Reviewer Comments and Proponent Responses

Project: Cantung Mine - Care and Maintenance
Board: Mackenzie Valley Land and Water Board
Proponent: MVLWB

File Number: MV2023L2-0001
Review Comments Due: May 24, 2024
Proponent Responses Due: August 31, 2024

No.	Topic	Reviewer Comment	Reviewer Recommendation	Proponent Response
GNWT - Environment and Climate Change - Environmental Regulatory Analyst				
1	GNWT-ECC Response Letter	Please see attached letter.	N/A	NATC thanks GNWT-ECC for their careful consideration of submissions and for their input into this proceeding. Please see attached reply from NATC.
Liard First Nation (Yukon) - Travis Stewart				
1	Response from LFN	Re NATCL Water License Application - IR #3	See attached.	NATC thanks LFN for their careful consideration of submissions and for their input into this proceeding. Please see attached reply from NATC.
Liidlii Kue First Nation (Ft Simpson) (LKFN) - Trieneke Gastmeier				
1	LKFN Comment	Łíídlįį Kų́ę́ First Nation: Letter on Legal Interpretation - When would a type B licence replace a type A licence	Please see attached letter from Łíídlįį Kų́ę́ First Nation	NATC thanks LKFN for their careful consideration of submissions and for their input into this proceeding. Please see attached reply from NATC.
Naha Dehe Dene Band (NDDB) - Elliot Holland				
1		NDDB is fundamentally concerned about the pace of progress towards final reclamation and closure of the Cantung site, and the protection of the NDDB Traditional Territory, and the lands and waters within, in the interim. NDDB has not sought detailed legal advice on the form of licence most appropriate to achieve these objectives, and looks forward to reviewing the many points of view to be provided by other governments and regulators on that issue.	NDDB recommends that the Board expeditiously provides direction to NATCL on the process to issue a new care and maintenance water licence, which can be more customized to the current status of the site. If a Type A licence is maintained, NDDB recommends that NATCL should still apply for a new licence which can better match the current state of the site, and encourage steady progress towards final closure and reclamation.	NATC thanks NDDB for their careful consideration of submissions and for their input into this proceeding. NATC is in support of a public hearing for this proceeding, should it proceed.

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		NDDB does consider a new care and maintenance water licence, in some form, to be most appropriate than the extension of the operational water licence under which the site is currently operating. NDDB notes that little progress has been made on this legal issue since reviewers and NATCL provided comments and recommendations on the original application on June 6, 2023, almost one year ago.	If the Board determines that a Type B licence is appropriate instead, NDDB also recommends that this new licence matches the current state of the site, and encourage steady progress towards final closure and reclamation. In either case, NDDB recommends that a Public Hearing be held in Nahanni Butte, as part of the licencing process.	
Tlicho Government - Brett Wheler				
1	Letter	Please See attached letter	Please see attached letter	
2	TG Position	Tłı̨chǫ Government is of the view that the Boards do have 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. Please see the attached letter for a full explanation of this position. In addition, we make the following points regarding the submissions made by CIRNAC and the GNWT.	Our main comments are in the attached letter. Please see the attached letter. We have a few additional comments below.	NATC thanks TG for their careful consideration of submissions and for their input into this proceeding. Please see attached reply from NATC.
3	Relationship between criteria for Type A vs B licence and criteria for no licence	A decision on criteria for Type A vs Type B licences is logically related to the criteria for when no licence is required. It is our understanding that determining when a licence is no longer required is an important outstanding issue. This issue has environmental, financial security, and socio-economic implications. Because most mines that opened after the MVRMA was passed have not yet closed, questions remain about if and when a licence is no longer required. We expect these questions will be resolved as mines in the Mackenzie Valley are closed and reclaimed.	We recommend that in making a decision on the Type A vs Type B licence for the Cantung Mine, the Board consider whether its decision has any implications on future decisions about when a licence is no longer needed.	
4	Type A vs Type B licences	Under the heading “Continuing to require a Type A Licence is conceptually logical” the GNWT says the more rigorous Type A requirements make sense for the greater liabilities of a mine.	Although Type A licences typically have more demanding requirements, this is not always the case, and we are not aware of anything that requires Type A licences to have more rigorous conditions. The requirements of Type A or Type B licences will be scaled to the project and based	NATC agrees the licences are scalable, and related decision making needs to be based on evidence presented.

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			on the evidence generated during the licensing proceeding.	
5	Water Licence Criteria: Alteration of flow or storage by means of dams or dikes	In its comments on NATCL's water licence application (CIRNAC Comment 1), CIRNAC compared the capacity of the tailings containment areas to water licence criterion 2(5) of Schedule V. This criterion is for the alteration of flow or storage by means of dams or dikes. The criterion says that a Type A licence is required if storage of a quantity of water is greater than 60,000 m3 for off-stream or instream storage. (Note that this is the criterion for both Mining and Milling and Industrial undertakings.) We note that CIRNAC compared the entire quantity of tailings to this criterion, even though the criterion is clearly about water. It is our understanding that the capacities of the Cantung TCAs (e.g., 45,000 m3 for TCA1, etc.) refers to the combination of any solid tailings and water in the TCAs, and that most of the volume is solid. (This criteria should not be confused with the Canadian Dam Association definition of a dam, which refers to the impoundment of 30,000 m3 of "liquid", whereas the Schedules in the Mackenzie Valley Federal Areas Water Regulations refer to volumes of water.)	In general, at mining or milling or industrial undertakings, the volumes in the criteria for alteration of flow or storage by means of dams or dikes should be compared to the quantity of water, not the total quantity of solids, water, and wastewater.	TG's understanding is correct: the TCA's are not water-holding structures, and the capacity of the TCAs refers to the amount of tailings stored therein.
6	Licence criteria: direct use of water	Precipitation, snowmelt, and process water that is entrained in or on the surface of tailings could be considered "water" or "waste", and may vary by project and whether the tailings facility is operational or successfully closed. At some projects, water entrained in tailings will meet the definition of a waste, especially during operations. Snowmelt and runoff that is on the surface may or may not be considered a waste, again depending in part on its characteristics. If closed tailings facilities have water (whether entrained or on the surface) that is very "clean", this water may not meet the definition of waste. Determining whether precipitation and snowmelt in or on tailings facilities is a waste may	In general, when considering licensing criteria for tailings facilities, we recommend that the Board consider whether precipitation, snowmelt and process water in and on tailings is a waste or water. This will then dictate which licensing criteria to consider.	

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		depend not only on its characteristics, but on the uses of the receiving waters. This is because the definition of waste refers to whether substances would be detrimental to its use by people or by any animal, fish or plant. For clarity, we are not commenting on the specifics of whether the Cantung TCAs contain waste or water or both. The determination of whether precipitation, snowmelt and process water in or on tailings facilities is a waste or water will be necessary in order to apply the water licensing criteria. Presumably, if the definition of a waste is not met, then the precipitation/snowmelt/process water is considered "water". In that case the criteria for alteration of flow (as discussed above) or for direct water use must be considered. The issue of what constitutes a "direct use of water' in relation to licence criteria is currently under review by the MVLWB and we have already commented on that issue.		
7	Water Licence Criteria: Direct water use	To further complicate the licensing criteria for closed tailings facilities, the Boards may need to consider whether a tailings facility continues to be a waste management structure after successful closure (i.e., after closure criteria are met). Or, after successful closure, will tailings structures be considered part of the environment? If so, then the water licensing criteria for storage and alteration of flow may no longer apply, because water is not being stored, it is passing through the environment. If closed tailings structures are not part of the environment, then the tailings are perpetually considered a waste, and any tailings that erode into receiving waters will be considered a deposit of waste. Some of these considerations will also apply to closed waste rock facilities. The regulations appear to set up a complicated decision-making process regarding licensing criteria for closed mines.	In making future determinations related to water licence criteria, the Boards may need to consider whether a successfully closed tailings facility is a waste management structure or part of the receiving environment. This issue requires more discussion and engagement.	

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8	Liquefaction of tailings	In its submission, the GNWT says that the tailings are a waste in part because of the potential for liquefaction. The post-closure risk of tailings liquefaction is an important consideration at Cantung and other sites. It is not clear how this risk should be considered in relation to water licence criteria. If tailings in a closed facility have a risk of liquefaction, does this automatically mean they are a waste, and therefore a licence will always be needed? If so, how high does the risk of liquefaction have to be? On the other hand, if the potential for liquefaction does NOT render the tailings a waste, and a licence is eventually no longer needed, will there be proper oversight of the residual risk?	We trust the Board will take great care in considering what factors determine whether tailings are a waste. These determinations may have far-reaching impacts on the regulation of present and future projects.	While post-closure risk and related oversight is of utmost importance, closure and post-closure aspects are not the subject of this proceeding.
9	Ditches	We note that NATCL's submission indicates that there are ditches around the tailings facility. In general, ditches that contain water (as opposed to wastewater) alter the flow of that water. Therefore, the quantity of water diverted by any ditches may be considered a water use. If that is the case, consideration needs to be given to whether this water use is relevant to water licensing criteria.	The Board should consider whether diversion of water with ditches is a water use, as it relates to water licensing criteria.	
10	Clarity in the regulations	There is uncertainty and lack of clarity in the regulations regarding several of the issues described above. Some issues may be complex and require extensive consideration, others may be straightforward to clarify.	We continue to call on GNWT and the federal government to take a proactive approach and to come together with Indigenous Government partners to review and, where necessary and appropriate, amend existing regulations for clarity, consistency, and effectiveness, and to adapt them to better meet the needs of our communities as well as those of industry. This can be done in a manner that will drive investment in our region while protecting our lands and resources for present and future generations. We believe there are practical regulatory adjustments that would have broad support and move forward efficiently. As we have said, Tłı̨chǫ Government is ready to collaborate on this important work.	

No.	Topic	Reviewer Comment	Reviewer Recommendation	Proponent Response
Fisheries and Oceans Canada (DFO) - Ms. Anna-Maija LaFlamme				
1	Cantung Mine - Care and Maintenance	Fisheries and Oceans Canada has reviewed the Cantung Mine - Care and Maintenance: Legal Interpretation, file number: MV2023L2-0001, in accordance with our mandate and has comments at this time.	DFO has no comments or recommendations at this time.	Noted.
NWT & Nunavut Chamber of Mines - Mr. executivedirector@miningnorth.com Hoefer				
1	Response from Chamber of Mines re Cantung Mine Water License Legal Interpretation	Re Cantung Mine Water License Legal Interpretation	We support the board on both questions.	NATC thanks the Chamber of Mines for their careful consideration of submissions and for their input into this proceeding. Please see attached reply from NATC.
North American Tungsten (NATCL) - Cantung - Todd Martin				
1		See attached	See attached	
2		Response from NATCL to Comments and Recommendations	See attached	

NWT & NUNAVUT CHAMBER OF MINES

May 14, 2024

Dr. Kathy Racher
Executive Director
Mackenzie Valley Land and Water Board
4922 - 48th Street
Yellowknife NT X1A 2P6

Dear Dr. Racher:

Re: Cantung Mine – Care and Maintenance – Water Licence Application (MV2023L2-0001)

We understand that a 5-day extension request has been granted by Board staff to comment on this file. Please accept our comments below.

It is our understanding that the Type A licence for the past producing Cantung mine site is expiring and the site needs relicensing. Further, North American Tungsten Corp has applied for a Type B Water License for the use of water or deposit of waste. Comments are being sought on two questions related to a legal interpretation of the LWB Boards' jurisdiction:

> **a) Does a LWB 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 licensing criteria under the regulations, and will no longer exceed type A licensing criteria?**

Yes.

The LWB only has the jurisdiction conferred on it by statute – nothing more. The LWB's jurisdiction to issue type A and B licences flows from the *MVRMA* and the *Waters Act*, SNWT 2014, c. 18, in federal and non-federal areas, respectively.

Section 72.03 of the MVRMA, titled "Issuance", states:

> 72.03 (1) Subject to this section, a board may issue, **in accordance with the criteria set out in the regulations made under paragraph 90.3(1)(c), type A licences and type B licences permitting the applicant for the licence** … to **use waters or deposit waste**, or both, in a federal area in connection with the operation of an appurtenant undertaking and in accordance with the conditions specified in the licence.

Similarly, section 26 of the *Waters Act*, titled "Issue of Licences", states:

> 26. (1) Subject to this section, the Board may issue, **in accordance with the criteria set out in the regulations made under paragraph 63(1)(c), type A licences and type B licences permitting the applicant for the licence** … to **use waters or deposit waste**, or both, in connection with the operation of the appurtenant undertaking and in accordance with the conditions specified in the licence.

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Accordingly, the LWB's jurisdiction to issue type A and B licences for the use of water or deposit of waste is determined by the criteria set out in the regulations - and by those criteria alone. Any other considerations are irrelevant and reliance on any other considerations beyond those in the regulations would be unreasonable and subject to being overturned on judicial review.

The applicable regulations under paragraph 90.13(1)(c) of the *MVRMA* and paragraph 63(1)(c) of the *Waters Act* are the *Mackenzie Valley Federal Areas Waters Regulations* and the *Waters Regulations*, respectively. Both sets of regulations contain clear thresholds delineating criteria for type A and B licences for the use of water or deposit of waste.

Section 8 of the *Mackenzie Valley Federal Areas Waters Regulations*, titled "Licencing Criteria" states:

> 8 (1) Subject to subsection (2), a licence issued under subsection 72.03(1) of the Act **shall be a type B licence for one or more uses of water or deposits of waste** set out in column I of any of Schedules IV to VIII, if any one of those uses or deposits
>
> > (a) meets a criterion set out in column III thereof; or
> >
> > (b) meets a criterion set out in column II thereof, but does not meet the requirements of paragraphs 5(1)(a) and (b).
>
> (2) A licence issued under subsection 72.03(1) of the Act **shall be a type A licence for one or more uses of water or deposits of waste** set out in column I of any of Schedules IV to VIII, if any one of those uses or deposits meets a criterion set out in column IV thereof.

Similarly, section 7 of the *Waters Regulations*, titled "Licencing Criteria", states:

> 7. (1) Subject to subsection (2), a licence issued under subsection 26(1) of the Act **shall be a type B licence for one or more uses of water or deposits of waste** set out in column I of any of Schedules D to H, where any one of those uses or deposits
>
> > (a) meets a criterion set out in column III of the Schedules; or
> >
> > (b) meets a criterion set out in column II of the Schedules, but does not meet the requirements of paragraphs 4(1)(a) and (b).
>
> (2) A licence issued under subsection 26(1) of the Act **shall be a type A licence for one or more uses of water or deposits of waste** set out in column I of any of Schedules D to H, where any one of those uses or deposits meets a criterion set out in column IV of those Schedules.

These provisions are clear and reference objective criteria.

If an application for a use of water or deposit of waste meets the criteria in the Schedules to each set of regulations for a type B licence, the board shall issue a type B licence.

If an application for a use of water or deposit of waste meets the criteria in the Schedules to each set of regulations for a type A licence, the board shall issue a type A licence.

The analysis is no more complicated than this.

There is nothing in either set of regulations that ties the criteria for issuance of a type A or B licence to closure plans, the perceived risk of the project associated with the deposit or use, or any other consideration. If GNWT or CIRNAC wishes to introduce additional criteria or thresholds for determining whether a type A or B licence is required beyond whether a use or deposit exceeds the criteria in the Schedules to the regulations, their remedy is to amend the regulations for all applicants, and not to unduly complicate the licencing process for one single applicant, as is occurring in this case.

A licensee is entitled to have its application considered – and the LWBs are legally required to consider that application - according to the objective criteria mandated by the legislation and the associated regulations. Introducing any other consideration is beyond the jurisdiction of the LWBs and unduly complicates what is already a complex licencing process. Fulfilling the LWB's mandate of managing resources in an optimal way for all residents of the Mackenzie Valley requires the application of clear, consistent and objective criteria that apply equally to all licence applicants.

b) Based on your response to question (a), does the MVLWB have the jurisdiction to issue a type B licence to NATCL in response to its Application?

We support the Board's ability to issue a Type B Water License for the past producing Cantung mine site pursuant to the analysis above and for the following reasons:

- Once a Type A, does not mean always a Type A. The Board should be able to assess and make the decision on whether a proponent can reduce to a Type B Water License from a Type A, if the deposit or use only requires a Type B License. Match the license to the objective criteria in the regulations.
- If a site no longer requires a deposit or use that triggers a Type A Water License, issuance of a Type B License is the only legally defensible result.
- In the case of Cantung, should the receiver find a new purchaser who wishes to put the mine back into production, and that activity requires a Type A License, then that new owner must secure a Type A License.

Yours truly,

NWT & Nunavut Chamber of Mines

Gary Vivian
Vice-chair, Chamber of Mines NWT Regulatory Working Group

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May 21, 2024

Dr. Kathy Racher
Executive Director
Mackenzie Valley Land and Water Board
4922 - 48th Street
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Dear Dr. Racher:

Cantung Mine – Care and Maintenance – Water Licence Application (MV2023L2-0001)– Legal Interpretation

On March 14, 2023, the Mackenzie Valley Land and Water Board (MVLWB) received the Application for type B Water Licence (Licence) MV2023L2-0001 for Care and Maintenance activities at the Cantung Mine site from North American Tungsten Corporation Ltd. (NATCL). The Application was sent for public review on the MVLWB's Online Review System on March 24, 2023. Comments and recommendations on the Application were received on May 19, 2023, with responses from NATCL received on June 06, 2023. On November 20, 2023, the Government of the Northwest Territories – Department of Environment and Climate Change (GNWT-ECC) received an information request (IR) as a result of the comments submitted by GNWT-ECC, NATCL and Crown Indigenous Relations and Northern Affairs Canada (CIRNAC) concerning the interpretation of legislation in respect of the classification of Licence. GNWT-ECC. CIRNAC, and NATCL all submitted legal interpretations to the MVLWB on February 23, 2024.

On April 04, 2024, the MVLWB circulated the three legal interpretations for public review and comment. GNWT-ECC responds to the public review for NATCL's submission as follows:

GNWT-ECC comments on NATCL's Cover letter

1. MVLWB's legal advice and the competing interests of procedural fairness

GNWT-ECC agrees with NATCL that the MVLWB should publicly disclose any legal advice it has received that is relevant to any discretion available to MVLWB regarding the determination to be made. GNWT-ECC agrees that the MVLWB is not required to publicly disclose the full legal opinion.

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2. Restrictions on who is permitted to make submissions in connection with NATC's water licence application

GNWT-ECC agrees that any legal determination by a land and water board should be made through a request for ruling for a specific water licence or land use permit application rather than through a more general review item. Neither the governing legislation, nor MVLWB's Rules of Procedure Including Public Hearings, expressly empower a land and water board to make a legal determination applicable to more than the application(s) before the land and water board.

GNWT-ECC comments on NATCL's Appendix A

1. Question A Section IV

GNWT-ECC agrees with the modern principles of statutory interpretation set out by NATCL.

GNWT-ECC also acknowledges that a mine site that has met its closure criteria could be issued a type B licence thereafter, which would be required so long as any waste continues, or may continue, to enter receiving waters. As Cantung Mine has not met any closure criteria, this does not apply to Cantung Mine.

GNWT-ECC submits that NATCL has not actually applied the modern principles of statutory interpretation appropriately from the final paragraph of page A4 to the middle of page A5:

- In the final paragraph of page A4, NATCL assumes that the criterion for a type A vs. type B licence on the basis of deposit of waste is limited to only waste generated by the mine during the term of the licence to be issued. As noted in GNWT-ECC's response to the review item questions, s. 6(2)(f) and 8 of the *Mackenzie Valley Federal Areas Waters Regulations* do not indicate that only waste generated by the mine during the term of the licence to be issued is relevant. Taking s. 72.01(1) of the *MVRMA* into account and applying the modern principles of statutory interpretation to these sections leads to the conclusion that whether waste will or may be deposited to receiving waters is the key point. Consequently, to the extent that the waste will or may be deposited to receiving waters, 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.
- At the top of page A5, NATCL claims that the conditions in a type B licence would not be less effective than the conditions in a type A licence and implies, by not noting any other factors, that this is the only relevant factor to assess in determining whether the objectives of the *MVRMA* are met. These claims are flawed for the following reasons:

- The effectiveness of the conditions included in a licence is not the only factor to take into account in assessing whether the objectives of the *MVRMA* are met. As noted in GNWT-ECC's response to the review item questions, the less robust process for a type B licence is also relevant.
- Given that type A licences for mines typically include various monitoring requirements whereas type B licences may not, the effectiveness of conditions in a type A licence are typically better scrutinized. If the monitoring reveals shortcomings in one or more conditions, the applicable land and water board can amend the applicable condition(s) in the licence in the public interest under s.72.12(1)(b)(iii) of the *MVRMA* or when the licence is renewed. NATC's claim that "there is no reason" conditions in a type B licence in this context would be less effective than conditions in a type A licence is therefore inaccurate.

- NATCL's flawed conclusion in the final paragraph under heading IV that the ordinary meaning of the relevant provisions in the *MVRMA* and *MVFAWR* is the correct meaning is based upon the aforementioned shortcomings in NATCL's excessively narrow analysis. Had NATCL actually applied the modern principles of statutory interpretation appropriately, in the broader way described in GNWT-ECC's response to the review item questions, it is difficult to see how NATCL could have reached the conclusion that a type B licence could be issued for care and maintenance of Cantung Mine.

2. Question A Section V

Regarding the first paragraph of Section V of NATCL's response to the review item questions, GNWT-ECC notes that the applicable provisions under federal legislation for federal areas and territorial legislation for lands outside a federal area are analogous. As there are no material differences, GNWT-ECC's letter is relevant. Further, GNWT-ECC's response to the review item questions deals specifically with the Cantung Mine context (federal legislation for federal areas).

The second paragraph of Section V of NATCL's response to the review item questions misses the key point that it is deposit of waste to receiving waters or that may be deposited to receiving waters that is at issue under s. 72.01(1) of the *MVRMA*, not future vs previous generation of waste. Unremediated waste present from past operation of a mine is waste that may be deposited to receiving waters, as is the case at Cantung Mine.

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3. Question A Section V

The Colomac Mine and Mount Nansen examples given by NATCL are distinguishable from and not relevant to the context of care and maintenance of Cantung Mine.

Colomac Mine

Colomac Mine was a remediation project carried out by CARD, not care and maintenance of a mine that may resume active mining and milling. GNWT-ECC reiterates the following from its response to the review item questions, which is equally applicable to care and maintenance as to closure of a mine:

> The GNWT-ECC also agrees that an abandoned mine remediation project is appropriately classified as a miscellaneous undertaking. When a mine is abandoned, a government will be responsible for the remediation of that mine. That government never produced minerals from that mine. It is therefore inappropriate to treat mine remediation as being analogous for the purpose of classifying the undertaking to activities carried out by an operator as part of the closure stage of a mine.

Colomac Mine was appropriately classified by the WLWB as a miscellaneous undertaking. As a type A licence is never required on the basis of deposit of waste for a miscellaneous undertaking, the miscellaneous undertaking context provides no assistance in determining whether a type A or type B licence is required for a mining and milling undertaking on the basis of deposit of waste.

Mount Nansen Mine

The Mount Nansen Mine chronology involved DIAND taking control of the site with the intention of eventually remediating the site; carrying out care and maintenance in the interim. In the *MVRMA* context, the undertaking would not have been a mining and milling undertaking during this period and presumably would have been a miscellaneous undertaking. Mount Nansen Mine was then sold for the purpose of carrying out remediation and closure, not for resumption of active mining and milling. In the *MVRMA* context, the undertaking would have continued to be a miscellaneous undertaking for which a type A licence on the basis of deposit of waste could not be required. This is another miscellaneous undertaking context that provides no assistance in determining whether a type A or type B licence is required for a mining and milling undertaking on the basis of deposit of waste.

Question B

NATCL's response to question B reiterates points made in its response to Question A and does not add any new point. GNWT-ECC reiterates the applicable comments above where NATCL reiterates the same point in response to this question.

If you require further information, please contact Bill Pain, Environmental Scientist, Regulatory and Permitting, at Bill_Pain@gov.nt.ca.

Sincerely,

Rick Walbourne

Rick Walbourne
Director
Regulatory and Permitting Division
Environment and Climate Change

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WATSON LAKE
May 21, 2024

SENT VIA EMAIL

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

Dear Ms. Racher:

RE: MV2023L2-0001 North American Tungsten Ltd. Care and Maintenance Water Licence Application — Information Request #3 ("IR#3")

We have had the opportunity to review the submissions of Crown-Indigenous Relations and Northern Affairs ("**CIRNAC**"), the Government of the Northwest Territories ("**GNWT**") and the North American Tungsten Corporation ("**NATC**") in relation to IR#3.

It is Liard First Nation's ("**LFN**") position that the Mackenzie Valley Land and Water Board (the "**Board**") does not have jurisdiction to issue:

A. 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 licensing criteria under the regulations, and will no longer exceed type A licensing criteria; or
B. A type B licence to NATC in response to its renewal application.

Firstly, we think that NATC's language that the undertaking "will no longer exceed Type A licencing criteria" is problematic given there are legacy issues that do exceed Type A licencing criteria. Secondly, IR#3 is overly narrow and fails to ask the important question of whether a Type B licence would make sense in the context of this Project at this time. It implies that project splitting mid-operational stage could be considered appropriate under the broader legislative scheme.

It is deeply inappropriate that NATC is making legal arguments to minimize their licensing responsibilities when it is a party with no remaining specific interest, and it is clear that Canada is responsible for the remediation of Cantung Mine (the "**Project**"). NATC is a corporate interloper with interests that diverge from the public interest looking to minimize responsibility and costs, and they are standing in for Canada who purports to disagree with their approach. There are two arguments being presented on behalf of one player. Not only should Canada's agent not be seeking to avoid Federal ministerial oversight, the Board should not be put in a position where it is forced to render a decision in the face of these conflicts of interest.

LFN has previously raised its concerns about this issue of Canada using a corporate stand-in to mitigate its clear and direct responsibilities as the proponent in this situation, including responsibilities related to consultation and accommodation with impacted Indigenous people. If Canada would appropriately embrace its clear responsibilities for this clean up, it would not continue to have a shell corporation with no public trust responsibilities leading the charge to limit both licensing and ministerial decision-making. It is deeply problematic that public funds are paying for their arguments.

Type A water licenses exist as a category for a reason. It takes the decision-making over whether a public hearing occurs out of the hands of the Board and makes it a requirement. A Type A licence *requires* ministerial approval, whereas a type B license only requires ministerial approval in circumstances left up to the Boards discretion. Ministerial sign-off **is essential** in a situation like the Project, where impacts to Indigenous rights and title are clear and well-documented; the Minister **should** be forced to weigh in on the sufficiency of consultation in this matter and the extent to which Crown reconciliation fulfills federal policy guidance. In particular, the work of the Board concentrates on valued components, and not specifically in impacts to Aboriginal rights and title – an aspect of this project whose assessment should be placed on the Crown.

No one is more aware than Indigenous peoples that past legacies continue to matter today. The Project is an existing mine, still in its operational phase, and a Type A license should continue and be considered applicable to its past work. NATC is asking the Board to draw a curtain over the past Project works and treat the next phase as a new day. We think this ignores the Board's responsibility to consider the cumulative impacts of a project and draws a line that lives only in NATC's imagination. Avoiding having to properly recognize and address their Cantung legacy issues, as NATC appears to want to do, also makes it more likely that the colonial and corporate approaches that brought about this and other mine failures in Kaska territory are likely to be repeated during remediation instead of being reversed and reconciled.

I. Summary Answers

1. The Board's Jurisdiction

The application under review is for the renewal of a type A water licence with updates to reflect the changes on site since 2015. This includes a reduction in water use and a cessation of mining and milling activities. However, it also includes the accumulated deposit of waste from the construction and operations of the mine which are still subject to the terms and conditions of the original type A licence. This includes a comprehensive closure and reclamation process that has not yet been fulfilled. The Project remains in the operational phase because it has not yet begun final closure activities.

The Mackenzie Valley Resource Management Act ("**MVRMA**"), Mackenzie Valley Federal Areas Waters Regulations ("**MVFAWR**"), and Exemption List Regulations govern whether a water licence is required and, if required, what type of water licence is triggered.[1] The classification of an undertaking is not solely determinative of which type of licence is required. The type of

[1] *Mackenzie Valley Resource Management Act*, SC 1998 c 25 [MVRMA]; Mackenzie Valley Federal Areas Waters Regulations, SOR/93-303 [MVFAWR]; Exemption List Regulations, SOR/99-103.

licence is also determined by the volume of water used or waste deposited and the method by which the waste is deposited and disposed, as set out in the MVFAWR Schedules.

A change in licence class can only occur under a new application (upon expiry or cancellation of the existing water licence) and not through an amendment or renewal of an existing water licence. There are good reasons for this restriction on the Board's jurisdiction. In part, it is a matter of procedural fairness and natural justice; LFN and other Indigenous groups have relied for years now on positions set out in relation to the initial Type A water licence that have set expectations on a going forward basis.

2. Project Scope does not meet the Criteria for a Type B Water Licence

The waste generated while the Project's mining and milling occurred has been deposited and stored on site, through the use of tailings containment dams. The volume of tailings deposited and stored at the site remains the same as when the site was operational; it has not been removed from site, covered, or otherwise remediated. Placing the mine into care and maintenance status, and the expiry of their type A water licence, does not eliminate the need to account for the presence of the waste deposited from their mining and milling activities, and the tailings containment dams used to store the waste onsite that were previously authorized.

As traditional users of the valley and the flats, those tailings and the waste holding are primary concerns to us. Given this Projects persisting use of storage of waste by dams, NATCL requires a type A water licence as per Schedule V of the Mackenzie Valley Federal Areas Waters Regulations, specifically Column IV, Item 2(5).

Both federal and territorial governments opine that the Board should issue a type A water licence for the continued care and maintenance activities associated with the Project. Further, the original type A licence was "forward looking" and included the care and maintenance phase of the Project. Now, NATC urges that the type A licence cease and be replaced with a new "forward looking" type B licence. LFN believes this should not occur until the work required under the original type A licence is completed.

II. LFN Response to GNWT's IR#3 Positions and NATC's Response

Both federal and territorial governments opine that the board should issue a type A water licence for the continued care and maintenance activities associated with the Project. Canada's agent, NATC, disagrees and refutes the arguments advanced by the GNWT and, ostensibly, CIRNAC.

With respect to the GNWT's argument, NATC makes two arguments:

1. That applications must be forward-looking; and
2. That GNWT's reference to territorial and not federal regulations nullify its argument.

Both arguments are flawed.

1. The MVRMA and the Board's assessment is not only "forward-looking"

NATC Incorrectly Uses Principles of Statutory Interpretation

NATC relies on the "ordinary meaning rule" in their response, as the starting point of the modern principle.[2] The modern principle is the official approach to statutory interpretation in Canada and involves reading the words of an act *in their entire context*.[3] The "ordinary meaning rule" that NATC cites as the starting point of the modern principle requires this contextual approach.[4]

The definition NATC relies on of the "ordinary meaning rule" explicitly states that it does not stop at simply reading words in their grammatical and ordinary sense and that interpreters "are obliged" to consider the broader context. Yet, NATC uses the ordinary sense of the words alone to further their arguments. For example, they rely only on the "ordinary meaning" or the "words as they are commonly used" to support their "forward looking" argument and their argument that a type A licence can become a type B licence. They reference the broader context of the MVLWB objectives yet continue to only consider the "ordinary meaning" of the words to support that a type B license can be given to a type A project.[5] This is an incorrect use of the modern principle and an attempt to use a more textual approach under the guise of the modern principle.

NATC argues that the language of sections 72 and 72.01 of MVRMA is forward looking and only prohibits the present and future use of water or deposit of waste without a licence.[6] Sections 72 and 72.01 of MVRMA set out general prohibitions against the use of waters and the depositing of waste in waters (or in a place that could enter waters) in federal water management areas. NATC assert that this means that a decision-maker must ignore all previous water uses and waste deposits. This argument fails on two grounds:

1. It does not make logical sense given the nature of statutory prohibitions; and
2. It does not consider the broader legislative context, which is required by both the "ordinary meaning rule" and the widely accepted modern approach to statutory interpretation.

The purpose of statutory prohibitions in this context is to prevent conduct from occurring without the required licences and safeguards. These prohibitions have been in place from the date that the MVRMA came into force in 1998. Additionally, prohibitions and their related licences were even carried over into the MVRMA legislative regime from *The Northwest Territories Waters Act* if they existed on December 22, 1998.[7] The prohibitions not only apply today and moving forward, but they have also applied throughout the entirety of their existence as legislative

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[2] MV2023L2-0001, NATC Response to IR3 at pg. A2.
[3] Hutchinson, Cameron, *The Modern Principle of Statutory Interpretation* (2002), 2nd Ed, LexisNexis Canada Inc; *Rizzo & Rizzo Shoes Ltd, Re*, [1998] 1 S.C.R. 27 (SCC) at para 21, recently followed in *R c Basque*, 2023 SCC 18 at para 52.
[4] Hutchinson, Cameron, *The Modern Principle of Statutory Interpretation* (2002), 2nd Ed, LexisNexis Canada Inc.
[5] MV2023L2-0001, NATC Response to IR3 at pgs. A5.
[6] MV2023L2-0001, NATC Response to IR3 at pgs. A5-A6.
[7] MVRMA, at s. 153.

prohibitions. Limitation periods address the retroactive nature of statutory prohibitions and offences.

NATC's argument that MVRMA only considers the "present and future" impacts on water and surrounding areas is completely divorced from the context of the entire legislative regime. Their interpretation of MVRMA is counter to the very principle of statutory interpretation that NATC relies on in their response.[8] It is counter to the modern principle, which is the accepted Canadian statutory interpretation approach in most circumstances.[9]

One of the purposes of the MVRMA is to establish various boards, including the MVLWB, to enable Mackenzie Valley residents to participate in resource management for the benefit of the residents and other Canadians.[10] This is also reflected in the objectives of the MVLWB, which are to "provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of the Mackenzie Valley".[11]

The MVRMA includes cumulative impacts in several of its processes. While cumulative impacts are not explicitly ascribed in the MVFAWR, they are part of the preliminary screening process of a licence[12] and a general requirement of the Act[13]. Because the applicant is applying to continue works associated with a continuing project, the project's accumulated body of risk still applies. This risk component is what lies behind the GNWT's main argument.

The objectives speak to the public interest being central to the legislative regime that this water licence renewal falls under. Additionally, an assessment and consideration of cumulative impacts is woven throughout MVRMA processes. NATC cites the MVLWB objective and uses it to support their statutory interpretation that the "ordinary meaning" of the MVRMA objectives supports that a type B licence can be used for a previously type A project.[14] This is incorrect and does not take into account the public interest or broader land management and conservation goals of the MVRMA and MVLWB. 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.

A main component of the terms and conditions of the type A licence was the development of a closure and reclamation plan in collaboration with affected Indigenous groups. This is an outstanding requirement that NATC has yet to fulfil. The GNWT makes the point that a project approved under specific conditions should see itself closed off under the same conditions or

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[8] See pg. A2 of MV2023L2-0001, NATC Response to IR3.
[9] NATC relies on the ordinary meaning rule throughout their February 23, 2024, response and is set out by NATC at: MV2023L2-0001, NATC Response to IR3 at pg. A2. See Hutchinson, Cameron, *The Modern Principle of Statutory Interpretation* (2002), 2nd Ed, LexisNexis Canada Inc; *Rizzo & Rizzo Shoes Ltd, Re*, [1998] 1 S.C.R. 27 (SCC) at para 21, recently followed in *R c Basque*, 2023 SCC 18 at para 52.
[10] MVRMA, at s. 9.1.
[11] MVRMA, at s. 101.1(1). [emphasis added]
[12] This is a clear instance where the Board should apply consistency in its interpretation of its mandate and decisions. It is a clear intent of the legislation that regulatory authorities take a thorough look and consideration of environmental risk when making their decisions. This cannot be done effectively absent consideration of cumulative impacts and risks to valued components, including those risks that are project-related and those that are not project-related.
[13] Act at s. 146.
[14] MV2023L2-0001, NATC Response to IR3 at pg. A5.

standards. This perspective appears consistent with the intent of the broader regulatory scheme as discussed above.

2. GNWT's reference to territorial regulations does not nullify their argument

Firstly, NATC relies on an outdated response from the GNWT. The GNWT's current response has no reference to territorial regulations and relies purely on the federal MVFAWR. Two sections within those regulations support the interpretation that any continued deposition or storage of waste associated with the ongoing project requires a type A licence. NATC does not address this point.

Regarding NATC's refutation of the federal arguments, they also rely on forward-looking considerations. NATC claims it is irrelevant what went on at the site during operations; only the planned water use and activities covered under the new application for care and maintenance work should be considered. CIRNAC asserts that this maintenance is part of the Project's operation phase and part of the Project's closure and reclamation phase. As such, activities performed should be covered by the same type A licence.

III. LFN Response to CIRNAC's IR#3 Positions and NATC's Response

1. The Project's Tailing Containment Areas require a type A licence

NATC's Engineer of Record ("**EOR**") refutes CIRNACs argument over the nature of the Tailing Containment Areas ("**TCAs**") dam and storage of waste deposits. However, there is no consideration as to whether the impounding and drainage of water in the TCAs constitutes an "other" form of storage. If so, a type A licence is triggered. Prior documentation of existing conditions at the Mine Site included mention of overflow runoff water from the underground mine to the surface. It is not clear that this continued water flow and waste deposition was factored into the GNWT, CIRNAC, or NATCL responses.

There is also the possibility that the project's selection of a TCA on the embankment of the Flat River constitutes a disruption of the riverbank. Under s. 51 of MVRMA, the definition of 'use' includes any alteration of the bed or bank of a river, whether or not the body of water is seasonal. According to Schedule V and VIII of the MVFAWR (e.g., what licence type is required), a dam that alters flow or storage will trigger a type A licence for "all other alterations or storage". Use of the Flat River riverbank as part of the TCA dam structure ought to qualify as such an alteration.

CIRNAC identifies an exception to this if the licencing board has been convinced that project risks no longer warrant the same degree of oversight. Should this occur, NATC would have to apply for an amendment and then follow that process. CIRNAC is firm in its view that changing a licence from mining and milling to miscellaneous can only occur via a new licence application (via expiration or cancellation of an existing licence). Neither case applies to NATC, who are applying for a renewal of their latest licence and not as a new application or classification.

IV. LFNs Regulatory Perspective

LFN supports the arguments advanced by the GNWT and CIRNAC that a type A licence is most appropriate for the application under review. LFN has additional concerns related to this matter that we assert are relevant for the Board's consideration.

1. **Procedural fairness and consistency**

NATCL makes use of a 'reverse' argument that a type A water licence would need to be issued in circumstances where type B licence triggers are exceeded: if a Type B can be raised to a Type A, then it makes sense that a Type A can be reduced to a Type B. CIRNAC presented counterpoints to this argument. However, applying the notion of consistency to the Board's decisions, NATC's scenario does raise the question of how could a Type B licence be downgraded so no licence is required? The reasonings that would allow for one licence to be downgraded should apply equally for another licence to be downgraded.

If a project advanced far enough in its closure and reclamation planning that it no longer used water and had demonstrated good diligence at continued reclamation, must it still require a water licence to fulfil its continued obligations? According to the triggers, no. But clearly the intent behind the regulatory process supports a licence. Licencing terms and conditions are meant to provide a sufficiently robust structure to manage environmental risks over the long term. This is not possible if terms and conditions are lessened before the risks have been managed.

2. **The Legislative and regulatory regime is not only forward looking**

The main basis of NATC's reasoning for requesting a type B licence and not a type A appears to hinge on its assertion that its planned activities – care and maintenance activities – will not use sufficient water or deposit enough new waste to warrant a type A licence. They are effectively approaching the new licence as a fresh start based on planned and anticipated activities. LFN disagrees with this approach and does not think it is in keeping with the intent of the regulatory scheme (see section II.1.1 on the "forward-looking" argument). A project must be considered in its entirety. A project/application must be considered alongside its corresponding risks to the environment, residents of the Mackenzie Valley, and affected Indigenous groups.

In a similar vein, the current application is for care and maintenance activities that are part of the operational phase of the Project. Within the recognized phases of a project, the operational phase includes everything from the end of construction to the start of final closure and reclamation. The planning and development of a closure and reclamation plan are required components of the operational phase and are intended to be iterative works done in collaboration with affected parties and Indigenous groups. This work has not yet been completed and remains an outstanding component of the operational phase and from the original type A licence. Another aspect of the operational phase is the diligent management of the site and its environmental risks up until the point that final closure and reclamation commences. The undertakings remain aspects of the operational phase of the Project and therefore part of the collective activities that have created the current levels of environmental impacts and waste depositions.

3. **Issuing a type B licence on renewal of a type A licence is project-splitting**

To argue that the project components and undertakings can be partitioned into care and maintenance in one licence and everything else into a separate licence is akin to project-splitting. If a licence is issued exclusively for continued care and maintenance activities, where in the regulatory process is the closure and reclamation planning captured? Will NATC apply for a separate licence for that portion of the Project? Or does NATC propose a joint application with CIRNAC for a licence to continue undertaking the closure and reclamation planning process? Project-splitting is actively discouraged in the regulatory scheme, including during the application scoping process and environmental impact review process. Efforts to

compartmentalize project components should also be discouraged in the review of the current water licence application.

4. Issuing a type B licence in these circumstances reduces confidence in regulatory processes

Another procedural issue LFN has with NATC's desire for a type B licence is that it reduces confidence in regulatory safeguards. A type A licence has a higher threshold of responsibility and expectation then a type B. The proponent has already reduced the requirements under its water licence through a recent amendment in December 2022, and again through its extension request.[15] This was supported by a public review process that justified the requested changes based on evidence supplied by NATC, confirmed by CIRNAC, and cross-examined through public review. This demonstrates that the amendment process works. It is not clear in the current situation what justification exists to issue a type B licence. If there are grounds to reduce certain terms or conditions, those should be made part of the renewal application. Those grounds can then be subject to a thoughtful review by the relevant parties and intervenors to the process.

LFN believes it is overreaching to seek a different type of licence or apply for a different type of undertaking. The Project was granted a type A water licence for its operations, and it has yet to fulfil its terms and conditions under that licence. The renewal licence should pick up where the previous licence left off absent major changes to the expectations, oversight, and anticipated outcomes that come from a properly fulfilled type A water licence.

5. Environmental and Social Justice

LFN is an affected Indigenous group whose Kaska rights and title ("**Kaska rights**") have been significantly and adversely affected by the Project. LFN lacks trust and goodwill in its dealings with NATC due to a history of engagement with NATC fraught with disappointment and unfilled expectations and responsibilities. It is hard not to see the reduction to a type B licence as a slippery slope leading to more of the same. NATC's ongoing conflicted and confusing relationship with Canada makes trust and goodwill impossible, and that is a real problem for an important relationship with LFN that requires both if it is to be effective and meaningful.

a. Ministerial Oversight and Public Engagement is Critical for the Project

A type B process risks no ministerial oversight and less public engagement. A type A process requires a public hearing and ministerial oversight. This is most likely to identify relevant concerns of parties to the process and develop appropriate terms and conditions to manage them. It also means a Crown decision-maker, who is effectively the shadow-proponent, is going to have to weigh in on the sufficiency of consultation and accommodation. A type B licence does not require a public hearing or ministerial oversight; this is left to the Board's discretion. A type B process requires more effort for parties to have their concerns heard. This places more burden of proof on the parties to justify why additional terms and conditions may be warranted while simultaneously allowing a licence that is easier to amend. Additionally, it makes it harder to stay informed about the project and makes it easier for NATC – or their representatives – to make decisions unilaterally.

Kaska rights in the area have yet to be properly assessed. LFN, as a party to the process, has an expectation that the regulatory process for the new licence will provide clarity and confidence

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[15] see MV2023L2-0006.

in the remaining works leading up to final closure of the Project. It is disconcerting to imagine a regulatory process where LFNs exercises and enjoyment of Kaska rights are not brought before the Board and where specific terms and expectations surrounding an iterative closure and reclamation planning process are not updated and made part of the proceedings. LFN is concerned that a type B process will result in a less robust and just process, particularly as it relates to our assurance that remediation will result in Kaska rights resuming and remaining meaningful.

Within the current type A licence context, LFN believes the burden of proof to convince parties that a different process/licence change is warranted is the sole responsibility of NATC. This is also appropriate given it is NATC requesting the renewal. There should be no doubt amongst the regulators or affected Indigenous groups that the change is warranted, and that the environment and waters are not at risk from the requested change. NATC has argued for changes based on "the ordinary meaning of the words" in the legislation and regulations (see our response at section II.1.1). NATC has not described how its requested changes will affect outstanding components from the previous type A water licence nor made assurances that the environmental and Indigenous values in the Project area will not be affected or receive less care and attention under a type B licence.

b. A type B licence for the Project creates unwarranted risk and lacks legitimacy

For its part, LFN has concerns that the issuance of a type B licence represents a risk to existing and future valued components in the project area. This concern stems from the expectation that the proponent will have an easier time reducing the scope of its responsibilities and that LFN will have fewer opportunities to understand and participate in the oversight of the care and maintenance and remediation activities. Reconciliation relies on the expectation that specifically designed objectives and activities will result in Kaska rights exercises resuming and remaining meaningful after having been harmed and infringed for more than half a century. For that, a type A license is necessary. LFN is also 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.[16]

Since exercises of Kaska rights in the area have not yet been fully assessed, the proponent lacks the awareness and knowledge to gauge how its activities will affect Kaska rights. That combined with the lack of confidence LFN has in NATC resulting from it past corporate conduct and the potential for complications due to its conflicts of interest as Canada's 'straw man' proponent, NATC is therefore unsuited to do so. Until that situation changes, LFN should maintain its ability to be meaningfully engaged about activities occurring on site. If engagement and participation requirements are reduced by a type B license, LFN may lose the little agency it has in this process to steward its resources and protect Kaska rights through care and maintenance and effective remediation. For LFN, this represents a loss of voice in the process absent any reduction in risk. This is neither fair nor just and compounds the previously noted lack of trust and goodwill derived from NATC potential conflicts of interest.

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. In conjunction with the process that established the terms and conditions of the original licence, this makes up a large portion of a proponent's

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[16] MVRMA at s. 92.02 and s.92.03.

social licence to operate in the Mackenzie Valley. Taken together, these factors are likely to help determine the Minister's satisfaction that reconciliation of Kaska rights through sufficiently deep consultation has occurred prior to making important decisions.

Legitimacy is also an important consideration for the Board and regulators. Regulators are obliged to make sure the original terms and conditions of a licence are fulfilled prior to accepting licence changes that could lead to the easement of expectations and responsibilities of a proponent to manage risks. With the original type A licence, the Board has created an agreement on behalf of the people of the Mackenzie Valley and the Indigenous groups that use it. If those same people or Indigenous groups are not convinced that the risks to the environment or their own Indigenous rights have been dealt with responsibly, then reducing the proponent's potential accountability is a breach of this regulatory agreement, the proponent's social licence and Canada's stated intention to accomplish reconciliation.

NATC has not convinced LFN that a licence change would not adversely affect the management of LFN's exercises of Kaska rights, including LFN's ability to meaningfully participate in the closure and reclamation planning process, and a post-closure future that aligns with Kaska rights and title in the area.

There are many important Kaska rights affected by the history of undertakings at the Project. Many of these constitutionally recognized rights have not been adequately assessed and remain at risk through the care and maintenance and remediation phases of the Project. LFN does not support change in NATC's licence requirements to that result in a reduction in safety standards, public participation, or ministerial oversight on matters related to continued undertakings at the Project site and Canada's and LFN's ability to achieve reconciliation about the Cantung mine legacy. LFN therefore recommends that a type A licence remain in effect for the remaining care and maintenance components of the Project.

6. Precedence and Sufficiency of Proof

The ruling before the Board will be precedent setting for the MVLWB licencing and permitting process. Future complex projects will consider the reasons for the Board's decision and weigh it in terms of their own plans and responsibilities. LFN has a long-term sacred obligation to manage land and water to remain healthy for future generations, to contribute to a healthy environment and to have confidence that Kaska rights will resume and remain meaningful. Non-government organizations and the private sector do not have these combined responsibilities. Industry proponents are typically motivated by cost savings or the risk of fines. If a change in licencing from a type A to a type B can result in savings and less financial/legal risk to a company, they are likely to pursue it. It is therefore important that a precedent-setting decision be held up to a high level of scrutiny on behalf of the people of the Mackenzie Valley and the Indigenous groups that use it (or at least did, before they were effectively blockaded from doing so by the Project).

There remains doubt about the extent of water being used and waste generated on site between regulators and the proponent. Use of the precautionary principle is appropriate and expected of the Board to ensure that the environment remains protected at a high level and with sufficient safety checks in place. The Board should be satisfied that no doubt remains on the risks remaining with the Project and how risks are being managed. It would be inappropriate for Indigenous users of the Mackenzie Valley and for residents of the Mackenzie Valley if the precautionary principle was not used to err on the side of caution in the Board's decision.

IV. Conclusion

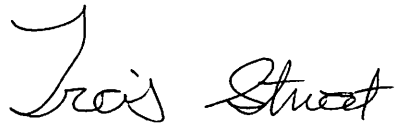
Regulators and the proponent also disagree that a type B licence can be issued in this instance. Notably, both levels of government disagree with the proponent. The Board also has made its own legal ruling in the past that legal rulings need to consider consistency with the entirety of the regulatory scheme. Consistency would suggest that the decision is made based on the entirety of the project and the remaining risk that it represents to the environment.

LFN disagrees with changing the licence from type A to a type B. Risks and outstanding terms and conditions from the original licence remain that LFN believes should be resolved prior to any significant changes in licence type or classification. LFN also has concerns that its ability to follow and comment on Project activities will be compromised by a change in licence type. LFN's foundational concerns about finally seeing Kaska rights exercises in the valley and surrounding region resumed and thereafter remaining meaningful through carefully considered remedial planning and relevant action are far less likely with a type B license.

The licence renewal can include modified terms and conditions to address Project changes and making the dramatic change to a type B licence is inappropriate in the circumstances, as outlined above.

Taken together, there is insufficient cause to support NATC's desire to have a type B licence issued for the remaining activities of the operational phase of the Project. Since this has the potential to be a precedent setting decision, LFN believes that NATC has failed to provide adequate argumentation and support to merit such a dramatic change. NATC's potential for conflicts of interest given the strange 'straw man' relationship created by CIRNAC further undermines NTC's credibility as a proponent and adds unnecessary complications and confusion about that role that would be compounded in a type B license. The Board's mandate (and agreement) to LFN and the people of the Mackenzie Valley who use it are best upheld by ensuring outstanding terms and conditions of the original type A licence are carried forward into a new type A licence at a minimum.

Liard First Nation



Travis Stewart, Lands Director

cc. Jeff Mackey, AANDC

Łíídlıı Kúé First Nation
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May 22, 2024

Dr. Kathy Racher
Executive Director
Mackenzie Valley Land and Water Board
4922 – 49th Street
Yellowknife NT X1A 2P6

Dear Dr. Racher:

RE: Cantung Mine – Care and Maintenance Water Licence Application (MV2023L2 - 0001) Information Request #3 - Łíídlıı Kúé First Nation Response Submission

Background

North American Tungsten Corporation Ltd. (NATCL) holds a type A Water Licence (MV2023L2-0006) for the Cantung Mine project, which is currently in a state of on-going care and maintenance.

NATCL has applied for a type B Water Licence (MV2023L2-0001) to continue the care and maintenance activities. Our understanding is this application would only cover care and maintenance activities and that if NATCL (or a successor) wished to recommence mining activities at the project site at some point in the future, they would need to apply for a type A water license in order to do so.

During the public review of NATCL's type B Water Licence Application, and in respective responses to Information Request #3, NATCL, Crown Indigenous Relations and Northern Affairs Canada (CIRNAC), and the Government of the Northwest Territories – Department of Environment and Climate Change (GNWT-ECC) provided different views on whether the

proposed activities required a type A or B licence, and differing views on whether the legislative framework generally permits downgrading from a type A to a type B licence.

Our understanding is that the Board intends to make a ruling on these matters in the context of the present license application, which could affect other parties throughout the Mackenzie Valley, including the Łíídlıı Kúé First Nation (LKFN).

The Mackenzie Valley Land and Water Board (the MVLWB) has requested comment from interested parties on Information Request #3 by May 14, 2024.

Information Request #3 – First Question

"Does a LWB 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 licensing criteria?"

On this first question related to jurisdiction, LKFN does not have particularly strong views on whether or not the legislative scheme prohibits changing from a type A to a type B licence during the life cycle of an applicable project. On this question, we offer the following:

1) Under section 72.15(1)(a) of the *Mackenzie Valley Resource Management Act* (MVRMA), the MVLWB has the explicit jurisdiction, where it would be in the public interest to do so, to require public hearings as part of type B licence applications (whether the application is for issuance, renewal, amendment, or cancellation of type B licences). As a matter of general principle, LKFN submits that in the context of mining and milling projects whose activities were, at one point in time, licenced as type A-level activities, regardless of whether a present application is for a type A or type B licence (and regardless of whether it is for a new licence, or a renewal/amendment/cancellation), it will very often be in the public interest to hold public hearings when the MVLWB is considering such licence applications, as such project sites will often be substantially contaminated, will often contain ongoing tailings storage, etc..
2) LKFN wishes to reinforce the critical principle that whether or not a licence in such circumstances is categorized as a type A or type B licence should have no bearing under any circumstances on the nature or extent of the conditions of the licence that speak to minimizing and avoiding adverse effects and impacts to Treaty and Aboriginal rights.
3) We wish to generally state that this Information Request #3 provides yet more compelling evidence of the need for legislative reform on this and related matters when it comes to the

lack of clarify in the MVRMA and the *Mackenzie Valley Federal Areas Water Regulations* (the Regulations).

Information Request #3 – Second Question

"Based on your response to question (a), does the MVLWB have the jurisdiction to issue a type B licence to NATCL in response to its Application?"

We have reviewed NATCL, CIRNAC and GNWT-ECC's response submissions to this question.

We note that both CIRNAC and GNWT-ECC are taking the position, for differing reasons, that the present licence is best categorized as a type A, basing their positions entirely on the activities NATCL is seeking to have licensed, and on the relevant licensing criteria set out in Schedule V of the Regulations.

We agree with and support the general consensus position among CIRNAC and GNWT-ECC that this matter is best addressed as a type A license application, however our rationale is focussed on three key reasons: the need for monitoring continuity, the requirement of Indigenous Guardians as part of the ongoing site monitoring within the water license, and the need for water discharge flexibility. LKFN strongly prefers that the environmental monitoring sites be maintained at all the current locations and frequencies for data continuity purposes to support decision-making for final closure. It is a standard expectation from LKFN for all water licenses to require local Indigenous Guardians be participants in ongoing environmental monitoring within our Traditional Lands. And in light of the highly unpredictable and widely varying volumes of precipitation (snow and rain) from year to year which is exacerbated by climate change, we see the operational flexibility provided by a Type A license as prudent from a site management and environmental protection perspective. If there ever happened to be excess water on site that risked causing the failure of the tailings facilities, we would not want water license imposed limitations to prevent the pumping of water that would avoid a more catastrophic failure of the tailings facilities or other key infrastructure on site..

We strongly recommend that a public hearing be held in the context of NATCL's application whether it proceeds as a type B application, or whether NATCL is required to re-submit a type A application. There is broad public interest – including among LKFN members – in the manner in which the ongoing activities at Cantung will be licenced. The ongoing potential for adverse environmental effects and impacts to LKFN rights and interests is substantial. Furthermore, there are historical (and ongoing) relationship issues between LKFN and the proponent, in particular related to fair, equitable and transparent contracting and procurement at the Cantung Mine site which make LKFN question the extent to which it can trust the licensee in this instance in the years to come. All things considered, it would be inappropriate and not in keeping with the honour of the Crown for the MVLWB to proceed with this application without a full public hearing.

Finally, and relevant to this question of MVLWB's jurisdiction to issue the licence in this matter, LKFN recommends that MVLWB include in the license clear conditions requiring NATCL to not only give preference, in the context of contracting opportunities whenever goods and services are required, to businesses owned by impacted Indigenous communities, but requiring NATCL to provide regular public reporting demonstrating that whenever bid packages for goods or services

go out, that such opportunities are made preferentially available, in advance, to the business arms of all impacted Indigenous communities. The Treaty and Aboriginal rights of LKFN have been and continue to be impacted by the Cantung mine. And while LKFN's primary concern is the protection of the environment, they also wish to have the benefit of preferential employment and contracting opportunities associated with the mine (such items being important and ongoing incidents of the Duty to Accommodate owed by the Crown to LKFN and others in relation to this licence application). In the view of LKFN, there is precedent with this mine and with NATCL of favouritism when it comes to how they treat the various impacted communities and their businesses. LKFN's recommendation in this paragraph is aimed at ensuring this does not continue to happen in the future.

Conclusion in Sum

- LKFN does not feel strongly that the legislative scheme here prohibits ever pivoting from a type A to a type B licence. That said:
    - LKFN recommends a public hearing as a critical component of the licencing process in this instance, whether NATCL's application ends up being characterized a type A or a type B.
    - LKFN wishes for it to be made abundantly clear that whether or not a licence is a type A or B has no bearing under any circumstances on the nature or extent of the conditions of the licence that speak to minimizing and avoiding adverse effects, and impacts to Treaty and Aboriginal rights, which should all be robustly tailored to context in each instance.
    - In the context of a project which was once a type A, and then becomes a type B, it will typically be in the public interest for licencing applications to trigger a public hearing in any event, given the nature of the genesis project, and the likelihood of ongoing, substantial liabilities and environmental risks.
- LKFN recommends a specific licence condition requiring NATCL to preferentially contract with businesses owned by impacted Indigenous communities, to treat all such businesses equitably, and to report publicly on a regular basis in relation to such equitable procurement practices.
- LKFN also recommends a specific license condition requiring the use of Indigenous Guardians as part of the ongoing monitoring at site.
- LKFN also believes that the number of monitoring sites on site should not be reduced during the care and maintenance period to maintain continuity of data gathering.

Tłı̨chǫ Government
Box 412, Behchokǫ̀, NT X0E 0Y0 • Tel: (867) 392-6381 • Fax: (867) 392-6389 • www.tlicho.ca

May 14, 2024

VIA ONLINE REVIEW SYSTEM

Re: Submission to the Mackenzie Valley Land and Water Board re determination of type A and type B water licences

Tłı̨chǫ Government thanks the Mackenzie Valley Land and Water Board ("MVLWB") for inviting comments and recommendations on the legal interpretation issue regarding the determination of type A and type B water licences in the context of North American Tungsten Corporation Ltd.'s ("NATCL") application for a type B water licence for care and maintenance activities at the Cantung Mine site, application number MV2023L2-00011.

We have carefully considered this issue, in light of the relevant statutory and regulatory framework, the role of MVLWB and the other Land and Water Boards in the Mackenzie Valley (collectively, "the Boards"), and the spirit and intent of the Tłı̨chǫ Agreement and the provisions therein related to the co-management of lands, waters, and resources. We have also reviewed the responses of the Government of the Northwest Territories – Department of Environment and Climate Change ("GNWT-ECC"), Crown Indigenous Relations Canada ("CIRNAC"), and NATCL to the MVLWB's Information Request #3.

The Position of Tłı̨chǫ Government

Tłı̨chǫ Government is of the view that the Boards do have 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. We do, however, have concerns about whether NATCL's specific application meets that threshold, but defer to the role and expertise of the MVLWB to make a fact-based determination on that matter.

The modern principle of statutory interpretation holds that the words of a piece of legislation are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act, and the intention of the legislature. An application of the principle to the legislative regime here demonstrates, in our view, that the Boards have broad discretion to issue type A and type B licences "in accordance with the criteria set out in the regulations made under paragraph 90.3(1)(c) …,"[1] subject to the terms and conditions set out in

[1] *Mackenzie Valley Resource Management Act*, s 72.03(1).

a licence. This aligns with the purpose of establishing the Boards: "to enable residents of the Mackenzie Valley to participate in the management of its resources for the benefit of the residents and of other Canadians," as well as the mandate of the Boards, whose objectives are to "provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of the Mackenzie Valley."[2] Curtailing the Boards' authority to issue type B licences where the original licence for an undertaking is type A in certain instances (i.e., if closure criteria for a mine have not been met or if there remains the potential to seek a new operator) would undermine the Boards' ability to make accurate, reasonable, evidence-based decisions as they attempt to fulfill their mandates. It would also unduly favour type A licences in situations where licensing criteria thresholds for type B licences have been met and a type B licence may be more appropriate.

It is worthy of note that at least one previous Board decision with similar facts to the present case supports our view that type A mining and milling projects can become type B industrial projects for the continuation of care and maintenance activities. In the 2010 Remediation of the Colomac Mine Site decision,[3] the Wek'èezhìı Land and Water Board granted a type B licence for remediation activities at a mine that initially had a type A licence. The reasons given were that "(1) the project is a continuation of remediation activities that were reviewed and approved in the past; none of these activities require a Type A water licence" and "(2) water use and waste deposition are expected to be less than what is currently licensed." In our view, this precedent provides further support for the proposition that licence types can change based on material changes to activities based on licensing criteria.

Response of Tłı̨chǫ Government to GNWT-ECC

Tłı̨chǫ Government would like to directly address some of the assertions in the responses of GNWT-ECC.

GNWT-ECC argues that a mining and milling operation, including projects in receivership if there is any potential to seek a new operator, should continue to require a type A license during care and maintenance until closure criteria have been met, due to the liabilities such projects could create. GNWT-ECC asserts that a mining and milling undertaking cannot be reclassified until a mine is abandoned and a government responsible for remediation, which did not produce minerals from the mine, is the operator. GNWT-ECC expresses concern that a Board could, under a type B licence, authorize a deposit of stored waste that would exceed what was authorized under the type A licence issued during the active operation of the mine, without a

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[2] *Mackenzie Valley Resource Management Act*, s. 101(1).

[3] Wek'èezhìı Land and Water Board, Reasons for Decision W2009L8-0003 – Renewal of MV2004L8-001 (18 February 2010), online: < https://registry.mvlwb.ca/Documents/W2009L8-0003/W2009L8-0003%20-%20Colomac%20-%20WL%20Reasons%20for%20Decision%20-%20Issuance%20-%20Feb%2023_10.pdf

public hearing and without approval of the Minister. GNWT-ECC argues that its interpretation of the regulations, and the constraints such an interpretation would place on the Boards, is needed to avoid what GNWT-ECC characterizes as "absurd consequences." GNWT-ECC also argues that allowing a type B water licence for care and maintenance is impractical and could delay further remediation efforts, rendering the site unattractive to potential purchasers who would need a type A licence immediately to start mining and milling or begin remediation. We find these arguments uncompelling.

In our view, the regulations do not bar the Boards from issuing type B licences for projects that meet the licensing criteria threshold, and indicate that such changes in undertakings and licence types were anticipated by the legislature. For example, the description of industrial undertakings under Schedule II of the Mackenzie Valley Federal Areas Waters Regulations, where the deposit of waste would only trigger a type B licence, explicitly includes "tailings reprocessing." Reprocessing from tailings can fall under both industrial and mining and milling undertakings. This would include mining projects where tailings reprocessing occurs at the mine site after all other mining and milling has stopped. Such projects would, it is trite to observe, have at one time likely been categorized as a mining and milling undertaking. Barring the issuing of a type B licence in such cases, as GNWT-ECC urges, would result in regulatory incoherence and demonstrates that the regulations do not support the approach that GNWT-ECC advocates.

Further, GNWT-ECC's assertion that reclassification from a type A to a type B license should only be available (a) after abandonment and (b) after government has taken control of the site for remediation purposes is tantamount to saying that the determination of whether activities at a site that previously had a type A license can be continued under a type B license is based upon the *identity* of the proponent (only public government) and the *intentions* of the proponent (only remediation). In our view, this proposed approach does not find support in the regulations. Making the possibility of the reclassification of an undertaking contingent on who the operator is and requiring that a licence type determination for projects in receivership be based on a subjective analysis of whether there is any potential to seek a new operator would move away from the activity-based licensing criteria that underpin the regime and towards determinations based on the analysis of proponents and their intentions.

Lastly, the Boards have the expertise and capacity to issue and administer type B care and maintenance licences in accordance with their authority and applicable laws and regulations, set appropriate conditions and information requirements, and provide adequate oversight. This could be further supported through regulatory amendments and with clearer procedures for mining and milling projects with initial type A licences that are under care and maintenance. Moreover, a Board retains the discretion to hold public hearings if it is satisfied that it would be in the public interest, and the Boards should be trusted to do so when circumstances require.

Conclusion

In summary, Tłı̨chǫ Government is of the view that the Boards do have the jurisdiction to issue a type B licence to replace a type A licence where the activities associated with an undertaking would meet the type B licensing criteria. Whether NATCL meets that threshold is for the

MVLWB to determine. The Boards have broad discretion to issue type A and type B licences in accordance with licensing criteria, which aligns with the legislative purpose and mandate of the Boards. Curtailing the Boards' authority to issue type B licences would undermine the Boards' ability to make accurate and reasonable decisions as they attempt to fulfill their mandate, and unduly favour type A licences where a type B licence may be more appropriate.

The regulations do not bar the Boards from issuing type B licences for projects that meet the licensing criteria threshold, and indicate that such changes in undertakings and licence types were anticipated by the legislature, as exemplified in the inclusion of "tailings and reprocessing" under the description of industrial undertakings in the regulatory schedules, which necessarily targets projects that would have at one time been categorized as a mining and milling undertaking. Further, licence type determination under the current regulations is activity-based and does not hinge on who the proponent is or what their intentions are.

In our view, the Boards are already well equipped to avoid "absurd consequences." They have the authority, expertise and capacity to issue and administer type B care and maintenance licences in accordance with applicable laws and regulations, to set appropriate conditions and information requirements, and provide adequate oversight. Rather than curb their authority, we should look to providing the Boards with the tools necessary to best exercise that authority and fulfill their mandate, through regulatory amendments and with clearer procedures for mining projects under care and maintenance.

We recognize that the regulations could be interpreted differently. We continue to call on GNWT and the federal government to take a proactive approach and to come together with Indigenous Government partners to review and, where necessary and appropriate, amend existing regulations for clarity, consistency, and effectiveness, and to adapt them to better meet the needs of our communities as well as those of industry. This can be done in a manner that will drive investment in our region while protecting our lands and resources for present and future generations. We believe there are practical regulatory adjustments that would have broad support and move forward efficiently. Tłı̨chǫ Government is ready to collaborate on this important work.

In Tłı̨chǫ Unity,

Brett Wheler
Sr. Advisor, Resource Management and Sustainability

May 31, 2024

Chris Hotson
Regulatory Manager
Mackenzie Valley Land and Water Board
4922 - 48th Street
Yellowknife NT X1A 2P6

Dear Mr. Hotson:

Cantung Mine – Care and Maintenance – Water Licence Application (MV2023L2-0001)– GNWT-ECC Responses on Legal Interpretation Comments

On March 14, 2023, the Mackenzie Valley Land and Water Board (MVLWB) received the Application for type B Water Licence (Licence) MV2023L2-0001 for Care and Maintenance activities at the Cantung Mine site from North American Tungsten Corporation Ltd. (NATCL). The Application was sent for public review on the MVLWB's Online Review System on March 24, 2023. Comments and recommendations on the Application were received on May 19, 2023, with responses from NATCL received on June 06, 2023. On November 20, 2023, the Government of the Northwest Territories – Department of Environment and Climate Change (GNWT-ECC) received an information request (IR) as a result of the comments submitted by GNWT-ECC, NATCL and Crown Indigenous Relations and Northern Affairs Canada (CIRNAC) concerning the interpretation of legislation in respect of the classification of Licence. GNWT-ECC, CIRNAC and NATCL submitted responses to the MVLWB's IR by the February 23, 2024 deadline. On April 04, 2024, the MVLWB circulated the three responses for public review and comment. On May 21, 2024, GNWT-ECC submitted its Comment on NATCL's Response to the IR. Other reviewers also submitted comments and recommendations to MVLWB prior to the deadline, including comments directed towards GNWT-ECC. As outlined by the Board's directions on the process for this public review, GNWT-ECC has replied to the selected reviewers below.

GNWT-ECC Responses to NWT & Nunavut Chamber of Mines

GNWT-ECC disagrees with the Chamber of Mines that the interpretation GNWT-ECC has set out is not clear, consistent and objective. GNWT-ECC's interpretation is straightforward:

- Until a mine that required a type A water licence during active mining and milling, on the basis of deposit of waste, has met the closure criteria set by the applicable land and water board, that mine continues to require a type A water licence.

…/2

- Once the closure criteria have been met or if the mine is abandoned and the Crown or another entity then becomes responsible for remediation, the undertaking becomes a miscellaneous undertaking rather than a mining and milling undertaking.

No assessment of the risk of the mine or any other factor is involved in this interpretation. GNWT-ECC referred to various respects in which there will or may be ongoing deposit of waste to receiving waters from legacy waste associated with Cantung Mine in its February 24, 2024 Response to the IR to indicate that, as with any mine that has not met closure criteria, such deposits are ongoing.

GNWT-ECC Responses to Tłı̨chǫ Government

GNWT-ECC wishes to clarify that its interpretation is not as the Tłı̨chǫ Government described in the second sentence of the final paragraph on page 2 and the second full paragraph on page 3 of the submitted May 14, 2024 Tłı̨chǫ Government letter. To clarify, GNWT-ECC's interpretation is as set out in the two bullets above in reply to the Chamber of Mines' Comment.

In reply to the first full paragraph on page 3, GNWT-ECC agrees that a tailings reprocessing operation could be either a mining and milling undertaking or an industrial undertaking. However, for the operation to be an industrial undertaking, it would have to be carried out as a separate operation, for instance, off-site and by a different licencee. A tailings reprocessing operation could not be both a mining and milling undertaking and an industrial undertaking simultaneously. A tailings reprocessing operation, whether as part of a mining and milling undertaking or a separate industrial undertaking, could facilitate the achievement of the closure criteria for a mine. However, until the closure criteria are met, there would continue to be a mining and milling undertaking and waste would or may be deposited to the receiving waters. A type A licence for mining and milling would therefore continue to be required for the reasons GNWT-ECC has set out in its Response to the IR and in its Comment on NATCL's Response.

If you require further information, please contact Bill Pain, Environmental Scientist, Regulatory and Permitting, at Bill_Pain@gov.nt.ca.

Sincerely,

Rick Walbourne

Rick Walbourne
Director
Regulatory and Permitting Division
Environment and Climate Change

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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; Łíídlı̨ı̨ Kų́ę́ First Nation; Nahʔą 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-RLM**[1]") 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

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[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

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[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

Łíídlı̨ Kų́ę́ 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.

Nahʔą 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.

Tłı̨chǫ 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 Response[26] 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 glaciofluvial[29] and colluvial[30], while a small portion underlying the toe of TCA 2 is considered to be fluvial[31]; 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.

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[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-NCSP[34], 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:

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[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 licence[41] 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

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[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 MVWLB, 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 future[46]. 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; Łíídlı̨ Kų́ę́ 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.