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**FROM:** Ian Miron and Laura Bowman

**RE:** Submissions to NPC on behalf of WWF-Canada  
re 2016 Draft Nunavut Land Use Plan

**MESSAGE:** Please find the attached submissions

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File No: 387

Attention: Nunavut Planning Commission

**Re: 2016 Draft Nunavut Land Use Plan**

On behalf of World Wildlife Fund-Canada, we have prepared the following submissions on whether the Nunavut Planning Commission may grandfather or exempt mineral rights from conformity or conformity determinations under the provisions of the 2016 Draft Nunavut Land Use Plan.

### **Summary**

The 2016 DNLUP provides ambiguous guidance as to when a new conformity determination will be required for projects with existing rights, and does not treat different stages of mining exploration and development as separate projects. As a result, the provisions of the 2016 DNLUP on existing rights conflict with legal requirements under the *Nunavut Land Claims Agreement* (NLCA) and the *Nunavut Planning and Project Assessment Act* (NuPPAA).

To ensure that the grandfathering rules comply with the NLCA and the NuPPAA, we recommend that the Nunavut Planning Commission (NPC) change the rules to clarify that:

- an "existing right" does not arise unless the NPC has already made a conformity determination for the project proposal or received a complete project proposal;
- project proposals without conformity determinations are not "existing rights" eligible for grandfathering; and
- moving from one stage of mineral exploration and development to another constitutes a new project, not a significant modification.

Finally, we recommend that the NPC clarify how reclamation and post-closure monitoring activities will be treated under the grandfathering rules.

These submissions address the following issues:

1. What legal rights do existing mineral tenures confer?

2. Does the approach to existing rights in the 2016 Draft Nunavut Land Use Plan (2016 DNLUP) comply with the requirements of the NuPPAA and the NLCA?
3. Recommendation to amend the land use plan.

Although the 2016 DNLUP improves clarity about existing rights, there are outstanding compliance issues with the existing rights approach under the 2016 DNLUP. We recommend amendments to address this.

**1. No form of mineral tenure in Nunavut confers an automatic right to construct, operate and close a mine**

Mineral tenure in Nunavut on Crown land is regulated under the *Territorial Lands Act*<sup>1</sup> and the *Nunavut Mining Regulations (Regulations)*.<sup>2</sup> The Regulations provide a process for the mining recorder to issue prospecting licences and permits, for staking mineral claims and for obtaining mineral leases of claims.

The mining recorder has no discretion to refuse to issue a licence to prospect.<sup>3</sup> Such a licence is valid for a one year term. Only a licensee may apply for a prospecting permit, which provides the exclusive right to prospect and stake claims in the zone specified.<sup>4</sup> In effect, a prospecting permit grants the right to explore for minerals and stake a mineral claim, subject to compliance with other regulatory requirements.<sup>5</sup> The mining recorder has no explicit discretion to refuse to grant such a permit if an application for the permit meets the requirements in the Regulations.<sup>6</sup> Such permits last from three to five years in duration.<sup>7</sup> A prospecting permit may be cancelled for nonpayment.<sup>8</sup>

Section 5(d) of the Regulations prohibits prospecting or staking a claim on lands that are subject to a prohibition on such activities under an approved land use plan. The intent of the Regulations is that such claims are subject to the land use plan requirements.

If the requirements for staking are met, then the mining recorder must record the mining claim.<sup>9</sup> A claim grants exclusive right to prospect and develop mineral discoveries within the boundaries of the claim. A claim does not provide a right to enter into full commercial production.<sup>10</sup> Claims last for 10 years unless they are extended.<sup>11</sup> Extensions for three consecutive one-year terms may be issued.<sup>12</sup> Claims are subject to work requirements and fees. The mining recorder must provide

<sup>1</sup> *Territorial Lands Act*, RSC 1985, c T-7.

<sup>2</sup> *Nunavut Mining Regulations*, SOR/2014-69 ["Mining Regulations"].

<sup>3</sup> Mining Regulations, s 3.

<sup>4</sup> Mining Regulations, s 9(1).

<sup>5</sup> Indigenous and Northern Affairs Canada, "FAQ about Mineral Tenure in Nunavut and the Northwest Territories" online: <https://www.aadnc-aandc.gc.ca/eng/1330617283096/1330617340416> (accessed 4 August 2016) ["INAC FAQ"].

<sup>6</sup> Mining Regulations, s 11(2).

<sup>7</sup> Mining Regulations, s 12.

<sup>8</sup> Mining Regulations, s 21.

<sup>9</sup> Mining Regulations, s 33(4).

<sup>10</sup> INAC FAQ.

<sup>11</sup> Mining Regulations, ss 33(5), 42(1), 60(4).

<sup>12</sup> Mining Regulations, s 42.

a notice of cancellation if the claim holder knowingly made a false or misleading statement in the application or if the claim holder has contravened subsection 7(2).<sup>13</sup>

Leases of recorded claims may be obtained once the area is surveyed. The mining recorder must receive a lease application at least one year before the end of the duration of the claim; such applications must also meet other requirements.<sup>14</sup> If the requirements in section 60 of the Regulations are met, the Minister must issue the lease to the claim holder for a term of 21 years, which can be renewed for a further 21 years.<sup>15</sup> A lease in good standing is required in order to enter into commercial production.<sup>16</sup>

None of the mineral tenures under the Regulations grant surface rights to lands. Accordingly, the mineral rights holder must obtain the consent of the surface rights holder before going onto the lands to prospect or stake a claim.<sup>17</sup> This is particularly the case for Inuit owned lands.<sup>18</sup>

While it is true that a proponent of a mineral extraction project obtains specific legal rights by obtaining authorizations under the Regulations, these rights largely relate to the right to exclude others from developing or exploring within the subject area. Mineral tenures do not grant an unlimited right to engage in the full build-out or closure and reclamation of a mine.

The NuPPAA does not automatically exempt mineral tenures granted under the *Territorial Lands Act* and the Regulations from the application of the land use plan or the subsequent requirement to obtain approval from NIRB and the responsible Minister. The mining recorder who issues mineral rights under the Regulations is a public body responsible for issuing licences, permits and other authorizations required under territorial law for a project to proceed. As such, the mining recorder is a “regulatory authority” for the purposes of the NuPPAA.<sup>19</sup>

Accordingly, the mining recorder and the Minister under the Regulations would normally be subject to subsection 69(1) of the NuPPAA, which requires each regulatory authority to ensure that any licence, permit or other authorization that it issues implements any applicable requirements of any applicable land use plan. This means that such authorizations must themselves conform to and implement the requirements of an approved land use plan (subject to the specific exceptions set out in the NuPPAA). As noted above, similar requirements are reflected in the Regulations themselves in section 5(d).

This means that the ability to transition from one stage of the mining process to another in terms of acquiring more advanced mineral tenures is constrained by law to those applications that conform to an approved land use plan.

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<sup>13</sup> Mining Regulations, s 53.

<sup>14</sup> Mining Regulations, s 60(2).

<sup>15</sup> Mining Regulations, ss 60(5), 62(4).

<sup>16</sup> INAC FAQ.

<sup>17</sup> Mining Regulations, s 6. In some cases, the mineral rights holder can instead obtain an order from the Nunavut Surface Rights Tribunal authorizing entry.

<sup>18</sup> NLCA, articles 21.2.1, 21.7.

<sup>19</sup> NuPPAA, s 2(1) “regulatory authority”.

*Mineral tenure must not be conflated with “lawful use of land”*

The rights granted in mineral tenures have long been subject to other approvals including approvals from the NPC, the Nunavut Impact Review Board (NIRB) and the Nunavut Water Board (NWB). The federal government has explicitly noted that all mineral exploration and mine development is subject to environmental regulations and land use planning processes.<sup>20</sup>

The issuance of a mineral tenure does not guarantee approval of mining projects from beginning to end of life cycle in Nunavut or a full legal right to develop a mine. To the extent that a proponent expects such a guarantee upon issuance of mineral tenure, the expectation would not be reasonable if it is based on mineral tenure alone. As set out above, mineral tenures in Nunavut are not for an indefinite duration and proponents must meet requirements under the Regulations to maintain tenure. A mineral tenure alone does not necessarily confer rights to engage in a specific use of land, such as exploration, mining or remediation. The fact of the existence of a mineral tenure also does not mean that the land is actually being used for all of the purposes that the tenure would allow.

**2. The approach to existing rights in the 2016 DNLUP lacks clarity and may conflict with requirements under the NuPPAA and the NLCA**

*Approach to Existing Rights under the 2016 DNLUP*

The 2016 DNLUP amends the prior 2014 DNLUP language providing that the Plan does not apply to certain projects<sup>21</sup> and instead provides for possible exemptions for existing rights (including mining rights) as follows (see sections 6.5 and 6.6 of the 2016 DNLUP):

Existing Rights means the use of land which does not conform to the NLUP but lawfully existed prior to the approval of the NLUP, provided that there have not been any “significant modifications” to the use as described in Chapter 6.5 of the NLUP.<sup>22</sup>

The NLUP and any future Plan Amendments may apply to some Projects/Project Proposals that had Existing Rights before the approval the NLUP. Users are encouraged to refer to the NUPPAA for guidance on whether the NLUP applies in specific circumstances.

NUPPAA requires a Project/Project Proposal to be submitted for a Conformity Determination if there is a “significant modification” to a Project/Project Proposal with Existing Rights. Significant modifications may include but are not limited to a change in scale or intensity of the Project/Project Proposal, new or modified works, activities, or components that were not included in the original Project/Project Proposal carried out prior to the approval of the NLUP as well as the following examples of significant modifications:

1. Any change to the location of the work or activity;
2. Any change to the type of land use;

<sup>20</sup> INAC FAQ.

<sup>21</sup> Nunavut Planning Commission, *Nunavut Land Use Plan*, (Draft, 2014), online: [http://www.nunavut.ca/files/2014DNLUP/2014\\_Draft\\_Nunavut\\_Land\\_Use\\_Plan.pdf](http://www.nunavut.ca/files/2014DNLUP/2014_Draft_Nunavut_Land_Use_Plan.pdf) (accessed 12 May 2016) [“2014 DNLUP”] at pp 9, 17, 46.

<sup>22</sup> 2016 DNLUP at p 9

3. Any change to the timing of the work or activity (e.g. seasonal changes);
4. An increase or modification in a work or activity that, for example, requires changes to a land use.

This list is non-exhaustive and simply illustrates what the NPC may consider to be “significant modifications” from a planning perspective.

...A Project/Project Proposal, as it was approved or accepted as a completed submission, prior to approval of the NLUP, may be considered grandfathered under the NuPPAA for the purposes of Conformity Determination. However, the transition from one stage of Mineral Exploration and Development to another may require a new Conformity Determination.”<sup>23</sup> [emphasis added]

*NuPPAA requires the NPC to make a conformity determination for every “project”*

“Project” is a defined term under section 2(1) of the NuPPAA and means the carrying out, including the construction, operation, modification, decommissioning or abandonment, of a physical work or the undertaking or carrying out of a physical activity that involves the use of land, waters or other resources.<sup>24</sup>

Article 1.1.1. of the NLCA defines project proposal as well:

“project proposal” means a physical work that a proponent proposes to construct, operate, modify, decommission, abandon or otherwise carry out, or a physical activity that a proponent proposes to undertake or otherwise carry out, such work or activity being within the Nunavut Settlement Area, except as provided in Section 12.11.1...

Importantly, a “project” refers to the actual physical work (for example, exploration project or mining project). Pursuant to the transitional sections 69, 207, 208 and 235 of the NuPPAA, it is the project which must be submitted to the NPC or approved under part 3 or the NLCA to have an argument for grandfathering.

The term “existing rights” is not defined in the NuPPAA and is not defined in the NLCA. Article 1.1.1 of the NLCA does make reference to “operators” with existing mineral rights on Inuit owned lands.<sup>25</sup> However, Article 11 provides no exemptions for “operators” from land use plan provisions.<sup>26</sup>

<sup>23</sup> 2016 DNLUP at p 52.

<sup>24</sup> The definition of project does not include: (a) the undertaking or carrying out of a work or activity if its adverse ecosystemic impacts are manifestly insignificant, taking into account in particular the factors set out in paragraphs 90(a) to (i); (b) the undertaking or carrying out of a work or activity that is part of a class of works or activities prescribed by regulation; or (c) the construction, operation or maintenance of a building or the provision of a service, within a municipality, that does not have ecosystemic impacts outside the municipality and does not involve the deposit of waste by a municipality, the bulk storage of fuel, the production of nuclear or hydro-electric power or any industrial activities.

<sup>25</sup> Operator is defined as a person or the authorized representative of such a person who has rights to explore, develop, produce or transport minerals, other than specified substances, in or on or under Inuit Owned Lands.

<sup>26</sup> See articles 21.7.8 through 21.7.13 of the NLCA dealing with access to Inuit owned lands for operators and others with prospecting rights.

The NPC has no power under the NuPPAA or the NLCA to exempt projects from the need to be subject to a conformity determination. Under the NuPPAA, project proponents must submit project proposals to the NPC and the NPC must determine whether the project conforms to the land use plan.<sup>27</sup> Projects that do not comply with the plan are prohibited.<sup>28</sup> Once the NPC determines conformity with the land use plan, it refers the project to the NIRB to conduct an environmental assessment.<sup>29</sup> Subsequent authorizations from other regulatory authorities must implement applicable land use plan conditions.<sup>30</sup>

The NLCA and the NuPPAA both obligate the NPC to assess every project proposal for conformity.<sup>31</sup> Only if the NPC determines that the proposal is in conformity with the land use plan may it subsequently be forwarded to the NIRB.<sup>32</sup> Until a project is submitted to the NPC and the NPC has made a conformity determination, the project is prohibited and so are all other authorizations.<sup>33</sup> This includes more advanced mineral tenures.

Notably, section 58 of the NuPPAA, which requires the NPC to “take into account” existing rights and interests and a number of other factors when developing a land use plan, does not authorize or require the NPC to exempt projects with such rights and interests from conformity or conformity determinations.

*The NLCA and NuPPAA set out the only two ways mining projects may avoid conformity*

No provision in the NLCA or the NuPPAA provides any express authority for the NPC to exempt “projects” that may be wholly or partially authorized under the *Territorial Lands Act* and the *Nunavut Mining Regulations* from the legal requirement for conformity with the land use plan requirements. Authority to deal with non-conforming projects that were not previously submitted to the NPC is set out entirely in sections 81 and 82 of the NuPPAA. These sections provide for a minor variance or a ministerial exemption.

The NuPPAA sets out a comprehensive scheme for the NPC to prepare land use plans and to enforce broad conformity with the land use plan for all “projects”. Under both the NLCA and the NuPPAA, land use plans are intended to guide resource development and manage development goals along with conservation goals.<sup>34</sup> In order to do so, the provisions of the plan will need to apply broadly to reasonably foreseeable resource development.

A Ministerial exemption or minor variance are the only lawful ways a non-conforming project can proceed under the scheme in NuPPAA. This is confirmed by the general prohibition in section 74(d) which provides that a non-conforming project is prohibited if there is no ministerial exemption or minor variance:

It is prohibited to carry out a project, in whole or in part, if

<sup>27</sup> NuPPAA, ss 76-77. A slightly different process occurs where there is no applicable land use plan: NuPPAA, s 85.

<sup>28</sup> NuPPAA, s 74.

<sup>29</sup> NuPPAA, ss 78-79. In certain cases, referral of the project proposal to the NIRB is optional or unnecessary: NuPPAA, s 80.

<sup>30</sup> NuPPAA, s 69.

<sup>31</sup> NLCA, article 11.5.10; NuPPAA, s 77.

<sup>32</sup> NuPPAA, s 78(1).

<sup>33</sup> NuPPAA, ss 74, 75.

<sup>34</sup> NLCA, article 11.2.2; NuPPAA, s 48(1).

(d) the Commission has determined, under section 77, that the project is not in conformity with any applicable land use plan and no minor variance or ministerial exemption has been granted under paragraph 81(2)(a) or 82(2)(a), as the case may be...

The NuPPAA does not contemplate that a non-conforming use can be exempted by the NPC by excluding it from the application of the requirements of the land use plan or from the need for a conformity determination. Subsection 82(5) above also confirms that a non-conforming use cannot be referred to the NIRB for impact review without an exemption from the Minister or minor variance.

These provisions of the NuPPAA are mirrored in the NLCA in articles 11.5.10 and 11.5.11, which require a conformity determination and that non-conforming proposals receive either an exemption from the Minister or a minor variance.

*Transitional provisions in NuPPAA define limited circumstances in which "projects" that were already subject to a prior conformity determination may avoid a subsequent conformity determination*

The NuPPAA contains transitional provisions which apply to the in-force date of the NuPPAA itself. These transitional clauses provide that a project assessed or approved by the NPC under the NLCA before the NuPPAA came into force is not subject to the Act. Where these transitional clauses apply to a project, the project would nevertheless remain subject to the land use planning provisions in the NLCA, including the conformity determination provisions.<sup>35</sup> In essence, these provisions require that the NPC review an activity to see if it fits within the boundaries of a project that was subject to a prior conformity determination. If not, then the proposed activity is a new "project" and a new conformity determination is required.

Section 235 of the NuPPAA provides:

235 (1) This Act does not apply in respect of

- (a) a project that is being assessed under the Agreement or is being, or has been, lawfully carried out on the day on which this section comes into force;
- (b) a project that was approved under the Agreement before the day on which this section comes into force, was commenced and then stopped or shut down for a period of less than five years, calculated from that day;
- (c) the rebuilding of a work that has been closed for a period of less than five years calculated from the day on which this section comes into force, if it relates to a project that was approved under the Agreement before that day and lawfully carried out; and
- (d) a project that was approved under the Agreement before the day on which this section comes into force and commenced within five years of that day.

Exception — significant modification

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<sup>35</sup> NLCA, article 11.5.10.

(2) Despite subsection (1), if, after this section comes into force, there is a significant modification, within the meaning of section 145, to a project referred to in any of paragraphs (1)(a) to (d), this Act applies to that project.

[emphasis added]

The NuPPAA's requirement that other authorizations or licences conform with the land use plan is also subject to transitional rules. These are set out in sections 69, 207 and 208 of the NuPPAA.

Section 69 of the NuPPAA is the relevant section for determining if a project approval by another regulatory authority is grandfathered or if that approval must conform to the land use plan. Other authorizations must implement land use plan requirements unless the criteria in subsection 69(3) are met or a minor variance or ministerial exemption has been granted.

The requirement that an authorization from another regulatory authority implement the applicable requirements of the land use plan does not apply to the types of projects referred to in sections 207 and 208 of the NuPPAA. Section 207(1) provides that once a project proposal is submitted to the NPC a subsequent new or amended land use plan is not to be taken into account in assessing whether a project is carried out in conformity with the land use plan.<sup>36</sup>

Section 207(2) provides that once a project is approved by the NPC a subsequent new or amended land use plan is not to be taken into account in assessing whether a project is carried out in conformity with the land use plan.

Section 207(2) clarifies that previously approved projects are not re-assessed under a new land use plan or amendments. Importantly, section 207 does not fully exempt previously submitted or approved projects from *the application of* the land use plan or from the need to submit a project for a conformity determination. These projects are still subject to a conformity determination by the NPC under subsection 74(d) if they are not yet approved. They are also still subject to new terms and conditions under subsection 69(4).

Section 208(1) provides that projects that were previously approved, commenced and shut down and then restarted or rebuilt after less than five years are not prohibited, even without an assessment under part 3 of the NuPPAA for land use plan conformity.<sup>37</sup>

The remaining subparts of section 208 clarify that project certificates are deemed to apply to such projects,<sup>38</sup> and that new or amended land use plan provisions are not considered in evaluating whether or not the project is carried out in accordance with the requirements of the

<sup>36</sup> NuPPAA, s 207(1). See also NuPPAA, s 14(a): In addition to its powers, duties and functions specified elsewhere in this Act, the Commission must...monitor projects approved under Part 3 to verify that they are carried out in conformity with any applicable land use plan. See also NuPPAA, s 74(f): It is prohibited to carry out a project, in whole or in part, if ...the project is not carried out in accordance with any requirement identified, under subsection 48(4), in any applicable land use plan, other than a requirement in relation to which a minor variance or a ministerial exemption has been granted under paragraph 81(2)(a) or 82(2)(a), as the case may be...

<sup>37</sup> NuPPAA, s 208(1).

<sup>38</sup> NuPPAA, ss 208(2), (3).

land use plan.<sup>39</sup> As with section 207, such projects continue to be subject to new terms and conditions to implement an amended or new land use plan.<sup>40</sup>

Where a project is stopped for five years or more and the proponent wants to restart or rebuild the project, it may be resubmitted to the NPC. These project proposals, if submitted, will be deemed to be in conformity with the land use plan.<sup>41</sup> New or amended land use plan provisions are not considered in evaluating whether or not the project conforms with the requirements of the land use plan.<sup>42</sup> As with section 207, such projects continue to be subject to new terms and conditions to implement an amended or new land use plan.<sup>43</sup>

Subsection 208(8) provides that previous assessments must be considered and may be relied upon in assessing non-exempt projects.

Under subsection 69(3)(a), a subsequent regulatory authorization will not be subject to a land use plan if the project was submitted to the NPC for approval before the land use plan is approved or amended. The effect of sections 207(2) and 69(3)(b) is to exempt subsequent regulatory authorizations from land use plan conformity for projects that were already authorized under part 3 before the land use plan or amendment. Sections 208 and 69(3) exempt projects that are already approved by the NPC and that are re-started within five years. Notably, these exempted projects must still comply with new terms and conditions in respect of land uses that are set out in a subsequent land use plan.<sup>44</sup> Regulatory authorities can also impose requirements upon these projects that are more stringent than those in the new or amended land use plan.<sup>45</sup>

None of the above transitional rules fully exempts previously assessed projects from the land use plan. They provide partial exemptions from the conformity requirements to projects that previously were submitted to the NPC and were found to conform at that time. This means that a project that was already reviewed by the NPC is not re-assessed every time the land use planning provisions change. These provisions do not exempt new projects that have mineral tenures but that were never previously submitted to the NPC or approved under the land use planning provisions of the NLCA.

Nevertheless, the 2016 DNLUP rules on grandfathering existing rights can be interpreted as fully exempting a particular project from a conformity determination even where the NPC has not previously assessed its conformity. For example, the 2016 DNLUP grandfathering rules leave open the possibility that progressing from one stage of the Mineral Exploration and Development cycle to another may not require a conformity determination, even if the NPC did not previously assess the new stage for conformity. As a result, the grandfathering rules may conflict with legal requirements under the NuPPAA and NLCA in some cases.

*Proposed approach does not fully conform with the NLCA or the NuPPAA*

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<sup>39</sup> NuPPAA, s 208(4).

<sup>40</sup> NuPPAA, s 208(4).

<sup>41</sup> NuPPAA, ss 208(5), (6).

<sup>42</sup> NuPPAA, s 208(7).

<sup>43</sup> NuPPAA, s 208(7).

<sup>44</sup> NuPPAA, s 69(4).

<sup>45</sup> NuPPAA, s 69(5).

While there are some important improvements in the 2016 DNLUP the intent of some of these amendments is not clear; these sections of the DNLUP can be interpreted in a number of ways.

The proposed 2016 DNLUP definition of “existing rights” has some analogy to land use planning doctrines in that it appears to require an on the ground *de facto* use of land, such as an operating mine in the phrase “use of land that lawfully existed”. This implies that there must be (i) an actual physical use (ii) the use must be lawful at the time the new or amended land use plan is brought into force.

However, this doesn’t address the scope of the “existing right” or what use of land is considered to “lawfully exist” as between different stages of the Mineral Exploration and Development. Nor does it fully clarify that the “use of land” must be in fact and not only exist as a legal right.

Because NuPPAA prohibits carrying out a project unless a project proposal has been submitted for a conformity determination,<sup>46</sup> the definition of “existing right” should be changed to clarify that a use does not lawfully exist until such a proposal has been submitted to the NPC. This could be done by defining an “existing right” in terms of a project/project proposal that has been assessed for conformity by the NPC previously, and where the project has all other approvals required to operate.

The grandfathering rules are also unclear in that they could be read to mean that not all “projects” will require a conformity determination. This is particularly apparent in the phrase “However, the transition from one stage of Mineral Exploration and Development to another may require a new Conformity Determination” [emphasis added].

This aspect of the language is inconsistent with NuPPAA and the NLCA. All projects require a conformity determination. Situations in which the transition between one stage of Mineral Exploration and Development and another that would not constitute a new project will be unusual and likely only occur where a multi-stage project proposal was submitted to the NPC. The relevant questions under NuPPAA and the NLCA for a project with some form of mineral tenure are whether:

- a) The proposed activity is within the scope of a project previously submitted or approved by the NPC or if the project is a “new” project that has aspects that are outside the scope of the previously submitted or approved project description?
- b) The proposed activity is not a “new” project, but nevertheless has a significant modification to the activity that was included in the previously submitted project description?
- c) The proposed activity is operating in fact and with lawful authority when the new land use plan or amended plan is brought into force?
- d) The new project conforms with the current land use plan?

For example, a proponent might submit an exploration project to the NPC to have a small exploration camp in the late summer and the conformity determination might be affirmative. If the same proponent subsequently proposes a project for advanced exploration, with greater impacts and longer duration, the advanced exploration would be a new “project” because the

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<sup>46</sup> NuPPAA, s 74(a).

physical activities and intensity are not the same as those previously submitted and assessed. The new advanced exploration project would be subject to a conformity determination requirement under the NuPPAA or the NLCA under the existing land use plan provisions in force at the time the new project is submitted. If there were subsequent amendments prohibiting mining, then the new project could not proceed.

In contrast, the 2016 DNLUP does not say that a project moving to a more advanced development stage will be *required to conform*. It says only that it “might” trigger the requirement for a conformity determination if it is a significant modification. This is not consistent with the NuPPAA or the NLCA. This wording gives little clarity that the proponent must indeed submit a new project proposal for a conformity determination and will be bound by the determination on conformity as a mining project evolves.

The 2016 DNLUP also conflates the concept of a “significant modification” with the concept of a new “project”. Significant modification is a concept in the NuPPAA that applies to projects approved by the NPC as conforming under the NLCA before the NuPPAA was brought into force. It also applies under sections 145 and 146 of NuPPAA which require assessments of conformity by the NPC for significant modifications. These significant modification provisions do not apply by virtue of a project having some other form of legal rights, such as mineral tenure. Significant modification applies when a proposed activity is not included in the project description of a previously NPC-approved conforming project. It does not apply simply by virtue of a previously approved mineral land use or tenure.

The 2016 DNLUP language appears to leave it to the proponent to evaluate whether a project has “existing rights”. The definition of existing rights does not include an activity that conforms to the land use plan; it applies only to non-conforming land uses. It is not clear how the proponent will know it has “existing rights” (i.e. a non-conforming project) without submitting its project for a conformity determination. It is also not clear how a proponent would self-assess if its activity meets the other requirements for “existing rights” such as an actual use of land that is lawful. Seemingly under the 2016 DNLUP language, if a proponent self-assesses in this manner, no conformity determination is required by the NPC.

For example, for a mining proponent moving from exploration to an operating mine with a milling operation, it is not clear under the proposed language whether a) a conformity determination is required b) a new project proposal must be submitted, or whether the conformity determination for a previous project proposal (for exploration) can be relied upon to deem the project (operating mine) to conform. Likewise it is unclear what is required for moving from active mining to closure or reclamation stages.

This self-assessment process is an affront to the strict conformity determination requirements in the NLCA and the NuPPAA, which require the NPC to assess if the project is or isn't a new project, or a previously approved project with a “significant modification” and if it conforms. This first step is crucial to the NuPPAA and NLCA process and cannot be circumvented by definitions used in the land use plan itself. The NPC has no jurisdiction to create additional exemptions from the conformity determination requirement other than those set out in the NuPPAA and the NLCA. The NuPPAA and the NLCA are very clear that the only way to circumvent the requirement that all projects are subject to a conformity requirement is through exemptions and minor variances. Inherently, the project must first be submitted for a conformity determination before an exemption or minor variance is pursued.

To conform with legislative requirements, the land use plan should clarify that all projects must be submitted for a conformity determination. The NPC should then evaluate whether it is a new project, or a previously submitted/approved project. If it is a previously submitted/approved project, the NPC should determine whether there is a significant modification requiring a new conformity determination.

Finally, the 2016 DNLUP treats closure/remediation and post-closure monitoring work as separate stages of the Mineral Exploration and Development cycle. In areas where Mineral Exploration and Development is designated as a prohibited use after mining development has occurred, this could mean that a reclamation and monitoring activities would require a new conformity determination and would not conform to the land use plan. The proponent would be required to seek a minor variance or a ministerial exemption for the work, but may have little incentive to do so at that stage of development. A minor variance cannot be sought unless there is language in the land use plan facilitating this. This creates a risk that mining projects will simply be abandoned without reclamation or monitoring. The 2016 DNLUP should be changed to explicitly clarify how these activities will be treated under minor variance rules.

### 3. Recommended amendments

The above issues are easily remedied by bringing the language in the 2016 DNLUP into conformity with the legislative requirements. To ensure the land use plan conforms to NLCA and NuPPAA the following amendments should be made:

Existing Rights means a project which the NPC has previously determined to conform with the land use plan and which has not been:

- a) significantly modified pursuant to sections 146 and 235(2) of the Act; or
- b) stopped or closed for five years or more pursuant to section 208 of the Act.

Any change to the work or activity may result in a new project or significant modification that is subject to a conformity determination including but not limited to:

1. A change to the location of the work or activity;
2. Any change to the type of land use;
3. Any change to the intensity or scale of the activity that, for example results in a larger footprint, deeper excavation, increased pollution or more human activity;
4. Any change to the timing of the work or activity (e.g. seasonal changes).

This list is non-exhaustive and simply illustrates what the NPC may consider to be a “new project” or a “significant modification” from a planning perspective.

The NLUP and any future Plan Amendments may apply to some Projects that had Existing Rights before the approval of the NLUP. Users are encouraged to refer to the NUPPAA for guidance on whether the NLUP applies in specific circumstances.

NUPPAA requires every Project/Project Proposal that is not subject to section 235 that does not have Existing Rights to be submitted for a Conformity Determination. For clarity, NUPPAA requires a new Project/Project Proposal to be submitted for a Conformity Determination if there

is a "significant modification" to a Project/Project Proposal with Existing Rights or if the Project/Project Proposal with Existing Rights has been stopped or closed for five years or more.

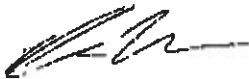
For clarity, the transition from one stage of Mineral Exploration and Development to another will require a new Conformity Determination unless the change in stage was assessed by the NPC as part of a Project/Project Proposal and determined to conform with the NLUP and the change of stage does not constitute a significant modification. Ordinarily, a change in stage of Mineral Exploration and Development will constitute a new project.

Where an operating mineral project is grandfathered under prior NPC approvals, and where the project submitted to NIRB excluded remediation and closure activities, the NPC will consider minor variances for non-conforming closure and remediation activities provided that the conditions of closure or remediation are approved by the NIRB and other regulatory authorities.

### Conclusion

The 2016 DNLUP language clarifies that existing rights are an existing lawful use of land. However, the 2016 DNLUP can be interpreted as exempting projects from conformity determinations, including new projects. This aspect of the 2016 DNLUP requires amendment and clarification. Existing rights should be defined in terms of prior NPC submission and approvals, not mineral tenures or undefined legal rights. Additionally, the land use plan provisions must themselves address how the NPC will address conformity issues for an existing mine with a closure or remediation step that is non-conforming by including minor variance language.

Sincerely,



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Barrister & Solicitor



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