May 15, 2019

Mr. Cory Vanthuyne, Chair
Standing Committee on Economic Development and Environment
Northwest Territories Legislative Assembly
Yellowknife, NWT

Attn: Mr. Michael Ball, Committee Clerk

RE: Comments on Bill 36 (An Act to Amend the Petroleum Resources Act) and Bill 37 (An Act to Amend the Oil and Gas Operations Act)

Alternatives North, Ecology North, and CPAWS-NWT offer the following joint submission regarding Bills 36 and 37, currently under consideration by the Legislative Assembly of the Northwest Territories.

For more information about our organizations, please see:
www.alternativesnorth.ca
www.ecologynorth.ca
www.cpawsnwt.org

Our primary interest in this legislation is to ensure that publicly-owned resources on publicly-owned lands are managed first and foremost for the benefit of the public (the citizens of the NWT and Canada). This includes ensuring equity between current and future generations, and fully respecting Indigenous rights as defined in Canadian and international law.

This submission has been informed by a review of the equivalent regulatory regimes of Yukon and Alberta, as well as a broader consideration of the characteristics of effective regulatory regimes.

We commend the GNWT for introducing some positive changes to the petroleum legislation, including greater public transparency and enhancing companies' financial responsibility for non-operating wells. However, we believe the changes can and must go further in order to build public trust in the oil and gas rights disposition and regulatory regimes.

Our specific recommendations below refer to aspects of the Bills related to:

- transparency and confidentiality;
- roles of the Minister vs. the Independent Regulator (conflict of interest);

- public hearings and public notice;
- financial responsibility; and
- Environmental Studies Management Board.

These recommendations are followed by bigger picture recommendations related to the territory's governance of oil and gas.

Transparency and Confidentiality

Given the stated commitment of the 18th Legislative Assembly to prioritize transparency, and the need to establish public confidence in the regulatory process, we believe the default requirement should be full disclosure of relevant information, and the onus should be on the proponent to establish a pressing need to withhold information on grounds of confidentiality.

Furthermore, the public should be able to challenge the claims for confidentiality and in order to make that public right realistic, at least some information about the basis for the claim should be made public.

Bill 36- Section 16 [referring to Section 91(2) of the *Act*] and
Bill 37- Section 7 [referring to Section 22(2) of the *Act*]:
These sections outline what information the Minister and Regulator shall make publicly available, while also establishing why information ought to be with withheld on grounds of confidentiality. Information that is financial, commercial, scientific, or technical in nature will be withheld if the person providing the information has treated it as confidential, if their interest in maintaining its confidentiality outweighs the public interest in its release, and if the information is not publicly available. These tests allow for the exercise of a considerable degree of discretion on the part of the Minister and Regulator and may create a situation where information is kept confidential by default (the only way to contest a Regulator or Minister's decision to withhold information would be through the courts, a costly option for members of the public). Setting such a low bar is not likely to create public trust in the regulatory process.

Recommendations:

1. *The test for maintaining confidentiality should be clarified and the onus put on the proponent to prove the need for confidentiality.*
2. *The basis for the confidentiality claim should be made public.*
3. *The clause in Section 91(3)(a) of the existing Petroleum Resources Act, which serves to clarify the test of balancing private interest versus public good, should be incorporated into Section 91(2).*
4. *Similar to #3, the clause in Section 22(3)(a) of the existing Oil and Gas Operations Act should be incorporated into Section 22(2).*

Bill 36 -Section 16 [referring to Section 91(9) of the *Act*] and
Bill 37 – Section 7 [referring to Section 22(9) of the *Act*]:
These sections are a step in the right direction, as they require the publication of information in respect of accidents, incidents or petroleum spills. However, they should go further and include publication of information around enforcement actions.

Recommendation:

5. *The Minister and Regulator should make information available to the public around any enforcement actions, including suspensions of activities.*

Bill 36 -Section 16 [referring to Section 91(1) of the *Act*] and
Bill 37 – Section 7 [referring to Section 22(1) of the *Act*]:
The definition of "hydraulic fracturing fluid information" is identical in both Bills; it includes "the total volume of water, in m3, injected with the ingredients" (section (k)).

Recommendation:

6. *The definition of "hydraulic fracturing fluid information" in both Bills should be expanded to include the amount of hydraulic fracturing fluid actually recovered (as well as the volume of fluid injected), so that it might be possible to determine how much injected fluid has been left in the environment.*

Role of Minister vs. Independent Regulator / Conflict of Interest

It is an inherent conflict of interest for the Department of Industry, Tourism and Investment to promote oil and gas development and for its Minister to attempt to impartially regulate it at the same time. This obvious conflict of interest undermines public trust in the regulatory system.

Some aspects of the Bills allow for discretionary powers by the Minister that infringe upon the authority of the independent Regulator; this should be avoided.

Bill 36 -Section 16 [referring to Section 91(2) and (4) through (7) of the *Act*] and
Bill 37 – Section 7 [referring to Section 22(2) and (5) through (7) of the *Act*]:
These sections grant the Minister the authority to classify information as confidential, which overlaps and infringes upon the authority of the Regulator. The Regulator must be an independent decision making body if its rulings are to be viewed by the public as being free from political interference. Furthermore, the Regulator is also the appropriate source of the technical expertise required to pass judgement on whether or not disclosure of information "could reasonably be expected" to cause material harm to a

proponent (Section 91(3)(a)) or if disclosure presents “real and substantial” risk to the security of energy infrastructure (Section 91(4)(a)).

Recommendations:

7. *Sections 91(2) and (4) through (7), referred to in Bill 36, should remove references to the Minister having power to designate information as confidential.*
8. *Sections 22(2) and (5) through (7), referred to in Bill 37, should remove references to the Minister having power to designate information as confidential.*

Bill 36 -Section 16 [referring to Section 91(9) of the *Act*] and
Bill 37 – Section 7 [referring to Section 22(9) of the *Act*]:
These sections refer to the Minister and the Regulator together making information available to the public. We are concerned that this will cause the release of information to become bottle-necked by unnecessarily requiring approval by two separate agencies. It also presents an opportunity for political interference in the execution of the Regulator’s responsibilities. Furthermore, the Regulator already operates an online public registry and is best placed to complete this task.

Recommendations:

9. *Remove reference to the Minister having a role in the release of information under Bill 36, section 16 as it refers to Section 91(9).*
10. *Remove reference to the Minister having a role in the release of information under Bill 37, section 7 as it refers to Section 22(9).*

Bill 36 -Section 7 [referring to Section 30(1) of the *Act*];
Bill 36 – Section 9 [referring to Section 32(4) of the *Act*] and
Bill 36 – Section 13 [referring to Section 42(4) of the *Act*]:
These sections give the Minister the sole authority to issue and renew significant discovery licenses (which are valid for fifteen years from date of issue) and to extend production licenses at the end of the 25-year term. The Minister can extend the terms of either of these licenses as long as the Minister has “reasonable grounds”. This could effectively allow license holders to squat indefinitely on territorial lands as the “reasonable grounds” test is not clearly defined. It also opens the door for political interference in what ought to be regulatory functions. Proponents should be provided with clear rules regarding the thresholds of activity they must meet in order to maintain their licenses, and transparent implementation.

The implicit philosophy behind the current grounds for renewing licenses is ‘use it or lose it’, which is based squarely in a frontier mentality which is quite frankly morally unacceptable to northerners, from the perspectives of indigenous rights and

environmental stewardship. Any grant of land tenure, or renewal of rights, should be based primarily on whether the company meets standards which reflect core aspects of public interest – e.g. indigenous rights, preservation of environmental and natural resources, public safety, and demonstrated contributions to local economies.

Recommendations:

11. *Develop a clear definition of the "reasonable grounds" test for both the extension of significant discovery licenses (section 32(4)) and the extension of production licenses (section 42(4)), which reflects core aspects of the public interest rather than an antiquated and immoral frontier mentality.*
12. *Replace references to the Minister in the above sections with the Regulator, relocating the power of license extension to the office of the Regulator.*

Public Hearings and Public Notice

Bill 37 – Section 5 [referring to Section 19.1 of the *Act*]:
This section allows, but does not require, the Regulator to hold public hearings "in respect of the exercise of any of its powers or the performance of any of its duties and functions". The Regulator appears to have full discretion as to whether and when it holds hearings. This does not provide the basis for a fair, efficient or transparent regulatory system.

Recommendation:

13. *The Regulator should create classes or categories of projects with defined thresholds for when public hearings are required, similar to the system of Class A and Class B water licenses administered by the Land and Water Boards.*

Bill 36 – Section 3 [referring to Section 6(1) of the *Act*] and
Bill 37 – Section 3 [referring to Section 8(3) of the *Act*]:
These sections provide the Minister with the ability to delegate any of the Minister's powers, duties or functions under the Act. The corresponding section in Bill 37 (section 3, 8(1) and (2)) allows the Regulator to delegate any of its powers, duties or functions; however public notice is required. Public notice should also be required for delegation by the Minister.

Recommendation:

14. *Delegation by the Minister should require public notice, by adding a clause similar to 8(2)—referenced in section 3 of Bill 37—after section 6(1) in Bill 36, and after 8(3) in Bill 37.*

Bill 36 – Section 4 [referring to Section 18 of the *Act*]:
This section specifies that the Minister must publish notices in the *Northwest Territories Gazette* and any other publications deemed appropriate. The *Gazette* is an antiquated system of public notification that cannot be considered widely used.

Recommendation:

15. *Given rapid changes in popular forms of public communication, the Act should specify the goal of wide dissemination without being too prescriptive, and potentially reference the Regulator's online registry. In accordance with the duty to consult and the internationally accepted principle of free, prior, and informed consent, the Act should also direct the Minister to provide notice to any affected Indigenous governments.*

Financial Responsibility

We believe it is very important that the Acts clearly endorse the "polluter pays" principle. The project operator must be held financially responsible until they have fulfilled all of their statutory and regulatory obligations to prevent, mitigate and remediate any impacts caused by their operation, as well as to complete the agreed-upon reclamation activities.

Bill 37 – Section 9 [referring to Section 18 of the *Act*]:
Encouragingly, this section attempts to ensure that the holder of any license or authorization is held financially responsible not only throughout the duration of the operation, but for a period of one year after the Regulator notifies the operator that the site/activities have been successfully abandoned or decommissioned. It is unclear whether a period of one year is an adequate and appropriate end point, and whether the definitions of "abandoned" or "decommissioned" could be problematic.

Recommendation:

16. *The definitions of "abandoned" and "decommissioned" need to be reviewed and carefully considered in light of the recent decision by the Supreme Court of Canada in the Redwater case.*

There is a serious omission in the bill when it comes to proof of financial responsibility. There is an arbitrarily low cap of a maximum of $40 million of absolute liability for spills set out in the Oil and Gas Spills and Debris Liability Regulations under the current Act. The federal government has amended its mirror Oil and Gas Legislation to put in a $1-billion cap to help prevent public liabilities. Members are surely aware that the Deep Water Horizon blow-out in the Gulf of Mexico resulted in clean-up and compensation

costs of over $80 billion. The $40-million amount in the current regulations is clearly insignificant and inadequate.

Recommendation:

17. *Set the maximum absolute liability cap of $1 billion for spills under the current Act, in light of actual financial liability risks related to modern technologies and operations and the very high risks of operating in remote subartic and arctic environments.*

Environmental Studies Management Board

Bill 36 – Section 14 [referring to Section 70(3), (4) and (5) of the *Act*]:
These new subsections specify that members of the Environmental Studies Research Board are to be appointed from the public service, nominees by interest owners, nominees by Indigenous governments and/or organizations, and members of the public (at the Minister's discretion). This section could be strengthened, and the Board's public legitimacy improved, by setting clearer parameters and minimizing discretion of the Minister. Given the increasingly sensitive environment in which similar organizations operate, it is advisable to remove as many opportunities for political interference in the functioning of the Board as possible.

Recommendations:

18. *The Act should clearly define the number of appointments to come from each pool and ensure that the Minister "shall" (rather than "may") appoint a certain number of members to represent the public interest at large.*
19. *The Act should set clear term limits for Board members. At present, Board members "hold office during pleasure" (Section 70(2)), a clear impediment to the independent functioning of the Board.*
20. *To ensure proper governance, the Environmental Studies Research Fund must be guided by a clear mandate, strategic priorities, and strong partnerships with indigenous governments, Renewable Resource Boards and Councils, and scientists (both academic and government).*

Bigger Picture Recommendations

21. Earlier in this engagement process, the GNWT indicated that this legislative update involving policy, administrative and technical issues could be considered "phase 1", and it would be followed by a more thorough modernization of the regulatory framework to reflect "best practices and standards." The incorporation of best practices and standards must be completed before any oil and gas

extraction is permitted to proceed. It must be done in a transparent fashion with full public input and full consultation with all Indigenous governments and organizations.

- We would like to remind Members that from 2011-2015, a wide range of individuals and groups across the NWT demanded that the GNWT conduct a comprehensive review of 'fracking' and whether/how its risks could be managed in the NWT. These groups included: Dene Nation, Gwich'in Tribal Council, Sahtu Secretariat, Akaitcho Government, and the NWT Elders' Parliament, as well as a petition from over 1100 individuals.

22. The development of regulations under these Acts should be done in full collaboration with Indigenous governments and non-government organizations.

23. A review of the oil and gas royalty regime and best practices needs to be completed as soon as possible, with assistance from independent expertise and in a transparent public fashion.

- We would like to remind the GNWT that responsible and sustainable management of non-renewable resources does not involve offering a 'clearance sale' to private corporations to encourage them to essentially clear out our stock of resources as quickly as possible. Once the resources are gone, they cannot be replaced. The citizens of the NWT own these resources, and it is not in our long-term interest to 'compete' with other jurisdictions by offering bargain-basement prices and essentially paying companies to take away our resources.
- Subsidies to the oil and gas industry, including major transportation infrastructure projects, are absolutely not in the public interest, given the long-term environmental costs that the public must bear as a result of this industry. Moreover, subsidies are a very poor investment of public funds and an inefficient way to boost our economy, given the relatively small number of jobs (especially long-term stable jobs) associated with oil and gas extraction. The economic multipliers report from the NWT Stats Bureau shows that oil and gas extraction creates by far the lowest number of jobs per output of any economic sector in the NWT (0.5 jobs per million dollars of output), even lower than mining.
- The more quickly we rush to have our oil and gas extracted, the less likely that industrial activity will benefit local economies or hire local workers, given the longstanding pattern of large-scale operations overwhelming local and territorial labour capacity, resulting in a dependence on southern workers and contractors to fill the shortfall.

24. The issuance of oil and gas rights should be managed by the GNWT Department of Lands rather than the Department of Industry, Tourism and Investment, which has the conflicting mandate of promoting oil and gas development. The Department of Lands already has systems and expertise in place for surface lands management. This would remove the apprehension of bias.

25. Both the GNWT's land tenure regime for the oil and gas industry, as well as its system for regulating operations, must incorporate clear limits on how much oil and gas activity will be allowed, in order to meet our climate change obligations.
    - The GNWT has set a target of reducing territorial GHG emissions by 30% below 2005 levels by 2030. This target simply cannot be met if there is unrestrained oil and gas development, particularly of unconventional shale oil resources or offshore resources, where the energy returned for the energy invested is so low, and methane emissions can be very high. The GNWT must also be mindful of Canada's commitment to the Paris Agreement, and the accelerating financial, social and environmental impacts of a changing climate.
    - The focus should switch to more responsibly managing existing production facilities and abandoned infrastructure, while shifting resources towards the new clean economy that is so desperately required if we are to avoid catastrophic climate change impacts.

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Yours sincerely,

Shauna Morgan
On behalf of Alternatives North, Ecology North and CPAWS-NWT