Todd M. Martin
Senior Vice President

Encl.

Cc: MVLWB: A. Love, A. Cleland
CIRNAC-Northern Contaminated Sites Program (“NCSP”): J. Mackey, M. Yetman, S. Kennedy
A&M/NATC: S. Hamm, D. Bynski
Communities Working Group: Acho Dene Koe First Nation; Dehcho First Nations; Fort Simpson Métis Local 52; Kaska Dena Council; Liard First Nation; Líídlı́ Kúé First Nation; Nahzà Dehé Dene Band; Ross River Dena Council

Appendix A
North American Tungsten Corporation Ltd. Response to
Mackenzie Valley Land and Water Board
Information Request Number Three, Questions A and B

On November 20, 2023, the Mackenzie Valley Land and Water Board (“MVLWB”) issued Information Request number three (“IR #3”) to North American Tungsten Corporation Ltd. (“NATC”) and the Governments of Canada (“CIRNAC-RLM¹”) and the Northwest Territories (“GNWT”) (collectively, “Governments”) in connection with NATC’s application number MV2023L2-0001 for a type B water licence (“Application”). The two questions in IR#3 were:

- a) Does a Land and Water Board have the jurisdiction to issue a type B licence that would replace a type A licence in situations when the activities associated with an appurtenant undertaking only exceed type B licencing criteria under the regulations, and will no longer exceed type A licencing criteria?
- b) Based on your response to question (a), does the Mackenzie Valley Land and Water Board have the jurisdiction to issue a type B licence to NATC in response to its Application?

NATC submitted its response to IR #3 on February 23, 2024 (“NATC Response”). The MVLWB also received responses to IR #3 from the Governments (“Government Responses”) and subsequently comments to the NATC and Government Responses from parties to the proceeding (“Party Responses”). Finally, the MVLWB has also received replies to the NATC Response from the Governments (“Government Replies”).

In its reply below, NATC seeks to provide a response to the Party Responses, Government Responses and Government Replies it considers relevant to the issues raised by IR#3. Responses are presented primarily by theme to address where multiple parties raised similar points.

I. Statutory Interpretation

In the Party Responses, both GNWT and Liard First Nation (“LFN”) make submissions with respect to NATC’s application of the modern principles of statutory interpretation in Part IV of the NATC Response.

There is no dispute regarding the modern principles themselves. However, an argument was made that NATC uses the principles incorrectly.² NATC submits that it appropriately applied the modern principles of statutory interpretation to arrive at an interpretation that aligns with the ordinary meaning of the relevant provisions of the *Mackenzie Valley Resource Management Act* (“MVRMA”) and *Mackenzie Valley Federal Areas Waters Regulations* (“MVFAWR”).

¹ Crown-Indigenous Relations and Northern Affairs Canada – Resource and Lands Management

² LFN Response to NATC Response to IR3 at 4; GNWT Response to NATC Response to IR3 at 3-4.

An argument was made that a pre-condition to transitioning from a type A licence to a type B licence is that a mine site has met its closure criteria.³ This argument is not supported by any reference to the licencing powers of the MVLWB nor any wording of the *MVRMA* or *MVFAWR*. As previously noted by NATC, the MVLWB's power to issue licences is found in s. 72.03(1) of the *MVRMA* which refers to criteria set out in the *MVFAWR*. Neither the *MVRMA* nor the *MVFAWR* set out completion of closure criteria as a pre-condition to a type B licence. As previously noted by NATC, the language of s. 72.04(1)(e) of the *MVRMA* is sufficiently broad to incorporate the completion of closure criteria as a condition in a type B licence.⁴ Accordingly, the argument that NATC has not met any closure criteria with respect to the Cantung mine site ("Site") should not factor into the analysis of whether a type B licence is appropriate.

An argument was made that "NATC uses the ordinary sense of the words alone to further their arguments."⁵ Contrary to this view, the same Party Response acknowledges that NATC references the "broader context of the MVLWB objectives" in its analysis.⁶ NATC submits that its approach is consistent with the modern principles of statutory interpretation. NATC conducted its analysis with respect to the proper interpretation of the licencing scheme and arrived at an interpretation that is consistent with the ordinary meaning of the words. The modern principles of statutory interpretation permit a justified departure from the ordinary meaning of the words in favour of an alternative and plausible interpretation.⁷ This approach does not require a rejection of the ordinary meaning of words but merely expands the available interpretations; in this case, no departure from the ordinary meaning of the words in the *MVRMA* and the *MVFAWR* is indicated or required.

An argument is made that "all waste generated during the term of previous licences that remains and that will be generated during the licence to be issued is relevant to determining the type of licence required."⁸ Similarly, a related argument states that "assessment and consideration of cumulative impacts is woven throughout MVRMA processes."⁹ NATC does not dispute the submission that some processes under the *MVRMA* require consideration of cumulative impacts and acknowledges that the *MVRMA* contains a reference to cumulative impacts at s. 146. However, NATC does dispute that cumulative impacts are relevant to the present application. NATC further disputes the historical waste argument because it defies a proper application of the modern principles of statutory interpretation. As the relevant Party Response agrees, the modern principles require that an interpretation be plausible in light of the text, context, and purpose of the statute. Section 8 of the *MVFAWR* provides clear criteria for determining whether the appropriate licence is type A or type B. The applicable Party Response goes on to acknowledge that "whether waste will or may be deposited to receiving waters is the key point."¹⁰ Notably, emphasis is placed on the words "will" and "may" which supports the view that the determination is based on prospective waste deposits. There is no logical connection from this position to the argument that previously generated waste "is relevant to determining the type of licence required."¹¹ NATC submits that in the absence of language, either express or implied, to consider

³ GNWT Response to NATC Response to IR3 at 3.

⁴ *MVRMA*, s. 72.04(1)(e).

⁵ LFN Response to NATC Response to IR3 at 4.

⁶ LFN Response to NATC Response to IR3 at 4.

⁷ MV2023L2-0001, NATC Response to IR3 at A3.

⁸ GNWT Response to NATC Response to IR3 at 3.

⁹ LFN Response to NATC Response to IR3 at 5.

¹⁰ GNWT Response to NATC Response to IR3 at 3.

¹¹ GNWT Response to NATC Response to IR3 at 3.

previously generated waste in a licence application, it is appropriate to account for this waste in the conditions of the licence, rather than via the licence type. No Party Response has identified any language in either the *MVRMA* or the *MVFAWR* to counter NATC's position in this regard. Such language would be necessary to support their arguments.

An argument is made that NATC has ignored relevant factors in determining whether the objectives of the *MVRMA* are met.¹² One response submits that NATC needed to consider the differences in process between a type A and type B licence. NATC has chosen to apply for a type B licence. NATC submits that this is appropriate based on the statutory scheme and has submitted arguments regarding why a type B licence is appropriate in its Application and the NATC Response. Such an argument ignores the possibility that the objectives of the *MVRMA* may be met by both a type A licence and a type B licence. As a result, the relevant question is whether the type B licencing process is sufficiently robust to achieve the objectives of the *MVRMA*. NATC submits that the type B process is a robust process that is adaptable to achieve the objectives of the *MVRMA* in the context of this application.

Similarly, an argument is made that NATC's interpretation "does not take into account the public interest of broader land management and conservation goals of the *MVRMA* and the MVLWB."¹³ The argument further states that "there are distinct differences between type B and A licences that benefit NATC and not the public and particularly those who are residents of the Mackenzie Valley."¹⁴ Again, the relevant question is whether a type B licence can meet the objectives of the *MVRMA*. NATC submits that it can and that there is nothing inherent in the type B process that would indicate that it cannot.

An argument is made that "type A licences for mines typically include various monitoring requirements whereas type B licences may not".¹⁵ This argument regarding monitoring requirements is flawed. It ignores the possibility of imposing monitoring requirements on a type B licence, the possibility of which GNWT acknowledges in its statement that type B licences "may not" rather than cannot include these requirements. Further, the provision cited to support the argument for amendments to a licence in the public interest applies equally to type B and A licences.¹⁶ Contrary to the argument, this point does not refute, but in fact reinforces, NATC's claim that there is no reason conditions in a type B licence would be less effective than conditions in a type A licence. Similarly, a related argument focuses on the risk of an undertaking as determining whether it should be a type A or type B, without identifying a source of authority for that submission.¹⁷ However, this concern is answered by the fact that the conditions are what will mitigate risk, and there are no substantive distinctions between type A and type B in terms of the conditions that may be applied.

Finally, with regard to the Government Responses, NATC wishes to address GNWT's arguments regarding potential "absurd consequences".¹⁸ NATC notes that the only statutory provisions referred to by GNWT in its response to IR #3 are: ss. 72.13, 72.15(2) of the *MVRMA* and ss. 6(2)(f), 8(2) of the

¹² GNWT Response to NATC Response to IR3 at 3-4.

¹³ LFN Response to NATC Response to IR3 at 5.

¹⁴ LFN Response to NATC Response to IR3 at 5.

¹⁵ GNWT Response to NATC Response to IR3 at 4.

¹⁶ *MVRMA*, s. 72.12(1)(b)(iii).

¹⁷ LFN Response to NATC Response to IR3 at 5.

¹⁸ GNWT Response to IR3 at 4.

MVFAWR. NATC has already identified its view regarding the provisions of the *MVFAWR* in its original NATC Response to IR #3 and in this reply above.

With respect to ss. 72.13 and 72.15(2) of the *MVRMA*, GNWT argues that these provisions mean that NATC's current application for a type B water licence must not be allowed because it would lead to absurd consequences. It is submitted that the pre-existing type A water licence can only be displaced by Ministerial approval (s. 72.13) and that any deviation from the current type A water licence requires a mandatory public hearing (s. 72.15(2)). The Government Response seems to argue that if a type A licence can only be displaced by another type A licence with Ministerial approval and a public hearing, then a type B licence cannot displace a type A licence without such an approval and process. NATC submits that these arguments do not support a contention that there is no authority to issue a type B licence after a type A licence. These sections seem to be focused on ensuring that new type A licences are not issued (via renewal or amendment) without following the process for a type A licence. However, they do not speak to the process for issuing a type B licence (except to the extent a public hearing may be required) or in any way imply that projects cannot receive type B licences after having received type A licences. The application before the MVLWB is for a new type B licence – not a renewal of a licence or an amendment of a licence (although the term renewal may have been used incorrectly in some of NATC's Application materials). In contrast to GNWT, NATC has clearly laid out the statutory foundation for the MVLWB's jurisdiction to issue a type B licence in response to its application.

II. Past water uses, deposits of waste and existing licence conditions

Both LFN and GNWT argue in their responses that Part V and VI of the NATC Response incorrectly state that the language of the *MVRMA* is “forward looking” and should only consider the use of water and deposit of waste that will occur under the licence.¹⁹ Arguments are made that historical water uses and deposits of waste must be considered when the MVLWB is determining what class of licence to issue.²⁰ NATC submits that this argument is incorrect and is not supported by the *MVRMA* or *MVFAWR*. The legislation is clear that a licence shall be a type B licence if one or more uses of water or deposits of waste set out in Column I of Schedule V meets the criterion set out in column III of Schedule V.²¹ The legislation functions in the present tense – in that one needs a licence based on the water it is using at any given moment in time – this structure is very much about what the use of water is over the term of that licence (not in the past). There is nothing in the *MVRMA* or *MVFAWR* that would support adding in all past uses to determine what present licence is needed – that would be absurd considering some of the other uses of water under this regime (some of which are undertakings that are likely to be ongoing perpetually). NATC meets the requirements for a type B licence. However, the fact that a licence must be issued based on the future use of water or deposit of waste does not limit the ability of the MVLWB to protect the environment or the interests of the people of the Mackenzie Valley. As discussed in section I above, the MVLWB can issue conditions with a licence to address previous uses of water and deposits of waste and there is no legislative requirement in the *MVRMA* or *MVFAWR* that the conditions issued under a type A licence be more stringent than those issued under a type B licence. The forward-looking water licencing process under the *MVRMA* aligns with the broader legislative scheme and does not prevent the MVLWB from looking to the past to determine

¹⁹ LFN Response to NATC Response to IR3 at 7; GNWT Response to NATC Response to IR3 at 4.

²⁰ LFN Response to NATC Response to IR3 at 7; GNWT Response to NATC Response to IR3 at 4

²¹ *MVFAWR* s. 8(1).

what conditions should be imposed on a proponent, as that is part of the context in which a licence is issued.

An argument is made that a type B licence should not be granted because existing conditions under the type A licence with respect to closure and reclamation have not been fulfilled and a new licence would “draw a curtain over the past Project works”.²² NATC disputes this and submits that a new type B licence could have similar conditions with respect to closure and reclamation as the current type A licence, and in fact, NATC included proposed conditions with its Application in order to demonstrate this. The historical deposits of waste at the Site necessarily cannot be ignored and can be adequately addressed by type B licence conditions. In fact (and as previously noted by NATC in section I of this response), s. 72.04(1)(e) of the *MVRMA* provides a statutory basis for the imposition of such conditions in a type B licence.

III. Other Comments

Łíídlı Kúę First Nation’s response does not take a solid position regarding whether the MVLWB has the authority to issue a type B licence in the circumstances, but advocates for a public hearing and specific licence conditions. While NATC supports a public hearing being held with respect to the issuance of a new type B water licence, NATC is of the view that the issues of whether a public hearing is required and particular licence conditions are not relevant or under consideration as part of the IR#3 process.

Nah?ą Dehé Dene Band submitted concerns regarding the pace at which the project is proceeding towards closure and reclamation and requested that the process be expedited given the environmental liabilities present at the Site. While an understandable concern, NATC submits that these comments are not relevant to the questions asked by the MVLWB in IR #3.

Tıhçq Government’s response expressed their view that the MVLWB has the jurisdiction to issue a type B licence that would replace a type A licence in situations where the activities associated with an undertaking would meet the threshold for type B licensing criteria under regulations. They responsibly leave the issue of whether or not the threshold is met to expertise of the MVLWB.

IV. CIRNAC-RLM Response

In the Government Response, CIRNAC-RLM states that a “change in licence class can only be legislatively achieved via a new application (upon expiry or cancellation of the existing water licence) and not via an amendment to an existing water licence.”²³ NATC agrees with this statement as its Application is for a new type B water licence which was intended at the time of Application submission, to take effect upon expiry of the existing water licence, as was the case at the time of application submission.

With respect to the second question of IR #3, CIRNAC-RLM states that it stands by its “previous opinion that, given the facts and the storage of waste by the dams in this case, NATC requires a type

²² LFN Response to NATC Response to IR3 at 2, 5.

²³ CIRNAC-RLM Response at 2.

A water licence.”²⁴ This argument was also made in other Party Responses.²⁵ NATC disputes this position and reiterates its submissions included in appendix B of the NATC Response²⁶ which set out why NATC’s Tailings Containment Areas (“TCA”) are not water-impounding structures and therefore there is no storage of water that meets the definition of storage under the *MVFWAR*.

V. Mine water as waste

Arguments were made that the overflow and run off of mine water from the underground mine was not factored into the NATC Response or Government Responses, and that this water does not meet federal guidelines and has not been remediated.²⁷ NATC believes this is outside the scope of IR #3 and has been previously addressed by NATC in its response to Information Request #1. In Information Request #1, NATC reiterated its position that it does not consider the water emanating from the mine to be a waste. NATC understands that there are varying opinions on this and the matter needs to be subject to technical discussion that is most appropriately undertaken at a Technical Meeting.

VI. Tailings Containment Areas constitute a disruption of the river bank

An argument was made that the tailings containment areas (“TCA”) on the embankment of the Flat River constitute a disruption of the riverbank and result in the alteration of flow or storage by dam under Schedule 5, item 2(5), column IV.²⁸ NATC disagrees with this argument. While NATC’s TCAs are constructed proximal to the right bank of the Flat River, the dams are constructed outside of the floodplain, not on the river bank and so are not altering the flow of the Flat River. This is evidenced by examination of the terrain underlying the TCAs as characterized in the Geotechnical Assessment of Tailings Storage Facilities, submitted with the Application. The terrain analysis presented in [Figure 4-1](#) of this document identifies the underlying terrain as predominantly glaciofluvial²⁹ and colluvial³⁰, while a small portion underlying the toe of TCA 2 is considered to be fluvial³¹; the vast majority of the TCAs are constructed outside of the floodplain, are not disrupting the riverbank and are not altering the flow of the Flat River.

VII. GNWT Response

In the Government Response provided by GNWT, GNWT does not answer the first question of IR #3 and suggests that it is “not possible to meaningfully answer such a broad and far reaching question. Attempting to answer this question would not meaningfully assist MVLWB in deciding whether to issue a type A or B licence in this process.”³² NATC disagrees with this statement. As set out in the NATC Response and further elaborated in this document, the *MVRMA* and *MVFAWR* clearly grant the MVLWB the authority to issue a type B water licence to where a type A water licence had previously been issued.

²⁴ CIRNAC-RLM Response at 3.

²⁵ LFN Response to NATC Response to IR3 at 6.

²⁶ NATC Response, appendix B section 2.0 paragraph 5.

²⁷ LFN Response to NATC Response to IR3 at 6.

²⁸ LFN Response to NATC Response to IR3 at 6.

²⁹ Materials that were redeposited or redistributed during glaciation.

³⁰ Unconsolidated sediment deposited at the lower parts of hillslopes by either rainwash, sheetwash, slow continuous downslope creep, or a variable combination of these processes.

³¹ Post-glacial materials distributed by water

³² GNWT Response at 2.

An argument is made that with respect to mining and milling operations, “any operator regardless of whether their licence has expired or they purchased the property and are newly operating it, including a receiver or monitor under a bankruptcy or insolvency proceeding if there is any potential to seek a new operator, would require the original class of licence issued for the undertaking for any care and maintenance, reclamation or closure activities.”³³ No authority has been provided to support this position. NATC submits that this statement does not align with the *MVRMA* or *MVFAWR* which do not place such restrictions on proponents.

Another argument is made that because CIRNAC-NCSP³⁴, acting as the Funder, has not ruled out seeking a new operator for Cantung, the Site should be assessed as a mine that has the potential to resume active mining and milling.³⁵ Furthermore, whether active mining and milling will resume at the Site is not relevant to assessing whether the MVLWB has jurisdiction to issue a type B licence to NATC. In addition, should active mining and milling resume at the Site the operator responsible for mining and milling must obtain a new licence to allow for this scope. It is uncontroverted that the relevant undertaking for this application is “mining and milling”. If NATC meets the requirements for a type B licence, the MVLWB has jurisdiction to issue a type B licence.

One Government Response states that continuing to require a type A licence is conceptually logical because a “type A licence will typically have created substantial liabilities” and the “more rigorous requirements under a type A licence for mining and milling during care and maintenance are conceptually appropriate given the risk to the environment.”³⁶ NATC disagrees with this statement. Neither the *MVRMA* nor the *MVFAWR* require nor invite consideration of the liabilities created under previous licences as a factor in determining the appropriate licence class for a project going forward. Additionally, the statement that type A licences necessarily contain more rigorous requirements is incorrect. As stated above, the *MVRMA* does not restrict the conditions that can be placed on a class of licence. The MVLWB is authorized to include conditions in a licence which the MVLWB considers appropriate.³⁷ MVLWB may issue the conditions it feels are necessary to address environmental liabilities at the Site regardless of the class of licence it issues.

Arguments were made that monitoring and management of various existing waste streams and materials constitute a deposit of waste necessarily requiring a type A licence. NATC submits that management of existing waste streams, such as management and mitigation of wind erosion of tailings and temporary storage of hydrocarbon-contaminated soils occur in relation to existing waste management facilities and pursuant to terms and conditions of the water licence and do not constitute a deposit of waste under the *MVFAWR*. Similarly, monitoring of the receiving environment, being the Flat River, in relation to various site features, including the Flat River tailings that were deposited in the 1960’s and largely remediated in the 1980’s, and existing hazardous materials and wastes stored on site along with metals-impacted fill materials, is routinely carried under the Surveillance Network Program associated with the current water licence and may continue under a type B licence; the mere existence of these materials on site is not enough to trigger the need for a type A licence under the *MVFWAR*. Further, an argument was made that the potential impact of a release of hazardous waste to the local environment may constitute a deposit of waste requiring a type A licence. NATC disagrees:

³³ GNWT Response at 2-3.

³⁴ Crown-Indigenous Relations and Northern Affairs Canada – Northern Contaminated Sites Program

³⁵ GNWT Response at 3.

³⁶ GNWT Response at 4, 5.

³⁷ *MVRMA*, s. 72.04.

an unplanned release of waste to the environment is considered a spill, not a deposit of waste, and spill management and response occurs accordingly pursuant to water licence terms and conditions.

It is argued that a historically characterized risk factor associated with the TCAs, being a prior understanding of potential liquefaction associated with TCA 4, necessitates persistence of a type A licence. The liquefaction risk potential has been further assessed through a deformation analysis as presented in [Section 10](#) of the Geotechnical Assessment of Tailings Storage Facilities, submitted with the Application. The study concludes that the TCA dams are stable and the risk of massive slope failure and tailings run out is considered low; the risk potential is not sufficient to trigger the need for a type A licence under the *MVFWAR*.

Appendix B
North American Tungsten Corporation Ltd. Response to
Mackenzie Valley Land and Water Board
Information Request Number Three: Clarification and Comments on Process-Related Aspects

I. Project Splitting

An argument is made that “issuing a type B licence on renewal of a type A licence is project splitting”.³⁸ This argument is not supported by NATC’s Application or the *MVRMA*. NATC is not attempting to compartmentalize project components. Instead, NATC makes this application as part of the necessary regulatory process for the Site. At the time of Application, NATC’s existing type A water licence was set to expire and current and expected water use and deposit of waste at the Site meets the requirements for a type B water licence set out in the *MVFAWR*. Issuance of a type B licence to NATC would not result in project splitting as NATC has no intention of simultaneously holding different licences for different aspects of its activities. Further, the MVLWB has no restriction on the conditions that it can issue with respect to a water licence, regardless of whether that licence is type A or type B.³⁹ Any conditions which the MVLWB believes are necessary, including with respect to closure and remediation, can be issued with respect to a type B water licence and would prevent any potential for “project-splitting”.

II. Ability to engage with regulatory process

An argument is made that the issuance of the type B water licence would reduce the ability of Indigenous groups and other people of the Mackenzie Valley to engage in the regulatory process and reduce public confidence in the regulatory process because a public hearing would not be mandatory and ministerial sign-off could be avoided.⁴⁰ This is outside the scope of IR #3 and NATC submits that this point is irrelevant to the MVLWB’s ability to issue a type B licence for an undertaking which has previously been issued a type A licence. Additionally, these concerns are addressed by the fact that the MVLWB may require a public hearing for a type B licence⁴¹ and any person may become a party to a proceeding before the MVLWB simply by submitting a comment to the MVLWB.⁴² NATC has stated as part of the proceedings that it supports a public hearing in connection with the Application and does not submit that its type B licence would not require ministerial approval. Whether an application before the MVLWB is for a type A or type B licence, the public and Indigenous groups have ample opportunity to become engaged in the regulatory process.

Another argument is made that the “extent and quality of engagement, participation, and meaningful consideration and accommodation of input received in consultation are important factors in the regulatory process that give it legitimacy for Indigenous groups”.⁴³ NATC submits that this is outside the scope of IR #3 and is not a relevant factor in determining whether the MVLWB can issue a type B licence in response to NATC’s application. However, whether an activity warrants a type A or type B

³⁸ LFN Response to NATC Response to IR3 at 1, 7.

³⁹ *MVRMA*, s. 72.04(1)(e).

⁴⁰ LFN Response to NATC Response to IR3 at 2, 8.

⁴¹ *MVRMA*, s. 72.15(1).

⁴² *MVLWB Rules of Procedure*, Rule 17.

⁴³ LFN Response to NATC Response to IR3 at 9, 10.

licence does not affect the Crown's obligation to undertake meaningful consultation with Indigenous groups – that obligation exists as a result of the rights of those Indigenous groups and the honour of the Crown, entirely independent from the regulatory regime. Additionally, the regulatory scheme under the *MVRMA* ensures that Indigenous rights can be respected and accommodated regardless of whether a type A or type B licence is issued by the MVLWB.

III. Applicability of the GNWT Letter

GNWT and LFN both argued in their submissions that NATC's position that the GNWT letter to the MVLWB dated September 14, 2018 ("GNWT Letter") does not apply with respect to the Site in Part V in the NATC Response is incorrect. An argument is made that the applicable provisions of the *MVRMA* and the territorial legislation are analogous and contain no material differences.⁴⁴ This statement of similarity is correct, but misses the point. The GNWT Letter should be viewed as a submission to the MVLWB and nothing more – it has no statutory authority. NATC's Application and IR #3 are in respect of a federal area to which the *MVRMA* applies. In respect of this area and NATC's Application, it is the MVLWB, not GNWT, who has jurisdiction.

An argument is made that the GNWT Letter is outdated and is not GNWT's current response.⁴⁵ The argument does not specify which document is GNWT's current response, but NATC has provided comments with respect to the GNWT Response elsewhere in sections I and VIII of this document. Furthermore, GNWT did not indicate in its own response that the GNWT Letter was outdated.

IV. Precedent setting decision

GNWT and LFN both made submissions with respect to Part VII of the NATC Response, stating that the issuance of a type B water licence for a project which had previously been issued a type A water licence would be precedent setting. NATC submits that the issuance of a type B water licence to NATC would not be precedent setting and is something the MVLWB has done before.

An argument is made that the Colomac decision is distinguishable and not relevant to the situation at the Site because Colomac was a remediation project rather than a project placed in care and maintenance which "may resume active mining and milling" in the future⁴⁶. NATC disputes this. The purpose of this licence is to undertake care and maintenance at the Site and should there be a change to this status quo, then evaluation of whether a new licence is needed to reflect any new activity would have to be undertaken. Regardless, the activity undertaken at the Site is not relevant to whether there is authority to issue a type B licence under these circumstances.

Another argument provided that the Colomac water licence was for a miscellaneous undertaking and is therefore not applicable because miscellaneous undertakings never require a type A licence for a deposit of waste.⁴⁷ NATC submits that this argument is flawed for multiple reasons. First, the specific requirements for a miscellaneous licence are not in question. The issue is whether a new type B water licence can be issued if the appurtenant undertaking no longer meets the requirements for type A. The Colomac licence was a type B because water use and waste deposition was expected to be less than

⁴⁴ GNWT Response to IR3 at 4.

⁴⁵ LFN Response to NATC Response to IR3 at 6.

⁴⁶ GNWT Response to IR3 at 5.

⁴⁷ GNWT Response to IR3 at 5.

what was previously licenced.⁴⁸ Water use and deposit of waste at the Site no longer meet the requirements for a type A licence set out in the *MVFAWR*, but would meet the requirements for a type B licence. As a result, a type B licence should be issued. Second, the fact that the Colomac mine was issued a miscellaneous water licence does not prevent the case from being relevant to NATC's application. As noted in IR #3, the issue is whether the MVLWB has jurisdiction to issue a type B licence to replace a type A licence when an appurtenant undertaking (of any classification) only meets the requirements for a type B licence. NATC submits that the MVLWB has jurisdiction to issue a type B licence in such a scenario. The MVLWB has done so before and issuing a type B licence to NATC would not be precedent setting.

The arguments raised with respect to the Mount Nansen decision of the Yukon Water Board are also incorrect. Debating what type of undertaking the Mount Nansen project would fall under if it were within the jurisdiction of the MVLWB is irrelevant. NATC submits that the case is another example of a water board issuing a type B water licence to an undertaking which had previously been issued a type A water licence.

A similar argument incorrectly states that issuing a type B water licence to NATC would be precedent setting.⁴⁹ No precedent would be set by the MVLWB issuing NATC a type B water licence. The MVLWB has precedent to rely on as it issued a type B water licence for the Colomac mine after the undertaking had previously been issued a type A water licence.

⁴⁸ Wek'eezhii Land and Water Board, Reasons for Decision (18 February 2010) for type B water licence number W2009L8-0003 for the remediation of the Colomac Mine Site at 3.

⁴⁹ LFN Response to NATC Response to IR3 at 10.

Appendix C
North American Tungsten Corporation Ltd. Response to
Mackenzie Valley Land and Water Board
Information Request Number Three: Response to Issues Raised which are Outside the Scope of
Information Request Number Three

I. NATC role as Licensee

An argument is made that NATC is acting as a corporate stand in, straw man and agent of Canada in the licencing process before the MVLWB.⁵⁰ NATC disagrees with these statements and submits that this is outside the scope of questions posed by MVLWB under IR #3 and the legal realities of the *Companies' Creditors Arrangement Act*. Regardless, the regulatory regime does not change simply because NATC is funded by CIRNAC-NCSP.

II. Lower monetary penalties for type B licences

One Party Response states it is concerned that "the significantly lower monetary penalties available under a type B licence will not adequately discourage NATC and are not suitable given the scope of the Project."⁵¹ NATC disagrees with this point and submits that the statement is outside the scope of the questions posed by the MVLWB under IR #3.

III. Burden of proof

One argument suggests that "the burden of proof to convince parties that a different process/licence change is warranted is the sole responsibility of NATC".⁵² No authority is cited in support of this proposition. NATC submits that the licensing process should be dealt with in accordance with the language and purpose of the *MVRMA*, which clearly authorizes the MVLWB to issue NATC a type B water licence.

IV. Downgrading of licences

Another argument claims that if a type A licence can be downgraded to a type B licence, then the same process could occur such that a proponent no longer requires a water licence.⁵³ While this statement is outside of the scope of the questions posed by the MVLWB in IR #3, NATC agrees with this statement. Licences have expiry dates, projects end and monitoring end points reached. This is not to say that the expiry of a licence allows a proponent to escape liability, as there are other mechanisms such as the posting of security which still protect against unwanted impacts to the environment or people of the Mackenzie Valley. However, water licences authorize the future use of water and deposit of waste, not use of water or deposits of waste that have occurred in the past. Previous deposits of waste are and

⁵⁰ LFN Response to NATC Response to IR3 at 1-2, 9.

⁵¹ LFN Response to NATC Response to IR3 at 9.

⁵² LFN Response to NATC Response to IR3 at 9.

⁵³ LFN Response to NATC Response to IR3 at 7.

should be addressed through conditions in a licence, including requiring a proponent to post security to secure its obligations under a licence.⁵⁴

The same argument suggests that the issuance to a type B licence would be a “slippery slope leading to more of the same.”⁵⁵ No justification is provided for this statement. NATC disputes this argument as conditions issued for a type A licence could also be issued for a type B licence.

V. Indigenous rights

Several arguments were made throughout the Party Responses that issuance of a type B licence by the MVLWB could adversely affect Indigenous rights under section 35 of the Constitution and reduce the “ability to achieve reconciliation about the Cantung mine legacy”.⁵⁶ The Crown’s obligations with respect to Aboriginal rights, consultation and reconciliation for all stages of the Cantung project are separate and apart from the requirements for issuing a type A or type B water licence. The Crown’s obligations must be fulfilled and will be fulfilled, but the narrow issues posed by the MVLWB under IR #3 are not the place to address these matters.

VI. Delays in closure

Multiple Party Responses expressed concern with the pace at which closure and remediation of the Site is occurring.⁵⁷ While this is an important issue and NATC is committed to moving the Site towards closure and reclamation in a timely manner, it is irrelevant to and outside the scope of IR #3.

⁵⁴ *MVRMA*, s. 71(1).

⁵⁵ LFN Response to NATC Response to IR3 at 8.

⁵⁶ LFN Response to NATC Response to IR3 at 10; Łíídlıı Kúé First Nation Response to NATC Response to IR3 at 3.

⁵⁷ Nah?ą Dehé Dene Band Response to NATC Response to IR3; LFN Cover Letter at 4.