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Office of the 2nd Vice-President

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May 5, 2009

Harry Flaherty
 Acting Chairperson
 Nunavut Wildlife Management Board
 Iqaluit, Nunavut X0A 0H0

Dear Mr. Chairperson:

NWMB April 24 Notice of June 2, 2009 Public Hearing at Pangnirtung to consider setting a Total Allowable Harvest

Further to NTI's April 30 e-mail message informing you of NTI's position, I confirm that NTI is proposing that this meeting proceed as a pre-hearing conference. In NTI's view, convening such a conference is the best way to use the scheduled meeting in the community to seek a satisfactory resolution to this issue.

NTI's reasons for proposing this manner of proceeding are detailed below.

1 Background

At the request of the Pangnirtung HTO, fishing for sale (termed "commercial fishing" under pre-NLCA fisheries regulations) was closed in these waters in 2000. At the HTO's request, fishing for sale was reopened in 2005, but under a legal authority asserted by the NWMB and accepted by the Minister that in NTI's view does not exist under the NLCA and could not respect the priority of Inuit fishing rights. NTI challenged the 2005 decision in court, but withdrew its challenge when NTI and the Board agreed in 2006 that the Board would reconsider its decision shortly on a different footing. The 2005 decision has not yet been modified. In July 2008 and January 2009 NTI and the Board exchanged letters that reviewed the 2006 agreement and disclosed that the Board may have misunderstood NTI's position between 2006 and 2008, but that history does not bear on the Board' decision how to proceed.

NTI requests that the following background letters be added to its public record of proceedings for the June meeting:

1. The NWMB's May 12, 2006 letter postponing a pre-hearing consultation meeting with the HTO until a later date.
2. The NWMB's January 23, 2009 letter to NTI confirming that the Board inadvertently did not send its September 22 2008 letter to NTI, identified as document number 10 in the record, until January 23, 2009.

2 NTI's position as to how this fishery should be managed in 2009, and discussions and communications after July 8, 2008

In its July 8, 2008 letter to the NWMB, NTI urged the Board to modify the 2005 decision that NTI considered invalid by scheduling a hearing to decide on a Total Allowable Harvest (TAH) for this fishery. While NTI's letter did not spell out the necessary elements of any TAH decision, the Board's practice and NTI's expectations with respect to TAH- setting are well established and confirmed in other Board proceedings. When deciding on a TAH, the Board decides on the basis of evidence and rationale whether or not a TAH is necessary for any of the three purposes stated under section 5.3.3 of the *NLCA* (normally, whether a TAH would restrict Inuit harvesting only to the extent necessary in order to effect a valid conservation purpose under 5.3.3(a)). If the Board sets a TAH, the Board also strikes a Basic Needs Level (BNL) reflecting the Inuit priority right in the fishery.

By proposing in July 2008 that the Board make a TAH decision, NTI was proposing that Inuit fishing for sale proceed either under a TAH or, if a TAH is not justified, some other arrangement that does not depend on a quantitative limit on Inuit fishing.

Later in July, 2008, representatives of NTI, DFO, the NWMB and the GN participated in a two day meeting in Iqaluit focused on how to manage this and similar fisheries under the *NLCA*. While the meeting was not 'on the record' and it took place under the auspices of the Working Group on Nunavut Fishery Regulations, NTI does not breach any confidences in stating that NTI took away from that discussion the understanding that marketing demands, rather than conservation requirements, are really the limiting factors for the management of this fishery. The driving concern for the Pangnirtung fish plant is that southern buyers need to know, by means of a reliable labeling system, that char sold by the plant are fished sustainably. In *NLCA* terms, this suggested to NTI that if a TAH is necessary for conservation, the lesser of the TAH or BNL can serve as the basis for labeling, and if a TAH is not necessary for conservation, the label should reflect that fact.

NTI did not hear further from the NWMB, DFO or GN on this issue until DFO organized a January 23 2009 conference call. At this call, NTI's representative proposed that a marketing system that does not depend on a TAH be discussed with the HTO at a meeting in Pangnirtung. NTI did not present a comprehensive

proposal, but all participants agreed that this approach should be explored further with the involvement of the Pangnirtung HTO and fish plant.

Accordingly, when - the same day as the conference call - NTI finally received the Board's September 22 2008 letter taking issue with NTI's previous objections to delays in scheduling a TAH hearing, NTI considered the issue practically moot, as all parties were already exploring what appeared to be a viable alternative to addressing marketing demands by means of a TAH.

The Board, DFO and GN have not replied to NTI's invitation to respond to NTI's February 16 proposal to the Board. The non-TAH alternative outlined in NTI's February 16 letter reflects NTI's position as to how this fishery should be managed in 2009.

3 The Value of a Pre-Hearing Conference

The course that NTI proposes the Board follow would aim to result in new, *NLCA*- compliant management measures being in place before the scheduled opening in August, 2009.

It is important to recognize that whether or not a TAH is set, understandings need to be reached as to what other measures need to be in place in order for the fish plant to be satisfied that it can buy fish from this source that southern buyers will purchase. The setting of a TAH would not avoid the need to resolve issues relating to licensing. Under the *NLCA*, Inuit are entitled to fish char for sale without any form of licence. It would be to everyone's benefit if these issues were discussed and resolved apart from, and in any event in advance of, any hearing on TAH justification, TAH level, and BNL.

With respect to the issues relating to the setting of a TAH, NTI has not yet received the discussion paper on consideration of "commercial" harvest patterns in BNL calculations that the Board's April 23 letter identifying documents to be used at the hearing promises. Clearly, as reflected in previous Board Rules, the issues related to setting of TAHs are themselves sufficiently complex that if a hearing were necessary, all participants would benefit greatly from a pre-hearing conference.

Direct discussion with the HTO and plan representatives on all related issues in an unpressured setting is also long overdue. As far as NTI is aware, the Board has not consulted the community representatives on these complex issues for at least several years.

In summary, the Board and all affected parties would benefit greatly from an open, exploratory discussion at a pre-hearing conference of the following issues:

- Clarification of Inuit harvesting rights as per 5.7.30 (disposition), 5.7.26 (licenses), and role of the HTO (5.7.3).
- Suitability of NTI's February 16 proposal. Can co-management partners reach consensus on a management solution to the development of the commercial char fishery that complies with the NLCA? Identify any outstanding issues needing further work.
- What would a char TAH/BNL system look like? What would be the obligations of DFO, GN, HTO, and NWMB?
- Is there any conservation rationale for a Kingnait char TAH in light of the current available information? If so, could it possibly justify a level in 2009 that is as low as the 2005 level decided by the Board (2000 kg annually)? Identify and discuss the available scientific data, harvest data and IQ.
- Is there a 5.3.3 (b) or (c) justification for a TAH?
- Clarification of BNL calculations based on Harvest Study data, which do not include commercial harvest by Inuit due to policy decisions made by the Harvest Study steering committee.

4. Procedural Fairness and Consultation with NTI

NTI hopes that the Board will agree with its proposal without having to consider NTI's rights to procedural fairness and consultation. However, for the record, NTI objects to the Board's proceeding to a hearing on June 2 on the grounds that this would breach NTI's rights to procedural fairness and consultation as representative of Inuit rights-holders under the NLCA in the following respects:

- NTI and other affected parties do not have a proposal for decision to respond to. Contrary to the Board's practice, the record does not disclose a *Proposal for NWMB Decision*. It is unclear what party, if any, is proposing that a TAH for 2009 is justified under the NLCA or if so, on what NLCA basis, and at what level.
- If there were a proposal, the ten documents that comprise the record of this proceeding do not provide sufficient information to disclose to NTI the case it would be expected to meet in response. In particular, proposed answers to the questions that NTI identifies under #3 above are not offered. This outdated material falls much short of the standard of evidence and rationale required under section 5.3.3(a) of the *NLCA* and the standard being established by Board practice.
- To NTI's knowledge, there are no extenuating circumstances that might justify lowering the normal standards that apply when satisfying the rights of affected parties to know the case that they must meet and to be consulted meaningfully about their concerns.
- As the Board is aware, NTI's Wildlife Department and affected Inuit communities have an impossible workload at present, principally due to the extraordinary demands of the measures that the Government of Canada appears to be considering following the Minister's Roundtable on Polar Bear Management held in January of this year. There are several

international dimensions, the most complex of which is the proposal for a first-ever ban on export of polar bear products under *CITES*. It has not helped NTI that despite NTI's request duly made at the Board's last regular meeting and followed up by e-mail, the Board has not yet confirmed for NTI whether or not or on what *NLCA* basis the Board considers itself to have any authority relating to such a measure. For these reasons, the response time that has been allowed for the Board's first-ever char fishing TAH decision in Nunavut is unworkable for NTI. Among other factors, NTI would be prejudiced by the fact that its staff biologist responsible for reviewing conservation rationale and evidence would be unavailable to work on a submission: he is assigned full time to preparation of the technical response that NTI committed to provide by mid-June in NTI's April 17 letter to the Canadian Wildlife Service, copied to the Board.

NTI sincerely hopes that NWMB members will make a careful and constructive decision in response to this request. Please consider the matter fully and let NTI know the Board's decision as soon as possible.

Sincerely,



Raymond Ningeocheak,
Vice-President of Finance and Executive Member responsible for Wildlife
Nunavut Tunngavik Incorporated

Etc.

CC. [HTO
DFO

