



## Appendix I

Please return completed templates by **5PM EASTERN TIME FEBRUARY, 24<sup>th</sup>, 2023** to the Nunavut Planning Commission,  
by email at [submissions@nunavut.ca](mailto:submissions@nunavut.ca), by fax at 867-979-3443, or by mail at Box 1797, Iqaluit, Nunavut X0A 0H0.

IDENTIFICATION	
Date	February 24, 2023
Your Name:	Paul Crowley
Your Title/Position	Strategic Counsel
Your organization (if applicable):	Friends of Land Use Planning
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	NPC REGISTRY FILE #	SECTION OF THE SUBMISSION	YOUR RESPONSE/COMMENT
1	<p><b>21-194E-2023-02-10-Joint NTI GoC GN Submission on the 2021 DNLUP-ENG</b></p> <p><b>21-201E-2023-02-10-Third GoC Comments and</b></p>	<b>Marine Shipping</b>	<p>Thank you for the opportunity to provide comments on other parties' submissions to the Nunavut Planning Commission (NPC) on the 2021 Draft Nunavut Land Use Plan (DNLUP). On February 10, 2023, the Friends of Land Use Planning submitted an expert report focused on marine shipping, in response to the significant and serious concerns voiced by community members about the impacts of shipping activities throughout Nunavut.</p> <p>In reviewing the comments received by the NPC on the DNLUP, we were once again struck by the number of Nunavut organizations that raised specific and serious concerns about marine shipping. These included, among others, the Qikiqtani Inuit Association, the Kivalliq Inuit Association and the Kitikmeot Inuit Association; the Ekalultutiaq Hunters and Trappers Organization; the Mittimatalik Hunters and Trappers Organization; the Qikiqtaaluk Wildlife Board in collaboration with at least ten different Hunters and Trappers Organizations; the Kivalliq Wildlife Board; and the Nunavut Impact Review Board.</p>



	<p><b>Recommendations on the 2021 DNLUP-ENG</b></p>	<p>The concerns these organizations raised included common themes, including recommendations that the DNLUP include:</p> <ul style="list-style-type: none"> <li>• Seasonal prohibitions on icebreaking to protect caribou sea ice crossings and sea ice travel by community members</li> <li>• Vessel approach distances from coastlines and sensitive areas</li> <li>• Vessel approach distances from walrus haul-out</li> <li>• Vessel avoidance of floe edges</li> <li>• The designation of additional limited use areas to address shipping.</li> </ul> <p>In addition, we reviewed the Government of Canada’s comments and recommendations, as well as the joint submission put forward by Nunavut Tunngavik Inc., the Government of Nunavut, and the Government of Canada.</p> <p>We also consulted with a legal expert on shipping law, Stephanie Hewson, at West Coast Environmental Law.</p> <p>We are concerned that the Government of Canada, as the regulator responsible for shipping and navigation, has not adequately considered or responded to the depth and breadth of community concerns on marine shipping, and that in its submissions it has not fully considered its jurisdiction within the Nunavut Settlement Area to address these concerns, nor the regulatory tools it is equipped with to address them.</p> <p><b>The Nunavut Land Use Planning Process is part of the Implementation of the <i>Nunavut Agreement</i> and is Constitutionally Protected</b></p> <p>It is important to note at the outset that the authority of this Nunavut Land Use Planning Process is derived from the Nunavut Agreement, which is a “land claims agreement” or treaty within the meaning of s. 35 of the <i>Constitution Act 1982</i>.<sup>1</sup> Accordingly, the scope of the Planning Process and the obligations it imposes on Crown officials must be understood within the context of the implementation of that treaty.</p> <p>The Supreme Court of Canada has determined that the purposes of modern treaties are “to renew the relationship between Indigenous peoples and the Crown to one of equal partnership” and to foster a “positive, long-term relationships between Indigenous peoples and the Crown.”<sup>2</sup> These</p>
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<sup>1</sup> *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35; Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada as amended, (May 25, 2018), sub-section 2.2.1 [*Nunavut Agreement*].

<sup>2</sup> *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at para 33.

			<p>purposes will not be achieved if officials interpret the treaty in an “ungenerous manner or as if it were an everyday commercial contract.”<sup>3</sup></p> <p>Treaties, such as the Nunavut Agreement, also place special obligations on Crown officials in carrying out their implementation, under both the <i>United Nations Declaration on the Rights of Indigenous Peoples Act</i>, SC 2021, c 14 (<i>UNDRIP Act</i>) and s. 35 of the <i>Constitution Act, 1982</i>. Article 37(1) of the UN Declaration of Rights of Indigenous Peoples states that Indigenous peoples have the right to have states honour and respect treaties, and, the Preamble to the <i>UNDRIP Act</i> states:</p> <p style="padding-left: 40px;">“the Government of Canada is committed to taking effective measures — including legislative, policy and administrative measures — at the national and international level, in consultation and cooperation with Indigenous peoples, to achieve the objectives of the Declaration.”</p> <p>Moreover, because the treaty is recognized under s. 35 <i>Constitution Act 1982</i>, the honour of the Crown is engaged when Crown officials are carrying out the implementation of the Agreement and this requires Crown officials to act “with diligence to pursue the fulfillment of the purposes of the obligation” and to engage in “honourable negotiation and the avoidance of the appearance of sharp dealing.”<sup>4</sup></p> <p>The NPC and Nunavut Land Use Planning Process are created under <i>Nunavut Act</i>, as a vehicle through which to implement the Nunavut Agreement. Accordingly, the jurisdiction of the NPC Planning Process and the obligations it places on Crown officials should be understood in the context of the treaty principles outlined above. The jurisdiction of the NPC should be interpreted in a generous manner and in a manner that fosters a positive, long-term equal partnership between the Crown and the Inuit.</p> <p>In engaging in the planning process, Canada must keep in mind that the honour of the Crown is engaged, and it must act with diligence to pursue the implementation of the Nunavut Agreement and to negotiate honourably. Canada must also honour its commitment under the UNDRIP Act to taking effective measures — including legislative, policy and administrative measures — at the national and international level to further the implementation of the treaty.</p> <p><b>The 2021 Nunavut Land Use Plan is an Appropriate Forum to Address Concerns on Marine Shipping.</b></p> <p>The NPC’s responsibility to develop land use plans includes a responsibility to develop plans for marine areas and the wildlife that uses these areas. The <i>Nunavut Agreement</i> provides that, under</p>
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<sup>3</sup> *Ibid* at para 37.

<sup>4</sup> *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 at para 73.

			<p>Article 11: Land Use Planning, “‘land’ includes water and resources including wildlife.”<sup>5</sup> The agreement further clarifies that Article 11 “applies to both land and marine areas within the Nunavut Settlement Area and the Outer Land Fast Ice Zone.”<sup>6</sup> Thus the NPC’s responsibility to develop land use plans within the Nunavut Settlement Area includes a responsibility to develop plans for marine areas and the wildlife within these areas.<sup>7</sup></p> <p>In order to meet this responsibility, the NPC must address marine shipping. Sub-section 11.2.1(b) of the <i>Nunavut Agreement</i> provides the following primary purpose of the land use planning process:</p> <p style="padding-left: 40px;">The primary purpose of land use planning in the Nunavut Settlement Area shall be to protect and promote the existing and future well being of those persons ordinarily resident and communities of the Nunavut Settlement Area, taking into account the interests of all Canadians; special attention shall be devoted to protecting and promoting the existing and future well-being of Inuit and Inuit Owned Lands.<sup>8</sup></p> <p>Additionally, sub-section 11.2.1(c) provides that “the planning process shall ensure land use plans reflect the priorities and values of the residents of the planning regions.”<sup>9</sup></p> <p>Throughout the public hearings on the 2021 Draft Nunavut Land Use Plan (“DNLUP”), the NPC heard extensively from residents of the NSA about their concerns around marine shipping and its impacts on wildlife, the environment, and on community well being, which the Friends of Land Use Planning documented in its February 10, 2023 submission to the NPC.<sup>10</sup> Given the breadth and magnitude of these concerns, we respectfully submit that the NPC would not be able to meet its guiding principles, nor adequately protect and promote the well-being of communities, if it does not retain and go beyond the current draft measures on shipping in order to fully address community concerns.</p> <p>Marine shipping in the Arctic grew by 25 percent between 2013 and 2019, and is projected to continue increasing in the next several years, exacerbating the impacts that communities and are already experiencing and threatening food security and community well-being.<sup>11</sup> Meanwhile,</p>
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<sup>5</sup> *Nunavut Agreement*, *supra* note 1, sub-section 11.1.2.

<sup>6</sup> *Ibid*, sub-section 11.1.4; see also sub-section 15.2.2.

<sup>7</sup> *Ibid*, sub-section 11.4.1(b).

<sup>8</sup> *Ibid*, sub-section 11.2.1(b).

<sup>9</sup> *Ibid*, sub-section 11.2.1(c).

<sup>10</sup> Elissama Menezes & Andrew Dumbrille, *Vessel Impacts: Nunavut Land Use Plan 2021 Hearings* (February 1, 2023), submitted to the Nunavut Planning Commission on February 10, 2023.

<sup>11</sup> Arctic Council, “First Arctic Shipping Status Report from PAME Working Group Highlights Increase in Arctic Shipping Traffic,” (14 April 2020), online: <https://arctic-council.org/news/first-arctic-shipping-status-report-increase-shipping-traffic/>

			<p>meaningful regulatory response to addressing the impacts of these activities has lagged behind.<sup>12</sup> The DNLUP is the primary means of addressing and mitigating the impacts of marine shipping on Inuit rights and the Arctic environment.</p> <p><b>The Government of Canada has the Jurisdiction and Regulatory Tools to Address Marine Shipping Concerns, if so Directed by the NPC</b></p> <p>The Government of Canada has noted in submissions to the NPC that “the firm Canadian position on the waters of the Northwest Passage is that they are the internal waters of Canada.”<sup>13</sup> This includes all waters of the Canadian Arctic archipelago that are enclosed within the straight baselines adopted by regulation under the <i>Oceans Act</i>.<sup>14</sup> The majority of the Nunavut Settlement Area falls within these internal waters, with some of the area additionally extending to Canada’s territorial sea and exclusive economic zone.<sup>15</sup></p> <p>Under international law, the Northwest Passage’s status as internal waters of Canada confers significant regulatory authority to Canada over shipping. Coastal states enjoy full sovereignty within their internal waters and territorial sea.<sup>16</sup> Although foreign ships enjoy a right of innocent passage with the territorial sea, this right should not interfere with Canada’s ability to protect sensitive areas of the marine environment, so long as ships may find some “continuous and expeditious” passage through the territorial sea.<sup>17</sup> International law grants coastal states the authority to adopt laws on innocent passage in the territorial sea, including laws that relate to the “conservation of living resources of the sea” and the “preservation of the environment of the coastal State and the prevention, reduction and control of pollution.”<sup>18</sup> Coastal states may also set out sea lanes and traffic separation schemes related to navigation safety within the territorial sea.<sup>19</sup></p> <p>However, Canada appears to be averse to making use of these significant authorities because other countries contest its claim of internal waters. In its February 10, 2023 submissions to the NPC, the Government of Canada noted its reluctance to impose “blanket prohibitions without important</p>
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<sup>12</sup> For example, the *International Code for Ships Operating in Polar Waters* (Polar Code), which entered into force in 2017, failed to provide legal means to meaningfully address the environmental impacts of marine shipping beyond vessel-source pollution (see Edgar Gold et al, *Canadian Maritime Law*, 2<sup>nd</sup> ed (Toronto: Irwin Law Inc., 2016) at 998). Additionally, The *Arctic Marine Shipping Assessment*, prepared by the Arctic Council in 2009 and updated in 2021, has so far not resulted in regulatory measures to address the impacts it identified.

<sup>13</sup> Government of Canada, *Comments and Recommendations on the 2021 Draft Nunavut Land Use Plan* (8 October 2021), s 2.2.2 at 10 [Government of Canada October 2021 Comments].

<sup>14</sup> *Territorial Sea Geographical Coordinated (Area 7) Order*, SOR/85-872 and *Oceans Act*, ss 5-7; see also Michael Byers and Suzanne Lalonde, “Who Controls the Northwest Passage” (2009) 42:4 *Vanderbilt Journal of Transnational Law* 1133 at 1161, noting then-Minister of External Affairs Joe Clark’s 1985 statement that “[t]hese baselines define the outer limit of Canada’s historic internal waters.”

<sup>15</sup> *Nunavut Agreement*, *supra* note 1, article 3.

<sup>16</sup> *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994, ratified by Canada 7 November 2003), arts 2(1) [UNCLOS].

<sup>17</sup> UNCLOS, arts 3, 18(2).

<sup>18</sup> UNCLOS, arts 21(1)(d),(f).

<sup>19</sup> UNCLOS, art 22(1).

			<p>exceptions” on activities such as icebreaking,<sup>20</sup> and recommends exceptions to navigation that would weaken the environmental protections provided by the DNLUP.<sup>21</sup> Canada proposes these changes on the basis of preserving “flexibility to implement international obligations and foreign policy considerations,” including within its internal waters and territorial sea.<sup>22</sup></p> <p>At the same time, Canada has stated that it is not necessary to apply to the International Maritime Organization (IMO) to designate waters as particularly sensitive sea areas or areas to be avoided, “because these are the internal waters of Canada.”<sup>23</sup> Canada further stated that “it would not be advisable to use an international organization to designate those waters as special areas, and doing so could suggest to other states that Canada no longer views those waters as internal.”<sup>24</sup></p> <p>These positions by Canada lead to inaction at both the national and international levels, which is not tenable in the face of communities’ growing concerns about marine shipping traffic and impacts on wildlife populations and harvesting.</p> <p>The fact that other states contest Canada’s claim to the Northwest Passage does not relieve Canada of its obligations to protect and preserve the marine environment that is under its jurisdiction,<sup>25</sup> nor of its constitutional obligations and obligations under UNDRIP to respect the direction provided by the NPC through the land use planning process. Canada’s position on the Northwest Passage includes a corresponding responsibility to make use of the greater regulatory authority this status confers and to protect and preserve Arctic waters accordingly.</p>
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<sup>20</sup> Nunavut Tunngavik Inc., Government of Canada & Government of Nunavut, *Joint Submission on the 2021 Draft Nunavut Land Use Plan* (10 February 2023) at 17 [Joint Submission].

<sup>21</sup> See for example Government of Canada, *Comments and Recommendations on the 2021 Draft Nunavut Land Use Plan*, (10 February 2023) at 6, 11.

<sup>22</sup> Joint Submission, *supra* note 20 at 17.

<sup>23</sup> Government of Canada, *Comments and Recommendations on the 2016 Draft Nunavut Land Use Plan*, (13 January 2021) at 9.

<sup>24</sup> *Ibid.*

<sup>25</sup> UNCLOS, *supra* note 16, art 192.

*Canada's Commitments under the Arctic Cooperation Agreement*

Canada has latitude to introduce measures that restrict icebreaking in order to protect the marine environment. While the *Arctic Cooperation Agreement* does commit both the United States and Canada to “undertak[ing] to facilitate navigation by their icebreakers in their respective Arctic waters,” both parties also “affirm that navigation and resource development in the Arctic must not adversely affect the unique environment of the region and the well-being of its inhabitants.”<sup>26</sup> Further, under the agreement “the United States pledges that all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada.”<sup>27</sup> This clearly indicates that Canada can withhold consent for navigation if Canada has concerns about environmental protection and community well-being.

*Federal Regulatory Tools to Address Marine Shipping*

The Friends of Land Use Planning’s February 10, 2023 submission includes a Policy Menu with an extensive list of the policy options available to the NPC and to Canada to address community concerns around shipping. We wish to highlight a few specific regulatory tools from this menu that would enable Canada to implement land use designations as directed by the NPC, in response to the concerns raised in several submissions on the 2021 DNLUP.

The majority of concerns raised in the submissions to the 2021 DNLUP are around vessel navigation and routeing. In particular, commentators recommended that the NPC introduce seasonal prohibitions on icebreaking, avoidance of floe edges, approach distances from walrus haul-out, whale calving areas, coastlines and other sensitive areas, and additional limited use areas. Canada has several tools available to it under the *Canada Shipping Act, 2001* to introduce shipping lanes, approach distances, and no-go zones within its internal waters and territorial sea, and has used these tools to further environmental protection on several occasions.

Under the *Canada Shipping Act, 2001*, Canada may make regulations for the protection of the marine environment within Canadian waters (Canada’s internal waters and territorial sea), including compulsory and recommended routes and restrictions or prohibitions on the operation, navigation, anchoring, mooring or berthing of vessels.<sup>28</sup> Canada may also make regulations for navigation services within Canadian waters “regulating or prohibiting the navigation, anchoring, mooring or berthing of vessels for the purposes of promoting the safe and efficient navigation of vessels and protecting the public interest and the environment.”<sup>29</sup> Thirdly, Canada may introduce regulations for vessel safety that provide compulsory or recommended routes and that prohibit the operation of vessels for the purpose of protecting persons, shore areas or environmentally sensitive areas.<sup>30</sup>

		<p>Canada regularly uses these powers to protect the marine environment. For example, the Minister of Transport has introduced multiple Interim Orders on the Pacific coast to protect southern resident killer whale populations. These orders mandate specific approach distances and seasonal “interim sanctuary zones” where vessel navigation is prohibited.<sup>31</sup> Similarly, the Minister of Transport introduced an Interim Order to protect right whales in the Gulf of St. Lawrence, which includes speed restriction zones and seasonal restricted areas based on the presence of right whales within the area.<sup>32</sup> Transport Canada has also supported regulations within the Scott Islands marine National Wildlife Areas setting out approach distances from shorelines while vessels are in transit and anchoring, in order to protect seabird habitat.<sup>33</sup> Given the availability of these regulatory tools and the precedent for their use, the NPC should recommend similar measures within Limited Use and Conditional Use areas of the Nunavut Settlement Area.</p> <p><b>Conclusion</b></p> <p>Marine shipping is set to increase exponentially in Arctic waters, and communities will bear the brunt of the impacts. The NPC has opportunity and responsibility to respond to community concerns now through the NLUP, by designating Conditional and Limited Use areas that specifically address the impacts of shipping, and the Government of Canada has jurisdictional and regulatory powers to implement many of these designations as directed by the NPC. Canada also has the responsibility to implement measures that are responsive to community concerns, as part of its constitutional obligations to the Inuit of Nunavut and its explicit commitment to taking effective measures, including law and policy measures, at a national and international level, to implement UNDRIP within Canada.</p> <p>Thank you for the opportunity to submit these comments. The Friends of Land Use Planning looks forward to the completion of the NLUP and its swift implementation in the coming months and years.</p> <p>Sincerely,</p> <p>Paul Crowley</p> <p>Friends of Land Use Planning</p>
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<sup>26</sup> *Agreement Between the Government of Canada and the Government of the United States of America on Arctic Cooperation*, CTS No 1988/29 at ss 2, 3.

<sup>27</sup> *Ibid*, s 3.

<sup>28</sup> *Canada Shipping Act, 2001*, SC 2001, c 26, s 35.1(j),(k).

<sup>29</sup> *Ibid*, s 136(1)(f).

<sup>30</sup> *Ibid*, s 120(1)(j),(k).

<sup>31</sup> *Interim Order for the Protection of the Killer Whale (Orcinus orca) in the Waters of Southern British Columbia, 2022* (May 31, 2022) (pursuant to the *Canada Shipping Act, 2001*).

<sup>32</sup> *Interim Order for the Protection of North Atlantic Right Whales (Eubalaena glacialis) in the Gulf of St. Lawrence, 2022* (April 20, 2022) (pursuant to the *Canada Shipping Act, 2001*).

<sup>33</sup> *Scott Islands Protected Marine Area Regulations*, SOR/2018-119, s 2(1)(e),(f).



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