CPAWS
CANADIAN PARKS AND WILDERNESS SOCIETY
NORTHWEST TERRITORIES CHAPTER

Alternatives North

July 6, 2023

ATTN: Legislative Assembly of the Northwest Territories
Standing Committee on Economic Development and the Environment

RE: Review of Bill 74 *Forest Act* (the "Act")

The following comments and recommendations are from Canadian Parks and Wilderness Society – NWT Chapter and Alternatives North. Comments focus on biodiversity, climate change, public participation, and wildfire.

Our comments and recommendations are set out sequentially based on the order of provisions in the Act. There is also an additional recommendations section at the end of this document.

We have included in Appendix A our previous joint submission on Bill 74 *Forest Act* where many of the same recommendations were made during the 18th Assembly and the public engagement in the development of Bill 74.

PREAMBLE

We recommend including acknowledgments of the statement of environmental values and the precautionary principle in the preamble.

a) Include the Statement of Environmental Values

We recommend that the preamble acknowledge the Government of Northwest Territories ("**GNWT**") Statement of Environmental Values. This would fit well after the 7th statement in the preamble, which provides:

> *And whereas the people of the Northwest Territories have an interest in forests as a natural resource and desire responsible stewardship of forest ecosystems;*

Then, we recommend adding as the next statement:

> *And whereas forests should be managed in consideration of the principles and provisions set out in the GNWT Statement of Environmental Values.*

b) Include the Precautionary Principle

We recommend including the precautionary principle in the preamble. This would logically follow the 5th statement in the preamble, which provides:

And whereas decision-making in respect of forests should use the best available information including Indigenous traditional knowledge and values, local and community knowledge and scientific knowledge;

The next statement could be worded as follows:

And whereas lack of full scientific certainty should not be used as a reason for postponing measures to prevent forest ecosystem degradation where there are threats of serious or irreversible damage;

PART 1 – INTERPRETATION AND APPLICATION

a) Amend the Definition of "Ecological Integrity" in Section 1 to Reflect Climate Change

We recommend an amendment to the language used in the section 1 definition for "ecological integrity," which states:

"ecological integrity" means the native components and conditions of the ecosystems that are characteristic of the Northwest Territories and that are likely to persist into the future [emphasis added].

This definition does not reflect that climate change poses a grave risk to many native ecosystem components and conditions in the Northwest Territories. To include in the definition of "ecological integrity" only those native ecosystem components and conditions that are "likely" to persist is to exclude many vulnerable yet critical native ecosystem elements.

Instead of the word "likely," the definition could employ the word "critical," as follows:

"ecological integrity" means the native components and conditions of the ecosystems that are characteristic of the Northwest Territories and that are critical to persist into the future; [emphasis added].

PART 2 – ROLES AND RESPONSIBILITIES

We commend the approach to explicitly including Renewable Resources Boards ("**RRBs**"), Renewable Resources Councils ("**RRCs**"), Forest Management Committees ("**FMCs**"), Indigenous Governments, and Indigenous Government Organizations as key collaborators throughout the Act.

The public and non-governmental organizations will also likely have an interest in forest management planning and decision making and may already be collaborating with Indigenous governments and organizations. NWT residents add value to forest management through sharing knowledge from their own experiences living and working in the NWT, and community members living near proposed forestry operations may want to have their opinions heard and considered.

We are curious as to why the GNWT is not ensuring that residents, businesses, and all levels of government including municipalities are informed. The Act would be much improved by including the public and adding a public registry that would align with the GNWT's commitments to transparency. With those changes, the Act would truly reflect a collaborative approach to forest management and stewardship between members of the public and Indigenous Nations in the NWT.

The Minister of Environment and Climate Change ("**ECC**"), Shane Thompson, recently attended a meeting of the Canadian Council of Forest Ministers (the "**CCFM**"). A focus of the CCFM is public involvement and transparency, as its webpage states:

> *Governments at all levels have responded to this interest in public involvement and participation with policy development that is open and transparent, based on community involvement and backed by comprehensive legislation.*[1]

We believe that excluding the public from the Act is contrary to those values and commitments, which are ostensibly endorsed by the Minister of ECC based on his involvement in the CCFM.

We want to support this the Act through to Third Reading and Assent before the coming election. However, our support depends on the inclusion of public participation, alignment with government transparency, and commitments to reporting through a public registry. We believe that these improvements will make the Act the best forestry regime in Canada.

a) Amending the Purposes of Part 2 under Section 7

We recommend amending section 7(b) and adding section 7(c).

Amending Section 7(b) to Remove Vague Language

Firstly, the purpose language in section 7 is vague. It provides that one of the purposes of Part 2 is to:

> *promote cooperative and collaborative working relationships for effective forest management at the local, regional and territorial levels.*

It is unclear how these relationships affect forest management. The purpose would be clearer if the reference to working relationships is simply removed and the section reads as follows:

> *promote cooperative and collaborative forest management at the local, regional and territorial levels.*

[1] https://www.ccfm.org/canadians-and-communities/

Include Collaborative Natural Resource Management in General

Secondly, the goal of cooperative and collaborative forest management would be furthered by reference to collaborative natural resource management more generally. The purpose language used in section 2 of the *Mineral Resources Act* could be imported and used as section 7(c). The relevant language in section 2 of the *Mineral Resources Act* states that a purpose of that legislation is:

> *to complement the systems for collaborative management of land and natural resources in the Northwest Territories.*

Using the same purpose language from the *Mineral Resources Act* would create continuity across natural resource management schemes, furthering the goals of collaborative and cooperative management.

b) Include Provisions for Public Participation, Public Notification, and a Public Registry

The Act is out of step with the modern trend of making sure that the public is aware of and can participate in administrative processes. We recommend including provisions for public participation, public notification, and a public registry within the Minister's roles and responsibilities (sections 11-14).

The Act is clearly oriented to promoting coordinated and collaborative forest management. Section 11(1) goes so far as to place an affirmative duty on the Minister to promote collaborative and cooperative forest management:

> *The Minister shall administer this Act in a manner that promotes a coordinated, collaborative, and integrated approach to the stewardship and management of forests in the Northwest Territories.*

A truly coordinated and collaborative approach to forest management is impossible without public involvement. Transparent and accurate information are pre-requisite to public involvement. We envision a public registry provision in the Act as follows:

> *(1) The Minister shall establish a forest management registry for the Northwest Territories.*
>
> *(2) The forest management registry shall contain the following information:*
>
> *(a) forest co-management agreements (section 10);*
> *(b) draft and final forest ecosystem management plans (section 24(1));*
> *(c) draft and final wildfire prevention and preparedness plans (section 45(2));*
> *(d) draft and final hazard assessment plans (section 45(5));*
> *(e) draft and final forest harvest agreements (section 25(1));*
> *(f) terms and conditions for forest permits and licences (section 52(1));*
> *(g) notices to the public regarding input into above;*
> *(h) appeals taken from decisions by government actors (Part 6);*

(i) reasons for decisions;
(j) enforcement actions taken (Part 7);
(k) penalties imposed, including alternative measures (Part 8);
(l) reporting on the Special Forest Fund; [see comments below]
(m) state of environment reporting [section 57(1)]; and
(n) any other information necessary to enable adequate notice and public participation.

(3) Information on the forest management registry shall be public and made available in a timely manner.

The requirement for a public registry would fit following section 14, meaning that the public registry provision would become section 15.

Public comment periods are imperative for public participation, yet they are entirely absent from the Act. Public comment periods should be codified in the Act for any significant decisions made under it. This is discussed more below in relation to forest ecosystem management plans under section 24 and forest threats under section 47.

In addition to statutorily mandated public comment periods for significant types of decisions, we recommend that an additional provision is added to the Act as section 16 to empower the Minister to hold public comment periods for any other decisions where the Minister determines that it is in the public interest to do so.

Remaining sections would need to be renumbered. Please note that all comments below follow the current numbering system.

PART 3 – SUSTAINABLE FOREST MANAGEMENT

The Forest Superintendent's authority under Part 3 is largely discretionary. We recommend vesting the Forest Superintendent with duties in respect of sustainable forest management and ecosystem management plans.

a) The Forest Superintendent's Powers for Sustainable Forest Management under Section 23(2) Should be Duties Not Powers

Section 23(2) vests the Forest Superintendent with broad powers for sustainable forest management. The section reads:

(2) The Forest Superintendent may, in accordance with the regulations,

(a) develop forest ecosystem objectives that guide decision-making;
(b) perform forest ecosystem monitoring;
(c) report on the health of forest ecosystems;
(d) utilize management processes that continually incorporate newly gained knowledge or information into decision-making; and

(e) set harvest limits for forest resources [emphasis added].

Although the Forest Superintendent's powers under section 23(2) are discretionary because of the word "may," the powers listed in (a) to (e) are each imperative for effective forest management:

- Ecosystem objectives that guide decision-making are critical to a coordinated and integrated forest management regime.
- Forest management decisions are uninformed and ineffective without up-to-date monitoring data. In essence, forest management decisions become guesses without good data.
- The purposes of the Act are to enable sustainable use of forest resources and to manage, protect, and enhance the health of forest ecosystems (see section 2(b)). These purposes are clearly undercut without reporting on the health of forest ecosystems.
- Decision-making that does not incorporate newly gained knowledge or information violates the precautionary principle and the preamble commitment to best available information and Indigenous knowledge.
- A complete absence of harvest limits for forest resources runs wildly counter to the Act's purposes. Unrestrained forest harvesting is unsustainable, and harvest limits are critical to ensuring the continued availability of forests resources.

Accordingly, the wording in section 23(2) should be changed from "may" to "shall." It would read:

The Forest Superintendent shall, in accordance with the regulations,

(a) develop forest ecosystem objectives that guide decision-making;
(b) perform forest ecosystem monitoring;
(c) report on the health of forest ecosystems;
(d) utilize management processes that continually incorporate newly gained knowledge or information into decision-making; and
(e) set harvest limits for forest resources [emphasis added].

b) Forest Ecosystem Management Plans under Section 24 Should be Mandatory, Include Public Consultation, and Consider Climate Change

Forest Ecosystem Management Plans Should be Mandatory

Section 24(1) gives the Forest Superintendent the discretion on whether to develop forest ecosystem management plans ("**FEMPs**") but does not require them to do so:

The Forest Superintendent may, in accordance with the regulations and any applicable land, resources and self-government agreement, develop forest ecosystem management plans that address;

(a) forest sustainability
(b) the maintenance of ecological integrity;
(c) cumulative effects of forest use; and
(d) other management objectives [emphasis added].

FEMPs are crucial to sustainable forest management, forest health, and ecosystem integrity. The Forest Superintendent should be vested with a mandatory duty to develop FEMPs. We strongly urge that the wording in sections 24(2) be changed from "may" to "shall":

> *The Forest Superintendent shall, in accordance with the regulations and any applicable land, resources and self-government agreement, develop forest ecosystem management plans that address*
>
> *(a) forest sustainability*
> *(b) the maintenance of ecological integrity;*
> *(c) cumulative effects of forest use; and*
> *(d) other management objectives.*

Forest Ecosystem Management Plans Should Require a Public Comment Period

FEMPs are significant decisions under the Act, particularly if they are mandatory, as they guide forest sustainability, the maintenance of ecological integrity, and the cumulative effects of forest use in a specified area. However, they are subject to no consultation under the Act.

We recommend that proposed FEMPs be subject to a mandatory public comment period before the Forest Superintendent implements them. This will ensure public consultation in respect of a very important aspect of forest management.

This public comment period could be added as section 24(3) under the Act.

Forest Ecosystem Management Plans Should Consider Climate Change

Climate change should be a consideration in every FEMP under section 24(1). Climate change considerations could become (d), and other management objectives would then become (e).

The impacts of climate change on our forest ecosystems are undeniable, and the role of the boreal forest in climate change mitigation and adaptation is under-acknowledged in the Act. We expect that the ECC as co-manager has an interest in addressing climate change considerations in every FEMP.

Overall, we recommend the following amendments for section 24:

(1) The Forest Superintendent shall, in accordance with the regulations and any applicable land, resources and self-government agreement, develop forest ecosystem management plans that address

(a) forest sustainability
(b) the maintenance of ecological integrity;
(c) cumulative effects of forest use;
(d) climate change considerations; and
(e) other management objectives.

…

(3) Forest ecosystem management plans shall be subject before they are implemented by the Forest Superintendent to a public comment period set by regulation.

c) Forest Ecosystem Management Plans Should be Pre-Conditional to Forest Harvesting Agreements under Section 25

Section 25(2) gives the Forest Superintendent the discretion of whether to require implementation of a FEMP before a forest harvesting agreement may be implemented in that area. Section 25(2) states:

The Forest Superintendent may require that a forest management plan concerning an area of forest be implemented before a forest harvesting agreement may be implemented in respect of that area [emphasis added].

As explained above, FEMPs are crucial to sustainable forest management, forest health, and ecosystem integrity. Importantly, FEMPs are impotent if forest harvesting is allowed to proceed before they are implemented. FEMPs should be pre-requisite to any forest harvest activity.

Therefore, we urge the wording in section 25(2) to be changed from "may" to "shall":

The Forest Superintendent shall require that a forest management plan concerning an area of forest be implemented before a forest harvesting agreement may be implemented in respect of that area [emphasis added].

We also recommend adding the following additional clause to ensure conformity between FEMPs and forest harvesting agreements:

All licenses and permits pursuant to this section shall conform to and be consistent with any approved Forest Ecosystem Management Plan as laid out in section 24.

This additional clause would fit most logically as section 25(4). Remaining sections would need to be renumbered. Please note that all comments below follow the current numbering system.

d) Monitoring the State of Forest Ecosystems under Section 26 Should be Mandatory

Section 26(1) vests the Forest Superintendent with the discretion to carry out forest ecosystem monitoring:

> *The Forest Superintendent may monitor the state of a forest ecosystem in the Northwest Territories including, but not limited to, monitoring the state of*
>
> *(a) forest vegetation;*
> *(b) forest health;*
> *(c) forest carbon;*
> *(d) forest change;*
> *(e) wildfire occurrence and impact;*
> *(f) sustainable use; and*
> *(g) any other matter the Forest Superintendent considers advisable* [emphasis added].

As we discussed above, monitoring of forest ecosystems is critical for informed and effective forest management decision making. This information is also essential for understanding the health of forest ecosystems. Accordingly, we recommend that the wording in section 26(1) be changed from "may" to "shall":

> *The Forest Superintendent shall monitor the state of a forest ecosystem in the Northwest Territories including, but not limited to, monitoring the state of*
>
> *(a) forest vegetation;*
> *(b) forest health;*
> *(c) forest carbon;*
> *(d) forest change;*
> *(e) wildfire occurrence and impact;*
> *(f) sustainable use; and*
> *(g) any other matter the Forest Superintendent considers advisable* [emphasis added].

PART 4 – WILDFIRES AND PROTECTION OF FORESTS

a) The Current Legislated Wildfire Season in Section 28 Puts the GNWT on its Heels

Section 28(1) establishes the wildfire season as May 1 to September 30 and section 28(2) vests the Minister with the authority to extend or vary the wildfire season based on "*an unusual danger of wildfires in any year*."

Climate change is causing extended wildfire seasons. The current wildfire situation in the South Slave and Dehcho Regions are obvious examples. The late season burn that destroyed the Scotty Creek Research Facility in October 2022 confirms the possibility that wildfire is a risk to valued infrastructure weeks beyond what was expected from fire behaviour in previous years. Ministerial intervention did not prompt a timely or robust enough response to prevent the loss of this infrastructure.

Requiring positive Ministerial action when the wildfire season inevitably falls outside the legislated May 1 to September 30 period puts the GNWT on its heels in respect of effective wildfire management. Furthermore, given the size of the NWT, it is likely difficult to establish a fire season that is apt for the entire territory. Consider the wording from the Nova Scotia *Forests Act*:

> *23 (1) The fire season in the various counties shall be prescribed by the regulations.*
>
> *…*
>
> *42 Until a regulation is made pursuant to clause (h) of Section 40, "fire season" means, in the case of the Counties of Queens, Shelburne, Yarmouth, Digby and Annapolis, the period between the first day of April and the fifteenth day of October in each year and, in the case of other counties of the Province, the period between the fifteenth day of April and the fifteenth day of October in each year.*

The GNWT must be highly responsive to changing conditions and equipped to deal differently with forest fires across the territory. Legislation like that of Nova Scotia would allow agility.

We suggest that the wildfire season under section 28(1) be extended to October 20 within the Act, with the ability to extend the wildfire season by regulation:

> *The wildfire season in the Northwest Territories is the period from May 1 to October 20th in each year.*

This would ensure that fire response teams can be best prepared to respond in conditions that may include adverse weather and temperatures that dictate the availability of equipment.

b) Industrial Owners Should be Required under Section 45(5) to Conduct Hazard Assessments

We strongly support the requirement under the Act for industrial owners and operators to submit a wildfire prevention and preparedness plan and receive approval of their plan from the Forest Superintendent before commencing or continuing their industrial activity during wildfire season. However, this requirement does not currently apply to new areas not covered by an approved plan. Section 45(4) of the Act states that:

> *Where an owner or operator of an industrial activity intends to carry out new developments in an area not previously covered by a plan that has been approved by the Forest Superintendent, the Forest Superintendent may require the owner or operator to conduct a hazard assessment in accordance with the regulations.*

This creates a loophole wherein industrial owners and operators can “add” areas to their operations and circumvent the requirement to have an approved wildfire prevention and preparedness plan for those areas. Accordingly, we recommend changing “may” to “shall” in section 45(4) to ensure that all areas are duly addressed:

Where an owner or operator of an industrial activity intends to carry out new developments in an area not previously covered by a plan that has been approved by the Forest Superintendent, the Forest Superintendent shall require the owner or operator to conduct a hazard assessment in accordance with the regulations.

c) The Public Should be Aware of and Consulted About Forest Threats Under Section 47

Invasive species can reduce the economic, cultural, recreational, and spiritual value that our forests provide for all. The public has an interest and role in reducing "forest threats." Individuals, civil society organizations, community groups and others may have expertise that can contribute to preventing, identifying, reporting, and participating in the removal of invasive species. Informing and mobilizing the public is also a good way to expand communication and awareness about "forest threats."

ECC should be eager to notify the public when a "forest threat" is identified and an action is to be taken. Broader collaboration among the public and Indigenous organizations, sharing of resources and opportunities to mitigate more readily "forest threats" are a few of the lost opportunities by not including "the public" in section 47.

We recommend amending both section 47(3) and (4) to account for public notification and consultation.

Amend Section 47(3) to Require Public Notification via the Public Registry

Section 47(3) currently requires notification only to select entities of action taken to address forest threats:

On taking action under subsection (2), the Forest Superintendent shall, as soon as is practicable, notify the following entities in the affected areas, if any, of any such action taken:

(a) renewable resources boards;
(b) renewable resources councils;
(c) forest management committees;
(d) Indigenous governments;
(e) Indigenous organizations [emphasis added].

We recommend amending section 47(3) to require public notification via the public registry by removing "if any" and using the following wording:

On taking action under subsection (2), the Forest Superintendent shall, as soon as is practicable, notify the following entities in the affected areas, and post on the public registry of any such action taken:

(a) renewable resources boards;
(b) renewable resources councils;

(c) forest management committees;
(d) Indigenous governments;
(e) Indigenous organizations;
(f) the public.

Amend Section 47(4) to Require Public Notification, Consultation, and Consideration

We recommend similar changes to section 47(4), which requires consultation with and consideration of the views of select entities:

> *An action taken under subsection (2) must be an interim measure and, as soon as is practicable after taking such action, the Forest Superintendent shall consult with and consider the views of the following entities in the affected areas, if any, on any subsequent actions to be taken:*
>
> *(a) renewable resources boards;*
> *(b) renewable resources councils;*
> *(c) forest management committees;*
> *(d) Indigenous governments;*
> *(e) Indigenous organizations.*

We recommend amending section 47(4) to require public notification via the public registry, as well as consideration of and consultation with the public by removing "if any" and using the following wording:

> *An action taken under subsection (2) must be an interim measure and, as soon as is practicable after taking such action, the Forest Superintendent shall consult with and consider the views of the following entities in the affected areas, and post on the public registry on any subsequent actions to be taken:*
>
> *(a) renewable resources boards;*
> *(b) renewable resources councils;*
> *(c) forest management committees;*
> *(d) Indigenous governments;*
> *(e) Indigenous organizations;*
> *(f) the public.*

d) The Public Should be Aware of Permits and Licenses Issued under Section 48(5)

The public should be informed if an area of forest is subject to issuance of a forestry permit or licence. The Forest Superintendent should post notice of all permits and licenses to a public registry, and of course should always notify any RRCs, RRBs, forest management committees, Indigenous Governments, or Indigenous Organizations in the relevant area.

Section 48(5) currently states that only certain entities are notified of permits or licenses:

Where the Forest Superintendent issues or refuses to issue a permit or licence of a prescribed class, the Forest Superintendent shall provide notice of the issuance or refusal to the following entities in the areas, if any, that would be affected by the permit or licence within 30 days after the issuance or refusal:

(a) renewable resources boards;
(b) renewable resources councils;
(c) forest management committees;
(d) Indigenous governments;
(e) Indigenous organizations.

Concealing permits and licenses from the public creates the conditions for conflict and public distrust. In contrast, transparency helps garner social license, thereby improving the Northwest Territories' ability to attract industry.

We recommend amending section 48(5) to require public notification via the public registry by removing "if any" and using the following wording:

Where the Forest Superintendent issues or refuses to issue a permit or licence of a prescribed class, the Forest Superintendent shall provide notice of the issuance or refusal to the following entities in the areas that would be affected by the permit or licence and post on the public registry within 30 days after the issuance or refusal:

(a) renewable resources boards;
(b) renewable resources councils;
(c) forest management committees;
(d) Indigenous governments;
(e) Indigenous organizations;
(f) the public.

PART 6 – APPEALS

a) Clarify "Person Affected" Under Section 60(1)

The public must have a right to appeal decisions made under the Act. This includes individual members of the public, environmental groups, and non-governmental organizations.

However, the wording in section 60(1) is unclear as to who can avail themselves of the Act's baseline appeal process:

Subject to sections 61 to 63, a person affected by a decision or order of an officer made under this Act or the regulations may appeal that decision or order by filing a notice of appeal in an approved form with the Forest Superintendent within 30 days after receiving the decision or order [emphasis added].

The applicability of section 60(1) should be clarified, either by adding a definition to the Act for "a person affected" or by clarifying the meaning of "a person affected" through regulation. Regardless of the method chosen, it is imperative that it be made clear that individual members of the public, environmental groups, and non-governmental organizations can all avail themselves of appeals under section 60(1), subject to the Chief Forester's discretion as an administrative tribunal. The Act must vest the Chief Forester with the discretion to allow for interested parties to bring a legitimate and valuable appeal, otherwise the Chief Forester's authority as an administrative tribunal is fettered.

Public participation is an essential aspect of any administrative regime, but particularly so in relation to environmental and resource law. Public participation provides a range of benefits, including by garnering social license and by improving the quality of administrative decisions.[2]

b) Recommendations Under Section 65 Regarding Appeal Decisions Will Create Inadequate Outcomes

Section 65(1) provides that the Minister can refer a notice of appeal to an advisor for recommendations or to an adjudicator to decide the appeal:

> *On receiving a notice of appeal referred to in section 61, 62 or 63, the Minister shall, within 45 days, appoint*
>
> *(a) an advisor to advise and make recommendations to the Minister respecting the appeal; or*
> *(b) an adjudicator to decide the appeal.*

Option (a) creates the possibility for an inadequate outcome if the advisor makes recommendations that the Minister chooses not to implement (see section 69(1)). In essence, the Minister may decide to do nothing with the recommendations they receive. It is preferable to have an adjudicator who is vested with decision-making authority because it will ensure that an outcome is achieved. Accordingly, we recommend amending section 65(1) as follows:

> *On receiving a notice of appeal referred to in section 61, 62 or 63, the Minister shall, within 45 days*
>
> *(a) elect to decide the appeal themselves; or*
> *(b) appoint an adjudicator to decide the appeal.*

[2] Raj Anand & Ian Scott, ''Financing Public Participation in Environmental Decision-Making" (1982) 60 Can. Bar Rev. 81 at 93-96

This will require corresponding amendment to the sections that flow from section 65(1), namely section 69(1).

c) The Public Should be Able to Intervene Under Section 66(2)

The Act creates a two-tiered appeal process. Under section 60(1), a "person affected" by a decision or order of an officer under the Act may appeal that decision to the Forest Superintendent. As explained above, section 65(1) establishes an elevated appeal process for the following situations wherein an appeal lies directly to the Minister:

- a person whose "designated" permit or licence application was refused (section 61);
- Indigenous organizations that seek to appeal the issuance or refusal of a permit or license (section 62(1));
- a person whose permit or licence has been made subject to terms and conditions (section 63(1));
- a person whose forest resources have been seized for non-payment of fees or charges (section 63(2)); and
- a person whose permit or licence has been cancelled or suspended for nonpayment of fees (section 63(3)).

We applaud that the GNWT has established an elevated appeal process for Indigenous organizations under section 62(1) of the Act that allows them to appeal directly to the Minister. This better ensures that the Honour of the Crown is upheld in relation to Indigenous peoples.

However, the elevated appeal process also applies to specified non-Indigenous forestry actors. Indigenous organizations may apply under section 66(2) for intervener status in all elevated appeals:

> *(2) An entity listed in paragraph (1)(a) [i.e., renewable resources boards, renewable resources councils, forest management committees, Indigenous governments, and Indigenous organizations] may intervene in an appeal under section 61 or 63 and a person or entity listed in paragraph (1)(b) may intervene in an appeal under section 62.*

The public has been completely excluded from this elevated appeal process, including from the role of intervener. Section 66(2) should be broadened to allow intervention by members of the public, including environmental groups and non-governmental organizations.

As described above, public participation is widely recognized as a positive contribution to administrative decision making.[3] Accordingly, the trend is to broaden rights of intervention in the interests of higher quality decision making.

[3] Raj Anand & Ian Scott, ''Financing Public Participation in Environmental Decision-Making" (1982) 60 Can. Bar Rev. 81 at 93-96

Moreover, public participation in the elevated appeal process is also in the interests of efficiency. As an example, imagine that an environmental organization intends to appeal a problematic permitting or licensing decision to the Chief Forester. An Indigenous organization intends to appeal that same problematic decision to the Minister. Assuming that they can avail themselves of section 60(1), the environmental organization has no choice but to bring a parallel appeal to the Forest Superintendent because they cannot intervene and participate in the appeal brought by the Indigenous organization. The environmental organization should be able to participate in the Indigenous organization's appeal as an intervener to prevent duplicative appeals.

It is important that the public has an opportunity to participate in these elevated appeals. The Act must vest the Minister with the discretion to allow interested and value-added parties to intervene under section 66(2) in appeals brought undersection 65(1). Otherwise, the Minister's authority as an administrative tribunal is fettered.

ADDITIONAL RECOMMENDATIONS

Codify That There is No Compensation for Government Carrying out its Duties in the Public Interest Under the Act

The Act should clearly codify that the exercise of government powers by officials, including the issuance and refusal of licences and permits, shall not be deemed to create a compensable taking. This provision would foreclose the possibility that the GNWT will incur private liability when regulating or acting under the Act in the public interest.

Forestry companies will be incentivized to seek compensation through litigation for any manner of regulatory changes, including those motivated by reconciliation and ecosystem-based management. Litigation like that is underway in other parts of Canada after the Supreme Court of Canada's decision in *Annapolis Group Inc. v. Halifax Regional Municipality,* 2022 SCC 36.[4] Forestry companies require clarity, and it is the duty of the legislature to provide that clarity.

BC recently amended the *Forest Act* to expressly insulate the government from private liability for various decisions made under that legislation.[5] For example, section 162 of the *Forest Act* provides:

> *No compensation is payable by the government and proceedings must not be commenced or maintained to claim compensation from the government or to obtain a declaration that compensation is payable by the government in respect of the effect, on a forest licence, timber licence or tree farm licence or on a contract or subcontract, under any provision of the following:*
>
> *(a) sections 152 to 161 of this Act;*

[4] See e.g., *Altius Royalty Corporation v. Her Majesty the Queen in Right of Alberta*, 2022 ABQB 255

[5] See e.g., *Forest Act*, RSBC 1996 c 157, ss. 24.91, 35(2), 80(2)-(4), 162, 175.1

(b) the regulations made under or for the purpose of a provision referred to in paragraph (a).

BC's *Forest Act* can serve as an example for language to codify that the GNWT will not incur any private liability when regulating or acting under the Act in the public interest.

Address Wildfire Risks to Communities, Biodiversity, Carbon Sequestration, and Species at Risk

Wildfire management close to communities is a clear priority, given the current fire situation in the NWT. We must also be aware of wildfire risks to biodiversity, soil, carbon sequestration, and species at risk. Canada is currently experiencing our worst wildfire season in recorded history. We are deeply concerned that this impact of climate change will continue to escalate in the NWT. We should anticipate that severe forest fire seasons will occur more frequently.

An expansion of wildfire policy regarding values at risk ("**Wildfire VAR Policy**") should address biodiversity, forest, soil carbon, and Species at Risk. This will benefit species such as boreal caribou, and will also help to mitigate climate change by keeping forest and soil carbon in place. This approach could qualify as a natural solution to climate change and may be an avenue to secure extra funds from the federal government or international investors for training and retaining fire fighters and resourcing their efforts. As well, this approach will help the GNWT meet its own commitments for Species at Risk, protect food security, local economies, and infrastructure important to land-users such as harvesters and trappers.

For example, in the GNWT's framework for boreal caribou range planning, section B.2 paragraph 3 states that:

> *It is recognized that managing both the human-caused and wildfire disturbance footprint will be important to achieving range plan objectives. Although management classes are defined by human disturbance thresholds, wildfire management options are considered an essential part of the tiered management approach and are discussed in Section B.2.4.*[6]

To advance these goals, we recommend:

1. hosting discussions with Indigenous Governments, land-users, the public, and non-government organizations about Wildfire VAR Policy;
2. expanding Wildfire VAR Policy to include biodiversity, forest carbon, soil carbon, and species at risk; and
3. including the Wildfire VAR Policy in the regulations for the Act.

Include a Requirement to Use Best Available Information, Including Indigenous Knowledge

[6] www.gov.nt.ca/ecc/sites/ecc/files/resources/boreal_caribou_range_planning_framework_2019_-_cadre_de_planification_de_laire_de_repartition_du_caribou_boreal_2019.pdf

The preamble of the Act acknowledges that "*decision-making in respect of forests should use the best available information including Indigenous traditional knowledge and values, local and community knowledge and scientific knowledge*." We strongly support the inclusion of this language in the preamble and believe it is a positive step towards sustainable forest management and preserving ecosystem integrity.

However, sustainable forest management and ecosystem integrity are most advanced if decision-makers under the Act are *required* to use best available information, including Indigenous knowledge. Therefore, we believe this principle should be codified in the body of the Act.

-End-

Sincerely,

Kris Brekke
Executive Director
Canadian Parks and Wilderness Society- NWT Chapter

Karen Hamre
Alternatives North

These submissions draw on legal and policy support donated by Tollefson Law – a law firm based in Victoria, British Columbia that specializes in tackling complex litigation, policy reform, and governance negotiations.

Appendix A: Previous joint submission on Bill 44: Forest Act

Bill 44 – Forest Act

Submission to the Standing Committee on Economic Development and Environment
Revised May 2, 2019

Joint submission by

- Alternatives North (www.alternativesnorth.ca)
- Ecology North (www.ecologynorth.ca)
- Canadian Arctic Resources Committee (CARC) (www.carc.org)
- Council of Canadians – NWT Chapter (https://cocnwt.wordpress.com), and

Overview: This bill needs substantive modifications.

Key Positive Elements
recognition of forest ecosystems; principles of sustainable forest management and use
promotes development of ecosystem management plans to address sustainability, ecological integrity, and cumulative effects
requirements for forest fire prevention and preparedness plans

Background
The Forest Act has been the most controversial of the three bills. The NGOs were *not* part of the Technical Working Groups, so cannot comment on how well that process went, or whether the commitments made during co-drafting are included in the acts. We were, however, part of stakeholder meetings about the five acts (those today plus Waters and Environmental Protection Act). We were told that the Forest Act was behind in terms of drafting compared to the EPA, so were quite surprised to see it brought forward. That sense was echoed in the number of concerns raised in the assembly during second reading of the Bill. We too have substantial concerns with this bill as presented.

That said, we understand that the role of SCEDE is to make the best recommendations possible to improve the bill. Whether it gets passed or not is up to the assembly. Given that, we hope these comments help the committee in their very substantial task ahead.

Key Issues for SCEDE to address

Purpose
One of the purpose statements in Bill 34: Mineral Resources Act is

"(g) to complement the systems for collaborative management of land and natural resources in the Northwest Territories;"

As many discussions have taken place regarding how the co-management system is aligned with the Forest Act, perhaps adding to Purpose

"…in a manner that…(d) complements the systems for collaborative management of land and natural resources in the Northwest Territories;"

Definitions

Industrial Activity: while the existing definition includes "the extracting and processing of raw materials", since oil and gas is separately listed, we believe mining warrants specific mention. Hence, we recommend adding:
(f) mineral exploration and mining development,
Then (f) is renumbered as (g).

Ecosystem Management Plans

These plans, described as addressing including forest sustainability, maintenance of ecological integrity, and cumulative effects management are key to implementing the ideals of the preamble. As such, they should be required. We recommend the wording:
12. (1) "The Supervisor **shall** develop" (rather than *may* develop).

This would then be in keeping with section 35 (2), which states "A forest ecosystem management plan concerning an area of forest **must** [emphasis added] be completed by the Supervisor before a forest harvest agreement is implemented".

We suggest this section needs to be supplemented, such as in the Yukon's *Forest Resources Act,* Part 2, with additional information on where these plans are, and how the interact with existing co-management systems. During the stakeholder group meetings, Alternatives North asked about the relationship between the Gwich'in Forest Management Plan (developed and signed by the GRRB, GTC and GNWT) and a Forest Ecosystem Management Plan. The answer was that the Gwich'in Plan was likely the equivalent of a FEMP. However, this should not be left to suggestion at this stage. The Yukon's *Act* says **"7**(1) The Minister may establish, by order, a planning area for the purpose of developing a forest resources management plan" (comparable to our FEMPs). Some equivalent wording suitable to our combination of settled and unsettled claims should be added.

In addition, there should be a provision in this section for public input into the development of the ecosystem management plans. For example, the Yukon's *Act,* the equivalent of Forest Ecosystem Management Plans are subject to a (minimum) 30-day public consultation period and must also be shared with Renewable Resource Councils holding responsibilities in the planning area.

Overall Monitoring

Monitoring is critical to proper forest management practices, so while Section 13 addresses monitoring the state of forest ecosystems, we suggest several additions. The health and regeneration of our forests is hugely impacted by climate change, so it is positive to see climate change addressed in the preamble. However, the preamble is not enforceable, so should be added. A climate change section would be broader than the already included 'forest change' section. It would help draw attention to some of the factors outside the NWT affecting our forests, and should be specifically mentioned. In this regard, we also suggest adding our ties to the national forest network of monitoring plots. Furthermore, the NWT Audit, required every five years under the *Mackenzie Valley Resource Management Act*, may give important recommendations on improving management, including relationships with co-management boards. This report should help track efforts to improving deficiencies noted in that Audit. Finally, the public must have full and transparent access to this information.

We recommend the following wording:

> 13 (1) The Supervisor **shall** [not may] monitor the state of the forest ecosystems in the Northwest Territories including, but not limited to, monitoring the state of
> (a) through (f) remain
> **(g) climate change** [add]
> **(h) comparison with national forest network of monitoring plots**
> **(i) progress on apt recommendations from the NWT Environmental Audit from the *Mackenzie Valley Resource Management Act* or subsequent legislation.**
> (j) any other matter the Supervisor considers advisable. [renumbered only]
> **13 (2) The Minister shall table a report to the Legislative Assembly annually with respect to the state and health of forest ecosystems."**

NEW SECTION: Public registry

The bill's preamble states it "promotes a cooperative, collaborative, integrated and adaptive approach to sustainable forest management". We can't have a co-operative and collaborative approach without the public…and the public needs information. As noted in our Environmental Rights Act submission, research has shown that good input from the public results in better environmental outcomes.

That statement is in the preamble, so not legally enforceable, but it sets the tone. The body of the bill talks about 'adaptive management' in several places. True adaptive management is an **open process** that involves stakeholders helping to assess management options for improving long term outcomes. Again, public participation, and information to the public, is needed.

Ensuring an open process is also in keeping with the mandate statement for this assembly: Governance: Improving accountability, transparency, and collaboration.

Since *Part 3 Sustainable Forest Management* does not include reference to a public registry, we recommend this additional section to make environmental information

accessible to the public in a reasonable, timely, culturally appropriate and affordable manner. If there is not a general public registry under the *Environmental Rights Act*, (i.e., unless revised from the current Bill), then a new Section 14 should be added to the Forest Act. Wording to consider (with possible reference section included):

"(1) The Minister shall establish a forest management registry for the Northwest Territories.
(2) The forest management registry shall contain the following information:

a. Ministerial agreements (section 7(7));
b. Draft and final forest ecosystem management plans (section 12(1));
c. Draft and final wildfire prevention and preparedness plans (section 15(1));
d. Draft and final hazard assessment plans (section 15(3));
e. Draft and final forestry agreements (section 35(1));
f. Provisions for forest permits and licences (section 35(3));
g. Notices to the public regarding input into above;
h. Appeals taken from decisions by government actors;
i. Reasons for decisions;
j. Enforcement actions taken and responses of recipients of enforcement actions;
k. Alternative measures in lieu of sentencing by a court;
l. Reporting on the Special Forest Fund; [see comments below]
m. *State of environment reporting [Section **]*
n. Other information to allow the public adequate information and notice to enable adequate public participation in decision making.

(3) Information on the forest management registry shall be public and made available in a timely manner."

This would become section 14, and remaining sections would need to be renumbered. Comments that follow use the current numbering system.

Hazard Assessment

We agree that hazard assessments are important to undertake when new activities are planned. We recommend 15 (3) wording be changed to:

"…the Supervisor **shall** [not may] require the person to conduct a hazard assessment."

Forest harvesting agreements

It is positive that "A forest ecosystem management plan concerning an area of forest must be completed by the Supervisor before a forest harvest agreement is implemented" (section 35 (2)). We suggest a second sentence that states:

"The implementation of all forest harvesting agreements must be in compliance with the appropriate forest ecosystem management plan or plans."

Licences and permits
Once the FEMPs are completed, all work should reference and flow from them. Therefore we recommend this additional clause:

"36 (4) All licenses and permits pursuant to this section shall conform to and be consistent with any approved Forest Ecosystem Management Plan as laid out in section 12."

Monitoring Programs
The requirement to complete a forest ecosystem management plan prior to any harvesting agreement is very positive. For management to be effective, monitoring is needed. Therefore, we recommend 39 (2) wording be changed to:

"The Supervisor **shall** [not may] require that monitoring programs….".

This will be important information to include in the reporting on the overall state and health of forest ecosystems.

ADDITIONAL CLAUSE(S): Special Purpose Fund:
The approach of having fees for reforestation and clearing be placed in a special forest fund could be very positive. However, as described in the Bill, it loses much of its potential to have sounder, ecologically based approaches to reforestation and natural regeneration.

This fund warrants additional description in the legislation, rather than leaving all to the regulations.

Given that this fund is a new approach, careful monitoring of the fund is needed to ensure it does cover liabilities. This is particularly important in view of the huge changes to forests due to climate change. As such, the use of the funds should be highly transparent. Co-mingling the funds in the Consolidated Revenue Fund may cloud transparency and weaken accountability, a separate fund is needed. Regular reporting from the responsible ministry is needed. The following starting point for drafting is drawn from *The Forest Act* of Manitoba found in sections 43(1) and 43(2):

> **Annual reports by minister**
>
> 43(1) Within nine months after the close of each fiscal year of the government, the minister shall prepare a report on the administration of this Act, including a review of all forestry allocations, for that fiscal year and lay the report before the Assembly if the Legislature is then in session or, if the Legislature is not then in session, within 15 days of the beginning of the next following session of the Legislature.

Five year reports by minister

43(2) In addition to the reports required under subsection (1), the minister shall, within nine months after the close of the fiscal year of the government ending on March 31, 1991 and within nine months after the close of the fiscal year in every fifth year thereafter, prepare and lay before the Assembly forthwith if the Legislature is then in session or if it is not then in session within 15 days of the opening of the next following session, a report containing

(a) a review of the status of the forest resources in the province including the status of any species of trees to which reference is made in the Act or regulations or in any licence or permit issued thereunder and such other species of trees as the minister may select for review;

(b) a review of the forestry management programs carried on by the government and an assessment of their effectiveness;

(c) an analysis of trends in, and the forecast of demands for, the use of forest resources in the province; and

(d) an evaluation of the capability of the forest resources in the province to meet anticipated demands.

We would also include:

- annual forest reforestation objectives
- state of forest ecosystem monitoring
- state of the health of the forest ecosystem, including predictions in changes to forests due to climate change
- state of understanding of natural forest regeneration
- number of permits and licences given, with details on annual reforestation requirements and responsive action achieved
- accounting of Forestry Fund (e.g., capital; investments; expenditures; proposed expenditures)

Additional Considerations for SCEDE:
Wildfire Season (Section 14):

Given the real possibility that climate change will lengthen the wildfire season, it is unclear why a limited wildfire season is legislated, then give the Minster discretions to change it. Furthermore, given the size of the NWT, it could well difficult to establish a fire season that is apt for the entire territory. Consider the wording from the Nova Scotia *Forests Act*:

"23 (1) The fire season in the various counties shall be prescribed by the regulations."

And

> "42 Until a regulation is made pursuant to clause (h) of Section 40, "fire season" means, in the case of the Counties of Queens, Shelburne, Yarmouth, Digby and Annapolis, the period between the first day of April and the fifteenth day of October in each year and, in the case of other counties of the Province, the period between the fifteenth day of April and the fifteenth day of October in each year."

The GNWT is going to have to be highly responsive to changing conditions and deal with different areas of the forest differently. Legislation similar to that of Nova Scotia would allow that agility.

Pests and diseases:

An example of the mis-matched scope resulting from joining the two current acts together is in *Part 4 – Protection of Forests*. In Part 4, there are 20 sections. Nineteen sections deal with wildfire, and only one section of one sentence in length addresses insects, diseases and invasive plant species. It is odd to leave such an important piece solely to regulations.

Offences and penalties:
Section 96 list some substantial fines, and imprisonment, for failing to comply to the Act or regulations. We support this. We also take that under the variety of additional possible orders under 103, this could include alternative sentencing arrangements, which we support.

Process:

Since so much is left to regulations in this Bill, and the others that SCEDE is reviewing, we have suggestions on the process. We realize that the co-drafting process is very innovative, and we hope that the process going forward might continue to enhance reconciliation and is as open as possible. The NGOs ask to be involved in the drafting of the regulation for this and other SCEDE bills. Please bring this request forward, or tell us how to bring this request forward.

In looking to future work, we have a couple of suggestions. We are not alone in being rather overwhelmed with the amount of work in a short period of time; you committee members are feeling this too! Next time, we would like to get plain

language material even before the bill comes to the house. This was done for MRA, with Minister of ITI giving a presentation to the YK Chamber of Commerce about the major aspects of the bill before it came up in the assembly. We shouldn't have to wait, as we did this time, partway through a short process, for information on the bills. Of course, the plain language materials should match what is in the actual bills, as has been noted in other sessions.

We appreciated the concept of a suite of related legislation being worked on together. However, the ability of the Standing Committee, IGOs and public to deal with so many bills at once is not realistic. The Standing Committee timelines need to be adaptable to the number of bills that are introduced.

-End-