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November 15, 2019

Shannon Allerston, Regulatory Specialist
Mackenzie Valley Land and Water Board
7th Floor, 4910-50th Avenue
PO Box 2130
Yellowknife, NT X1A 2P6

**RE: Response to claims for compensation with respect to water licence
application MV2007L8-0031**

Dear Ms. Allerston:

Please accept the Giant Mine Remediation Project's ("GMRP") response to the applications for compensation from all the parties who submitted claims for compensation with respect to water licence application MV2007L8-0031. The GMRP is responding to the following claims received on October 18, 2019:

- Dawn Andrews
- Lora Archer
- Terry and Diane Brookes
- City of Yellowknife (Town Site/Dock)
- City of Yellowknife (Water Pipeline)
- Dwayne Coad and Jan Fullerton
- Derek Cutler
- Sherry and Gerald Drover
- Great Slave Sailing Club
- J.P. Guy and C.L. Seale
- James Hodson
- Andy Hutchinson and Harold Andrejek
- David Kellet and Sheila Bassi-Kellet
- Greg and Val Krisch
- Rebecca Lang
- Ian and Rita McCrea
- John McCullum
- Ben McDonald and Jacquelyn Burles
- Kevin and Karen McLeod
- Doug Morrison and Susan Bowie
- Katie O'Beirne
- Terrance and Joanna Pamplin
- Mark Peer and Leslie Smith



- Evan Walz and Sonya Saunders
- Yellowknife Historical Society

In the enclosed response, the GMRP sets out the general background to the proposed Project as it relates to the claims for compensation, and the general principles that the GMRP submits should guide the Mackenzie Valley Land and Water Board's (the "Board") interpretation and application of the relevant legislation. The GMRP then provides detailed responses to each individual claim or category of claim, making submissions on the claimants' eligibility to make their claim, the extent of their use that is relevant to their claim, whether the Project will have adverse effects on that use, and the damages and losses claimed.

We understand the Board may provide claimants with an opportunity to reply to the GMRP response in accordance with the Board's Rules of Procedure. If it is the case, the GMRP submits that claimants should not be able to raise new issues or adduce additional evidence. However, if the Board allows them to do so, the GMRP submits that they should have an opportunity to submit a further reply to any new evidence or submissions raising new facts or arguments.

Should you have any questions regarding this matter, please contact the undersigned by phone at (867) 669-2838 or by email at Natalie.Plato@canada.ca.

Sincerely,



Natalie Plato
Deputy Director
Crown-Indigenous Relations and Northern Affairs Canada
Giant Mine Remediation Project

Encl. GMRP Response to Claims for Compensation With Respect to Water Licence
Application MV2007L8-0031

**GMRP RESPONSE TO CLAIMS FOR COMPENSATION WITH RESPECT TO
WATER LICENCE APPLICATION MV2007L8-0031**

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BACKGROUND

General Project Description

The GMRP will remediate and manage the historic contamination from the Giant Mine to reduce and mitigate adverse impacts to the environment and human health. The Giant Mine Site is situated on Commissioner's land within the municipal boundary of the City of Yellowknife (the "City"), approximately 5 km north of Yellowknife's city centre at the north end of Yellowknife Bay on Great Slave Lake. It is anticipated that remediation will commence in 2021, pending issuance of a water licence and approval of applicable plans, and take approximately 10 years to complete. Long-term maintenance and monitoring will then follow for the life of the Project, i.e., 100-years as defined by the Mackenzie Valley Environmental Impact Review Board ("MVEIRB") during the environmental assessment.

The Giant Mine operated as a gold mine for over half a century before being abandoned and deemed orphaned. In 1999, the subsurface reverted back to the Crown under the administration of the Department of Crown-Indigenous Relations and Northern Affairs ("CIRNAC"), then the Department of Indian Affairs and Northern Development. The surface of the site came under, and remains under, the administration and control of the Government of the Northwest Territories ("GNWT"). Historical mining activities left extensive hazards and contaminants on the site, including 237,000 tonnes of arsenic trioxide in underground stopes and chambers, contaminated soils and sediments, contaminated mine water requiring treatment, tailings ponds, underground mine workings, open pits, and deteriorating site infrastructure.

The GMRP proposes to undertake the remediation and long-term management of this contaminated site and to remove, contain, or otherwise mitigate existing hazards at the site as per its water licence application (the "Project"). More specifically, historical mining components and supporting infrastructure requiring remediation or long-term management at the site include:

- Eight open pits;
- Four tailings containment areas ("TCA"s, i.e., South, Central, North and Northwest) and associated rock fill dams;
- The Settling Pond and Polishing Pond and associated rock fill dams, which support the existing Effluent Treatment Plant ("ETP");
- The ETP, which was installed in 1981 and remains in seasonal use;
- Tailings deposited outside of the TCAs, including those in the foreshore tailings area, Mill Pond, an area west of the Settling/Polishing ponds, and the Calcine Pond;
- Contaminated soils on land, contaminated sediment in Baker Creek, and contaminated soils and sediment along the shoreline of Yellowknife Bay from arsenic dust deposition and discharges of contaminated mine water, amongst other smaller sources;
- An underground mine with numerous openings to surface, underground workings, including 15 stopes and chambers filled with arsenic trioxide dust, bulkheads, and numerous drifts; some stabilization in the underground has already been completed to address unacceptable risks associated with underground stability;
- An abandoned Town Site area and other buildings that supported mining activities (a total of 101 structures remain on site); some structures (e.g., Roaster Complex, A-Shaft headframe, C-

Shaft headframe, Assay Lab, and former Curling Club) have already been deconstructed to address unacceptable risks associated with deteriorating infrastructure;

- Over 30 km of roads and culverts (some which will remain to support post-closure monitoring and maintenance activities), abandoned utilities, common utilidors, and fencing; and
- Baker Creek channel, the alignment and shape of which currently pose a risk of flooding, and require realignment and channel widening in some areas.

The GMRP also proposes to construct components that will remain on site for the purpose of long-term monitoring and management, including:

- A new Water Treatment Plant (“WTP”), which will treat contaminated mine water year-round;
- An on-site Non-hazardous Waste Landfill for disposal of infrastructure wastes during remediation and for ongoing long-term disposal of WTP residuals;
- A freeze system that will encapsulate the arsenic-trioxide filled stopes and chambers underground and part of B1 pit;
- Possibly a temporary freshwater intake to support remediation activities, primarily related to dust mitigation; and
- A long-term underground access.

The GMRP will undertake long-term monitoring and maintenance of the underground arsenic trioxide freeze systems, monitoring and maintenance of remediated former mining components, and long-term water management of underground mine water levels.

Remediation Work, Use of Water, and Deposit of Waste at the Town Site Area

The Town Site Area refers to the lands in the vicinity of the Giant Mine town site and includes the City’s leased lands, the Giant Mine boat launch, the lands of the Great Slave Sailing Club’s sub-lease, and the lands of the Yellowknife Historical Society’s sub-lease. Contaminated materials in the Town Site Area include contaminated soils, contaminated sediment in Baker Creek, and contaminated soils and sediment along the shoreline of Yellowknife Bay from arsenic dust deposition and discharges of contaminated mine water during historical mine operations.

Remediation activities in the marina area of the Town Site Area will entail excavation of contaminated soils and backfill with clean fill, stabilizing areas with natural vegetation as necessary. Remediation activities in Yellowknife Bay near the Town Site Area extending north to the foreshore tailings will entail partial excavation of contaminated sediment and the placement of a cover to minimize potential human exposure to contaminated sediments. In addition to the placement of a cover in Yellowknife Bay, the new Water Treatment Plant outfall will be constructed in this area. The outfall will be a submerged pipe, supported to stand approximately 1 m off the lake bottom, which will discharge treated mine water at a rate between 17 and 30 L/s.

Baker Creek will also undergo major and minor realignments and creation of new channels. This work will include a widening of the channel of Baker Creek to accommodate a probable maximal flood and reduce flood risks from Baker Creek to the underground. Tailings and contaminated sediments will also be removed from the creek.

Project Purpose and Net Benefits

The GMRP's proposed remediation of the Giant Mine Site will address historical contamination concerns and physical site hazards. Remediation of the site will minimize human health risks and ensure environmental protection by mitigating the physical, chemical, and biological hazards that remain at the site.

The GMRP's proposed remediation plan of the Giant Mine Site may have the potential to result in short-term disturbances to third party users of the area. However, the Project will ultimately be a net benefit to the users of the area, the residents of Yellowknife, N'dilq and Dettah, the residents of the Mackenzie Valley, and Canadians in general, as well as the claimants.

The GMRP will ensure robust controls are in place throughout the Project to minimize the impacts on the surrounding environment and third-party users. However, safety of workers and the public is a paramount consideration in carrying out the Project, and therefore it will be necessary to limit access to areas where and when the Project will be carried out in the Town Site Area if the Great Slave Sailing Club's ("GSSC") sub-lease, and Yellowknife Historical Society's ("YKHS") sub-lease are renewed and those parties have access to their leased properties. As indicated in our October 10th letter to the City of Yellowknife, it is anticipated that if an additional boat launch that will allow for public access is constructed on the current sub-lease of the GSSC, it will be possible to stage and sequence the Project in order to enable substantially uninterrupted public access to Great Slave Lake.

The Closure and Reclamation Plan ("CRP") was designed to balance environmental considerations, cost and limit possible negative impacts to the health of people and wildlife. Implementing the remediation plan will reduce long-term health and safety risks and reduce the release of contaminants from the site into the surrounding environment.

The GMRP initially planned to remediate the Town Site Area to an industrial level. At the request of the City of Yellowknife, the GMRP's objective is to remediate the Town Site Area to a residential soils standard¹. The change in standard further reduces residual risk of exposure to arsenic in soils. The application of a more stringent soil standard resulted in an increase in the volume of soil that will need to be managed and the addition of a sediment cover in Yellowknife Bay. The increase in the costs of the remediation at the Town Site Area is estimated to be approximately \$36 million, a significant increase in costs for the GMRP.

There is no legal requirement, either under statute or at common law, that the GMRP remediate the site to a residential soils standard. The MVEIRB did not require the Town Site Area to be remediated to a residential standard. Remediating the Town Site Area to a residential soil standard instead of an industrial soil standard will provide much greater benefits to all of the claimants.

¹ As set out in the Environmental Guideline for the Remediation of Contaminated Sites adopted pursuant to the *Environmental Protection Act*, R.S.N.W.T., 1988, c. E-7, which was in effect at the date of the Responsible Ministers' approval of the Report of Environmental Assessment for the Project.

Engagement with the Claimants related to Compensation Claims

The GMRP has had regular engagement with many of the claimants. The GMRP has consulted with the City of Yellowknife, the Great Slave Sailing Club and some of its members, and the Yellowknife Historical Society with a view to minimize project impacts and disruptions to the greatest extent possible and accommodate their respective use of the site to the extent reasonably possible.

Engagement with City of Yellowknife

July 5, 2018 – Regular Monthly Meeting – Established who should be involved in discussions regarding relocation of boat launch

October 30, 2018 – Regular Monthly Meeting - City notes they will be requesting funding for a marina study

March 19, 2019 – Regular Monthly Meeting - Discussion around budget for a new dock

May 7, 2019 – Regular Monthly Meeting - Inquiring with Municipal and Community Affairs and Industry, Tourism and Investment regarding funding for new dock at Con

June 4, 2019 – Regular Monthly Meeting – City is looking into whether or not they will put in a claim

July 19, 2019 – Specific claim discussions on a “without prejudice” basis

August 14, 2019 – Follow up discussion on claim on a “without prejudice” basis

September 20, 2019 – GMRP Proposes comparable dock built at GSSC

October 10, 2019 – Letter to City of Yellowknife committing to staging and sequencing to enable access

Engagement with Great Slave Sailing Club

October 1, 2018 – Letter from GSSC regarding remediation and requesting a meeting

October 30, 2018 – Discussion around closure of boat launch, sequencing dredging, City of Yellowknife exploring Con site

September 17, 2019 – Compensation Claim Meeting

Engagement with Yellowknife Historical Society

November 30, 2018 - Annual Meeting, discussion of upcoming mining activities. It is noted they would be able to make a presentation during water licence process

April 16 2019 – Historical Society Recommendations received and discussed

September 4, 2019 – Letter from GMRP confirming access to museum would not be affected

September 19, 2019 – Compensation Claim Meeting

INTERPRETATION OF LEGISLATION

Under paragraph 72.03(5)(b) of the *Mackenzie Valley Resource Management Act* (“MVRMA”), the Board shall not issue a licence unless the Board is satisfied that appropriate compensation has been or will be paid by the applicant to users, licensees, depositors, owners, occupiers, or some permit holders who would be adversely affected by the applicant’s use of waters or deposit of waste under the water licence.

A party claiming compensation bears the burden of proving all of the following in order to be entitled to compensation under the MVRMA:

- a. The claimant falls in one of the categories of claimants listed in paragraph 72.03(5)(b) of the MVRMA and is therefore eligible to make a claim;
- b. The applicant’s proposed use of water or deposit of waste will adversely affect the use or activities of the claimant; and
- c. The level of prejudice and the amount of damages the claimant will suffer because of the adverse effects of the applicant’s proposal, taking into account the factors in subsection 72.03(6) of the MVRMA.

The claimant needs to prove the above on the civil standard of proof. In other words, the claimant needs to provide proof that each of the above is “more likely than not”.

In determining any matter before it, including compensation, the Board must consider the purpose of the MVRMA to balance conservation and development for the benefit of the residents of the Mackenzie Valley and Canada. Generally, the claimant needs to prove that the applicant’s interference with their use and activities would be substantial (i.e. non-trivial) and unreasonable to constitute adverse effects justifying an award of compensation. In determining what may constitute a substantial and unreasonable interference sufficient to amount to an adverse effect, the Board must balance that interference against the purpose of the applicant’s proposal and the net benefit of this proposal to residents of the Mackenzie Valley and other Canadians. The more a proposed project will benefit the public and align with public interest, the more substantial and unreasonable the interference with the claimant’s use and activities will need to be to justify awarding compensation under the MVRMA.² This approach aligns with the Board’s mandate as described in s. 101.1(1) of the MVRMA to provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of the Mackenzie Valley.

Finally, the Board may only order compensation for future adverse effects that will be caused by the applicant’s proposed project. The Board cannot award compensation for past adverse impacts.³ Likewise, the Board cannot award compensation in relation to conditions, risks, and hazards at a site that exist independently from the applicant’s proposed project.

² MV2016L8-0003 – DIAND – CARD – Gordon Lake Group – Reasons for Compensation Decision, February 16, 2017, p.9, Board analysis of item 5E.

³ *Carter v. Northwest Territories Power Corp.*, 2014 N.W.T.S.C. 19, p. 27; see also MV2011L2-0004 – Northwest Territories Power Corp. – Reasons for Compensation Decision, July 11 and 13, 2017, p.9.

CITY OF YELLOWKNIFE (WATER PIPELINE CLAIM)

Eligibility and Extent of Use

The City of Yellowknife is eligible to make a claim as the holder of water licence MV2009L3-0007. The Board granted the City water licence MV2009L3-0007 as a renewal of water licence N1L3-0032 dating back to May 30, 2002. This pre-dates this water licence application, which the GMRP originally submitted to the Board on October 19, 2007.

The MVRMA delineates the extent of the City's eligibility to make a claim in connection to their water licence as follows. As the holder of water licence N1L3-0032, now MV2009L3-0007, the City's use of water as it was licenced on October 19, 2007 takes precedence over the GMRP water licence application pursuant to subsection 72.26(1) of the MVRMA. However, subsection 72.26(2) provides that the GMRP's proposed water use and deposit of waste take precedence over any amendments to water licence MV2009L3-0007, for which the City applied after the date of the GMRP application.

The City is not a domestic user within the meaning of the MVRMA since it does not fit any of the categories of the definition of 'domestic user'. Section 51 of the MVRMA defines 'domestic user' as follows:

domestic user means a person who uses waters

(a) for household requirements, including sanitation and fire prevention;

(b) for the watering of domestic animals; or

(c) for the irrigation of a garden adjoining a dwelling-house that is not ordinarily used in the growth of produce for a market.

It seems obvious that the City does not use waters for watering animals or irrigating a dwelling-house garden.

The City is not using waters for household requirements either. While the City draws water so that its residents can in turn use water for their own individual household requirements, the City itself does not use water for household requirements within the meaning of this definition. This definition is meant to capture the needs of an individual household, which uses such a small amount of water that subsection 72(2) of the MVRMA exempts it from the general prohibition on using waters without a licence or regulatory authorization. What Parliament intended to cover are individual houses, cottages and cabins not serviced by a municipality. In contrast, the City drawing a large quantity of water each day to make it available to households and businesses in Yellowknife and N'dilq qualifies as a municipal undertaking requiring a water licence in accordance with section 8 and Item 1 of Schedule VI of the *Mackenzie Valley Federal Areas Waters Regulations*.⁴ This is why the City has a water licence authorizing the use of its water pipeline. Finally, if the City requires water for extinguishing fires, it is entitled to do so by paragraph 72(1)(c) of the MVRMA, not as a "domestic user".

Therefore, the City's eligibility to submit a compensation claim in connection with its water pipeline is based entirely on its status as a water licensee at the time of the initial GMRP water licence application.

⁴ SOR/93-303.

At that time, water licence N1L3-0032 authorized the City to do the following subject to terms and conditions:

- a) Obtain all fresh water from the Yellowknife River using its water supply facilities;
- b) Obtain water from Yellowknife Bay in Great Slave Lake for use on an emergency basis at Pumphouse No. 1.

According to the City's Claim Form for Water Compensation, it draws its water from the Yellowknife River through a steel pipeline drawing near the end of its useful life. It may also draw water from Yellowknife Bay, but on an emergency basis. The City may only base its claim for compensation on these grounds. Any proposal to draw water from Yellowknife Bay as the City's main water source would be a future unlicensed use that would be outside of the scope of the City's eligibility to claim compensation for an adverse effect of the GMRP's proposed use of waters and deposit of waste as per its water licence application.

Effects of GMRP Proposed Water Use and Deposit of Waste on Claimant's Use

The GMRP proposed water use and deposit of waste will have no adverse effect on the City's licenced water drawing from Yellowknife River or from Yellowknife Bay on an emergency basis.

First, the GMRP will not impact the City's ability to draw all fresh water under its water licence from the Yellowknife River. The City itself admits at page 5 of its Claim Form for Compensation that "adverse and incremental adverse effects are not expected to extend upstream to the Yellowknife River water intake." The City provides no evidence of adverse effects on its Yellowknife River water intake and use.

Second, the GMRP will not impact the City's ability to obtain fresh water from Yellowknife Bay on an emergency basis. The GMRP will not create or increase the risk of contamination in Yellowknife Bay, nor will the Project activities increase a risk of a failure of the Northwest Pond. On the contrary, the work the GMRP proposes to carry out will further reduce the risk which is already very low. The GMRP will not deposit wastes in a manner that would raise the level of contamination in Yellowknife Bay. Further, the GMRP provides measures to drastically reduce the level of contamination in its discharge to the environment.

No heightened risk from Northwest Pond

The City claims that the GMRP's proposed activities will prevent the City from using Yellowknife Bay as a water source for drinking water. The City claims the GMRP's "proposed water licence perpetuates or increases the risk of catastrophic release of arsenic into Yellowknife Bay from the Northwest Pond at the applicant's project site during the licence period".

However, the Board cannot award compensation for the perpetuation of the risk of release of arsenic from the Northwest Pond. First, the Supreme Court of the Northwest Territories established clearly that the Board does not have authority "to award compensation for loss or damage incurred under previous licences."⁵ The Northwest Pond exists because of former deposits of waste due to former mining activities on the site, which were carried out by proponents other than the GMRP or the Government of Canada under separate water licences, and not because of the GMRP's activities. Nor does a risk of a release of arsenic from the Northwest Pond result from the GMRP's application for water licence. Even

⁵ *Carter v. Northwest Territories Power Corp.*, 2014 N.W.T.S.C. 19, para. 128.

though the risk the City is alleging might be a risk of a catastrophic future loss, it still results from a previous deposit of waste that is not due to GMRP's past, current, or proposed activities.

On the contrary, the GMRP has been actively managing the Northwest Pond to control water levels through year-round presence of personnel on site. The Northwest Pond is inspected daily, weekly, and monthly for physical stability, and is inspected annually by a geotechnical expert. The GMRP's activities at the site are actively minimizing the pre-existing risks associated with the Northwest Pond.

Moreover, the risk of a failure of the Northwest Pond causing contamination in Yellowknife Bay is minimal. The Northwest Pond has capacity to store the Probable Maximum Flood (PMF), with additional freeboard to accommodate wave uprush from wind. This exceeds Canadian Dam Association ("CDA") guidance, but is considered prudent because the facility does not have an emergency spillway. A failure of the Northwest Pond causing a release is a very low probability event, and if it occurred, it would result in short-term effects. The probability of a maximum precipitation event occurring is extremely low. The likelihood of such an event is not typically quantified as it is based on a theoretical analysis of the maximum precipitation that could occur.

The City also notes that the Northwest Pond will be used to store asbestos-containing waste. This is not entirely correct. No additional asbestos waste discovered during remediation will be discarded in the Northwest Pond. Instead, it will be containerized according to applicable regulations and disposed of in the new non-hazardous landfill constructed during remediation.

Additionally, the GMRP's proposed activities include doing work to reduce further the risk associated with the dams on site. Closure activities will reduce risk:

- Spillways will be constructed so dams will not have to retain water. Regrading will also provide positive drainage so that dams will no longer be water retaining.
- Removal of standing water and cover placement will promote drying of the tailings, improving stability of tailings during a hypothetical dam failure scenario.
- Stabilization works are planned for Dam 21A (mentioned in the CRP) to CDA guidelines. Evaluations of other dams to confirm long-term stability are planned, and additional stabilization will be carried out, if required.

Accordingly, the Board should not award compensation to the City for a risk that is due to a former depositor of waste and pre-exists the GMRP application for water licence and where the GMRP's activities and measures at the site are aimed specifically at managing this risk to keep it at a minimum. The Board should not grant compensation because of a risk that the City itself recognizes is very unlikely and that the very proposal for a water licence under review seeks to reduce even further through safe closure activities.

Proposed deposit of waste will not affect the City's emergency use of water in Yellowknife Bay

The City claims that the GMRP's "proposed water licence contemplates depositing waste, including arsenic, in and around Yellowknife Bay, at concentrations that far exceed drinking water quality standards set out in the Guidelines and far exceed levels recommended by the Mackenzie Valley Environmental Impact Review Board".

The Guidelines for Canadian Drinking Water Quality (“GCDWQ”) are prepared by Health Canada in collaboration with the Federal-Provincial-Territorial Committee on Drinking Water to provide guidance to providers of drinking water supplies and are not intended as guidelines for discharge to the aquatic environment. Appropriate discharge limits are set by the Board through the water licencing process. The GMRP has proposed effluent quality criteria that are protective of human health and the environment as described in the Effluent Quality Criteria report submitted to the MVLWB as part of the Water Licence Application. The proposed effluent quality will meet the GCDWQ for arsenic (10 µg/L) only and not all parameters as is in line with the requirement by the MVEIRB. This provides a high level of protection to the receiving environment that is beyond what is expected of any mine or other industrial discharge.

The site currently has an existing Effluent Treatment Plant on site. This ETP was constructed over 30 years ago. The ETP has been treating water from the site to meet the *Metal Mining Effluent Regulations* – now the *Metal and Diamond Mining Effluent Regulations* (“MDMER”)⁶, and seasonally discharging treated effluent to Baker Creek, a tributary to Yellowknife Bay, for many years. The permissible monthly mean arsenic concentration under MDMER is 300 µg/L (and as proposed by GMRP in the Effluent Quality Criteria provided in the GMRP Water Licence Application) and ETP effluent will continue at or below this concentration until the new Water Treatment Plant is built. Once the new WTP is built, the GMRP proposes effluent quality that will meet the GCDWQ for arsenic (10 µg /L) as required by the Mackenzie Valley Environmental Impact Review Board. It is unreasonable to expect the GMRP to meet the Measure provided by the MVEIRB on the day the licence is issued. In order to reduce concentrations in the GMRP’s effluent from 300 µg /L to 10 µg /L the GMRP is required to construct a new WTP. The existing treatment plant is at the very limit of its treatment capacity. The activities required to construct a new WTP are those outlined in the water licence application: construction of a non-hazardous waste landfill, discharge line and outfall, remediation of the sediment at the outfall area and other associated activities.

The City’s claim that continued arsenic loading levels in Yellowknife Bay in the 2020 – 2026 period will persist and adversely affect water quality for many years to come, even if the GMRP’s effluent meets the GCDWQ after 2026 is not consistent with monitoring and plume studies or the models developed for the Water Licence Application. Mixing beyond the breakwater is very rapid, with a substantial decrease in concentrations of arsenic as you go further into Yellowknife Bay (Section 2.5 and Appendix B of CIRNAC and GNWT 2019).⁷ Arsenic concentrations in effluent from either the ETP (2020 – 2026) or WTP (2027 to 2040) are not predicted to persist or adversely affect water quality for years to come in Yellowknife Bay (refer to Appendix E of CIRNAC and GNWT 2019). Plume delineation studies conducted in 2009 and 2012 demonstrate that even at the higher concentrations discharged from the ETP, arsenic concentrations do not persist far into the Bay. From 2027 to 2040, effluent from the WTP is also predicted to disperse rapidly, with less than 1% of the effluent predicted to remain 200 m from the outfall under ice-cover. Additionally, when the new WTP is discharging effluent directly to Yellowknife Bay, and under average flow conditions, the model predicted a decrease in total arsenic concentrations

⁶ SOR/2002-222.

⁷ CIRNAC and GNWT (Crown-Indigenous Relations and Northern Affairs Canada and Government of the Northwest Territories), 2019, *Giant Mine Effluent Quality Criteria Report*. Prepared for the Mackenzie Valley Land and Water Board, Yellowknife, NT, Canada.

in Yellowknife Bay compared to present-day. The discharge from the new WTP will achieve the limit for arsenic prescribed by the MVEIRB in Measure 14 of its Report of Environmental Assessment.

Evidence submitted by the City confirms this. The City presented measured concentrations of arsenic in Yellowknife Bay near the location of a possible water intake for the City in their submitted evidence (Exhibit B). The data analysis resulted in the following conclusion:

For Normal Conditions, the upper bound estimates for total and dissolved arsenic (total arsenic is virtually entirely associated with the dissolved form) in surface waters ranged from 1.7 µg /L to 4.5 µg/L, and therefore met the Health Canada drinking water quality guideline for arsenic of 10 µg/L without the requirement for further treatment. These values are likely over-estimates of the upper bound of arsenic concentration under Normal Condition because of an observed significant decreasing temporal trend in arsenic within the period of record (2005 to 2017) – Exhibit B, AECOM report, page 3

The City provides the data used in the analysis in Appendix A of Exhibit B. The data presented by the City covers the time period during which the ETP has been operational and demonstrates that even when the ETP is operational with a discharge limit at or above concentrations requested in the GMRP Licence Application (i.e. Effluent Quality Criteria), concentrations of arsenic in Yellowknife Bay near the proposed water intake location for the City's treatment plant would be below the GCDWQ before any treatment and the water does not require additional treatment to remove arsenic.⁸ Therefore, the activities proposed in the GMRP water licence application will not prevent the City from using Yellowknife Bay as a source for drinking water in case of emergency.

In addition to the construction of the new WTP, other activities of the GMRP should also contribute to reducing the contaminant loading from the site to Yellowknife Bay. These activities include, but are not limited to, excavating and covering contaminated soils, excavating contaminated sediment in Baker Creek and replacing with clean material, covering tailings, and freezing arsenic trioxide storage stopes and chambers.

Accordingly, the continuing operation of the ETP and current seasonal discharge of treated effluent to Baker Creek and eventually to Yellowknife Bay does not negatively affect the City's ability to take water from Yellowknife Bay. The City's own evidence confirms this is the case. Moreover, the GMRP includes building a WTP to treat water to a point where discharged water will meet GCDWQ for arsenic of 10 µg/L without the necessity of a mixing zone. Such a measure, combined with others the GMRP proposes to carry out, will reduce the amount of arsenic being discharged into Yellowknife Bay and reduce arsenic loading over time.

The GMRP submits that there is no reason for the Board to award compensation on this ground.

Proof of Loss and Damage

The City claims the immediate loss and damage caused by the Project's activities is \$34,482,958 because the City must construct a new water pipeline to withdraw drinking water from the Yellowknife River.

⁸ Exhibit B, AECOM Report, Appendix A, p. 24.

However, the pipeline is simply at the end of its life, and must be replaced regardless of the Project activities. The current water pipeline is now around 50 years old. According to the City's Claim Form for Water Compensation, the life expectancy of a steel pipeline such as this one is from 40 to 50 years. This infrastructure belongs to the City. It is entirely the City's responsibility to replace it at this time if it wants to continue its licensed water use of taking water at the Yellowknife River. The GMRP proposed activities do not change or impact this.

The GMRP is not the reason that the Yellowknife River water pipeline needs to be replaced. The compensation claimed by the City to fund its replacement cannot be attributed to the Project. This alone is sufficient to reject the City's claim for compensation.

The City cannot claim either that the Project will force it to continue drawing water from the Yellowknife River instead of Yellowknife Bay, or that it will incur additional costs as a result. First, the City is currently not authorized to draw waters from Yellowknife Bay otherwise than on an emergency basis. If the City elects to draw all of its fresh water from Yellowknife Bay, this will be a new and future project and would require a new water licence or amendment to its licence. Such a future project cannot be the basis of a compensation claim.

Second, as indicated above, the current water quality in Yellowknife Bay complies with GCDWQ at the City's water intake. The Project will reduce the concentration of contaminants entering Yellowknife Bay even further. Nothing relating to the Project will restrict the ability to draw water from Yellowknife Bay.

Moreover, per the City's own evidence, replacing and maintaining the Yellowknife River water pipeline will cost less than operating and maintaining a pipeline drawing water from Yellowknife Bay. The City has received \$25,862,218.00 from the federal Disaster Mitigation & Adaptation Fund ("DMAF") for the new Yellowknife River water pipeline. This represents 75% of the estimated total cost of replacing the pipeline. The City must provide 25% of the total cost of its capital project, which amounts to \$8,620,740. In the City's "Special Governance and Priorities Committee Report" (City's Compensation Claim Exhibit E, page 12), the Committee acknowledges that the DMAF contribution "now makes [the Yellowknife River pipeline] the most cost effective option" in terms of water sourcing projects. This cost is less than the estimated \$9,340,000 capital cost to build the Yellowknife Bay water intake project. Moreover, according to the City's Compensation Claim Exhibit D, DMAF Application Form at page 3, and Exhibit B, 2017 AECOM Study at page 21, the operating and maintenance (O&M) costs of the Yellowknife River option are "significantly" lower than the O&M costs associated with the Yellowknife Bay option. Annual O&M costs for the Yellowknife River project are estimated to be \$300,000 while estimated annual O&M costs for the Yellowknife Bay project are \$510,000 (about 67% higher annual O&M costs than the Yellowknife River option).

Therefore, because the City has secured funding from the DMAF – which has reduced its own share of the costs of the Yellowknife River water pipeline project below the capital cost of the Yellowknife Bay project – the City is not incurring any financial damage or loss. Whether the project proceeds or not, the City will be required to replace the pipeline or build a new water treatment plant to withdraw water from Yellowknife Bay. The new WTP would now cost the City more to build than replacing the pipeline. Additionally, by replacing the pipeline the City is saving on annual O&M costs since the O&M costs of the WTP at Yellowknife Bay would be "significantly" more each year.

The City claims “the risk of having to live with an actual or contaminated water supply is extremely stressful” and claims for compensation on the basis of nuisance and inconvenience due to adverse effects to the “actual, emotional, economic, spiritual and cultural well being of Yellowknife’s residents”[sic]. The City claims \$8,620,740 representing \$431 for each Yellowknife resident. It has not submitted any evidence to show there will be actual, emotional, economic, spiritual or cultural effects to the wellbeing of users of the City’s drinking water.

The City cannot be compensated in the name of its residents. Any resident who fits the categories in paragraph 72.03 (5)(b) of the MVRMA and who considers they will be adversely affected by the GMRP’s water licence application had the opportunity to file a compensation claim with the Board. The City does not have the ability to allege adverse effects on third parties as grounds for compensation to itself.

Moreover, the water supply the City uses is not contaminated and is upstream of the Giant Mine site at the Yellowknife River. Nothing attributable to the Project will prevent the City from continuing to draw water from this location. Moreover, the City’s own evidence shows that in the vicinity of an intake for a proposed City WTP on Yellowknife Bay the arsenic concentration in the water is well below human health guidelines and has seen a decreasing trend over the study period (AECOM report, Appendix A at page 17). Therefore, the City’s position that it is entitled to compensation for nuisance and inconvenience cannot stand when the City is not actually experiencing, or reasonably expected to experience, any inconvenience or nuisance due to Project activities. The City will also benefit from the remediation to the site as the Project will further reduce the risk of arsenic contamination of land and water as it progresses.

The City is suffering no immediate or future loss or damage from the proposed project activities. The City is also not suffering any nuisance or inconvenience which would give rise to an award of compensation. The City currently draws water from the Yellowknife River. The City needs to replace its water pipeline to continue drawing drinking water either from the Yellowknife River or Yellowknife Bay. The GMRP will not interfere with the City’s ability to draw drinking water from either location.

CITY OF YELLOWKNIFE (TOWN SITE CLAIM)

Eligibility and Extent of Use

The extent of City of Yellowknife use at the Town Site Area

The GMRP acknowledges that the City of Yellowknife occupies the Town Site Area under a lease granted by the GNWT that Miramar Giant Mine Ltd. assigned to the City in 2000. The GMRP acknowledges that the City occupies the site and carries out or enables the following activities and uses:

- a) A public boat launch and dock, designated as the Giant Mine Boat Dock natural area under the City's Public Parks and Recreation Facilities By-law, including parking, launching, and docking facilities;
- b) A portion sub-let to the Great Slave Sailing Club; and
- c) A portion sub-let to the Yellowknife Historical Society.

The GMRP notes that the City makes a number of unsubstantiated statements in its claim for compensation. For instance, no evidence was submitted supporting:

- a) That access to the water as provided by the Lease forms an emotional and intangible connection to the water and contributes to the quality of life of all the residents of Yellowknife;
- b) The extent to which vessels launched and docked at the Town Site facility are used to connect the communities of Yellowknife, N'dilq and Dettah, and provide services to the majority of the communities on Great Slave Lake and the Mackenzie River;
- c) The extent to which the boat launch serves as a launching point for commercial fishing and barging vessels, and to what extent it is the only point where commercial fishing and barging vessels may be launched and docked.

The City provides no evidence as to the actual level of use of the Giant Mine boat launch and dock facilities at the Town Site Area. There is no evidence of the number of users of the Giant Mine boat launch and dock, or whether such users will be able to use other boat launches or infrastructure.

The City of Yellowknife's eligibility to make a claim for compensation in connection to use at the Town Site

The City is an "occupier" or an "owner" of property as set out in the MVRMA because it is the lawful owner and occupier of the Town Site by virtue of its lease. However, as discussed below, the Board should not entertain its claim for compensation because the nature of the adverse effect it raises is not of the kind contemplated by subsection 72.03(5) of the MVRMA, and is outside of the jurisdiction of the Board.

The City is not a "domestic user" within the meaning of the MVRMA since it does not fit any of the categories of the definition of "domestic user". Section 51 of the MVRMA defines "domestic user" as follows:

domestic user means a person who uses waters

(a) for household requirements, including sanitation and fire prevention;

(b) for the watering of domestic animals; or

(c) for the irrigation of a garden adjoining a dwelling-house that is not ordinarily used in the growth of produce for a market.

The City does not use waters for watering animals or irrigating a dwelling-house garden. Nor is the City using waters for household requirements, which are requirements relating to persons living in a home.

The City is not an authorized user within the meaning of the MVRMA either since it does not fit under the definition of “authorized user”. Section 51 of the MVRMA defines “authorized user” as follows:

authorized user means a person who uses waters without a licence but under the authority of regulations made under paragraph 90.3(1)(m).

The City provided no evidence or information indicating that it is using waters or depositing waste without a licence under the *Mackenzie Valley Federal Areas Waters Regulations*, SOR/93-303. It provided no evidence or information either that it uses waters or deposits waste without a licence under the authority of any territorial law.

The City uses the property it leases for the purpose of enabling the public and its sub-lessee, the Great Slave Sailing Club, to have access to the water. This is not a stand-alone water use. This is a riparian right arising from its status as a waterfront lease holder and occupier.

Effects of GMRP Proposed Water Use and Deposit of Waste on the City’s Leasehold

The City is seeking compensation from the GMRP because the GMRP will require access to various sections of its leased property at various times to the exclusion of the public to carry out the Project. This is not the type of compensation contemplated by the regime set out in the MVRMA, even in connection with respect to an owner or occupier of property.

The GMRP is proposing to remediate the Town Site Area. The GMRP initially intended to remediate to industrial soil standards (as set out in the Environmental Guideline for the Remediation of Contaminated Sites adopted pursuant to the *Environmental Protection Act*, R.S.N.W.T., 1988, c. E-7, which was in effect at the date of the Responsible Ministers’ approval of the Report of Environmental Assessment for the Project). However, the City requested that the remediation of the Town Site Area be completed to residential soil standards. In spite of the resulting increased cost of over \$30 million to do so, the GMRP’s objective is to remediate the Town Site Area to a residential soils standard. The GMRP also agreed to remediate a section of the lake bed, to protect against possible exposure in the case of wading. This will require more work, increased cost to the GMRP, and more time where sections of the leasehold property will need to be under GMRP’s exclusive access.

Since the City holds a lease over most of the Town Site Area, it needs to provide access to the GMRP in order for the GMRP to access the leasehold property and complete the remediation work. It is within the City’s power to allow access on appropriate terms and conditions. However, if the City refuses to grant access on appropriate terms and conditions, the GMRP will simply be unable to remediate the Town Site Area, or sections of it, since the GMRP will have no right to access that portion of the property. The GMRP will neither trespass on the City’s leasehold nor expropriate that portion of the property.

Canada, the GNWT and the City are currently attempting to negotiate an access agreement which would set out the terms and conditions pursuant to which the GMRP would be provided access to various sections of the City leasehold property at various times and for various lengths of time.

The Board's jurisdiction is laid out in subsection 102(1) of the MVRMA:

102 (1) The Board has jurisdiction in respect of all uses of land in the Mackenzie Valley for which a permit is required under Part 3 and in respect of all uses of waters or deposits of waste in the Mackenzie Valley for which a licence is required under Part 3 or any territorial law, as the case may be,

The Board has jurisdiction in respect of land uses for which a permit is required under the Act or territorial law. This does not include determining whether a proponent may access an owner's or occupier's property. This is a matter left to the proponent and owner or occupier to resolve themselves, or to be otherwise determined by some other law than the MVRMA or equivalent territorial legislation.

The Board also has jurisdiction in respect of all uses of waters or deposits of waste. This includes the authority to award compensation to, amongst others, owners and occupiers who would be adversely affected by the use of waters or the deposit of waste proposed by an applicant. Such owners and occupiers would typically be neighbouring owners or occupiers who might be adversely impacted by a proposed diversion, obstruction or other alteration of the flow of waters, or alteration of the bed or banks of a body of water, or a proposed deposit of waste that would alter the quality of waters by the owner's or occupier's property.

Here, the City is not claiming that the GMRP's proposed use of waters or deposit of waste will result in unwanted and adverse effects to it as an owner or occupier of property. On the contrary, the City actually requested the GMRP does even more work than what was initially proposed to attempt to remediate the Town Site Area and the adjoining foreshore and lakebed beyond the industrial standard to try to achieve a more demanding soil standard. As the lessee of the Town Site Area, the City will actually benefit greatly from the GMRP's remediation work.

The City is actually claiming compensation for the temporary loss of use of its leasehold property if it grants access to the GMRP to do the work it wants the GMRP to do on its leasehold property. It is asking the Board to arbitrate or otherwise intervene in the parties' negotiations of what should be acceptable terms and conditions for granting access to the leasehold property. The City is inappropriately asking the Board to use its jurisdiction to order compensation to settle a dispute and negotiation over a real property matter in its favour.

The City has a choice to make. Either it grants access to the GMRP, which will allow the GMRP to carry out the Project on its leasehold property, or it does not grant the necessary access and sections of its leasehold property will not be remediated. The City cannot on the one hand negotiate access to the leasehold property, and on the other force the payment of compensation through the Board's authority outside of the negotiations.

Moreover, the GMRP is committed to making efforts to plan and conduct the Project to minimize the time required and the impact on the GSSC and other users to what will be reasonably necessary to carry out the Project. The GMRP will make best efforts to maintain continuous public access to Great Slave Lake for boating through the Town Site Area during the boating season. The GMRP proposes to achieve

this by constructing a boat launch comparable to the existing one at the Giant Mine boat launch near the site of the GSSC, and to make sure that at least one of the existing or new boat launches will be accessible by the public over the duration of the project during the boating season.⁹ This should mitigate most of the issues raised by the City in its claim for compensation.

Given the high importance and significant benefits of the Project to the residents of Yellowknife, N'dilq and Dettah, the residents of the Mackenzie Valley, and Canadians in general, the short-term impact of the Project on the City and users of the Giant Mine boat launch should be considered to be reasonable in the circumstances. The City has been requesting that the GMRP remediate the entire Giant Mine Site, including the Town Site Area, to a higher standard than the GMRP originally proposed. The GMRP is willing to remediate the Town Site Area to this standard despite the higher cost of doing so. It would be unfair for the Board to determine that the adverse effect of the Project's proposed water use and deposit of waste would unreasonably impact the City so as to justify an award for compensation by the GMRP to the City for work that the City has requested be done.

The GMRP submits that the Board should dismiss the City's claims for compensation on the above grounds.

Proof of Loss and Damage

The GMRP disagrees with the City's contention it is entitled to compensation in an amount of \$290,000 for a feasibility study to construct a suitable alternate boat launch and dock facilities at the "Con Dock" or another location, and for additional compensation in an amount yet to be determined for construction of such alternative boat launch and dock facilities. If the City allows the GMRP to go ahead and clean up its leasehold property, it will get a remediated and improved site. Public access to the existing Giant Mine boat launch and dock facilities will be temporarily interrupted, but not for a period of time that would justify building alternate facilities elsewhere. Moreover, the GMRP will make best efforts to build boat launch facilities near the GSSC site, to maintain continuous public access to Great Slave Lake at a comparable level to what is currently provided by the Giant Mine boat launch and dock.

The GMRP submits that the City's claim for nuisance and inconvenience at \$1.3 Million per year to be groundless and exaggerated. First, the City cannot stand to be compensated in the name of its residents. Any resident who fits the categories in paragraph 72.03 (5)(b) of the MVRMA and who considers they will be adversely affected by the GMRP's water licence application had the opportunity to file a compensation claim with the Board. The City does not have the ability to allege adverse effects on third parties as grounds for compensation to itself.

Second, there was no evidence or data submitted by the City on the actual use of the Giant Mine boat launch and dock. The City's claim is loosely and speculatively based on the number of residents of Yellowknife, not all of whom use the Giant Mine boat launch and dock. There will also be an unknown number of users who will likely use other existing facilities for their boating activities. Calculating any

⁹ Letter to the City of Yellowknife from the Giant Mine Remediation Project, October 10, 2019, <http://registry.mvlwb.ca/Documents/MV2007L8-0031/MV2007L8-0031%20-%20DIAND-GIANT%20-%20Letter%20to%20City%20of%20YK%20Re%20-%20Water%20Compensation%20Claims%20Mitigation%20and%20Accommodation%20-%20Oct10-19.pdf>.

amount of compensation on the basis of the entire population of Yellowknife would be arbitrary, exaggerated, and unreasonable.

The City's claims for compensation are directly linked to the fact that the City wanted the benefit of having its leasehold property remediated to residential soil standards per its own request. This a real property matter the City needs to resolve with the GMRP and the GNWT through negotiations. The alternative is for the GMRP to either not remediate the City's leasehold property at all or only remediate certain sections of it. The GMRP submits the Board should refrain from using its authority over compensation to arbitrate a real property negotiation.

GREAT SLAVE SAILING CLUB

Eligibility and Extent of Use

The GMRP acknowledges that the GSSC currently makes use of a waterfront property in the vicinity of the Town Site. Since 2008, the City of Yellowknife sub-let the property to the GSSC in accordance with a head-lease from the GNWT that Miramar Giant Mine Ltd. assigned to the City. The GMRP acknowledges that the GSSC occupies the site and carries out or enables the following activities and uses:

- d) Access to waterfront by members, sailing students, GSSC personnel and other patrons and invitees of the GSSC, including use of a 100' X 12' dock to embark and disembark, load and off-load embarkations of various sizes;
- e) Access to the mooring field, where large sailboats are anchored during the sailing season;
- f) Sailing school activities;
- g) Clubhouse and storage of GSSC assets;
- h) Boatyard for off-season storage of deep draft sailboats, some storage being off the sub-let premises, which the City apparently permits or tolerates; and
- i) Use of a 100-ton crane to lift boats and launch them or store them on their cradle.

All such activities and uses are essentially land-based and enabled by the successive sub-leases the City granted to the GSSC over time since 2008. Without such a sub-lease, the GSSC does not have the right to occupy the property it requires and currently occupies for the purposes of those activities and uses.

It must be noted that the GSSC's sub-lease from the City includes specific provisions for termination of the lease due to remediation activities in Part 4.4:

4.4.1 Notwithstanding any other termination clause(s) in this Agreement, this Agreement may be terminated by the City upon six (6) months written notice should, in the sole opinion of the City, the aforementioned remediation activities necessitate such termination.

4.4.2 The City accepts no responsibility for costs or services associated with termination, relocation, or member services severed due to termination for remediation activities.

Given that the GSSC's sub-lease expressly provides for termination due to remediation activities, the GSSC knew or ought to have known that its lease may be terminated to allow the Project to be carried out, and that it would be responsible for all of its costs related to termination or relocation due to remediation activities.

Additionally, the City has been renewing the sub-lease to the GSSC for successive terms of three years. The current sub-lease will terminate on December 30, 2019. Whether the sub-lease is renewed depends on whether both the City and GNWT Deputy Minister of Municipal and Community Affairs will consent, and whether relinquishment is required to "facilitate the completion of the Giant Mine Remediation Project" as per s. 1.3.2(c) of the GSSC sub-lease. If for whatever reason the GSSC sub-lease is not renewed or is terminated, the GSSC will need to vacate the property, give possession of the property back to the City, and cease its activities there.

The GSSC's eligibility is entirely dependent on its status as a lawful occupier of the sub-lease property at the time the GMRP might carry out the Project on or around the sub-lease property. If the GSSC has a

sub-lease at the relevant time of remediation it would be eligible pursuant to sub-paragraph 72.03(5)(b)(ix) of the MVRMA.

However, the GSSC is not a 'domestic user' within the meaning of the MVRMA contrary to what it indicates in its Claim Form for Water Compensation. Section 51 of the MVRMA defines 'domestic user' as follows:

domestic user means a person who uses waters

(a) for household requirements, including sanitation and fire prevention;

(b) for the watering of domestic animals; or

(c) for the irrigation of a garden adjoining a dwelling-house that is not ordinarily used in the growth of produce for a market.

It seems obvious that the GSSC does not use waters for watering animals or irrigating a dwelling-house garden. The GSSC is not using waters for household requirements, which are requirements relating to persons living in a home. The GSSC is a society and whatever use it may make of water would be for society purposes, not the requirements of a household. In any event, the GSSC does not provide any evidence supporting its contention it is a domestic user or otherwise a water user.

Therefore, the GSSC can only be eligible to make a compensation claim if it will be an occupier of the property pursuant to a valid sub-lease at the time the GMRP might carry out the Project on or around its sub-leased property. If this is not the case, the GSSC would not be eligible. Since this will depend on whether the City keeps renewing the sub-lease with the GNWT's approval, or if the City will terminate the sub-lease to enable the GMRP to carry out the Project in this area of the Town Site Area, there is much uncertainty as to whether the GSSC will qualify as an occupier of property at the relevant time.

Effects of GMRP Proposed Water Use and Deposit of Waste on Claimant's Use

The GMRP proposes to remediate the Town Site, including the property currently occupied by the GSSC. The remediation constitutes an improvement that will benefit the residents of Yellowknife, N'dilq and Dettah, the residents of the Mackenzie Valley, and Canadians in general, but much more particularly the parties who make regular use of the Town Site Area.

The GSSC is one of those parties who stand to benefit directly from the Project. It currently occupies and makes use of a contaminated site. The GMRP, at the City's request, has the objective of remediating the site the GSSC occupies to a residential soil standard. In the event that the City and the GNWT agree to lease the GSSC the property after remediation is complete, the GSSC will benefit from a safer and healthier site.

The GMRP notes the acknowledgements made by the GSSC that:

- a) The GSSC will not suffer future losses or damages as a result of the Project once the Project is complete;
- b) The GSSC will suffer no adverse effects from the licenced activity; and
- c) There will be no incremental, gradual or accumulative effects from the proposed activities.

It is true the GMRP cannot carry out the Project without interruption to the GSSC's use of its current facilities during the time required to remediate the property, the lakebed near the property, and the property around the GSSC sub-lease. However, if the GSSC sub-lease is renewed, the GMRP is committed to making efforts to plan and conduct the Project so as to minimize the time required and the impact on the GSSC and other users to what will be reasonably necessary to carry out the Project. The long-term benefit that will result from remediating the Town Site Area should not be treated as an adverse effect within the meaning of the MVRMA. The disturbance will be what can be expected when governments pursue public works in the public interest, and will not amount to nuisance. The GSSC will be among the primary beneficiaries of such public works accomplished as part of the Project in the Town Site Area.

Given the high importance and significant benefits of the Project to the residents of Yellowknife, N'dilo and Dettah, the residents of the Mackenzie Valley, and Canadians in general, the impact of the Project on the GSSC should be considered reasonable in the circumstances. The GSSC obtained a sub-lease in support of its activities after the GMRP had originally applied for this water licence and when it was well known that the Giant Mine Site would be remediated. The GSSC sub-leases consistently provided they could be terminated to enable the remediation to go ahead. The GSSC decided to go ahead and establish its activities in that location knowing full well all of the circumstances. Its sub-lease agreement itself consistently contained stipulations the lease could be terminated to enable the remediation of the site, and the GSSC agreed to assuming the costs of its relocation due to remediation activities. It would be unfair for the Board to determine that the adverse effect of the Project's proposed water use and deposit of waste would unreasonably impact the GSSC so as to justify an award for compensation by the GMRP to the GSSC.

In any event, neither the GMRP's proposed water use or nor its deposit of waste is a basis for compensating the GSSC pursuant to the MVRMA.

The GSSC is actually claiming compensation for its anticipated loss of access and use of its leasehold property. The GSSC could itself grant, with the City's consent, the GMRP access to carry out the Project on the property to obtain the benefits of a site remediated to the residential soil standards. It could also be lawfully required to vacate the property as is clearly provided by the sub-lease that it signed. All those instances are real property transactions and matters outside the purview of the MVRMA. It is legitimate for a lessor not to renew a lease, or to stipulate the termination of a lease for doing major work, repairs and improvements to its property. The fact that the Project's work, repairs and improvements require a water licence does not change the fact that the GSSC has a terminable sub-lease that requires renewal periodically. To the extent the lessor finds it beneficial to interrupt lawfully the GSSC's occupancy of its leasehold, it is legitimate for the lessor to do so, and no compensation is due to the lessee.

Finally, the GSSC's claim that noise and nuisance will be a factor "because the use of the boatyard is transitional to uses which are several miles from the proposed-licensed activities"¹⁰ is unsubstantiated and baseless.

¹⁰ Great Slave Sailing Club Claim Form for Water Compensation, p. 9.

The GMRP submits that the Board should dismiss the GSSC claim for compensation on the basis that the GSSC will not be adversely affected as an occupier.

Proof of Loss and Damage

The GSSC did not submit any evidence to support the amounts of compensation it is claiming. The GSSC recognises that the shorter the interruption of its use of the property the lesser amount of compensation would be required. However, it does not provide any information on what basis and length of time it is submitting its claims for compensation. It is therefore not possible to ascertain the level of compensation for any given time. The Board should also deny a compensation award on the basis that the GSSC's claim lacks the necessary evidence and specificity.

Moreover, the GMRP submits the following in respect of the specific heads of losses and damages listed by the GSSC:

- a) The \$20,000 claim for "Demolition of the main pier" is not justified because the GMRP is not intending to demolish the main pier;
- b) The \$40,200 claim for the anticipated need for "Removal of abandoned boats" is not justified since the GMRP cannot be held liable if the GSSC members and other invitees do not fulfill their obligations; the GSSC is responsible for managing its relationship and liability in respect of its members and invitees;
- c) The \$79,200 claims for both summer and winter "Lost boatyard storage fees" are for lost revenues, which are not supported by evidence; moreover, those claims don't take into account expenses that might be saved by off-setting those revenues;
- d) The \$85,222 claim for "Lost Sailing School Fees" is unsubstantiated for lack of demonstration that the GSSC will be totally unable to continue such activities at another location in Yellowknife. Further, any such estimate of fees from future schools is totally speculative; and
- e) The \$24,000 and \$120,000 claims for "Administration and financial records" and "Management during period of no access" respectively appear to be baseless since (1) those are costs that would be incurred in the normal course of the GSSC business, (2) there is no indication that administration and management expenses will increase due to the Project, and (3) on the contrary, those expenses should be non-existent or greatly reduced if the GSSC decides to shut down or significantly reduce its activities and business.

If the Board contemplates awarding any compensation to the GSSC, it should consider that the GSSC's eligibility to make a claim under the MVRMA is conditional on whether it will be an occupier of the property pursuant to a valid sub-lease if and when the GMRP might carry out the Project on or near its facilities. The GMRP submits that any compensation award should only be payable in the future if that condition is fulfilled.

However, since the GMRP will not trespass on GSSC or the City's property, if it does carry out the Project on or near the GSSC facilities, it will be with the agreement of all lawful occupiers at that time. The GMRP submits there is therefore no ground for the Board to award any compensation in favour of the GSSC.

YELLOWKNIFE HISTORICAL SOCIETY

Eligibility and Extent of Use

The GMRP acknowledges that the Yellowknife Historical Society (“YKHS”) currently occupies leasehold property on the Giant Mine Town Site Area. Since 2010, the City of Yellowknife has sub-let property to the YKHS. The GMRP acknowledges that the YKHS occupies the site and carries out or enables the following activities:

- a) Establishing a heritage destination site at the Giant Mine Town Site Area;
- b) Operating a community museum utilizing the Giant Mine Recreation hall building at the Town Site Area; and
- c) Maintaining public displays of artifacts, a building and equipment at the Giant Mine Town Site Area on land located outside of its sub-lease.

All of these activities and uses are land-based and enabled by the sub-lease granted by the City to the YKHS. Without its sub-lease, the YKHS does not have any right to occupy the property it requires and currently occupies for the purposes of those activities and uses. The YKHS’s sub-lease from the City includes specific provisions for the termination of its lease due to remediation activities in Part 4.3:

4.3.1 Notwithstanding any other termination clauses in this agreement, due to the ongoing remediation activities that may impact the use of the Land as described in this lease, the Agreement may be terminated upon six (6) months notification from the City.

4.3.2 The City accepts no responsibility for costs or services associated with termination or relocation due to termination for remediation activities.

Given that the YKHS’s sub-lease expressly provides for termination due to remediation activities, the YKHS knew or ought to have known that its lease may be terminated to allow the Project to be carried out, and that it would be responsible for all of its costs related to termination or relocation due to remediation activities.

Additionally, the City has been renewing the YKHS sub-lease for successive terms of three years. The current sub-lease expired on October 31, 2019. Whether the sub-lease is renewed depends on whether both the City and GNWT Deputy Minister of Municipal and Community Affairs will consent, and whether relinquishment is required to “facilitate the completion of the Giant Mine Remediation Project” as per s. 1.4.2(c) of the YKHS sub-lease. If for whatever reason the sub-lease is not renewed or is terminated, the YKHS will need to vacate the property, give possession of the property back to the City, and cease its activities there.

Therefore, the YKHS may be eligible to make a claim for compensation, but only if it will be an occupier of the property pursuant to a valid sub-lease at the time the GMRP might carry out remediation activities on or around that property. If one or the other of those conditions is not present at the relevant time, the YKHS will not be eligible. Since this will depend on whether the City continues to renew the sub-lease with the GNWT’s approval, or if the City will terminate the sub-lease to enable the GMRP to carry out the Project in this area of the Town Site, there is much uncertainty as to whether the YKHS will qualify as an occupier of property at the relevant time.

Effects of GMRP Proposed Water Use and Deposit of Waste on Claimant's Use

The GMRP proposes to remediate the Town Site Area, including the property currently occupied by the YKHS. The remediation constitutes an improvement that will benefit the residents of Yellowknife, N'dilq and Dettah, the residents of the Mackenzie Valley, and Canadians in general, but much more particularly the parties who make regular use of the Town Site Area. Accordingly, the impact of the Project on the YKHS should be considered reasonable in the circumstances.

The YKHS is one of those parties who stand to benefit directly from the Project. The YKHS currently occupies and makes use of a contaminated site. The GMRP, at the City's request, will attempt to remediate the Town Site Area to a residential soil standard. In the event that the City and the GNWT agree to lease the property to the YKHS after remediation is complete, the YKHS will benefit from a safer and healthier site.

While the GMRP activities will prevent the YKHS from occupying and using portions of the property it currently occupies for the time required to remediate the property, if the YKHS sub-lease is renewed the GMRP is committed to making efforts to plan and conduct the Project so as to minimize the time required and the impact on the YKHS and other users to what will be reasonably necessary to carry out the Project. The long-term benefit that will result from remediating the Town Site Area should not be treated as an adverse effect within the meaning of the MVRMA. The disturbance will be what can be expected when governments pursue public works in the public interest, and will not amount to nuisance. The YKHS will be among the primary beneficiaries of such public works accomplished as part of the Project at the Town Site Area.

The YKHS obtained a sub-lease in support of its activities after the GMRP had originally applied for its water licence and when it was well known that the Giant Mine Site would be remediated. The YKHS sub-leases consistently provided they could be terminated to enable the remediation of the site, and the YKHS agreed to assume the costs of its relocation due to remediation activities. The YKHS decided to go ahead and establish its activities in that location knowing full well all of the circumstances. It would be unfair for the Board to determine that the effect of the Project's proposed water use and deposit of waste would unreasonably impact the YKHS so as to justify an award of compensation.

In any event, neither the GMRP's proposed water use nor deposit of waste is a basis for compensating the YKHS pursuant to the MVRMA.

The YKHS is actually claiming compensation for its anticipated loss of access to and use of its leasehold property. The YKHS could itself grant, with the City's consent, the GMRP access to perform remediation work on the property in order to obtain the benefits of a site remediated to the residential soil standards. It could also be lawfully required to vacate the property as is clearly provided by its sub-lease. All those instances are real property transactions and matters outside the purview of the MVRMA. It is legitimate for a lessor not to renew a lease, or to stipulate the termination of a lease for doing major work, repairs, and improvements to the property. The fact that the Project's work, repairs, and improvements require a water licence does not change the fact that the YKHS has a terminable sub-lease that requires renewal periodically. To the extent the lessor finds it beneficial to lawfully interrupt the YKHS's occupancy of its leasehold, it is legitimate for the lessor to do so, and no compensation is due to the lessee.

Proof of Loss and Damage

The YKHS provided scant evidence to support the amounts of compensation it is claiming. While it did provide quotes from Weatherby Trucking and DC Moving with respect to the costs of moving and relocating outdoor displays and museum collections, it has not provided any evidence with respect to its alleged loss of visitor revenue and other funding. It is not possible to ascertain the level of compensation for these losses, and to offer any estimate would be very speculative. Nor does the YKHS claim for compensation take into account the fact that remediating their leasehold property to make it healthier and safer should actually encourage more visitors to visit their museum and displays. In the long run, a remediated site will be better for YKHS's business than a contaminated one.

CLAIMS BY RECREATIONAL BOATERS

This is the GMRP response to compensation claims submitted by the following:

1. Kevin and Karen McLeod
2. Derek Cutler
3. James Hodson
4. Mark Peer and Leslie Smith
5. J.P. Guy and C.L. Seale
6. David Kellet and Sheila Bassi-Kellet
7. Sherry and Gerald Drover
8. Terry and Diane Brookes
9. Dawn Andrews
10. Lora Archer
11. Kris Schlagintweit and Stephen Fancott
12. Terrance and Joanna Pamplin
13. Doug Morrison and Susan Bowie
14. John McCullum
15. Ian and Rita McCrea
16. Greg and Val Krisch
17. Ben McDonald and Jacquelyn Burles
18. Evan Walz and Sonya Saunders
19. Andy Hutchinson and Harold Andrejek
20. Dwayne Coad and Jan Fullerton
21. Katie O'Beirne

Eligibility and Extent of Use

To be eligible for compensation under paragraph 72.03(5)(b) of the MVRMA, a claimant must fall in at least one of the following categories of persons:

- a) The holder of a water licence;
- b) An earlier water licence applicant;
- c) A domestic user as defined by the MVRMA;
- d) An instream user as defined by the MVRMA;
- e) An authorized user as defined by the MVRMA;
- f) An authorized waste depositor as defined by the MVRMA;
- g) A person using waters or depositing waste into waters without a licence under territorial law;
- h) An owner of property;
- i) An occupier of property;
- j) The holder of an outfitting concession, a registered trapline or of a right of a similar nature.

A person who does not fit in any of the above categories is simply not eligible to present a claim for compensation by a water licence applicant.

Boaters, sailors, and others navigating on water do not fit any of the categories, and are not eligible to make compensation claims. They cannot make a claim on the sole basis of their boating and sailing activities. They are not occupiers of land either because they do not have control over property or a legal right to occupy property.

Recreational boaters are not users of water within the meaning of the MVRMA

First, recreational boaters are not “domestic users’ within the meaning of the MVRMA contrary to what some claimants indicate in their Claim Form for Water Compensation. Section 51 of the MVRMA defines ‘domestic user’ as follows:

domestic user means a person who uses waters

(a) for household requirements, including sanitation and fire prevention;

(b) for the watering of domestic animals; or

(c) for the irrigation of a garden adjoining a dwelling-house that is not ordinarily used in the growth of produce for a market.

Recreational boaters do not use waters for watering animals or irrigating a dwelling-house garden. They are not using waters for household requirements either. They do not have a home at the location, and do not draw water to provide to persons living in their home.

Second, recreational boaters are not “instream users”, “authorized users”, or “persons using waters without a licence under the authority of territorial law”. Their activities amount to navigating on Great Slave Lake, and navigation is a not water use within the meaning of the MVRMA.

Section 51 of the MVRMA defines “instream user” as follows:

instream user means a person who uses waters, otherwise than as described in paragraph (a), (b) or (c) of the definition use, to earn income or for subsistence purposes.

Recreational boaters are not instream users because they do not pursue boating and sailing to earn income or for their subsistence. The recreational boaters use boats and vessels for recreation.

Section 51 of the MVRMA defines “authorized user” as follows:

authorized user means a person who uses waters without a licence but under the authority of regulations made under paragraph 90.3(1)(m).

A person needs to be one “who uses waters” within the meaning of the MVRMA to fit the definition. Section 51 defines “use” as follows:

use, in relation to waters, means a direct or indirect use of any kind other than a use connected with shipping activities that are governed by the *Canada Shipping Act, 2001*, including

- (a) any diversion or obstruction of waters;
- (b) any alteration of the flow of waters; and
- (c) any alteration of the bed or banks of a river, stream, lake or other body of water, whether or not the body of water is seasonal.

Similarly, to use waters without a licence under the authority of territorial law, one would need to use water within the meaning of the *Waters Act*¹¹ of the Northwest Territories. Section 1 of the NWT *Waters Act* defines “use” in essentially the same way as the MVRMA. Therefore, the analysis of whether navigation alone is a water use within the meaning of territorial law is the same as under the MVRMA. In the following paragraphs, we are discussing the meaning and scope of the term “use” in the MVRMA, but the same reasoning and conclusion will apply under the NWT *Waters Act*.

Section 51 of the MVRMA defines “use” of waters in very broad and inclusive terms to capture all sorts of direct or indirect uses of water. However, it makes a specific exception regarding shipping activities that are governed by the *Canada Shipping Act, 2001* (“CSA”).

Shipping activities are not expressly defined in the CSA. Actually, the term “shipping” is barely used in the CSA. However, the objectives of the CSA include promoting safety in recreational boating, protecting the marine environment from damage due to navigation and shipping activities, and developing a regulatory scheme that encourages the viable, effective and economical use of Canadian waters by recreational boaters. The CSA applies to pleasure craft, which it defines as a vessel used for pleasure and that does not carry passengers.¹² A vessel is a boat, ship, or craft designed, used, or capable of being used solely or partly for navigation in, on, through, or immediately above water. Navigation and shipping have been interpreted as terms “which envisage traffic on navigable waters and the use which may be made of navigable water in that regard.”¹³ Therefore, recreational boaters’ activities are within the purview of shipping activities governed by the CSA. They are not using waters within the meaning and for the purposes of the MVRMA.

The conclusion that navigation is not a use of waters for the purposes of the MVRMA is consistent with the purpose and general framework of the MVRMA provisions governing use of waters and the deposit of waste in waters. The relevant provisions of the MVRMA, like those of its predecessors the *Northwest Territories Waters Acts*, the *Northern Inland Waters Act*, and those prior to that were not meant to regulate navigation. They provide for State ownership and control of waters and then establish a system of allocation of appropriation of water, and of other rights to use waters as a resource to be exploited or preserved.¹⁴ Accordingly, section 9.1 of the MVRMA provides that “the establishment of boards by this Act is to enable residents of the Mackenzie Valley to participate in the management of its resources”; waters are therefore treated as a resource under the MVRMA. This contrasts with the right of

¹¹ S.N.W.T. 2014, c. 18.

¹² *Canada Shipping Act, 2001*, S.C. 2001, c. 26, s. 2.

¹³ *R v. Rice* (1963), [1963] 1 C.C.C. 108, 1962 CarswellOnt 239 at para. 14.

¹⁴ See La Forest, A. W., *Anger & Honsberger Law of Real Property, 3rd Ed.*, Thomson Reuters, §19:40.70 (L.L. Ed.).

navigation, which is of a different nature, since it provides a public right of way over waters where navigation is possible.¹⁵ It is not a property right, nor does it deal with water as a resource.

Moreover, if the defined term ‘use’ were to include navigation, it would include it not only to determine who is entitled to make a compensation claim, but also to determine who is regulated as a user of waters under the MVRMA. This would mean that subsection 72(1) of the MVRMA would prohibit navigation unless authorized by a water licence or by regulations. It is telling that the MVRMA or the *Mackenzie Valley Federal Areas Waters Regulations*¹⁶ do not mention navigation when regulating water uses, except to say that shipping under the *Canada Shipping Act, 2001* is excluded. This is because navigation is governed by the *Canada Shipping Act, 2001*, and navigable waters are protected by the *Canadian Navigable Waters Act*, not by the MVRMA.

Since navigating on Great Slave Lake is not a use of waters within the meaning of the MVRMA or the *NWT Waters Act*, recreational boaters are not “instream users”, “authorized users” or “persons using waters without a licence under the authority of territorial law”.

Recreational boaters are not occupiers of property within the meaning of the MVRMA

Mr. Evan Walz and Ms. Sonya Saunders (the “Yacht Club Members”) use the Giant Mine boat launch and are not occupiers of property. They are licensees who attend a public property leased by the City of Yellowknife to use the Giant Mine boat launch to access (enter and exit) the water for navigation (in the sense that they are given free of charge permission to access the land occupied by the City). This is akin to using a public park, and is not sufficient to make the Yacht Club Members occupiers of property under the MVRMA. If the Project is carried out at the Town Site Area and access to the Giant Mine boat launch is temporarily blocked as a result, it will be with the agreement of the lawful occupier of the Town Site Area: the City. No legal right of the Yacht Club Members will be breached as a result.

A number of the recreational boaters also claim compensation as occupiers of property by virtue of the Great Slave Sailing Club’s sublease of waterfront property. The MVRMA does not define “occupier of property”. At common law, for the purpose of determining liability, an occupier of property is one who exercises control over a property:

... it has not been possible to find authority for the proposition that a person not in control at the moment of the accident can nevertheless be said to invite persons on to premises. ... Ordinarily, of course, the invitation is extended by the occupier of the property, whether fixed or movable, where the damage is caused. But is this essential? It seems to me that the importance of establishing that the defendant who invites is the occupier of the premises lies in the fact that with occupation goes control. The importance of control is that it affords the opportunity to know that the plaintiff is coming on to the premises, to know the premises, and to become aware of dangers whether concealed or not, and to remedy them, or at least to warn those that are invited on to the premises.¹⁷

¹⁵ *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, p. 54.

¹⁶ SOR/93-303.

¹⁷ *MacDonald v. The Town of Goderich et al.*, [1949] O.J. No. 474.

Similarly, in the sphere of property tax assessments, an occupier has been defined as “a person who is in possession of land the fee of which is in a municipality and that is held under a lease, licence, agreement for sale, accepted application to purchase, easement or other record from the municipality, or who simply occupies the land...”¹⁸ Occupier has also been defined in the mining context to mean “in respect of private property, an occupier at common law, and includes (i) a person who is in physical possession of the property, and (ii) a person who has responsibility for, and control over, the condition of the property, the activities conducted on the property or the persons allowed to enter upon the property...”¹⁹

The Great Slave Sailing Club is the leaseholder of the property occupied by the Club. The GSSC is the occupier of the property by virtue of the fact that, when it has the legal right to occupy the property, it has responsibility and control over the property and activities there. The GSSC also has control over who may enter the property. According to the GSSC website²⁰, the GSSC exercises effective control over the property as follows:

- The GSSC offers various kinds of memberships to individuals wanting to use the premises;
- Purchasers of a sailing school membership may enter the GSSC property during the regular hours of the Sailing School’s operation;
- Associate, Full, or Honourary Members are given keys to the gate and clubhouse of the property;
- Associate members can only operate boats from the boatyard but cannot store boats on the property;
- Full and honorary members can store boats on the property;
- The Board of the GSSC also has the power to expel members for non-payment of dues and fees, conduct unbecoming or detrimental to the GSSC, and not conforming with GSSC rules or regulations; and,
- The GSSC exercises control over who is a member and which status they are provided; its website provides that members selling boats to non-members must advise the new owners that membership is a requirement to operate a boat from GSSC facilities; if membership is not granted to the purchaser of the boat, then all property associated with the sold boat must be removed from GSSC facilities.

Individual members of the GSSC are not occupiers of the property in a legal sense for the purposes of compensation under the MVRMA because they do not control who may enter the property, and they have no control over the GSSC facilities or the activities at the property. Members are legally distinct from the GSSC, which is a legal person of its own as an incorporated society. The GSSC has legal control of the facilities when it benefits from a sublease from the City.

Members of the GSSC are invitees of the GSSC, as they do conduct business with the GSSC and have a common interest (sailing boats on Great Slave Lake). The GSSC derives an economic advantage from its

¹⁸ *Assessment Act*, R.S.B.C. 1996, c. 20.

¹⁹ *Mineral Resources Act*, R.S.N.S. 2016, c. 3, s. 1.

²⁰ Great Slave Sailing Club, “Membership at G.S.S.C.”, <https://www.greatslavesailingclub.com/greatslavesailingclub/join/join.html>.

members by virtue of the yearly membership dues, boat storage fees, and sailing school fees. To entertain that the GSSC and its individual members can seek and obtain compensation by virtue of the fact that they are both occupiers of property would result in a risk of double compensation to both the GSSC and individual members on the exact same grounds.

The GSSC gives permission to some of its members to store their boat, cradle, and other equipment on its facilities. Some of the GSSC members appear to store their boat, cradle, and equipment on City property outside of the area sublet to the GSSC, which the City seems to tolerate. This limited use for storage falls short of the common law requirement for control to be an occupier of real property.

This occupancy is also limited in a number of other ways. First, the occupancy is strictly limited to storing boats and assets in a location. This does not extend to getting access to Great Slave Lake, or navigating on, or mooring in it.

Second, whatever right the GSSC may have granted a Club member to store a boat and assets, this right cannot be greater than the right of the GSSC itself. GSSC's rights depend on the sub-lease the City grants it. Without such a sub-lease, the GSSC does not have the right to occupy the property, and cannot give lawful permission to its members or anyone to store boats and assets on its facilities. Whether the GSSC sub-lease is renewed in the future depends on the City and the GNWT Deputy Minister of Municipal and Community Affairs consenting to renewing the sub-lease. If for whatever reason the GSSC sub-lease is not renewed or is terminated, the GSSC will need to vacate the property, give possession of the property back to the City, and cease its activities there, and so will its members.

Third, the GSSC's sub-lease from the City includes specific provisions for termination of the lease due to remediation activities necessary for the remediation of the Giant Mine. Consequently, the GSSC knew or ought to have known that its sub-lease may terminate to allow the Project to be carried out, and that any permission it was giving to store boats and assets on site would likely have to be rescinded. It would be unfair to require the GMRP to compensate GSSC members for the lawful rescission of GSSC permission when the GSSC can only grant that permission subject to the eventual termination of its sub-lease to enable the Project to proceed. The GSSC had the responsibility of advising its members accordingly.

Finally, Club members who are storing their boats and assets on City property outside of the GSSC facilities have even less of a right. The City might tolerate the storage of GSSC members' assets on its property; otherwise, they might simply be trespassing on City property. This does not appear sufficient to make one an occupier of property under the MVRMA. If remediation activities is carried out at the Town Site Area and the members are required to remove their boats and assets from City property, it will be with the agreement of the lawful occupier of the Town Site Area: the City. No legal right of such Club members will be breached as a result.

Club members individually simply do not have enough of a right to occupy the property and to exercise control over it to qualify as an occupier of property within the meaning of paragraph 72.03(5)(b) of the MVRMA. They are not eligible to make a claim for compensation.

Effects of GMRP Proposed Water Use and Deposit of Waste on Claimants' Use

There will be very little or no impact to recreational boaters' ability to navigate Great Slave Lake during the life of the Project. The GMRP's use of water or shoreline work in the Town Site Area or Yellowknife

Bay will not interrupt or impede boating and sailing activities on Great Slave Lake in any significant manner.

Their claim instead relies on the impact the GMRP remediation activities will have on their ability to access Great Slave Lake while the GMRP is carrying out the Project in the area of the GSSC facilities and the Giant Mine boat launch.

The GMRP proposes to remediate the Town Site Area, including the property currently occupied by the GSSC and the Giant Mine boat launch. The remediation constitutes an improvement that will benefit the residents of Yellowknife, N'dilq and Dettah, the residents of the Mackenzie Valley, and Canadians in general. It will even more directly benefit the parties who make regular use of the Town Site Area.

The recreational boaters who have submitted claims for compensation stand to benefit directly from the Project. They currently make use of a contaminated site. Assuming that the City will allow the continued use of the site as a sailing club and public site for launching boats after remediation is complete, the recreational boaters will benefit from a safer and healthier site.

It is true the GMRP cannot carry out the remediation without interruption or some level of disturbance to the recreational boaters' use of the Town Site Area during the time required to remediate the Town Site, the foreshore, and the lakebed near the Town Site. However, the GMRP is committed to making efforts to plan and conduct the Project to minimize the time required and the impact on users to what will be reasonably necessary to carry out the Project. The long-term benefit that will result from remediating the Town Site Area will make up for any such interruption or disturbance, and should not be treated as an adverse effect within the meaning of the MVRMA. The disturbance will be what can be expected when governments pursue public works in the public interest, and will not amount to nuisance. The claiming recreational boaters will be among the primary beneficiaries of such public works accomplished as part of the remediation activities in the Town Site Area.

Given the high importance and significant benefits of the Project to the residents of Yellowknife, N'dilq and Dettah, the residents of the Mackenzie Valley, and Canadians in general, the impact of the Project on the recreational boaters should be considered reasonable in the circumstances. They are relying on the sub-lease the GSSC obtained after the GMRP had originally applied for this water licence and when it was well known that the Giant Mine Site would be remediated. The GSSC sub-lease consistently provided for its termination to enable the remediation to go ahead. It would be unfair for the Board to determine that the adverse effect of the Project's proposed water use and deposit of waste would unreasonably impact the recreational boaters so that the GMRP should provide them compensation.

In any event, neither the GMRP's proposed water use or nor its deposit of waste is a basis for compensating the boaters or sailors pursuant to the MVRMA.

The recreational boaters do not have a right to permanent and unimpeded access to the GSSC facilities or Giant Mine boat launch. Their ability to use those facilities depends entirely on the City granting, with the GNWT's consent, a continued sub-lease to the GSSC without lawfully terminating it, or continued permission to the public to use the Giant Mine boat launch. If the Project is carried out at the Town Site Area and access to the GSSC facilities or the Giant Mine boat launch is temporarily blocked as a result, it will be with the agreement of the lawful occupier of the Town Site Area: the City. Indeed, the GMRP will not trespass on the City's property.

Permissions granted by the City by way of sub-leases or otherwise to use the GSSC facilities or Giant Mine boat launch can be withdrawn, and especially so for doing work and improvement to those premises. A lessee such as the GSSC cannot prevent its lessor from making improvements to its property in between terms of the lease, or when, like in the case of the GSSC sub-lease, the lease itself makes provisions for such work and improvement. In respect of the Giant Mine boat launch and other City property, the situation is very similar to when public works and improvements are made to some public area, like a park or playground, a public parking lot etc. Public authorities are entitled to block off access to such sites for the time necessary to carry out the works and improvements. Members of the public, even frequent users, do not have a right to constant access or to be compensated for the temporary loss of access.

Moreover, the GMRP is committed to making efforts to plan and conduct the Project to minimize the time required and the impact on the GSSC and other users to what will be reasonably necessary to carry out the Project. The GMRP will make best efforts to maintain continuous public access to Great Slave Lake for boating through the Town Site Area during the boating season. The GMRP proposes to achieve this by constructing a boat launch comparable to the existing one at the Giant Mine boat launch near the site of the GSSC, and to make sure that at least one of the existing or new boat launches will be accessible by the public over the duration of the project during the boating season.²¹ This should mitigate most of the issues raised by the recreational boaters in their claims for compensation.

Finally, since the recreational boaters' base their claims on anticipated loss of access and use of the GSSC facilities and public areas of the Town Site Area, they are actually basing their claims on the limitation of their right to real property in the Town Site Area. They can be lawfully required to vacate the Town Site Area, as is clearly provided by the GSSC sub-lease, or because some might be trespassing on City property. All those instances are real property matters outside the purview of the MVRMA. It would be legitimate for the City as a lessor not to renew a lease, or to stipulate the termination of a lease for doing major work, repairs and improvements to its property. Similarly, the City may suspend public access to some facilities for the purposes of doing repairs and improvements to those facilities. The fact that the Project's work, repairs and improvements require a water licence does not change the fact that the City has the ability to terminate or not renew sub-leases, or manage access to public property under its control. To the extent the City finds it beneficial to interrupt leases and access lawfully for remediating the Town Site Area to a residential standard, it is open to the City to do so, and no compensation would be due to current permittees and invitees.

As a result, the GMRP submits that the Board should not award any compensation to the recreational boaters.

Proof of Loss and Damage

Generally, recreational boater claimants did not submit enough evidence to support the amounts of compensation they are claiming.

²¹ Letter to the City of Yellowknife from the Giant Mine Remediation Project, October 10, 2019, <http://registry.mvlwb.ca/Documents/MV2007L8-0031/MV2007L8-0031%20-%20DIAND-GIANT%20-%20Letter%20to%20City%20of%20YK%20Re%20-%20Water%20Compensation%20Claims%20Mitigation%20and%20Accommodation%20-%20Oct10-19.pdf>.

The GMRP submits the following in respect of some heads of losses and damages recreational boater claimants typically claim:

- a) Recreational boaters are not saying that they will not be able to access Great Slave Lake and make use of GSSC facilities on a permanent basis because of adverse effects of the proposed use of waters or deposit of waste.
- b) They are mostly objecting to the interruption of access to Great Slave Lake and of use of GSSC facilities for storage purposes. Interruptions will be temporary in nature, and any compensation would depend on length of the interruption. This is uncertain at this point.
- c) Some allege that they will have to sell or otherwise dispose of their boat elsewhere in Canada in case they are denied access to the GSSC facilities over the long term, or if there is a loss of the community supporting sailing activities. If permanent denial of access happens, it will not be because of the Project, but because of the City's decision regarding the use of the Town Site Area after the remediation is complete. The loss of community support is purely speculative and not based on any evidence.
- d) The GSSC's claim is seeking compensation for some of the same costs and expenses. Compensation cannot be provided against the same loss directly to a claimant and indirectly through the GSSC.
- e) Claimants should not get compensation for costs they would have incurred in any event. The GSSC says that it collects revenues from storage fees. Claims for storage costs need to take into account storage fees that would have been payable normally. Similarly, regular costs and expenses, such as for insurance coverage, cannot be claimed in the absence of evidence there would be an increase in such costs and expenses.
- f) Compensation should aim at making a claimant whole, not put them in a better position than they would have been, or create any type of windfall in their favour. Awards of compensation should not be for purchasing new assets or repairing assets in need of repairs, such as trailers.
- g) Claims relating to moving, removing or replacing mooring equipment are not compensable under the MVRMA because they do not relate to the use of waters or occupation of property.
- h) Claims for loss of enjoyment of navigation on Great Slave Lake do not amount to nuisance, inconvenience or noise within the meaning of the MVRMA. The expenses a claimant will not incur when not engaging in sailing activities will offset any amount of compensation for loss of enjoyment. If the amount of compensation claimed is being valued based on the amount of money usually spent to enjoy those activities, then the amount of compensation claimed is entirely offset by the amount of saved expenses.
- i) The MVRMA does not allow for compensation for the time and efforts to make a claim for compensation, or implement alternative arrangements.
- j) Compensation should not be too remote from actual adverse effects. For instance, travel costs to attend sailing training courses outside of Yellowknife are too remote to be compensated.

BECKY JANE LANG

Eligibility and Extent of Use

Based on the information Becky Jane Lang provided, it appears Ms. Lang navigates the waters of Great Slave Lake in order to fish and pick berries for her business selling fish, fish products, jewellery, jams, berries, and syrups. She accesses Great Slave Lake and her fishing and berry-picking sites via the Giant Mine boat launch the City of Yellowknife makes available to the public in the Town Site Area. She says she uses the Giant Mine public boat launch four or five days a week to launch and retrieve her boat for the purposes of her business in the period from May/June to October.

She also says she purchased a new boat in August 2019, a 28-foot Kingfisher. As a result of purchasing a bigger boat, she says she hopes she will increase her fish and berry harvesting.

Ms. Lang does not say or provide evidence that she is the holder of an outfitting concession or of a registered trapline. She is not the holder of a right of a similar nature within the meaning of the MVRMA either. First, she does not need a permit or licence to pick berries, so this is not a right of a similar nature. Second, assuming she has a commercial fishing licence, which she has omitted to submit as evidence in support of her claim, this is not a right that is similar enough to an outfitting concession or a registered trapline to fit the category of eligible claimants in sub-paragraph 72.03(5)(b)(x) of the MVRMA.

A fishing permit is not of the same nature because it is not a land-based activity for which a specific area is being designated. Moreover, if Parliament had had fisheries permits in mind when enacting the relevant provisions of the MVRMA, the former *Northwest Territories Waters Act* and other predecessor legislation, it would have been easy for Parliament to include it in the list of rights giving rise to eligibility to make a claim for compensation.

An outfitting concession refers to what is currently an outfitter licence under the Northwest Territories *Wildlife Regulations*.²² Subsection 36 of those regulations describes the nature of an outfitter licence in the following manner:

36. (1) The holder of an outfitter licence is entitled, for money or money's worth or in the expectation of money or money's worth, to provide equipment and guides to persons hunting big game in the areas designated in the licence.

A registered trapline refers to a registered trapping area licence under the Northwest Territories *Trapping Regulations*.²³ Subsection 7(1) of those regulations describes the nature of a registered trapping area licence in the following manner:

7. (1) Subject to section 10.2, the holder of a registered trapping area licence is entitled exclusively to harvest fur-bearers in the wildlife management area specified in the licence.

²² N.W.T. Reg. 069-97.

²³ N.W.T. Reg. 023-92.

Both those rights attach to a specific area designated by the licence. It makes sense for the MVRMA to base the eligibility to make a claim for compensation against a water licence applicant, because they provide the right to conduct land-based activities in a designated area which could be significantly affected if water is diverted, obstructed, or its flow otherwise altered. Commercial fishing permits do not attach to specific areas of land for obvious reasons. They are related to much broader regions established by the *Northwest Territories Fishery Regulations*.²⁴ The impact of proposed water uses on fishing permits are not of a similar nature at all.

Moreover, commercial fisheries are a matter under the direct jurisdiction of Parliament being regulated under the federal *Fisheries Act* and federal regulations made under that Act. Not only would it have been easy for Parliament to provide expressly that a commercial fishing permit was one of the rights it intended to include in sub-paragraph 72.03(5)(b)(x) of the MVRMA, but one would expect it to have done so if that had been its intention. The fact that Parliament does not mention expressly fishing permits indicates clearly that the holder of such a permit does not have eligibility to make a claim for compensation for this reason.

Ms. Lang is neither an instream user nor an authorized user because her activities amount to navigating and fishing on Great Slave Lake, which are not water uses within the meaning of the MVRMA.

Section 51 of the MVRMA defines ‘instream user’ and “authorized user” as follows:

instream user means a person who uses waters, otherwise than as described in paragraph (a), (b) or (c) of the definition use, to earn income or for subsistence purposes.

authorized user means a person who uses waters without a licence but under the authority of regulations made under paragraph 90.3(1)(m).

In both cases, a person needs to be one “who uses waters” within the meaning of the MVRMA to fit the definition. Section 51 defines “use” as follows:

use, in relation to waters, means a direct or indirect use of any kind other than a use connected with shipping activities that are governed by the *Canada Shipping Act, 2001*, including

(a) any diversion or obstruction of waters;

(b) any alteration of the flow of waters; and

(c) any alteration of the bed or banks of a river, stream, lake or other body of water, whether or not the body of water is seasonal.

Section 51 of the MVRMA defines use of waters in very broad and inclusive terms to capture all sorts of direct or indirect uses of water. However, it makes a specific exception regarding shipping activities governed by the *Canada Shipping Act, 2001* (“CSA”).

Shipping activities are not expressly defined in the CSA. Actually, the term “shipping” is barely used in the CSA. However, the objectives of the CSA include promoting safety in marine transportation;

²⁴ C.R.C., c. 847.

protecting the health and well-being of individuals, including the crews of vessels, who participate in marine transportation and commerce; protecting the marine environment from damage due to navigation and shipping activities; and developing a regulatory scheme that encourages viable, effective and economical marine transportation and commerce. The CSA applies to a vessel, which is a boat, ship, or craft designed, used, or capable of being used solely or partly for navigation in, on, through, or immediately above water.²⁵ Navigation and shipping have been interpreted as terms “which envisage traffic on navigable waters and the use which may be made of navigable water in that regard.”²⁶ Therefore, boaters’ activities are within the purview of shipping activities governed by the CSA. They are not using waters within the meaning and for the purposes of the MVRMA.

The conclusion that navigation is not a use of waters for the purposes of the MVRMA is consistent with the purpose and general framework of the provisions in the MVRMA governing use of waters and the deposit of waste in waters. The relevant provisions of the MVRMA, like those of its predecessors the *Northwest Territories Waters Acts*, the *Northern Inland Waters Act*, and those prior to that, were not meant to regulate navigation. They provide for state ownership and control of waters and establish a system of allocation of appropriation and other rights to use waters as a resource to be exploited or preserved.²⁷ Accordingly, section 9.1 of the MVRMA provides that “the establishment of boards by this Act is to enable residents of the Mackenzie Valley to participate in the management of its resources”; waters are therefore approached as a resource under the MVRMA. This contrasts with the right of navigation, which is of a different nature, since it provides a public right of way over waters where navigation is possible.²⁸ It is not a property right, nor does it deal with water as a resource.

Moreover, if the defined term ‘use’ were to include navigation, it would include it not only to determine who is entitled to make a compensation claim, but also to determine who is regulated as a user of waters under the MVRMA. This would mean that subsection 72(1) of the MVRMA would prohibit navigation unless authorized by a water licence or by regulations. It is telling that the MVRMA or the *Mackenzie Valley Federal Areas Waters Regulations*²⁹ do not mention navigation when regulating water uses, except to say that shipping under the *Canada Shipping Act, 2001* is excluded. This is because navigation is governed by the *Canada Shipping Act, 2001*, and navigable waters are protected by the *Canadian Navigable Waters Act*, not by the MVRMA.

Because Ms. Lang’s navigating Great Slave Lake is not a use of waters within the meaning of the MVRMA, she is not an “instream user” or an “authorized user”. Therefore, Ms. Lang is not eligible to make a claim for compensation under the MVRMA. The Board should dismiss her claim on this basis alone.

Effects of GMRP Proposed Water Use and Deposit of Waste on Claimant’s Use

In any event, there will be very little or no impact to Ms. Lang’s ability to navigate Great Slave Lake during the life of the Project. She has not indicated that the GMRP’s use of water or shoreline work in the Town Site Area of Yellowknife Bay will interrupt or impede her fishing or berry picking activities. Ms.

²⁵ *Canada Shipping Act, 2001*, S.C. 2001, c. 26, s. 2.

²⁶ *R v. Rice* (1963), [1963] 1 C.C.C. 108, 1962 CarswellOnt 239 at para 14.

²⁷ See La Forest, A. W., *Anger & Honsberger Law of Real Property*, 3rd Ed., Thomson Reuters, §19:40.70 (L.L. Ed.).

²⁸ *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, p. 54.

²⁹ SOR/93-303.

Lang's claim instead relies on the impact the GMRP remediation activities will have on her ability to access Great Slave Lake while the GMRP is carrying out the Project in the area of the Giant Mine boat launch.

However, Ms. Lang does not have a right to permanent and unimpeded access to the Giant Mine boat launch. As a member of the public, she is a licensee of the City to use the Giant Mine boat launch to access (enter and exit) the water for navigation (in the sense that she is given free of charge permission to access the land occupied by the City). If the Project is carried out at the Town Site Area and access to the Giant Mine boat launch is temporarily blocked as a result, it will be with the agreement of the lawful occupier of the Town Site Area: the City. Indeed, the GMRP will not trespass on the City's property. Like other users of the Giant Mine boat launch, Ms. Lang does not have a legal right to use it, but benefits from a mere permission at the discretion of the City to use it. This permission can be withdrawn, and especially so for the purpose of doing work and improvement to a public site. The situation is very similar to when public works and improvements are made to some public area, like a park or playground, a public parking lot, etc. Public authorities are entitled to block off access to such sites for the time necessary to carry out the works and improvements. Members of the public, even frequent users, do not have a right to constant access or to be compensated for the temporary loss of access.

Moreover, the GMRP is committed to making efforts to plan and conduct the Project to minimize the time required and the impact on the GSSC and other users to what will be reasonably necessary to carry out the Project. The GMRP will make best efforts to maintain continuous public access to Great Slave Lake for boating through the Town Site Area during the boating season. The GMRP proposes to achieve this by constructing a boat launch comparable to the existing one at the Giant Mine boat launch near the site of the GSSC, and to make sure that at least one of the existing or new boat launches will be accessible by the public over the duration of the project during the boating season.³⁰ This should mitigate most of the issues raised by Ms. Lang in her claim for compensation.

Finally, Ms. Lang does not provide evidence of why there are no alternatives to using the Giant Mine boat launch when it might not be accessible. She does not say if her boat could be launched elsewhere on Great Slave Lake, and whether she can arrange for mooring her boat during the fishing season. She fails to demonstrate she has attempted to mitigate her losses.

It is the GMRP's position that Ms. Lang is ineligible to receive compensation for her fishing vessel and business ventures. While it is unfortunate that the Project may have impacts on local commercial activities due to the temporary lack of access to the waterfront at Yellowknife Bay, the impact arises from a lack of access due to road and site closures in areas where Ms. Lang does not have a legal right of continual access. Any impact on her activities will not result from the GMRP's proposed use of waters or deposit of waste, but rather from the decision from the lawful occupier of the area to suspend public access to enable the Project to proceed so as to remediate and improve the site to the benefit of the public and boat launch users such as Ms. Lang.

³⁰ Letter to the City of Yellowknife from the Giant Mine Remediation Project, October 10, 2019, <http://registry.mvlwb.ca/Documents/MV2007L8-0031/MV2007L8-0031%20-%20DIAND-GIANT%20-%20Letter%20to%20City%20of%20YK%20Re%20-%20Water%20Compensation%20Claims%20Mitigation%20and%20Accommodation%20-%20Oct10-19.pdf>.

Proof of Loss and Damage

Ms. Lang has not provided a copy of her fishing licence or any evidence of where in Great Slave Lake she sets her nets. It is unknown if any of her nets are set in proximity to the Project or Giant Mine in Yellowknife Bay.

Ms. Lang claims compensation for future losses in revenues from her fishing and berry picking business. In her Claim Form for Water Compensation, she reports an income of \$28,184.03 in 2016, \$33,656.50 in 2017, \$48,255.83 in 2018, and a projected income of \$39,500 in 2019. She filed her Tax Assessments and Statements of Fishing Activities for the years 2016, 2017 and 2018 in confidence with the Board. Those documents are insufficient to give the Board the information it would need to determine future losses. They do not provide sufficient details explaining the discrepancies between statements of higher incomes from fishing activities and lower total income in tax assessments. They do not provide information about revenues from berry picking activities and potential other businesses Ms. Lang might be pursuing. They do not detail Ms. Lang's expenses, and do not establish her net income from her various activities. They provide an insufficient basis to determine future losses.

Additionally, Ms. Lang says she is projecting to earn significantly higher revenues in future years, and claims for much higher losses in future revenues: \$87,250 in 2020 and \$107,600 in 2021. She says this is due to purchasing a larger commercial fishing boat in August 2019. She projects a significantly increased income due to the increased capacity of the new boat, but has not provided any evidence to account for her projected income. She claims there are initiatives which increase the visibility of the market and that sales will increase as a result, but she does not identify these initiatives or show any studies which substantiate these claims. She has not provided receipts for the sales of her fish nor contracts with her buyers that show she can expect to make the same income on fish sales per pound in coming years. She provides figures based on average sales rates in a given year and projects that in years to come this average rate will remain the same but provides no evidence that shows rates are relatively stable over a number of years. Her 2018 income was purportedly \$48,255.83 and her projected income for 2021 is more than twice this number. Ms. Lang has not provided any evidence about the size of her previous boat and how its capacity impacted revenue generated by the business, nor how a larger boat will impact future revenues. She has failed to show the data and assumptions she used to calculate these revenue projections and the formulas she used to come to her conclusions.

Ms. Lang has failed to prove her potential future loss or damage. She has not substantiated with enough specificity the amount and nature of her current revenues and expenses to enable the Board to properly determine any future losses based on things remaining the same. Moreover, she claims for significantly larger amounts than her revenues in the past few years because of her hopes of expanding her business. However, she does not provide enough evidence establishing the projected revenues on which she is basing her claim for the Board to be able to determine potential losses on the balance of probabilities.