

Similarly, recognizing that the GN CH and GN DOE are the regulatory authorities responsible for negotiating and implementing the Exemption Agreements, if parties require a more detailed understanding of how the Exemption Agreements are implemented by GN, the advice of the GN CH and GN DOE should be sought directly, as the NIRB's comments about the role of regulatory authorities can be provided at a high level only.

From a process perspective the NIRB is quite concerned about the following:

- that the basic premise of the CIRNAC and NTI comments is that the NIRB and the GN, by entering into these Exemption Agreements are acting in a manner that circumvents or is otherwise contrary to the *Nunavut Agreement* and the *NuPPAA*. All parties should rest assured that the NIRB, as an Institution of Public Government established under the *Nunavut Agreement* and responsible for implementation of the *NuPPAA* is well familiar with and takes very seriously the Board's obligations in Nunavut's regulatory framework. The suggestion that the NIRB would have entered into and implemented for several years Exemption Agreements with any party in a manner that is inconsistent with those obligations is problematic and damaging to the integrity of the Board and the Nunavut regulatory system in general; and
- notwithstanding that extensive opportunities have been given to the parties (most recently 2 comment periods of approximately 180 days each on the Exemption Agreements), these substantive concerns about the Exemption Agreements have only been shared in the context of the commentary on Schedule 3, which is so late in the process to be a wholly unsatisfactory venue to address these issues in a responsive manner.

The Board would welcome follow up discussions with CIRNAC and NTI to ensure that any future exemption agreement comment processes are more effectively managed so that the substance of comments can be addressed in an appropriate forum.

From a substantive perspective, it appears to the NIRB that statements such as the following (from NTI's email of January 3, 2019) speak to some fundamental miscommunication regarding the role and function of Exemption Agreements and the role of the respective parties in the implementation of Exemption Agreements, which appears to be at the core of both the comments of CIRNAC and NTI:

For example, the NA [Nunavut Agreement] and NuPPAA require the NPC to review Schedule 3 and if the project is exempt, identify whether there are cumulative impact concerns. However, for a project that is subject to the exemption agreement, the NPC would have to review Schedule 3, and first determine whether the GN department has referred the project to the NIRB for cumulative impact concerns. If the department has not done so, the NPC would find the project exempt from screening. Under s. 80 of NuPPAA, the NPC would then be required to identify whether it has cumulative impact concerns. This is potentially duplicative, and confusing.

By way of another example, under s. 86 of NuPPAA, NIRB must perform further determinations on receiving projects from the NPC under s. 79. It is not,

however, directed to perform these determinations on receiving project from another source.

The integrated regulatory system established under the *Nunavut Agreement* and the *NuPPAA*, and particularly Schedule 12-1, Item 7 of the *Nunavut Agreement* and Schedule 3 of the *NuPPAA* recognizes that it is appropriate for regulatory authorities and the NIRB to exempt certain types of projects from the NIRB's impact assessment requirements. Exemption agreements in general, and the GN CH and GN DOE Exemption Agreements specifically are tailored to ensure that the NIRB is conducting meaningful impact assessments of projects that will be used to inform the subsequent decision-making of regulatory authorities responsible for permitting and licensing. The NIRB and the parties negotiating exemption agreements generally commence the discussions with the identification of the appropriate scope of the activities, undertakings and works that typically represent high volumes of permitting and licensing activity with low potential for adverse environmental impacts. In the development of these agreements, the NIRB recognizes that the regulatory authority is well-positioned to define both the scope of the activities, works and undertakings for which a NIRB impact assessment is not required to inform the regulatory authorities' subsequent decision-making as well as any exceptional activities, works and undertakings for which a NIRB impact assessment ought to be required.

Subsequently, when an Exemption Agreement is being implemented, it is understood that the regulatory authority continues to have a role in ensuring that the scope of the Exemption Agreement as negotiated is applied to projects appropriately. The regulatory authority who is most familiar with the regulation of the activities, works and undertakings to which the Exemption Agreement applies reviews applications and confirms for project proponents whether the Exemption Agreement applies prior to submission to the Commission. In the GN CH and GN DOE Exemption Agreements, the GN's role in assessing the potential for cumulative effects is much different than the Commission's role. The GN's consideration of cumulative effects takes place **before** a project is submitted into the regulatory system and the Commission is engaged and is intended for the GN to verify whether or not a given project should be included within the scope of the Exemption Agreement (or the exempt activities under Schedule 3).

Pursuant to *Nunavut Agreement* and the *NuPPAA*, the Commission's criteria for making cumulative effects referrals is restricted to instances where it has concerns respecting the cumulative impact of a proposed project in relation to other past, present or planned development activities. The GN is not bound by this constraint when identifying a concern for potential cumulative effects, as an interaction with or relation to other **development activities** is not required. For example, if the GN has concerns that the interaction of a proposed project with Inuit harvesting activities could result in potential cumulative effects or if the GN is aware of significant public concerns associated with a proposed project for any reason (for example, if numbers for a wildlife population are critically low in the project area), the GN can advise the Commission that the Exemption Agreement is not applicable to the project; the project would be considered by the Commission as any project not subject to an Exemption Agreement under the *Nunavut Agreement* or the *NuPPAA*.

Admittedly, the NIRB would expect it to be in very rare circumstances that GN CH or GN DOE would find that the potential for cumulative effects associated with a proposed project are such

that an Exemption Agreement should not apply. However, the NIRB and regulatory authorities recognize that regulatory authorities are most likely to have information about the scale and scope of similar projects taking place in a given area and/or have awareness and information of investigations and complaints about cumulative impacts in the project area that would not be available to the Commission or the NIRB. Consequently, it was determined that preserving the GN's ability as a regulatory authority to say to a given proponent that a general Exemption Agreement should not apply given the context of a specific project (due to factors such as public concern or concerns over cumulative effects) was required. As you may recall, comment submissions from NTI noted the importance of regulatory authorities bound by such Exemption Agreements, such as Parks Canada and the GN, having the discretion to refer activities for screening by the NIRB where public concerns are noted in respect of a proposed activity that would otherwise be exempt from screening under an Exemption Agreement. Consequently, preserving this discretion is a key feature of the Exemption Agreements negotiated by the NIRB to date and should be preserved in the wording chosen for Schedule

As such, the way that the Exemption Agreements are implemented post-*NuPPAA* is that by the time a party submits a project proposal to the Commission that could be included under the definition of activities, undertakings and works governed by the GN CH or GN DOE Exemption Agreements, the GN CH or GN DOE would have already confirmed whether or not the Exemption Agreement should apply to the project. If the GN CH or GN DOE have determined the Exemption Agreement is inapplicable due to public concerns or cumulative concerns, the GN CH or GN DOE would so advise the Commission and the Commission would assess conformity and refer the project to the NIRB for screening as required under s. 79 of the *NuPPAA*. If, however the GN has indicated that an Exemption Agreement applies to a project, it remains open to the Commission to independently assess whether the Commission has cumulative effects concerns such that the project should be referred to the NIRB pursuant to the Commission's powers under s. 80 of the *NuPPAA*. Nothing in the implementation of the Exemption Agreements with GN CH or GN DOE usurps, limits or otherwise affects the Commission's duty to consider the cumulative effects of activities, works or undertakings to which the Exemption Agreements apply.

In closing, as identified above, the NIRB looks forward to continuing to work with Crown-Indigenous Relations and Northern Affairs, the Government of Nunavut and Nunavut Tunngavik Incorporated to ensure that the wording in Schedule 3 accurately reflects the scope of the Exemption Agreements. We recognize that further coordination may be necessary to ensure that all parties have the necessary clarity regarding the respective roles and responsibilities for implementing these types of exemption agreements. To this end, we remain available to meet and discuss the implementation of the *NuPPAA* generally and the Exemption Agreements specifically moving forward.

If you have any further questions regarding the Board's views on this matter, please contact me directly at (867) 983-4608 or via e-mail at rbarry@nirb.ca.

Sincerely,



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Executive Director
Nunavut Impact Review Board

cc: Sharon Ehaloak, Brian Aglukark, Jonathan Savoy - NPC
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