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FAX NUMBER: see dist. list

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Please find attached the Reasons for
 Decision for NATCL preliminary screening.

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MACKENZIE VALLEY LAND AND WATER BOARD

In the Matter of:

An Application by the North American Tungsten Corporation Ltd. for a new Type A Water License MV2002L2-0019 for its Cantung mining operation on the Flat River, Northwest Territories

And in the Matter of:

The application of part 5 of the *Mackenzie Valley Resource Management Act* and the requirement to conduct a preliminary screening of this Water License Application

REASONS FOR DECISION

Background:

The North American Tungsten Corporation Ltd. (the Applicant or NATL) applied to the Mackenzie Valley Land and Water Board (the MVLWB or the Board) on February 1, 2002 for a new water license to replace Water License N3L2-0004 for its mining operation on the Flat River in the Northwest Territories (the Application). Between March and May, 2002, the Board received a significant volume of correspondence urging that the Application be referred for Environmental Assessment pursuant to section 125 of the *Mackenzie Valley Resource Management Act* (MVRMA). In a series of letters forwarded to the Board during this period, counsel for the Applicant argued that the Application was exempt from the requirements of part 5 of the MVRMA as a result of section 157.1 of the Act.

Section 157.1 of the *MVRMA* reads as follows:

157.1 Part 5 does not apply in respect of any license, permit or other authorization related to an undertaking that is the subject of a license or permit issued before June 22, 1984, except a license, permit or other authorization for an abandonment, decommissioning or other significant alteration of the project.

The MVLWB conducted a hearing under section 24 of the *MVRMA* to address the interpretation of this section of the *MVRMA* in light of the Application and, on July 24, 2002, ruled that section 157.1 of the *MVRMA* did not apply to the Application. The Board subsequently conducted a preliminary screening of the Application and referred it to the Mackenzie Valley Environmental Impact Review Board (MVEIRB) for an environmental assessment.

The MVLWB then extended the term of Water License N3L2-0004 for 60 days and, subsequent to a hearing held in Fort Liard on October 22, 2002, further extended the license for a period of one year with no change to the existing terms and conditions of the license. These extensions were, in the Board's view, necessary so that issues associated with the requirement for an environmental assessment of the Application could be resolved. The current term of the license expires on November 29, 2003.

On August 22nd, 2002, the Applicant sought judicial review of the MVLWB's preliminary screening decision to refer the Application to the MVEIRB for environmental assessment. The Supreme Court of the Northwest Territories held a hearing on the judicial review application in November 2002. In reasons for judgment filed November 28th, 2002, Schuler J. of the Supreme Court of the Northwest Territories dismissed the Applicant's judicial review application, thereby confirming the need for an environmental assessment of the Application.

The July 2002 hearing held by the MVLWB under Section 24 of the *MVRMA* was directed, as was urged by counsel for NATL, only to the question of whether the water license renewal was a continuation of the existing license or whether it involved the issuance of a new license. No other aspects of the interpretation of Section 157.1 were argued as part of that proceeding.

In the Supreme Court of the Northwest Territories, the issue tried related to whether the Application for a license for the development (the mine) was in respect of an undertaking which had been the subject of a license before June 22nd, 1984. At paragraph 13 in her reasons, Justice Schuler made the following ruling with respect to the scope of the interpretive issues she was deciding:

[13] As there was no issue raised or dealt with by the Board as to whether North American Tungsten's renewal application was for a license for the abandonment, decommissioning or other significant alteration of the project, I need not deal with whether that part of s.157.1 applies in this case.

NATL filed a Notice of Appeal to the Northwest Territories Court of Appeal from the decision of Justice Schuler on January 9th, 2003. The appeal did not include any challenge to Justice Schuler's ruling about the abandonment, decommissioning or significant alteration of the undertaking (the mine).

The Northwest Territories Court of Appeal's reasons were filed the 1st of May, 2003.¹ The Court of Appeal overturned Justice Schuler decision and held that the NATL Application was "in respect of a license for an undertaking that had a license before June 22, 1984". The Court of Appeal's decision makes it clear, however, that their ruling did not address the applicability of part 5 to applications which involve "abandonment, decommissioning or other significant alteration of the project" (see the latter part of s.157.1). The Court of Appeal remitted the matter of the Application to the MVLWB directing that it be handled on the basis of their interpretation of Section 157.1.

The MVLWB is bound by the Court of Appeal's determination of the meaning of the first part of section 157.1. It is clear, however, that neither the Board nor the Courts have dealt with the question of whether the NATL Application involves the "abandonment, decommissioning or other significant alteration of the project". This matter must still be resolved before a water licensing proceeding can go forward.

The Issue:

Simply put, does the Application made by NATL indicate that abandonment, decommissioning or other significant alteration of the project will occur during the term of the new Water License?

Analysis:

If the Application will involve the abandonment, decommissioning or other significant alteration of the NATL mining project, then the exception contained in the latter part of Section 157.1 of the *MVRMA* applies. In such a case, the ruling of the Northwest Territories Court of Appeal does not apply.

If that is the case, the MVLWB must conduct a preliminary screening of the Application since part 5 of the *MVRMA* applies. The Preliminary Screening Requirement Regulations make the preliminary screening of water license applications mandatory.

The question of whether the Application involves the abandonment, decommissioning or significant alteration of the NATL project is question of fact based on the evidence filed by the Applicant and the parties to this proceeding.

¹ *North American Tungsten Corporation v. Mackenzie Valley Land and Water Board*, 2003 NTCA 5.

The February 1, 2002 letter filed with NATL's Application indicates that "... this renewal does not involve abandonment, decommissioning or other significant alteration of the project. Indeed, the operations are virtually identical to what they previously were and no changes to the License are proposed."² The attached Application indicated that it was for ongoing operations and requested a license term of 7 years. Section 37 of the Mining Industry Questionnaire filed in support of the application indicated that the expected life of the mine was 5 years. An Abandonment and Restoration Plan was prepared by EBA Engineering in 2001 and was filed with the Board; such a plan is a requirement for all water licenses.

During the course of this Water Licensing proceeding, Information Requests (IRs) were issued to the Applicant to secure additional information about abandonment and restoration plans for the mine site. These included an IR issued by Board Staff on June 10th, 2003; an IR issued by the Government of the Northwest Territories (GNWT) on June 2nd (questions 1.2 and 1.5); an IR issued by the Department of Indian Affairs and Northern Development (DIAND) on June 2nd (question 1); Parks Canada Agency (question 2).

The Applicant advised the GNWT that, at current tungsten prices, the expected life of the Cantung Mine, taking into account only current reserves, is 2 years. However, the Applicant advises that some of the indicated resource may be incorporated into the reserves after more study is done and that additional exploration is ongoing. Based on these possibilities, the Applicant estimated mine life at between 2.5 and 7 years.

In responses to the Board, GNWT, DIAND and Parks Canada Agency questions, the Applicant consistently stated that the Application does not involve abandonment, decommissioning or other significant alteration of the project.³ The Applicant states categorically that "Final Restoration and Abandonment activity will not commence until current mineable reserves are depleted and it has been determined that the probability of establishing further economic reserves in sufficient quantity to justify continued operations is too remote to justify maintaining the facilities in place."⁴ In its response to the MVLWB questions, the Applicant states that "The majority of existing mine infrastructure and surface areas will be required in support of ongoing operations of the mine, mill and related services. There will be no reclamation conducted on any of those items until closure. Reclamation of those areas will be conducted following Notice of Final Abandonment in accordance with the approved Abandonment and Restoration Plan."⁵

² Letter from Udo E. von Doehren to Melody J. McLoed, February 1, 2002.

³ June 20th, 2003 NATL Response to Parks Canada Agency IR 2.

⁴ June 20th, 2003 NATL Response to GNWT IR 1.2, paragraph 2. The same paragraph is found in the June 20th, 2003 NATL Response to DIAND IR 1(b).

⁵ June 20th, 2003 NATL Response to MVLWB question, page 2.

None of the participants in this licensing proceeding have challenged the Applicant's assertion that abandonment, decommissioning or other significant alterations of the project will not occur during the life of the water license applied for in February 2002. The MVLWB is aware that the life of the mine may be shorter than the preferred term of the license specified by the Application. However, the Board is not of the opinion that there is any basis to challenge the evidence and commitments provided by NATL.

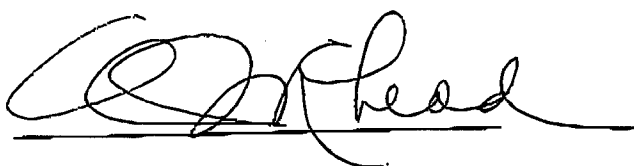
In the absence of evidence to the contrary, the Board accepts the Applicant's position that this license will not involve the abandonment, decommissioning or significant alteration of the project. The MVLWB notes that it will have the opportunity to review and consider the scope and term of the water license during the water licensing process as well as the opportunity for close scrutiny of a revised Abandonment and Restoration Plan.

Decision:

The MVLWB has examined the record in this proceeding and has decided that the Application will not involve the abandonment, decommissioning or other significant alteration of the project. Based on this factual determination, the second half of Section 157.1 of the *MVRMA* does not apply to the Application and no preliminary screening should be conducted.

In the Board's view, the Application should proceed to the water licensing stage of the regulatory process.

Signed on behalf of the Mackenzie Valley Land and Water Board:



Melody J. McLeod,
Chairperson MVLWB

July ^{9th} 2, 2003.

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