



# **Northern Regulatory Improvement Initiative**

**A Submission to**

**Neil McCrank, Special Representative**

**Minister of Indian and Northern Affairs Canada**

**February 25, 2008**

**Canadian Association of Petroleum Producers**

**Calgary, Canada**



## Submission on Northern Regulatory Improvement

### LETTER OF TRANSMITTAL

February 25, 2008

Neil McCrank  
Special Representative to the Minister  
Indian and Northern Affairs Canada

Dear Mr. McCrank;

**Re: Submission to the Northern Regulatory Improvement Initiative**

The Canadian Association of Petroleum Producers (CAPP) is pleased to provide the enclosed submission to the Northern Regulatory Improvement Initiative (NRII).

This submission reflects the experience of our members North of 60. We qualify our input by noting that, while we have been keen observers of the policy and regulatory regimes in Yukon and Nunavut and have members with land holdings in those jurisdictions, the greatest experience with oil and gas operations has been in the Northwest Territories. We have also made a concerted effort to provide an assessment that is not focused on reaction to the review process for the Mackenzie Gas Project (MGP). The MGP has, however, raised issues inherent in the regulatory system in the Northwest Territories, many of which are relevant across the North.

We understand that the NRII will address issues and opportunities at a strategic scale, and that there will be a need for a long-term implementation plan for acting on approved recommendations. In this regard, we would welcome recommendations that:

- Are practical, clear, and identify priorities for action;
- Describe the necessary mechanism, mandate and accountability to make change happen;
- Include a schedule for implementation; and
- Meaningfully engage regulatory system users in the process of improvement.

CAPP's directions for improvement are described broadly in the submission and intended as general guidance. We look forward to the results of your work and the opportunity to contribute to the planned workshop in March in Yellowknife.

Thank you for the opportunity to contribute to what CAPP believes to be both a timely and necessary Initiative.

Sincerely,



Pierre Alvarez  
President

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# 1. INTRODUCTION

## 1.1 Purpose and Intent

The Canadian Association of Petroleum Producers<sup>1</sup> strongly supports the Federal Government's commitment to improve regulatory function, and this initiative to consider ways forward. We also appreciate that the time frame for the Special Representative's work is short and has a scope that spans a vast area. In keeping with the scope and time frame, the purpose of this document is to describe the challenges that the oil and gas industry is experiencing with regulatory processes in the North; the directions in which improvement is urgently needed; and some approaches to consider.

We would like to stress that our comments are intended to shape improvements, not to criticize or to blame. The political, jurisdictional and legislative changes of the recent past have put tremendous demands on all participants. Northerners and their representatives have been grappling with new models of governance created pursuant to land claim agreements, new legislation on environmental assessment and protection, all this in a region with serious logistical challenges. Public expectations for consultation and coordination have never been greater. For Northerners to make the most of the land and resources north of 60, however, there must be a way to make the necessary decisions more effectively and coherently than under current arrangements.

This submission has the following parts:

- Background
- Industry Assessment
- Lessons from Case Examples
- Objectives for an Effective Regulatory Regime
- Directions for Improvement
- Practical Measures

## 1.2 Why Regulatory Improvement Matters

Northern regulatory improvement warrants a high priority because the status quo carries serious risks for the expectations and aspirations of Northerners and all Canadians for Northern Canada.

The effect of the policy and regulatory system is to increase the risk attendant on northern resource activities. Such risk is out of proportion for a Canadian jurisdiction, and is not contributing to effective or efficient decision-making. It deters investment, erodes resource values, and delays understanding of the resource base. The economic impact is magnified in Northern Canada because locating and monetizing non-renewable resources remains the primary, in some areas the only, opportunity for wealth creation.

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<sup>1</sup> The Canadian Association of Petroleum Producer's (CAPP) represents 140 companies that explore for, develop and produce more than 95 per cent of Canada's natural gas and crude oil. CAPP also has 135 associate member companies that provide a wide range of services that support the upstream oil and natural gas industry.

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Other government priorities for Canada's North are also affected. A strong northern economy is critical to advancing the priorities outlined in the Federal Government's 2007 Budget:

- Strengthening sustainable northern communities;
- Supporting individual and community economic self-sufficiency;
- Developing infrastructure;
- Supporting Arctic sovereignty and security.

Furthermore, a healthy northern economy is needed to support long-standing goals of greater territorial self-sufficiency and devolution of federal powers.

Northern Canada is significant on many levels: it represents a homeland for Aboriginal people and other Canadians, a vast territory of international ecological significance, and a region of great resource potential. For all these reasons, Northerners and Canadians need a high standard of non-renewable resource management and decision-making. Under current arrangements this standard is not being met and without intervention will continue to decline.<sup>2</sup>

CAPP is concerned that without attention to these issues, Canada and the northern territories will find in the long term that economic, societal and strategic opportunities have been foreclosed without an appreciation of the implications. Implications have a reach beyond levels of resource activity, to longer-term, national issues of energy supply and security.

In pressing for improvement, CAPP acknowledges Indian and Northern Affairs Canada's (INAC's) Northern Regulatory Improvement Initiative (NRII) and commends the changes proposed for Phases I and II. We hope that these measures will be put into effect as soon as possible, with very clear directions from the Minister to Boards, as originally envisaged by the *Mackenzie Valley Resource Management Act (MVRMA)*. The regulatory challenge in the north however extends beyond INAC's perimeter and beyond the Mackenzie Valley, and requires an approach that considers the collective impact of the activities of multiple governments, departments, agencies and bodies on the governance of non-renewable resources and economic development activities.

### 1.3 Distinctions among Territories

The scope of the Special Representative's review extends to Yukon, Northwest Territories (NWT) and Nunavut. A challenge for companies working north of 60 is that systems in each territory (and in the case of the NWT each region) have evolved independently. This has led to differences in the relationships (called here "wiring") among the various bodies with roles and authorities in dealing with applications for resource activities. There also remains uncertainty in each jurisdiction over how arrangements may change further as a result of devolution or planning processes.

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<sup>2</sup> Shortcomings in northern regulatory processes have been identified by many inside and outside government, including: the Office of the Auditor-General of Canada Report 2005; Conference Board of Canada Report 2007 report; Advantage Canada; INAC in the Northern Regulatory Improvement Initiative; and Northwest Territories Chamber of Mines.

The directions for improvement are described broadly here, applying in general to processes north of 60. Because arrangements as well as policy are so different across the northern regions, the challenges that industry encounters differ as well. Reform measures would have to be suited to deal with the specific circumstances and arrangements of each territory.

For physical and policy reasons, most of the oil and gas industry experience has been in the Northwest Territories. While the directions outlined here are strongly influenced by experience in the Mackenzie Valley and Inuvialuit Settlement Region (ISR), CAPP believes they are relevant to Nunavut and Yukon as well.

## 2. BACKGROUND

### 2.1 Transformation of the North

After a hiatus through the 1990s, the Canadian petroleum industry returned attention to the northern frontier. Since the earlier rounds of exploration, the political landscape and regulatory arrangements have been entirely transformed. Progress toward settlement and implementation of land claims, as well as changes in jurisdictional arrangements in the federal government (end of COGLA, role for INAC north of 60) have altered the authorities and jurisdictions bearing upon oil and gas activities. Requirements were expanded by legislative initiatives on environmental assessment and protection, both at the federal level (such as the *Canadian Environmental Assessment Act*, or *CEAA*) and the territorial level, (with a new jurisdiction under the *Nunavut Act*). These innovations create an entirely new system both for regulators and applicants. Also transformed were the expectations of Northerners for engagement, consultation and influence upon activities of both government and industry.

### 2.2 Regulatory Roadmaps Project

In an effort to achieve some clarity for applicants to the system, CAPP engaged with Indian and Northern Affairs in a project to work with regulators of oil and gas activities to document requirements and processes. In its examination of arrangements in Northwest Territories, onshore and offshore, the *Regulatory Roadmaps Project* (1999-2004) revealed processes far more complicated than first appreciated, and systems that were largely untried. At the time of completion of the Roadmaps, it was assumed that some of this complexity and uncertainty would be resolved in the course of implementation, and that handling of applications would lead to improvements as problems were encountered and solutions found.

Five years after the Regulatory Roadmaps documentation of the systems in the NWT (Mackenzie Valley, ISR onshore, Beaufort Sea),<sup>3</sup> there have not been improvements in keeping with experience gained. Instead applicants in both the petroleum and mining sectors are increasingly uneasy regarding regulatory challenges. In spite of sincere efforts to understand northern requirements and constructive engagement with regulatory bodies, CAPP members have experienced little or

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<sup>3</sup> The Regulatory Roadmaps Project is a jointly funded initiative of CAPP and INAC on behalf of the federal family, the products of which can be found at [www.oilandgasguides.com](http://www.oilandgasguides.com)

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no improvement in processes, and in fact are witnessing increasing times for dealing with applications. Processes remain slow, costly and unpredictable in schedule or outcome. Some decisions have not met acceptable standards for consistency or fairness. Problems are especially acute where activities straddle a boundary between jurisdictions.

### **2.3 Review of the Mackenzie Gas Project**

Over the intervening period, the attention and resources of both government and industry have been largely focused on meeting the challenge of assessment, review and authorization of the Mackenzie Gas Project (MGP) in the Northwest Territories. This Project has major implications for the North by providing access to market for resources otherwise stranded, but the scale of the project is not unusual as pipeline projects go. The trans-boundary aspect however triggered requirements of multiple jurisdictions and statutes. In an effort to ensure the project received due consideration, the Federal Government engaged at senior political and departmental levels and rallied resources across departments to build capacity to deal with the pipeline application.

The course of the Mackenzie Gas Project through consultation, coordination, and assessment is itself a demonstration of the enormous effort required by governments, institutions and proponents to try to make northern systems produce decisions.

At four years and counting, environmental assessment of the MGP has yet to conclude. Depending on the outcome of assessment, regulatory processes may ensue. Once these are concluded, business decisions will determine whether the project in fact proceeds. Until then, uncertainty over market access will keep further investment in natural gas in limbo. Apart from work in areas where market access exists, or activities necessary to meet lease commitments, little will proceed until this uncertainty is cleared.

### **2.4 Capacity Concerns Post-MGP**

Should the pipeline proceed, there will be a large number of activities to prove up and connect reserves to the line, all of which must go through northern review and approval processes. Operators are increasingly concerned that once the extra governmental resources that have been committed to the Project are dispersed, northern regulatory systems will be unable to cope. Regulatory agencies are already stretched to address the relatively small number of non-MGP applications today. In terms of concern for the future, there are processes underway in northern jurisdictions (land claim negotiations, devolution and planning processes) that tend in a direction toward increasing the complexity of arrangements and further erosion of accountability for resource decision making.

### **2.5 Reason to Act Now**

CAPP believes that events have come to a critical juncture, where there is both need and opportunity for improvement. As mentioned above, public expectations have been transformed by the political and legislative initiatives of recent decades. Over the same time, industry practice has been transformed by industry management systems, processes and new technology. Regulatory practice now needs to evolve to keep pace with the times.

There is an opportunity today to learn from the experience with the Mackenzie Gas Project review process and several years' experience with applications. Many of the people involved with the MGP are still accessible. This is the time to assess lessons learned to revive northern systems into a workable and effective framework for northern resource management.

There are also consequences of hesitation. Opportunities for the conversion of resource potential into wealth are not continuous, and once deterred can take decades to revive. The petroleum sector's interests in the North are considerable, but they are contingent on market conditions, on the pipeline project, and on potential returns, qualified by the regulatory risk of doing business here. The oil and gas sector is poised to commit investment, but it is still assessing returns and risks, among which regulatory risk is becoming daunting. Similarly, territorial and aboriginal/regional governments are poised to make the most of economic development. Efforts to improve the system now could have much more impact than if they are deferred.

### 2.6 Costs of Missing This Opportunity

The implications of continuing with inefficient regulatory systems should not be underestimated. Applicants most immediately bear the costs of unnecessary iterations and delays, but costs and lost opportunities are borne more broadly within the economy and society.

In economic terms, regulatory inefficiency and duplication represent deadweight, causing unnecessary expenditures that do not contribute to sound decision-making. There is also increased risk of error, and signals that lead to misallocation of resources.

Dead-weight erodes resource values. Regulatory barriers delay acquisition of knowledge of the sub-surface necessary for good decision-making. Distortions in resource values represent a loss of wealth, needed in the North for investments in communities and individuals.

In spite of a much greater hydrocarbon resource potential, levels of drilling activity and investment in the North are very much lower than south of 60. Without regulatory change and without a pipeline, activity will continue to decline. Industry now is concerned that the considerable investments made in northern hydrocarbons are coming to represent stranded capital. The public interest should be concerned that the resources themselves could be stranded.

In societal terms, the North has a relatively small population, and leadership is already heavily committed in dealing with a multitude of challenges. Excessive processes put a burden on people, communities and institutions of the North, and draw people and resources away from economic, societal and cultural endeavours.

The current system creates uncertainty and risk for proponents who cannot be reasonably sure when planning:

- whether an authorization will be obtained at all;
- whether the timing will meet northern operating requirements;
- what terms and conditions may apply; and
- what costs will accrue.

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This risk and uncertainty attend all applications, whether for drilling a well or digging a soil pit to take samples. The short windows associated with northern operations and limited lease tenure mean companies must often make expenditure commitments well in advance of a regulatory outcome. Regulatory uncertainty and delays place this investment at considerable risk.

Process or regulatory risk is an important factor in investment decisions. The cumulative effect of industry's regulatory experience in northern Canada is a burden of risk, the effect of which is to deter investment by responsible operators. This burden puts at risk agreed-upon goals of responsible, sustainable economic development, as well as more recently announced objectives for Arctic presence and sovereignty.

### Process Risk

Geological risk is inherently high in the north. Estimations of undiscovered resource potential are high but have yet to be proven. The remote locations, limited services and infrastructure, and extreme conditions pose extraordinary operating and technological challenges. Technological risk is high, in that new generations of technology have to be developed and tried. In addition, there will always be a requirement to meet the highest standards of environmental protection and engagement with (and benefits for) communities.

Industry has experience in dealing with these types of inherent risks, however there are three major government-related factors out of the control of industry that are deterring decisions to explore or develop in the North. These risks can be characterized as:

- regulatory risk associated with uncertainty over whether an application will be approved, the terms and conditions of approvals, and whether authorization will be obtained in time to enable operations according to plans;
- policy risk, associated with policy changes that alter the terms for development of resource prospects from the terms understood at the time of acquisition of resource rights, and associated with policy changes during the period of an application; and
- risk of intervention that causes delays and unnecessary costs, or that lead to decisions unwarranted by the facts.

These regulatory risks (outside the industry's control) handicap northern opportunities in competition for international investment because of increased uncertainty and system unpredictability, thus impeding resource exploration and development.

### **3. INDUSTRY ASSESSMENT**

#### **3.1 Unnecessary Complexity**

The effect of the political and regulatory evolution of the North has been to move from a unified system of oil and gas administration to a region with nine jurisdictions, in each of which there are in the order of ten categories of lands, on which arrangements for handling of applications for activity differ. In the event that Yukon First Nations elect to “draw down” authority to regulate oil and gas resources, up to 14 jurisdictions may be added to the total.

Each region has a different array of authorities involved in decision-making and in co-management of resources. A simplified schematic for the Northwest Territories is provided in Figure 1, page 25. There are also differences in the “wiring” among the authorities, for instance between government and land claim institutions, and between assessment and authorization.

Environmental assessment and regulatory authorization systems north of 60 are unnecessarily complicated, in that the complexity does not result in better outcomes. This places a heavy duty on operators, and can be a challenge for regulators, few of whom have a working understanding of the system as a whole. It should be possible for an operator to gain familiarity with the process so that requirements can be understood and met, and authorizations approved, without wasting time and resources of the operator, the community or the regulator.

Complexity does not have to be an issue: regulatory systems across the country are complex. But systems, complex or not, have to work. Complexity should be justifiable as contributing to the quality of the decisions made. The effect of system complexity in the North is that too much time, energy and money is going into process, rather than into the northern economy and society.

#### **3.2 Imbalance between Surface and Subsurface Interests**

Current arrangements create an imbalance between surface and sub-surface interests, with an institutionally-enforced advantage to surface rights-holders. This bias reduces the value of sub-surface rights, a loss that is more immediate to the rights-holder but which will accrue to the resource-owner (whether the Crown or an Aboriginal land corporation), and ultimately to the public interest.

An example is the lack of recourse for applicants when negotiations come to an impasse, for example over benefits or terms of access. Even in jurisdictions where there are mechanisms for appeal, it is often difficult to get access to these mechanisms to resolve issues. Proponents find themselves trapped in a process where there is no way to advance resolution other than by making concessions. The lack of surface rights dispute resolution is especially acute in the Mackenzie Valley. Although dispute resolution was envisaged under the settlement terms as a necessary balance to the advantage given to surface-rights holders under the other parts of the agreement, no such mechanism has been introduced.

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### 3.3 Implementation Out of Line with Intent of Agreements

Land claim agreements concluded between Aboriginal peoples and the Crown enjoy the privilege of protection under the *Constitution Act*. The oil and gas industry has the greatest respect for the understandings achieved through many years of difficult negotiation, and has been a consistent promoter of the resolution of claims.

It is not clear that interpretation and implementation of the land claim agreements, however, have been true to the original understanding and intent of the signatories. This is not a new point. During consultations in 1997 on the draft *MVRMA*, concerns were raised during consultations on the Bill that it went beyond the commitments made in the claim agreement and were so inappropriate to northern circumstances that they would prove unworkable.<sup>4</sup>

### 3.4 Poor Standards of Governance

The workings of the processes and the quality of the outcomes fall short of what most Canadians would consider reasonable standards of governance.

- Requirements and standards change in the course of review.
- Similar applications are not treated in a consistent manner, and suffer from interventions that cause unwarranted disruption to process, timing, and decisions.
- The level or intensity of assessment is often out of proportion to the activity proposed.
- Regulatory processes and threatened delays have been used to increase the pressure on proponents in negotiations of benefits to communities.

These are not the kind of problems that mend with time and inattention. They are the kind of problems that can undermine the reputation of the North as a place to work and invest. In the 21<sup>st</sup> century, the Canadian North is no longer a remote hinterland. It is a homeland and a strategic region in a fully-connected global context.

### 3.5 Unreasonable Coordination Challenges

The effect of the changes of the past two decades has been to balkanize decision-making responsibilities across the northern territories and across departments, agencies and land claim institutions. Much of this is the result of the “silo” organization of government. Legislative initiatives are advanced and implemented by departments without regard to implications for the responsibilities of other departments. There is a tremendous resistance to coordination among agencies, departments and boards, even where coordination is a matter of policy or mandate. As a result, in order to move applications through multiple assessment and review processes, a tremendous effort is needed to inform all participants and to coordinate information

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<sup>4</sup> Submission of the NWT Power Corporation to the Standing Committee on Aboriginal Affairs, 2 Dec. 1997, Bill C-6, the *Mackenzie Valley Resource Management Act*.

NWT Chamber of Mines Submission to the Standing Committee on Aboriginal Affairs, December 2, 1997 on the *Mackenzie Valley Resource Management Act*.

requirements, communications, consultations, timings and outcomes.<sup>5</sup> Since the consequence of failure to coordinate falls mainly on the proponent, companies are drawn into monitoring, facilitating and expediting to prevent unnecessary delays.

### 3.6 Disproportionate Benefit Demands

Proponents continue to face onerous and variable demands from communities and from boards regarding benefits. Benefits accrue to communities and regions in multiple ways, through benefit agreements, direct and indirect employment, access fees, and revenue-sharing under the terms of land claim agreements. Communities are not always well informed on the full “matrix” of benefits, and this leads to circuitous discussions and escalation of demands.

Community expectations for benefits continue to be out of line with the economic realities of hydrocarbon exploration and development. The industry is still relatively new to the “New North” and whether any returns will be realized on the outlays to date remains hypothetical. At the same time, companies need to appreciate their obligations in terms of new arrangements in the North. Greater clarity could serve both communities and proponents.

Proponents of major projects often face extensive demands from local communities and organizations for benefits and programs that go far beyond the scope of a project’s impacts – often as redress for past ills and grievances, or to make up gaps in government funding.

Companies find especially difficult “leverage” of processes, whereby applicants are threatened with delays or escalation of requirements unless benefits demands are met. This practice and the effect on processes are magnified in northern jurisdictions by lack of clarity in the system on whether benefits requirements are conditions of authorizations.

### 3.7 Consultation Overload, Overlap with Benefits

Consultation requirements are onerous and inefficient. There are requirements for consultations on so many matters, that communities are easily overloaded and confused: companies often find that what they had understood to be consultation meetings may not be recorded as such. Neither are consultation requirements in proportion to the scale of proposed activity.

### 3.8 System Poorly Suited to Resource Activities

Northern systems are poorly designed to deal with applications for non-renewable resource activity. Even simple activities typically require a number of authorizations from multiple authorities, with each authorization requiring the completion of environmental assessment. This is caused in part by sensitive activity thresholds in legislation and very inclusive definitions of development. These thresholds are triggered many times in the course of the iterative processes

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<sup>5</sup> Refer to the flowcharts for review of a Drilling Program Approval in the Regulatory Roadmap *Oil and Gas Approvals in the Northwest Territories – Inuvialuit Settlement Region*, a guide to regulatory approval processes for oil and natural gas exploration and production in the Inuvialuit Settlement Region; June 2001; which can be found on-line at [www.oilandgasguides.com](http://www.oilandgasguides.com).

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typical of both hydrocarbon and mineral exploration, and at each stage of reconnaissance, exploration, delineation, development and production.

From a resource management perspective, the degree of regulatory complexity is inconsistent with the stage of development of northern hydrocarbon basins. Even with the work conducted in the first round of oil exploration activity, the resources of these basins are in an early stage of discovery and delineation. All participants need better information on the location and value of sub-surface resources in order to make good decisions toward a sustainable and healthy economy. The complexities and inefficiencies of the current system build a bias against the activities needed to define the potential of the North.

### 3.9 Incoherence in Resource Policy and Decision-Making

Northern arrangements mitigate against coherent resource management. Obviously northern governments serve a wide range of interests, however there are risks created when resource management policy becomes a residual of processes driven by other priorities and interests.

Both INAC and the Government of the Northwest Territories (GNWT) for example have stated positions in favour of sustainable northern economic development, with a prominent role for non-renewable resource activity in the northern economy. In many processes sponsored by government, however, resource considerations are absent.

Examples of the incoherence between overarching goals and policy processes that affect resource activities today or for the long term:

- **Infrequent, unpredictable calls for nominations:** The hydrocarbon resource cycle requires some predictability regarding the availability of lands and issuance of rights, in order to build knowledge about a region's resources and to acquire a land base. Stop-start processes in south-east Yukon and south-west Northwest Territories put current investments at risk. In some instances, there have been significant alterations in size and location of lands from one disposition to the next.
- **Foreclosure of lands for exploration:** Vast regions of the north are presently closed to or have not been opened to exploration. Land use planning processes are tending toward further limitations. This prevents industry from doing the work needed to discover and define sub-surface resources. This in turn limits the information available to inform balanced land-use decisions. It also forecloses northern economic opportunity for the long-term, at the same time as governments profess to be courting investment.

A vital concern for all resource industries is the rapid foreclosure of lands in each region and in the offshore for resource activity. Decisions to withdraw lands from future mineral and hydrocarbon activity are being made in several processes, (land use planning, Protected Areas Strategy, local "issue management" planning) without due regard for the collective effect in relation to protection objectives or loss of future opportunity. While it is true that industry representatives are allowed to attend these processes, concerns are not reflected in either process or outcomes. Further, it is reasonable that government officials in these processes be accountable for properly representing the public's interest in sub-surface resource values.

- **Midstream Escalation of Requirements:** Operators develop and submit applications based on what they understand to be the requirements as set out in regulations, guidelines and in consultation with agencies. More and more commonly, applicants are pressed to exceed these standards, with the threat used that unless they do, the project will be referred to a higher level environmental assessment (EA), i.e., delayed. There needs to be clarity on requirements at the outset, and stability of the rules – or at least a predictable process for evolving new standards.
- **Policy In-Progress:** The evolving nature of the policy regime that surrounds resource development activities in the North creates special challenges. This is particularly true when industry users of the system are either not consulted during policy development, or are given insufficient advance notice of a change. While changes are understood to be necessary as policy develops, ad hoc policy development that changes the terms for applications that are in-process, or for operations already approved, confound an operator's activity planning and project viability.

There should be a point at which outcomes are assessed against overall objectives and the collective impact on resource development opportunities in the long term.

### 3.10 Insufficient Capacity

A common complaint about northern processes is that the system does not have the capacity to handle more than a few applications at a time. Having observed the system at work, CAPP's view is that capacity is not simply a matter of resources, but has to do with available expertise, flexibility, timeliness, and how resources are deployed. It also relates to organization: personnel with the necessary skill sets are scarce in the north to start with, and if every board requires its own secretariat, there will be chronic shortages.

The flow and distribution of applications for resource activities are difficult to predict for regulators trying to plan to meet demands. Forces of nature, policy and the market drive decisions on where and when activity might take place. A highly differentiated regulatory system is at a disadvantage, because capacity is highly dispersed and may be difficult to reassign to meet unexpected demands.

Industry can attest to indications that capacity is inadequate:

- time required to process resource applications is increasing, rather than decreasing as would be expected;
- there seem to be more frequent delays and interruptions attributable to problems of availability (e.g. getting Board quorum);
- there is a poor understanding of industry practices among northern regulators; and
- communities are overloaded, and unable to accommodate consultation requests in a reasonable time.

### 4. LESSONS FROM CASE EXAMPLES

In preparation for this review, CAPP canvassed members regarding their practical experience with northern processes. Following are general observations that follow from the examples provided.

The most commonly reported problem was referral, or threat of referral, of a project to a higher level of environmental assessment than justified by the nature of the activity. Demands came variously from communities related to the resolution of benefits, or government departments seeking influence on matters outside their mandate or over which they have no direct control. This reflects the system's vulnerability to interference, and the difficulty it has in dealing with such interference. The effect was to delay or prevent authorizations, and to compromise the soundness of decisions and the integrity of the system.

Serious difficulties were also experienced with:

- Consistency of policy and objectives between and among government agencies and boards;
- Regulators overstepping authority by using the permitting process as a de facto method to turn guidelines into regulations;
- Absence of commitment to resolve regulatory underperformance (inconsistent timelines, changing processes, absence of accountability, administrative errors);
- Unpredicted changes in policy requirements between the time of application and the authorization decision;
- Lack of regulator familiarity with the resource cycle and with oil and gas industry operating practices and constraints;
- Inflexibility in relation to proponent's needs for timely decisions to meet logistical schedules.

Regulatory processes have been tested over the past seven years in the NWT, and should be at a stage now where the process for "typical" drilling or seismic operations is predictable in terms of requirements, timelines and outcomes. However, successive drilling applications by one company in the same region shows that application timelines are continuing to vary widely and on the whole are lengthening.

In the current regulatory environment, delays or uncertain conditions have resulted in operators missing the short operating window, and being liable for capital commitments. Equally significant is losing a year against a time-sensitive exploration license. The ripple effect through the local and Northern contracting communities has been immediate, with cancellation of contracts and activity.

## 5. OBJECTIVES FOR AN EFFECTIVE REGULATORY REGIME

### 5.1 Shared Objectives

Analysis of alternatives should begin with clarity and agreement about objectives. We think the following objectives related to resource development would have wide support from both public and private interests.

- Sound decision-making on access to and exploitation of natural resources toward achievement of responsible, sustainable resource development that is in the interests of Northerners and all Canadians.
- Engagement of First Nations, Inuit and Inuvialuit in governmental resource decisions on traditional lands, generally and in keeping with land claim settlement agreements.
- Wise use and conservation of public resources, maximization of the value of resources and wise investment in human and societal capacity.
- Protection of the land, waters, air and wildlife against anthropogenic damage, presently and for future generations.
- A resilient and healthy northern economy, able to support the aspirations of Northerners.
- Security of persons and territory.

### 5.2 Process Objectives

Public interests and private interests would be expected to have different criteria for assessing policy and regulatory frameworks. What is needed here is a common understanding of and commitment to Canadian principles of governance, in particular:

- clarity of rules, requirements, standards and guidelines, and consistency in application and enforcement;
- appropriate standards of fairness, competence, consistency, and timeliness in decision-making, free of bias or conflict of interest;
- development of requirements, standards and guidelines in a transparent and consultative manner;
- clear lines of accountability for resource decisions by governments, and all institutions of public government, in relation to the public interest;
- responsibility of the Crown for sound decision-making for management of Crown lands and resources;
- balance in the rights and responsibilities of applicants and of government respectively, and by implication appropriate assignment of responsibilities between government and applicant regarding environmental and socio-economic impact;
- avenues of appeal to protect the public's interest against bad decision-making;
- fair and timely processes to achieve closure when disagreements arise on terms for land access approvals or accrual of benefits.

### The Resource Cycle

This submission makes several references to northern systems being badly suited to deal with applications for resource activities. Broadly speaking, the specific concerns of resource operators are grounded in the fundamental nature of the “resource cycle”.

Wherever an operator chooses to invest, the “resource cycle” for non-renewable resources imposes certain realities. Non-renewable resource companies must make large expenditures early in the cycle (to acquire rights, undertake exploration) with a high degree of uncertainty over whether resources will be proven to exist, and even greater uncertainty over how long it will be between the initial outlays and eventual returns in the form of revenues from production.

These uncertainties over returns and timing are accentuated in operations in northern Canada by three sets of factors:

- **physical realities**, such as the early stage of investigation of northern resources, and short operating windows, logistical and technological challenges, lack of infrastructure;
- **economic issues**, such as costs of northern activities, and uncertainty over market access; and
- **process factors**, such as rule changes mid-stream, limited public policy discipline, longer times for obtaining authorizations, risks of missing planning deadlines, more time- and cost-intensive requirements, high risk of interference.

A second source of mismatch between resource activities and northern processes is the iterative way in which resource companies function. Companies acquire land, then undertake exploration, usually with seismic surveys followed by exploratory drilling. At this stage the risk is high that nothing will be found, and further work is needed. Based on exploration results, companies may relinquish tenure, and acquire new lands for exploration. Companies build an information base and intensify exploration efforts over successive seasons. Because of very low activity thresholds in northern statutes, this process generates many applications for authorization of similar activities. Northern regulators typically require a very detailed work plan, and there is limited flexibility should plans change.

The investigative nature of resource activity is also constrained by tenure policy. In order to build knowledge of the sub-surface and a land base, companies rely on governments to conduct regular and predictable rights dispositions. Instead, in some areas (Yukon and southwest NWT) dispositions have been irregular and infrequent, or have only released land of minimal potential. Tenure policy can also be detrimental if the terms of access change radically after the rights are sold and before monetization can be achieved.

### Industry's Requirements for Authorization Processes

As a result of the nature of the resource industry, operators' requirements for regulatory processes in any jurisdiction are specific:

- requirements and processes that enable industry to meet high standards of environmental and societal stewardship
- cost-effective and efficient regulatory processes that are competitive with other petroleum jurisdictions
- predictability of outcomes, timing and terms of decisions to enable planning
- fairness in policy and regulatory treatment relative to other industrial sectors
- consistency of treatment from one proponent to another for applications for similar work, so that cost implications of regulatory compliance are uniform across operators;
- clarity from the outset on requirements that must be met to achieve approvals and stability of those requirements over the course of review
- transparency of process, reliability of scheduling, and protection from arbitrary or irrelevant considerations or influences or leverage/gaming of the process
- a policy framework that provides for access to lands to explore for, and develop resources, consistent with the requirements of the "resource cycle"
- policy and regulatory processes that are rooted in the physical, economic and competitive realities of activities necessary to develop public resources
- reliable commercial relationships with lessors of rights to resources, in particular, confidence that lessors will ensure that, having bought the rights, the lessee is not prevented from exercising them by any action of the lessor
- protection of commercial and proprietary interests, confidentiality regarding competitive information.

## **6. DIRECTIONS FOR IMPROVEMENT**

In calling for action, industry appreciates that these are not simple problems. That little progress has been made has to do with the complexity of the systems and difficulty in engaging across agencies, boards and departments, and between governments, as well as diverse perceptions of the issue. Nonetheless, industry does not believe problems are intractable and hopes that progress can be made.

When plans for this initiative were first discussed, CAPP had hoped that definition of issues, and development and analysis of options could be tasks that could be undertaken by the Special Representative for Regulatory Improvement. As it turns out, the short time frame for the review and broad scope mitigate against an in-depth investigation. Directions for improvement are described here in strategic terms. Progress is needed in every territory and region in the direction described, however the means for progress would have to be adjusted to suit the situation in each territory.

### **Territorial Distinctions**

#### **Nunavut**

Processes established under *Nunavut Act* and Nunavut Land Claim Agreement are still working through implementation. There are mixed messages on authorities for processes under NIRB and CEAA. Experience so far has been with mineral exploration and Bathurst Inlet Project. Processing time frames are long and unpredictable. In a promising development, the most recent Budget of the Government of Nunavut outlines an initiative to examine the issues and challenges facing the petroleum industry in Nunavut.<sup>6</sup>

#### **Yukon**

Has a more unified system under terms of devolution of federal responsibilities to the territorial government. Problems have been noted with getting applications processed in time to meet planning deadlines. Limited access to lands is a particular impediment to oil and gas industry activity in Yukon.

#### **Mackenzie Valley**

Each region has different arrangements and relationships that must be navigated. Implementation of *MVRMA* creates a bias against sub-surface rights holders. Processes promote local intervention, and produce inconsistent decision-making. Of concern for the future is uncertainty regarding effect of future land settlements, devolution, and self-government negotiations on the diversity in systems across jurisdictions.

#### **Inuvialuit Settlement Region**

There is greater clarity and familiarity around processes in the ISR, both among regulators and proponents. Benefits requirements differ in the ISR from other regions. Benefits demands tend to escalate to include wide range of issues beyond scope of project. There has been a substantial increase in processing time for applications over the past few seasons.

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<sup>6</sup> February 20, 2008

### **6.1 Direction: REBALANCE**

At the time that land claims were negotiated, it was understood by industry that the outcome was intended to improve land use certainty and the investment climate for communities and investors. In the course of subsequent interpretation and implementation, however, the effect has been to halt economic activity in many situations with respect to development of lands and resources. Measures are needed to redress imbalances between holders of surface and sub-surface rights, and also between resource owners and rights holders. In particular rights-holders need access to effective dispute resolution.

### **6.2 Direction: HARMONIZE**

In every jurisdiction north of 60, the business of getting approvals involves a great deal of work to determine what needs to be done, who to deal with and how to go about it. Answers to those questions vary widely or subtly depending on location. Companies want to do this right, but find that there is too much to understand that does not have to do with the responsible conduct of the activity.

Present arrangements require an application for a single activity to be examined by multiple reviewers, involving a great effort at coordination to avoid delays. Although various statutes call for coordination, there is no ultimate accountability and the cost of failure is borne by the applicant in the short-term, and ultimately by Canadians.

Responsibilities and processes should be unified, rationalized and harmonized so that oil and gas applications are handled consistently and efficiently.

### **6.3 Direction: CREATE ACCOUNTABILITY**

Pending devolution, Indian and Northern Affairs Canada acts for the Federal Crown as owner of Crown resources and lessor of rights, as well as creator and custodian of resource management systems. For the resource-owner to accept payment from lessees, fairness requires that its actions do not impede a reasonable opportunity to access the resource in the time frame of the lease.

Industry's experience however is that the resource management system is not producing decisions efficiently or in time to meet tenure deadlines. This is partly because of issues that arise because of diverging and sometimes competing objectives of departments and agencies, and which are beyond INAC's reach. For these issues, there is nowhere to go for assistance in resolving the conflict. In some cases, the issue is with the workings of the co-management bodies or institutions of public government, which were created by INAC, but for which no one seems to take responsibility.

### **6.4 Direction: RESPOND TO THE REALITIES OF THE RESOURCE SECTOR**

The North now depends, and most probably will continue to depend, on non-renewable resource development for economic activity and wealth creation. Systems however are badly suited to dealing with applications for resource activities, which often involve multi-year activities, some

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sequential and iterative.

Systems need to take account of the realities of the resource cycle. Good decision making requires up-to-date technical knowledge of resource activities, to a level that is difficult for so many boards and secretariats to achieve and to keep current. Effective assessment requires that the activities applied for are objectively understood, and that associated risks are rationally defined. Processes need to be better informed by personnel with experience with industry practices. Those involved in reviewing authorizations should be brought to a higher level of understanding of current technology and practices of industry, and the business requirements of applicants. In the case of oil and gas activities in northern Canada, the body with the most expertise and experience is the National Energy Board.

### **6.5 Direction: BUILD COHERENCE BETWEEN OBJECTIVES AND PRACTICE**

Greater coherence is needed in non-renewable resource management, policy development and decision-making. There needs to be better articulation of a collective vision for the role that resource development should play in the future economic well-being of Northerners. These goals need to be clarified and policy development coordinated to ensure that initiatives that affect the resource industry progress in a rational way, consistent with these goals.

### **6.6 Direction: BUILD A MORE FUNCTIONAL SYSTEM**

In its present state, authorization systems require an army of administrators, board members, staff, and inordinate effort from applicants to keep an application moving along – anticipating obstacles and making the system work.

Progress is needed toward better “wiring” among boards, agencies, departments and governments toward:

- more effective ways to meet the intent of legislation;
- a common set of procedures and decision-criteria;
- better coordination; and
- accountability at a more senior level, across the “silos” of departmental authority.

Capacity and “wiring” are related. A more focused and cohesive system still requires capable staff and adequate resources, but these resources would be far more effectively and consistently used by significantly reducing the number of boards/agencies from the thirty or more bodies that must now be staffed and resourced.

### **6.7 Direction: MAKE SENSE OF BENEFITS REQUIREMENTS**

There should be better definition of all of the benefits that accrue from development of oil and gas resources. Communities and other stakeholders should have a clearer understanding of the suite of benefits that can be reasonably expected from industry activity (i.e., access fees, infrastructure fees, royalties, employment, contracting, etc.).

Benefits demands require rationalization with respect to the both the scale of activity and the potential impacts from planned activities. Linkages could then be made more readily between the type of proposed activity, the role of “benefits agreements” in the regulatory authorizations process, and a reasonable level of benefits.

### **6.8 Direction: DEFINE CONSULTATION REQUIREMENTS**

The direction should be toward more focused and effective consultation, to reduce the burden on communities and proponents while still meeting the intent of the land claim agreements to ensure that people are fully informed and their interests accommodated. Consultation requirements and procedures need to be defined and rationalized.

## **7. PRACTICAL MEASURES**

It is clear from assessments of the system that considerable confusion and anxiety arise from uncertainties about rules, roles and responsibility, and inconsistencies. It is quite reasonable that there will be different ways of doing things in the North, and that the Crown commitments under land claim settlement agreements create a framework that must be respected. Nevertheless, applicants should be able to expect the same high standards of fairness, consistency and due process in decisions made by the Crown in the North as in the rest of Canada. This is important if investment decisions are to be taken on the basis of appropriate resource values and prospectivity, rather than on regulatory process risk.

The recommendations that follow reflect on elements of the policy and regulatory regime north of 60 where improvements could be explored, and result from the practical field experience of oil and gas sector operators.

### **7.1 Northern Federal Regulatory Coordination**

#### **1. Establish a northern energy office<sup>7</sup> under a single, accountable authority.**

Functions could include:

- co-locating federal resources to provide a storefront of federal expertise and resources with respect to oil and gas exploration and development north of 60
- integrating and coordinating federal processes so that authorizations for resource activities are timely and consistent;
- responding to increasing demands associated with upstream oil and gas activities;
- liaison and support to improve the ability of communities to participate in reviews of oil and gas development proposals;
- establishing working partnerships with other regulatory and review bodies and northern governments;
- regulating *CPRA/COGOA* provisions for benefits;
- amalgamating enforcement and monitoring efforts;

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<sup>7</sup> This office would share attributes of the “Major Projects Office” that was announced for jurisdictions south of 60.

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- coordinating federal support to northern boards;
- ensuring a lead role for the NEB in keeping with its expertise;
- developing policy and coordination regarding research, technical data and science related to northern oil and gas;
- facilitating resolution of conflicts over policy and operating procedures between departments.

### 7.2 Streamline Environmental Assessment

2. **Eliminate the risk of duplication of environmental assessment** (“double jeopardy”). It should be mandatory that environmental review agencies cooperate with one another to meet their respective requirements within a single process. This may require legislative amendments and policy directives to ensure that all Environmental Review Boards are able to delegate to CEAA and to each other to meet legislative requirements for assessment/review.

3. **Undertake where possible umbrella assessments that would inform and expedite the assessment of individual projects**, for example, in a region where much activity is anticipated, or where certain types of activities would be expected to have similar impacts. There is capacity under legislation for strategic assessments and class screenings, but use has been limited.

A **Regional Environmental Assessment for the Beaufort Sea** for example could provide baseline data and impact analysis that would be taken into account in the assessment of a range of activities in the region. This would make better use of the resources for regional review boards whose efforts can be directed to those activities that do pose a more serious risk, rather than those with predictable and manageable impacts.

4. **Require that northern boards draw upon federal and territorial government expertise and information in the conduct of their duties.** Require that relevant information and analyses from previous assessments be taken into account in all subsequent applications, to reduce duplication wherever possible.

5. **Position the proposed Arctic Research Centre<sup>8</sup> in the north to support northern EA**, for example as a repository for environmental assessment information, available for future use by applicants and regulators.

6. **Connect northern resource decision-making firmly to the public interest.** Some Board decisions have turned on a very narrow interpretation of duty to local interest.

7. **Introduce discipline in the establishment of the scope and terms of reference for EA.** Scope and proponent responsibilities should not extend beyond those aspects of projects over which they have control.

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<sup>8</sup> 2007 Speech from the Throne.

- 8. Set clearer triggers for environmental assessment**, including rules for screening of projects. The objective should be that going beyond the screening level is the exception rather than the rule. Information requirements should also be tailored to be in keeping with the scale and nature of the activity applied for.

### 7.3 Mandate and Capacity of Regional Boards

- 9. Ensure northern Boards are institutions of public government.** Distinguish this from the co-management function. Create appropriate distance to limit ability of individual opinions/agendas to inappropriately influence Board operations. Use federal ministerial authority to define principles, standards and benchmarks to be met by Boards.
- 10. Amalgamate land use permitting and water licensing functions under a single Board for the Mackenzie Valley.** This would make more efficient use of expertise and administrative resources, and would achieve more consistent practice. Industry believes that there is a case for amalgamating land and water authorizations across the North to achieve an appropriate level of consistency.
- 11. Adopt procedures on Board appointments.** Appointees should meet high qualification standards relative to experience, knowledge, conduct, availability, and conflict of interest. An explicit consideration in appointment procedures should be the need to avoid problems with quorum.
- 12. Ensure Boards have access to, and use, the technical capacity necessary to perform their duties.** Consider re-assignment of INAC resources to Boards. There appears to be overlap under present arrangements.
- 13. Make it mandatory for Boards to consult other government expertise in the carrying out of their duties**, with requirements that federal agencies will respond appropriately.
- 14. Streamline requirements for production and distribution of materials.** Currently, each review and permit authority requires one, sometimes multiple, complete record of information, consultation and distribution lists for each application.
- 15. Amend legislation to define terms and remove ambiguity.** “Public concern” and “significance” need to be more clearly defined in the *MVRMA*, for example, so that Boards cannot refer applications to higher level EA on specious grounds.
- 16. Clarify and illuminate processes for jurisdictions that have not yet dealt with applications.** Considerable petroleum potential exists in Nunavut, however there is no experience in newly-created institutions in dealing with applications for activity. This increases the uncertainty and risk for the first applicant in the door. Consider an initiative to document the authorization process for oil and gas

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activities in Nunavut, and to anticipate the system needs for capacity to deal with such applications. An extension of the Regulatory Roadmaps Project to Nunavut may be the appropriate vehicle.

### 7.4 Rationalize Socio-Economic Considerations and Benefits Demands

17. **Set standards to ensure that benefits are in keeping with the scope of the project.** Benefits plan requirements should be standardized on the basis of type and scale of activity, including the waiving of benefits plan requirements below specified thresholds. An alternative would be to provide automatic approval where the applicant has an approved benefit plan on file in which the applicant has commitments in line with each authorization.
18. **Clarify benefits requirements in relation to EA and issuance of authorizations.** Where access agreements and/or benefits agreements are preconditions for the issuance of authorizations by local Boards, this should be made explicit in published operating rules. Remove the ability of local parties to stall review processes and leverage demands where access and benefits agreements are not a pre-requisite to issuance of authorizations.
19. **Land claim organizations should be asked to negotiate a system for resolving issues where proposed activities overlap settlement boundaries.** Such cooperation should extend to the reconciliation of views between neighboring settlement areas.

### 7.5 Dispute Resolution Mechanism

20. **Redress the imbalance between surface and sub-surface rights holders.** Review the dispute resolution processes in each of the territories, to ensure an explicit requirement to settle access and compensation disputes in a timely manner. Specifically, implement the intent of the land claims for surface rights solutions in the Mackenzie Valley through the *MVRMA*.

### 7.6 Standards for Timely Review and Authorizations

21. **Set standards for the time required from submission of a project description to issuance of authorizations.** Assign accountability for timelines to regulators in a manner that requires best efforts to remove impediments and resolve impasse. This should extend to the requirement for Boards to “sit” in a timely fashion. Set appropriate targets/limits by category of activity – research and survey activities, geotechnical, seismic, exploratory drilling, development plans – appropriate to a resource operator’s timing needs in both the onshore or offshore.
22. **Integrate policy processes so that there is consistency and predictability.** There is a general lack of accountability for changing policy in an ad hoc or year-over-year manner. Regulators should be required to consult with industry and

other stakeholders in advance of changes to policy and operating requirements, so that the system users have adequate time to account for operational changes and financial impact.

### 7.7 Rationalize Consultation Requirements and Procedures

23. **Reduce the work load on communities and industry associated with Aboriginal consultation in regulatory procedures.** Engage governments and Aboriginal leaders in a real conversation about making improvements to the nature, timing and amount of “consultation” required, relative to various activities on different land types. Community and aboriginal consultation pressures are a significant burden on all parties, and defining principles, steps and standards could streamline the processes and lead to substantially improved relationships.

### 7.8 Stop Foreclosure of Future Opportunity through Land Withdrawal

24. **Integrate non-renewable resource values into planning and decision making process.** A more strategic approach is needed to integrate the implications of various planning and analysis processes in the North to ensure that future opportunities for public access to non-renewable resources are not foreclosed. This means that geological potential must become an equally important consideration at the outset of planning and in issue resolution processes. Resource information is just as important to the public interest as to private interests. Make decision-makers accountable for evaluating future economic impacts prior to decisions so that access to public sub-surface assets is not unknowingly relinquished. It must be understood that currently available information on potential could be either overestimated or underestimated several times over.
25. **Provide for access to lands that overlay prospective sub-surface geology so that public oil and gas resources can be found and monetized.** Adopt an oil and gas tenure allocation policy that is in synch with the iterative way in which explorers build land portfolios and conduct activities. Companies do not acquire a land portfolio in a single rights disposition, but rather accumulate a portfolio over many successive dispositions based on each season’s exploration results. It is vital that once governments conduct an initial rights disposition and effectively open a region for oil and gas exploration, there be continued regular and systematic opportunities for companies to acquire further rights.

### 7.9 Establish High-Level Oversight to Implement Changes

26. **Establish a “Northern Regulatory Forum” with a tripartite political mandate to set priorities and oversee northern regulatory improvement initiatives.** Create a Forum under the auspices of accountable political co-leadership: Federal, Territorial and Aboriginal/Regional, with a mandate to pursue changes to the northern regulatory system (similar to the Energy Roundtable in Atlantic Canada). Require participation by federal, territorial and aboriginal/regional

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governments at a senior level so that experience and authority is brought to bear on necessary work. Ensure that all agencies/bodies whose regulatory and decision-making responsibilities bear on the North, come to the process with a commitment to improvement. Involve applicants to the system to ensure a focus on workability from an external perspective.

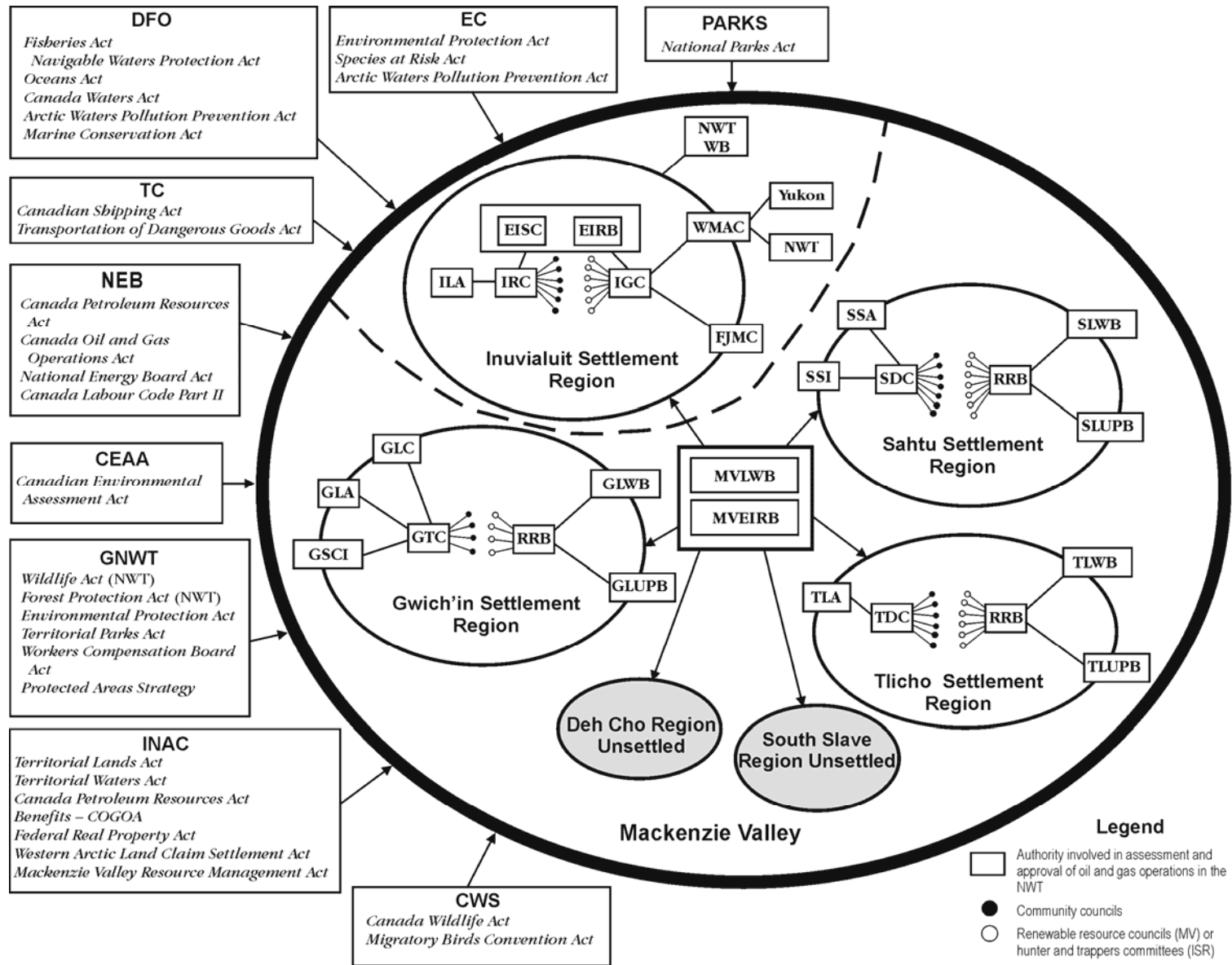
### **CONCLUDING REMARK ...**

Improvement of the Northern regulatory regime will be difficult, but is urgently needed to address a serious impediment to a functioning northern economy, able to serve the long-term interests and aspirations of Northerners and of Canada as a whole.

CAPP strongly supports this Government's northern priorities and its commitment to improving regulatory function, and appreciates the opportunity to contribute. As a primary user of the regulatory system, we would like to see this contribution continue. In addition to being engaged at the implementation stage, we would ask to be consulted directly in the design of policy and regulatory change.

CAPP staff and member company representatives will be available at any time to discuss the content of this submission in more detail, and we look forward to those opportunities.

Figure 1: Regulatory Framework for Oil and Gas Activities in the Northwest Territories



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