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Sent via email and fax

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Dear Mr. Savoy,

Re: Submissions on behalf of WWF-Canada re 2016 Draft Nunavut Land Use Plan and Regulation of Bottom Trawling

On behalf of World Wildlife Fund-Canada, please see the following submissions on whether the Nunavut Planning Commission (NPC) may impose restrictions on bottom trawling through a land use plan.

Summary

On behalf of WWF-Canada, we submit that the Nunavut Wildlife Management Board's (NWMB) jurisdiction over non-quota limitations is not exclusive in the context of bottom trawling, such that the NPC has jurisdiction to prohibit bottom trawling in a land use plan.

While generally the NWMB has exclusive jurisdiction over all harvesting methods (i.e. non-quota limitations) there are specific exceptions in Article 5 and read in context, this is not truly an exclusive power. The Nunavut Land Claims Agreement (NLCA), including in Article 11, contemplates a role for the NPC in regulating wildlife and promoting wildlife conservation, and we submit that regulation of harvesting methods in order to protect habitat are within the jurisdiction of the NPC and are not exclusive to the NWMB.

This submission is restricted to the Nunavut Settlement Area and Outer Land Fast Ice Zone, the boundaries of which are defined in the NLCA.¹ The reason for this limitation is that the NPC's

¹ *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada as amended*, online: http://www.tunngavik.com/documents/publications/LAND_CLAIMS_AGREEMENT_NUNAVUT.pdf, articles 1.1.1 "Outer Land Fast Ice Zone", 3.1.1 ["NLCA"].

powers to regulate land use are confined to these regions.² The NLCA does provide some advisory powers to the NWMB, but not the NPC, in marine areas adjacent to the Nunavut Settlement Area.³ These areas, designated as “Zone I” and “Zone II” under the NLCA, support commercial marine fisheries (turbot, shrimp and arctic char). However, neither the NWMB nor the NPC have any decision-making authority within these areas.⁴

Furthermore, we have focused these submissions on commercial fishing rather than on subsistence harvesting.

1) The Nunavut Wildlife Management Board’s jurisdiction over non-quota limitations is not exclusive in the context of bottom trawling, such that the NPC has jurisdiction to prohibit bottom trawling in a land use plan?

a. The NWMB is the main instrument of wildlife management and main regulator of access to wildlife in the Nunavut Settlement Area

Article 5 of the NLCA governs wildlife management in the Nunavut Settlement Area. Article 5 of the NLCA proclaims Inuit rights to harvest wildlife; these rights are “constitutionally protected by virtue of the incorporation of [the NLCA] into section 35 of Canada’s *Constitution Act, 1982*.”⁵ Article 5 strives to balance conservation and exploitation of wildlife in a manner that protects Inuit harvesting rights and interests.⁶ Protection of Inuit harvesting rights from “unwarranted state interference” is a primary objective of the NLCA.⁷

Article 5 of the NLCA recognizes that there is a need for an effective role for Inuit in all aspects of wildlife management.⁸ Accordingly, the NWMB is given primary responsibility for wildlife management in the Nunavut Settlement Area:

[T]he NWMB shall be the main instrument of wildlife management in the Nunavut Settlement Area and the main regulator of access to wildlife and have the primary responsibility in relation thereto in the manner described in the Agreement.⁹

² NLCA, article 11.1.4. See also *Nunavut Planning and Project Assessment Act*, SC 2013, c 14, s 41 [“NuPPAA”]. This section provides the NPC with authority to conduct land use planning in the “designated area”, which is defined as the Nunavut Settlement Area and the Outer Land Fast Ice Zone: NuPPAA, s 2(1) “designated area.”

³ The marine areas of the Nunavut Settlement Area include “that part of Canada’s internal waters or territorial sea, whether open or ice-covered, lying within the Nunavut Settlement Area, but does not include inland waters.” It also includes the seabed and subsoil below those internal waters or territorial sea: NLCA, article 1.1.1 “marine areas.”

⁴ *Nunavut Tunngavik Inc v Canada (Minister of Fisheries and Oceans)*, [1998] 4 FC 405, [1998] FCJ No 1026 at para 35 (Fed CA) [“NTI v Canada”].

⁵ *Kadlak v Nunavut (Minister of Sustainable Development)*, 2001 NUCJ 1 at para 13, 29 Admin LR (3d) 311 [“Kadlak”].

⁶ NLCA, article 5.1.3.

⁷ *Kadlak* at para 20.

⁸ NLCA, article 5.1.2(h).

⁹ NLCA, article 5.2.33.

However, government retains ultimate responsibility for wildlife management under the NLCA.¹⁰ In the context of fisheries, this responsibility falls to the Government of Canada.¹¹ This is a co-management relationship in which the NWMB “acts as the primary decision-making agency” and “operates as a co-jurisdictional body, integrally involved with Government in legal rule-making.”¹²

Pursuant to its mandate, the NWMB regulates both quota and non-quota limitations on harvesting and performs other wildlife management functions.

b. The NWMB has “sole authority” to make, alter or remove non-quota limitations on harvesting in the Nunavut Settlement Area

Article 5.6.48 of the NLCA provides that:

Subject to the terms of [Article 5], the NWMB shall have sole authority to establish, modify or remove, from time to time and as circumstances require, non-quota limitations on harvesting in the Nunavut Settlement Area.”¹³ [emphasis added]

The NWMB can exercise this authority throughout the Nunavut Settlement Area, including in marine areas.¹⁴ This authority is constrained in the Outer Land Fast Ice Zone, where the NWMB may only exercise it in relation to harvesting from land-fast ice and marine mammals in open waters.¹⁵

In essence, non-quota limitations are non-numerical harvesting limitations such as hunting seasons or methods of harvesting. The NLCA defines non-quota limitations very broadly:

"non-quota limitation" means a limitation of any kind, except a total allowable harvest, and may include a limitation on season of harvest, sex of wildlife, size of wildlife, age of wildlife or method of harvest.¹⁶ [emphasis added]

The NLCA defines “harvest” broadly to mean “the reduction of wildlife into possession,” including “fishing, as defined in the *Fisheries Act*.”¹⁷ The *Fisheries Act* defines “fishing” as

¹⁰ NLCA, articles 5.1.2 (h), (i). “Government” means the Government of Canada or the Government of Nunavut, as the context requires.

¹¹ The Government of Nunavut retains ultimate responsibility for wildlife manage in Nunavut and regulates wildlife management under the *Wildlife Act*, S Nu 2003, c 26 [“*Wildlife Act*”]. See especially *Wildlife Act*, s 1(2)(o). However, the *Wildlife Act* does not apply to fish species or marine plants; ultimate responsibility for management of these species falls to the Government of Canada under the *Fisheries Act*, RSC 1985, c F-14 [“*Fisheries Act*”]: see *Wildlife Act*, s 6(3). See also *Constitution Act, 1867*, 30 & 31 Vict, c 3, s 91(12), which grants the federal government jurisdiction over fisheries [“*Constitution Act, 1867*”].

¹² Nunavut Wildlife Management Board, *Governance Manual*, online: <http://www.nwmb.com/en/about-nwmb/governance-manual> at 2 [“NWMB Governance Manual”]. See also *NTI v Canada*.

¹³ NLCA, article 5.6.48. The French version of the NLCA, which is also “official,” reads similarly.

¹⁴ NLCA, article 15.2.2.

¹⁵ NLCA, article 16.1.1. Notably, the NPC’s jurisdiction over land use planning in the Outer Land Fast Ice Zone is not similarly constrained: NLCA, Article 16.1.1.

¹⁶ NLCA, article 5.1.1.

¹⁷ NLCA, article 1.1.1 “harvest”. “Wildlife” means all terrestrial, aquatic, avian and amphibian flora and fauna *ferae naturae*, and all parts and products thereof: NLCA, article 1.1.1 “wildlife.”

fishing for, catching or attempting to catch fish by any method” [emphasis added].¹⁸ Under the *Fisheries Act*, “fish” includes fish, shellfish, crustaceans and marine animals, as well as parts and juvenile stages thereof, including eggs.¹⁹

Since bottom trawling is a specific method of harvesting fish, it falls within the broad literal definition of a non-quota limitation. Accordingly, on a literal reading of Article 5.6.48, the NWMB will have sole authority to establish, modify or remove limitations on bottom trawling within the Nunavut Settlement Area unless one of the other terms of Article 5 provides otherwise.

In order to assess whether the NWMB has sole authority over non-quota limitations, both the definition of “non-quota limitation” and Article 5.6.48 must be read in accordance with the NLCA rules for interpreting its provisions.²⁰

These provisions must therefore be read not just literally, but in the context of Article 5 and the NLCA as a whole, including Article 11.²¹

The articles of the NLCA must also be construed according to the *Interpretation Act*,²² meaning that the NLCA must be interpreted in a fair, large and liberal manner so as to “best ensure the attainment of its objects.”²³

Accordingly, the NWMB’s exclusive authority over non-quota limitations must be reconciled with the government’s ultimate responsibility for wildlife management and the NPC’s mandate.²⁴

On behalf of WWF-Canada, we submit that a contextual and purposive reading of the NLCA confirms that the NWMB’s exclusive authority over non-quota limitations is not meant to override the NPC’s land use planning role. Rather, the NPC has a limited power to impose, in accordance with Article 5, what are effectively non-quota limitations through the land use planning process within the Nunavut Settlement Area in some circumstances.

c. *There are narrow exceptions to the NWMB’s authority to make non-quota limitations*

The NWMB recognizes that it “is not the sole instrument and sole regulator” of wildlife management and access in the Nunavut Settlement Area. The NWMB further recognizes that it “is authorized to work with the other instruments of wildlife management and regulators of access to wildlife” on relevant issues, though it does not explain what those other instruments and regulators are.²⁵

¹⁸ *Fisheries Act*, s 2(1) “fishing.”

¹⁹ *Fisheries Act*, s 2(1) “fish.”

²⁰ NLCA, Articles 2.9.1, 2.9.4.

²¹ NLCA, article 2.9.1.

²² NLCA, article 2.9.4; *Kadlak* at para 13.

²³ *Interpretation Act*, RSC 1985, c I-21, s 12.

²⁴ NLCA, articles 11.3.1(g), 11.4.4, 11.5.1.

²⁵ NWMB Governance Manual at p 9.

Article 5 of the NLCA creates several exceptions to the NWMB’s “exclusive” authority to impose non-quota limitations on harvesting.²⁶

Because the Government of Canada retains ultimate responsibility for wildlife management in the context of fish species,²⁷ the NWMB’s decision to impose a non-quota limitation on marine harvesting must be made in accordance with articles 5.3.17 to 5.3.23 of the NLCA.²⁸ These articles set out a process by which the federal Minister of Fisheries and Oceans reviews and approves (or varies or rejects, as the case may be) the NWMB’s decision. Although the federal Minister retains ultimate approval authority, the NWMB nevertheless plays an integral role in the decision-making process.²⁹ This exception does not authorize the NPC to impose non-quota limitations through a land use plan.

However, Article 5 includes other exceptions to the NWMB’s authority over non-quota limitations.³⁰ These exceptions include situations where an Inuit harvesting method will result in harmful alteration to the environment. Furthermore, the NPC and other land management agencies, as opposed to the NWMB, are primarily responsible for wildlife habitat management. As well, the NPC can authorize a land use, including a conservation initiative, and thereby restrict land uses, including harvesting, that are incompatible with the land use.

- i. The NPC can determine that a harvesting method harmfully alters the environment

Article 5.7.42 authorizes an Inuk or their assignee (i.e., their spouse or common law spouse or another Inuk) to use any type, method or technology to harvest pursuant to the terms of Article 5 that does not:

- (a) conflict with a non-quota limitation established by the NWMB,
- (b) conflict with laws of general application regarding humane killing of wildlife, public safety and firearms control, or
- (c) result in harmful alteration to the environment.³¹

The second restriction clearly contemplates that law-making entities other than the NWMB can lawfully impose requirements that are effectively non-quota limitations. The third restriction, prohibiting harvest methods that result in harmful alteration to the environment, effectively creates a non-quota limitation within the NLCA itself.

²⁶ Hunters and Trappers Organizations and Regional Wildlife Organizations may also regulate the harvesting practices and techniques of members through non-quota limitations: NLCA, articles 5.7.1, 5.7.3(a), 5.7.6(a).

²⁷ *Supra*, note 12.

²⁸ NLCA, article 5.3.16. A decision to impose a non-quota limitation is made under Part 6 of Article 5.

²⁹ NWMB Governance Manual at p 2.

³⁰ In addition to the exceptions discussed below, the NWMB is required to take certain steps with respect to non-quota limitations where the harvested species is designated as endangered or threatened under the *Wildlife Act: Wildlife Act*, ss 132(1)(d), (e). Furthermore, the *Wildlife Act* itself imposes restrictions that amount to non-quota limitations for protected species: s 66(2). However, this memo does not explore these in detail because the *Wildlife Act* does not apply in the fisheries context.

³¹ These restrictions do not apply to non-Inuit harvesters.

On behalf of WWF-Canada, we submit that, because Article 5 creates this limitation, it is open to the NPC to determine that a land use activity (e.g., fishing or bottom trawling) will result in a harmful alteration to the environment and to prohibit or restrict the activity in a land use plan. This is because the NPC has a clear authority to address environmental protection issues, including those relating to wildlife conservation and habitat, within the land use planning process. Accordingly, we submit that a non-quota limitation that is for the purpose of preventing harmful alteration of the environment and wildlife habitat may be created by the NPC in the land use planning process, and is an express exception to the NWMB's otherwise exclusive jurisdiction over non-quota limitations on harvesting methods. If bottom trawling causes harmful alteration, then it is appropriate for restriction in a land use plan.

The NPC must develop land use plans that guide and direct resource use and development in the Nunavut Settlement Area. The NPC must fulfil this responsibility in a manner consistent with the provisions of Articles 5, 7 and 11.³² Nothing in Article 5 prevents the NPC from determining that a particular harvesting method will harmfully alter the environment. On the contrary, as will be discussed below, Article 5.2.36 clarifies that the NPC, and not the NWMB, has primary responsibility over lands management.

When developing planning policies, priorities and objectives, the NPC is also required to consider environmental protection and management needs, including wildlife conservation, protection and management.³³ Furthermore, the NPC must take into account environmental considerations, including wildlife habitat, in a land use plan.³⁴ Finally, one purpose of a land use plan is “to protect, and where necessary, to restore the environmental integrity of the Nunavut Settlement Area.”³⁵

Although Article 5.7.42(c) applies specifically to Inuit harvesters, harvesting by non-Inuit harvesters is subject to all laws of general application.³⁶ In the context of bottom trawling, this would include the *Fisheries Act*, which prohibits a person from conducting any activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.³⁷ Such harm includes the permanent alteration to, or destruction of, fish habitat.³⁸

ii. The NPC retains primary responsibility for land use planning and management

Article 5.2.36 of the NLCA confirms that the NWMB is not primarily responsible for the management of lands within the Nunavut Settlement Area. That Article recognizes and preserves the habitat protection roles played by entities other than the NWMB:

³² NLCA, articles 11.4.1(b), 11.8.1.

³³ NLCA, article 11.2.3, 11.4.4.

³⁴ NLCA, article 11.3.1(g).

³⁵ NLCA, article 11.3.2.

³⁶ NLCA, article 5.6.37.

³⁷ *Fisheries Act*, s 35(1).

³⁸ *Fisheries Act*, s 2(2).

While habitat management and protection is an integral function of wildlife management, and as such is commensurate with the NWMB's responsibilities for wildlife matters, primary responsibility for the management of lands, including flora, shall be exercised by the appropriate government agencies and such other related bodies as may be established in the Agreement. [emphasis added]

The NPC clearly falls within the scope of this provision as a "related body" established in the NLCA with major responsibilities for the management of land under Articles 11 and 12.

By contrast, the NWMB does not play a decision-making role in the land use planning process; instead, it is assigned a secondary, advisory role.³⁹ The Federal Court of Appeal has confirmed that a similar recommendatory power granted to the NWMB under Article 15 is not binding on the ultimate decision-maker.⁴⁰ In other words, the NWMB does not have a veto power with respect to land use plans, despite its exclusive powers over non-quota limitations on harvesting.

- iii. The NPC can authorize a land use and thereby restrict land uses that are incompatible with the authorized uses

The NLCA defines rights of access for Inuit to areas within the Nunavut Settlement Area. Inuit have the free and unrestricted right of access for the purpose of harvesting to all lands, water and marine areas within the Nunavut Settlement Area with some exceptions.⁴¹ Without limiting this general right, the right extends to all Crown lands, including Parks and Conservation Areas, as those terms are defined in the NLCA, and to all lands vested in a municipal corporation.

As noted, there are exceptions.⁴² For instance, the right of access is subject to public safety laws of general application, any conservation restrictions established by the NWMB and any authorized land use activity, to the extent that the access right is incompatible with that activity and for only as long as is necessary to permit that land use to be exercised.⁴³

The NPC can designate land uses for all areas over which a land use plan applies.⁴⁴ This includes designating protected areas or special management areas within which certain incompatible land uses are prohibited or restricted. Restrictions include, in the latest draft of the DNLUP, both access and seasonal restrictions.⁴⁵ Conservation is a potential land use. On behalf of WWF-Canada, we submit that by authorizing a "conservation initiative" with which bottom trawling is

³⁹ NLCA, article 5.2.34(b).

⁴⁰ *NTI v Canada*.

⁴¹ NLCA, article 5.7.16.

⁴² See, e.g., NLCA, article 5.7.17; the right of access does not extend to the lands listed in this article. See also NLCA, article 5.7.18.

⁴³ NLCA, articles 5.7.18(a), (b), (d).

⁴⁴ See, e.g., Nunavut Planning Commission, *Nunavut Land Use Plan – 2016 Draft*, online:

http://www.nunavut.ca/files/2016DNLUP/2016_Draft_Nunavut_Land_Use_Plan.pdf at 22 ["DNLUP"].

⁴⁵ DNLUP at 22-23. Notably, however, the NPC explicitly states that the latest draft of the DNLUP "does not apply to subsistence land use or to the harvesting of wildlife" and that generally, setbacks "do not fetter the Inuit right to unrestricted access for the purposes of harvesting: DNLUP at 21-22.

incompatible, the NPC could lawfully restrict the method of harvesting of bottom trawling for as long as is necessary to permit the conservation initiative to be carried out.⁴⁶

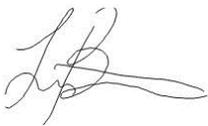
d. Conclusion

On behalf of WWF-Canada, we submit that the exclusive authority of the NWMB over non-quota limitations is limited by the terms of Article 5 and must be read in the context of the NLCA as a whole. The NPC clearly has authority to limit a use of land that would result in harmful alteration of habitat, even if such a limit would otherwise be considered a non-quota limitation. The NLCA makes it clear that harvesting wildlife (including fish) is a use of land that can be regulated by the NPC.⁴⁷ The NPC also has the power to authorize conservation initiatives, which could have the effect of limiting incompatible activities including harvesting methods. Where bottom trawling meets either criterion, the NPC has authority to restrict or prohibit it in a land use plan.

On behalf of WWF-Canada, we submit that, relying on Article 5.7.42(c) and Article 5.2.36, harvesting methods that result in harmful alteration of the environment or habitat can be restricted by other agencies. Such restrictions are not within the exclusive jurisdiction of the NWMB and can be included in a land use plan.

This is consistent with the provisions of Article 11 on land use planning which are described above. As noted, the regulation of methods harmful to habitat is an exception to the general rule that restrictions on methods of harvesting is generally a non-quota limitation to be set by the NWMB. This is of course subject to general geographic limitations of the jurisdiction of bodies established under the NLCA which is confined to the Nunavut Settlement Area and the Outer Land Fast Ice Zone.⁴⁸

Yours truly,



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Cc. Rachel Theoret-Gosselin, Eastern Arctic Specialist, WWF-Canada

⁴⁶ It should be noted that the approval of the NWMB is still required before a wildlife-related Conservation Area, as that term is defined within the NLCA, can be established: NLCA, articles 5.2.34(a), 9.3.2. This includes marine areas within Conservation Areas: NLCA, article 9.3.6.

⁴⁷ NLCA, article 11.1.2. See by contrast “lands” in Article 1.1.1 which excludes water but does include lands covered by water, whether onshore or offshore, and does not explicitly include wildlife.

⁴⁸ See, e.g., NLCA, article 11.1.4.