SAHTU LAND AND WATER BOARD

APPLICATION FOR RENEWAL OF WATER LICENSE

LICENSEE: Imperial Oil Resources N.W.T Limited

LICENCE NUMBER: Water Licence S03L1 – 001

DATE OF ISSUANCE: 30 August 2004

REPLY OF IMPERIAL OIL RESOURCES N.W.T LIMITED TO

SUBMISSION OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA

1. Imperial acknowledges, and accepts, the authorities cited in paragraphs 1 to 15. However, it is respectfully submitted that these provisions do not provide a complete answer to the question which is at issue in this application. Imperial has never questioned whether the Board has any jurisdiction to regulate a water use undertaking. The question is: in a field of multiple and over-lapping jurisdictions, which is the most appropriate regulator, and regulatory regime, to oversee the operations of a unique, 90 year old oil production facility in the Northwest Territories?

2. Imperial submits that the authorities cited in paragraph 16 are not relevant in this case as Imperial is not arguing the point of division of security costs being allocated between water and land-related costs. Imperial has always acknowledged that the Board does have a statutory jurisdiction to oversee reclamation activities of water use facilities, along with other responsible authorities. Imperial is simply seeking clarification on the Board's scope

of that responsibility, especially where that responsibility more properly falls under the jurisdiction of other government agencies which are in a better position to discharge those responsibilities.

3. Imperial submits that the authority cited in paragraph 17 is not applicable in the case of the Norman Wells Operation. The mining cases are very different from Imperial's production operation, primarily because other government agencies have jurisdiction over various aspects of the oil production operation. This situation does not exist in the case of mining operations.

4. Imperial respectfully submits that the Court erred, in its finding in the *Qikiqtani* case, that the use of water jurisdiction granted the Board may be extended to blowing dust from tailings, health impacts and the effect of mine operations on wildlife. Alternatively, if the Court did not err, then its decision must be limited in its application to mining operations where no other statutory body has been expressly granted that statutory jurisdiction.

5. Imperial submits that the decision in the *BHP Billiton Diamonds* case, referenced in paragraph 18, does not provide binding authority on the Board, in this case. In that case, the Court did not decide the question of the Board's jurisdiction; the Court did not hear argument on that issue as that point was conceded by the parties. Its pronouncement is *obiter*. An oil production operation operates in a completely different, and mature, regulatory framework.

6. Imperial submits that it is not clear, as asserted in paragraph 19, that " ... the grant and conditions of water licences have broad environmental purpose.". The objectives of the Board are set out in s. 58 of the MVRMA, as cited in paragraph 14, to be " ... the conservation, development and utilization of ... water resources ....". Other government agencies are specifically charged with the protection of the environment. For instance, one of the purposes of the *Canada Oil and Gas Operations Act*, (COGOA) as stated in section 2.1(b), is "the protection of the environment".

7. Imperial understands that there is a physical relationship between land and water in the natural environment. Both are important. The question at issue is: who has jurisdiction over these various components? Imperial submits that treatment of "... water and land as interconnected systems ...", as asserted in paragraph 19, applies generally, where the Board has the duty, and the responsibility, to manage both land use and water use. This is not the case in the Norman Wells Operation as land use was specifically designated in 1944 by the Federal Government. In this sense, Norman Wells Operation is unique in the Northwest Territories and due regard must be paid to the historic regulatory framework which has been in place since 1944. This framework requires that the land be returned to the Federal Minister, in a condition satisfactory to the Minister, at end of life, which means, in accordance with the standards of the day, at the time of surrender.

8. The work described in the license application, the "appurtenant undertaking", includes specified activities conducted in the Proven Area. Namely, Imperial Oil NWT

> (a) obtains water from the Mackenzie River on an ongoing basis and (b) routinely conducts maintenance activities in and around the banks of the Mackenzie River (see Section 6 below for clarification). Water from the Mackenzie is required for process cooling and reservoir pressure maintenance. Regular maintenance work in and around the banks of the River is required to control erosion, and to protect, replace and repair equipment.

The broader description of all activities undertaken in the Proven Area, cited in the Crown's paragraph 20, simply provides the context for the appurtenant undertaking, but they are not that undertaking. Those oil and gas production facilities are regulated by the National Energy Board. It is noted in the GNWT reply, paragraph 23 that, prior to 2014, the MVRMA and Regulations did not provide a definition of "undertaking".

9. It is respectfully submitted that, when considering the security required to meet the end-of-life liabilities of the Norman Wells Operation, a clear distinction must be drawn between water use activities and the entire Norman Wells Operation, which is regulated by the National Energy Board, contrary to the Crown's submission in paragraph 21. For example, a portion of the expenses anticipated at end-of-life for the Norman Wells Operation relate to the abandonment and remediation of oil field and plant operations, which activities will be conducted under the stewardship of the National Energy Board. They have little bearing on water use or the deposit of waste into a water body. The expertise and the resources, required to over-see such activities resides with the National Energy Board.

10. In determining the intent of Parliament, in assigning priority for responsibilities among respective federal regulatory agencies, which may appear to have over-lapping jurisdictions, the Courts are bound to consider the express wording of the legislation. The *Canada Oil and Gas Operations Act* makes it clear, in section 5.31 (1), that:

> " The National Energy Board has **full and exclusive jurisdiction** (over) an act, matter or thing required to be done by this Act ...." (emphasis added)

- The Chief Conservation Officer, appointed under COGOA, is responsible for regulating 'waste' (s. 19) which is defined to include "the escape or flaring of gas" (s. 18(2)(f)).
- The Chief Conservation Officer is responsible for site remediation (s. 25(4)) of any release of petroleum and for any remedial action required (s. 26(2)) to remove "... any installation or structure that was put in place in the course of any work or activities ...." (s. 24(2).

The National Energy Board has published its *Remediation Process Guide* on remediation for works abandoned under COGOA and these publications are available on the Board's website. http://www.neb-one.gc.ca/clf-nsi/rcmmn/srch/srchrsult-eng.asp

Section 1 reads:

> This Guide applies to NEB-regulated facilities under the *National Energy Board Act* (NEB Act) and the *Canada Oil and Gas Operations Act* (COGOA). At a minimum this Guide applies to:
>
> - remediation of residual contamination in soil and groundwater to an appropriate standard;
> - remediation of all spill sites whether the spill is reportable or not;
> - off-site contamination remediation; and
> - historic contamination events.

11. Section 2, page 2, of the National Energy Board's *Remediation Process Guide* expressly lays to rest the question of over-lapping jurisdictions:

> Going forward under this Guide the NEB will be the lead agency for all contamination incidents or remediation requirements for contamination from an NEB-regulated facility. Other regulators such as provincial and territorial departments of environment and health, as well as municipalities and federal departments may be involved and may be consulted at various stages in the remediation process.

12. The *Guide* further defines (page 7) a contamination scenario #4 to include a category into which Norman Wells Operations properly falls:

> Contamination is encountered that has occurred either at a location or a previously reported incident or is not the result of an obvious release (accumulation over time)

13. Imperial is not challenging the statutory authority of the Board to regulate a water use undertaking, it submits that, in the case of over-lapping jurisdictions, the Board must yield to the express will of Parliament and defer to the jurisdiction of the National Energy Board, in this matter.

14. Imperial respectfully submits that the authority cited in paragraph 24 of the Crown's submission is not binding as it is *obiter*: The court did not decide the issue of the scope of "undertaking" but simply assumed it, as it was not disputed by the company.

15. Imperial submits that the argument presented by the Crown in paragraph 26 cannot be extended to the current circumstances. While a broader interpretation of undertaking has been applied in the context of an environmental assessment, conducted under CEAA, this reasoning does not apply in the present case where other regulatory agencies are specifically charged with the responsibility to over-see the activities in question. It should be noted, that Parliament has specifically amended CEAA to ensure that such reasoning will no longer be applied in the context of environmental assessments.

16. Imperial relies on the authority cited by the Crown in paragraph 27 of its submission as direction which the Board must consider in applying a narrow application to the definition of undertaking.

17. In rebuttal to the Crown's argument, presented in paragraph 28, Imperial submits that the *Canadian Zinc Corp.* case is exactly on point: the production wells in the field and production facilities are regulated by the National Energy Board.

18. Imperial submits, contrary to the Crown's argument expressed in paragraph 29, that the Norman Wells Operation is not analogous to the *Tungsten* case, but is analogous to the *Canadian Zinc Corp* case.

19. Imperial agrees with the submissions of the Crown contained in paragraphs 30 and 31.

20. Imperial is not submitting, as is suggested in paragraphs 33 and 34, that the Proven Area Agreement "... ousts or otherwise overrides the jurisdiction of the Board...". It is simply arguing that the Supreme Court recognizes that there can be a contract which binds the Crown, and that the Proven Area Agreement is such an agreement. It is submitted that the Proven Area Agreement is not simply a commercial arrangement; it is also the original, and primary, regulatory instrument for land use and end of life responsibilities set in place by the Federal Crown, and its life, and application, continue until the entire Proven Area is returned in a condition satisfactory to the Minister.

21. Imperial submits, contrary to the view expressed by the Crown in paragraph 35, that the National Energy Board is, and has always been, and will continue to be post-Devolution, the primary regulator of the oil field and production facilities in the Norman Wells Operation.

22. Contrary to the implication made by the Crown in paragraph 35, Imperial has never suggested that COGOA absolves Imperial from responsibility for compliance with the requirements of all other applicable legislation. Imperial's sole purpose, in raising these questions, is to seek clarification, in this situation of over-lapping jurisdictions, on which agency is best positioned to over-see the end-of-life abandonment, remediation and reclamation responsibilities of Imperial's oil field. Imperial submits that the Board is not

well positioned, nor should it attempt, to over-see the abandonment and remediation of the Norman Wells oil wells and plant facilities which will account for a large portion of the end-of-life expenditures. These responsibilities will fall under the jurisdiction of the National Energy Board.

23. Imperial agrees that the "presumption of legislative coherence" will apply in this case, as described in the Crown's submission at paragraph 36. We submit, however, that this is not a case of contradictory provisions, as discussed in paragraph 37, but rather it is a case of overlapping jurisdictional authority, as suggested in paragraph 38. Imperial submits that the "harmonizing" of over-lapping statutory jurisdictions, and the "presumption of legislative coherence" which the courts speak of, require that the regulatory agency which is best positioned to discharge that responsibility should assume the primary jurisdiction and the other agencies should yield to that jurisdiction. Imperial submits that this determination has already been made by the Parliament of Canada when it assigned "full and exclusive jurisdiction" for oil and gas activities to the National Energy Board under COGOA.

24. Imperial agrees with the Crown's submission, contained in paragraphs 39 and 40: there is no operational conflict existing today, as the Court found in the *BHP Diamonds* case. The risk in this case is one of redundancy and credibility.

25. Imperial does not rely on COGOA to regulate the use of water or deposit of waste to a water body, as implied in paragraph 41 of the Crown's submission. Imperial expressly recognizes the Board's jurisdiction over the use of water and the deposit of waste back into water bodies. However, the National Energy Board, pursuant to COGOA, has been given the statutory jurisdiction to manage, and to take security for, abandonment, dismantling, decommissioning, remediation and reclamation of all oil field and production facilities, and for debris left after decommissioning. The definition of 'debris' in the Act includes installations and structures.

26. The Crown's discussion, in paragraph 42, of the concept of "waste" as described in COGOA is misapplied. The term "waste" in the oil and gas context, is a term of art which bears no relation to the use of the term 'waste' in the MVRMA. It refers to the failure to optimally recover a petroleum resource which a producer has been given the right to recover. COGOA places on the National Energy Board the responsibility for the remediation of spills and other deposits to the environment specifically but does not describe this in the conventional oil field definition of waste.

27. The discussion found in the Crown's submission in paragraphs 44 and 45 fails to consider the definition of "debris" found in COGOA which includes installations and structures which must be removed and which sites must be remediated. It is in this respect that the security held by the National Energy Board is intended to cover end of life abandonment, remediation and reclamation liabilities. One of the stated purposes of COGOA is the

"protection of the environment" (s. 2.1 (b)). Remediation of an oil field production facility achieves this purpose.

Norman Wells Proven Area has always, and consistently, even to today in the Devolution Agreement, been treated as unique. Imperial submits that the way the MVRMA has been applied to mining operations in the Northwest Territories does not apply to the oil production activities provided for in the Proven Area.

28. Imperial submits, contrary to the view of the Crown expressed in paragraph 47, that the MVRMA does not have the broad environmental purpose suggested by the Crown. Having jurisdiction over "... the conservation, development and utilization of ... water ..." does not give the Board jurisdiction over aquatic life, fisheries or fish habitat. Conservation is only one element of environmental protection of water; it does not give the Board the authority to reach into the jurisdiction of the Department of Fisheries and Oceans.

29. It is true, as the Crown asserts in paragraph 47, the Act does not restrict the "deposit of waste" to deposits directly into water, it includes deposits which "... may enter any waters in the Mackenzie Valley". The deposit of withdrawn water, which the Norman Wells Operation returns into the Mackenzie River, comes through the discharge of cooling water and the only substance which is added to that discharge is chlorine at a concentration which is 1/20 of the expected residual found in Canadian drinking water.

30. Imperial submits that the MVRMA treats land and water as interconnected systems where it has jurisdiction over both land use and water use. This combination of responsibilities does not exist in this case, contrary to the submission of the Crown in paragraph 47. Imperial submits, on the authority of the *Canadian Zinc* case, that the Board need not, and may not, contrary to the submission of the Crown in paragraph 47, assume jurisdiction over Imperial's entire, historic, operation at Norman Wells.

31. Imperial submits that the Proven Area Agreement is not simply a "private commercial contractual arrangement between the Government of Canada and IOR" as suggested by the Crown in paragraph 47. It is the primary, and original, operating authority granted by His Majesty which governs expectations for the end-of-life abandonment, remediation and reclamation responsibilities of Imperial. This fact is recognized in the Devolution Agreement and should be respected by the Board.

REPLY OF IMPERIAL OIL RESOURCES N.W.T LIMITED TO

SUBMISSION OF GOVERNMENT OF THE NORTHWEST TERRITORIES

32. Imperial agrees with the submissions of the GNWT made in paragraphs 1, 2, 3, 4, 5, 6, 8, 10.

33. The main thrust of the GNWT's submission (paragraphs 7, 11, 13, 14, 15, 28) is the need for the Board to operate in an integrated and coordinated manner to manage both land and water. In this case, the Norman Wells Operation is unique, and an exception, as it does not hold, nor does it require, a land use permit. Land use has been determined by the Proven Area Agreement.

34. Imperial's position is not based on a narrow, technical interpretation of the Board's jurisdiction, as expressed in paragraph 9. It is based on a respect for the terms of the agreement which it has with the Government of Canada and which it has been operating under for the past 70 years. Pursuant to the terms of the Proven Area Agreement, the land will be returned to the Minister in a condition satisfactory to the Minister, complying with the remediation and reclamation standards of the day.

35. The submission, contained in paragraph 12, dealing with the Board's mandate to ensure "conservation, development and utilization of water" has been addressed in paragraph 28.

36. To argue, as the GNWT has done in paragraph 18, that the mandate of the Board takes it beyond the use of water, exceeds the jurisdiction of the Board.

37. The issue of waste (paragraphs 16 and 17) has been addressed in paragraphs 25 and 26.

38. Imperial acknowledges the authority of the Board under its statutory mandate and that the Proven Area Agreement does not prohibit the activities of the Board, as stated in paragraph 19.

39. Imperial has never denied the jurisdiction of the Board to take security (paragraphs 20 and 21). It submits; however, that, in the case of over-lapping jurisdictions, responsibility should be assumed by the agency which has the greatest role to play, the expertise and resources to steward the activities. Imperial submits that a water license is not designed to regulate land activities. Regulatory expertise and jurisdiction for regulating decommissioning, dismantling, abandonment, and remediation of wells, installations and structures, and subsequent reclamation of the land, lies with the National Energy Board pursuant to COGOA.

40. This is not a case of "project splitting" as is suggested in paragraph 22 and 26. That concept applies in the context of environmental assessments under CEAA; it has no application to this case.

41. The scope of the license (paragraphs 23, 24, 25) has been addressed in the paragraphs responding to the Federal Crown's reply.

REPLY OF IMPERIAL OIL RESOURCES N.W.T LIMITED TO

SUBMISSION OF THE SAHTU SECRETARIAT INCORPORATED

42. Imperial takes issue with a number of key assertions which Sahtu Secretariat Incorporated (SSI) makes in its submission, and would respectfully submit that:

    a. Imperial has been open and transparent in its operations, and in its preparation of this application. It has conducted extensive public consultation with communities in the Sahtu region. All filings in respect to the water licence renewal are posted on the Boards public registry.

    b. Imperial meets annually with SSI representatives, as is required by Chapter 9 of the Sahtu Agreement, to keep them informed of Imperial's operations . Topics covered at these meetings include:

        i. The previous year's operations

        ii. The environmental consequences of incidents and clean-ups

        iii. Community relations and liaisons

        iv. Employment and training of participants

        v. Plans for upcoming years

        vi. Other matters of concern to the participants

43. As it has prepared its renewal application, Imperial has made every effort to engage the public and other stakeholders. This has included a Traditional Knowledge Study workshop in April 2013, community public meetings (in Norman Wells, Fort Good Hope, Tulita, Colville Lake and Deline) in May 2013, a Mackenzie River workshop with community

members in July 2013, an Emergency Response Workshop with community members in August 2013, and our first edition of "Neighbour News" that was sent to every mailbox in the Sahtu this spring. During this time, Imperial also updated its 10-year Community Engagement Plan. Logs and copies of engagement documents are detailed in section 10 of Imperial's renewal application.

44. Imperial further submits that:

    a. It welcomes the opportunity to meet with the members of the Sahtu communities and to answer any questions that are relevant to its operation.

    b. The end-of-life reclamation responsibilities imposed in the Proven Area Agreement require that the land be returned in a condition satisfactory to the Minister. It is Imperial's expectation that it will meet all local and national standards, in force at the time of abandonment.

    c. Imperial is not proposing any new activities that would trigger a formal environmental assessment. Imperial respectfully affirms that it has, in the hearing process and in its ongoing operations, consistently complied with the spirit and intent of the Sahtu Agreement.

Imperial submits that it has met all of its responsibilities, delegated to it by the Federal government, in respect to Chapter 9 of the Sahtu Agreement.

45. Imperial has addressed the issue of the Board's broad mandate elsewhere in this reply.

46. Imperial is committed to continue to work with the communities in the Sahtu Region to foster understanding, positive relations and environmental responsibility; and to develop business opportunities through which the people of the Sahtu Region may participate directly in the development of the country's natural resources.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this 22nd day of April, 2014, in the City of Calgary, in the Province of Alberta.

Peter L Miller

Barrister and Solicitor

Imperial Oil Resources N.W.T. Limited