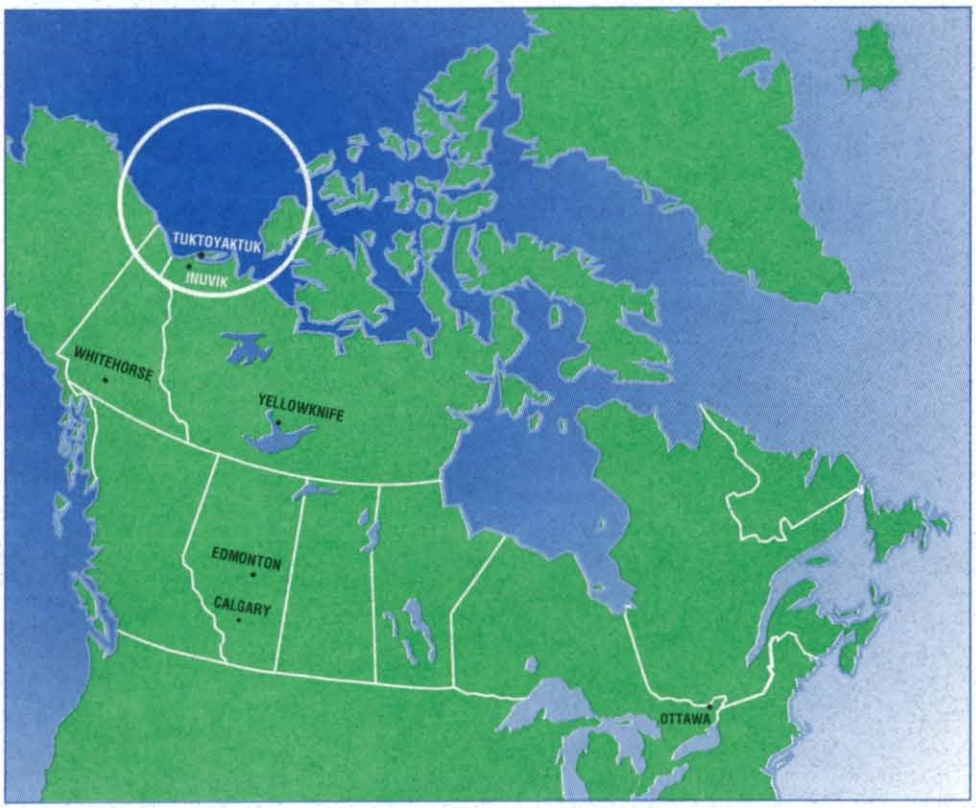
VOLUME 4

REPORT OF TASK GROUP THREE
Compensation and Financial Responsibility



FOR THE
BEAUFORT SEA STEERING COMMITTEE
April 1991

REPORT

by

TASK GROUP NUMBER THREE

COMPENSATION AND FINANCIAL RESPONSIBILITY

for

BEAUFORT SEA STEERING COMMITTEE

APRIL, 1991

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March 12, 1991

R. Hornal
Hornal Consulting Ltd.
401 - 1744 West Broadway
Vancouver, B.C.
V6J 4S5

Attention: James Maxim

Dear Mr. Hornal:

I enclose a copy of the final report of Task Group 3. As you are aware, disagreements over the correct interpretation of section 13 of the Inuvialuit Final Agreement have prevented Task Group 3 from making any concrete recommendations regarding the types and monetary limits of financial instruments which should be put in place for Beaufort Sea exploration and development. However, the Inuvialuit and Indian and Northern Affairs Canada have now entered into discussions to resolve this impasse. The Inuvialuit and industry also continue to develop a generic wildlife compensation agreement.

Sincerely,

James D. Rogers
Legal Counsel

TASK GROUP #3

REPORT
ON WILDLIFE COMPENSATION AND INSTRUMENTS OF FINANCIAL RESPONSIBILITY

Presented to the Beaufort Sea Steering Committee

February 15, 1991

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TASK GROUP #3
REPORT

EXECUTIVE SUMMARY

Task Group 3 was formed to examine and recommend which financial instruments should be required from Beaufort Sea operators to provide security for wildlife compensation and costs of taking remedial and mitigative steps should an operator default in its obligations under section 13 of the Inuvialuit Final Agreement ("IFA"). Task Group 3 was also charged with developing a generic wildlife compensation agreement.

The efforts of Task Group 3 have been confounded by disparate interpretations of the liability provisions of section 13 held by Canada, industry, and the Inuvialuit. These interpretations in turn impact upon the interpretation of the "government backstop" provision in section 13.

Until this difficulty is resolved, it will not be possible to formulate final and decisive recommendations, since the financial instruments appropriate in any given case depend in part upon the extent of liability of the developer and to what degree Canada is required to "backstop" the developer's liability. Canada and the Inuvialuit are entering into discussions to resolve these issues.

Task Group 3 accepts that compensation to Inuvialuit for actual wildlife harvest loss in the event of a developer's default should be secured by some form or forms of security that will allow prompt access to compensation by Inuvialuit, but not be unduly expensive or detrimental to the developer's balance sheet. Preliminary discussions have identified letters of credit and corporate guarantees as possibilities. We expect that some form of insurance will be acceptable for the costs of taking remedial and mitigative steps.

Task Group 3 has also developed a draft generic wildlife compensation agreement. It has been modelled after wildlife compensation agreements previously developed between the Inuvialuit Game Council and Gulf and Esso, and is undergoing further revision and discussion.

BEAUFORT SEA STEERING COMMITTEE

TASK GROUP #3

REPORT

A. INTRODUCTION

This document is submitted to the Beaufort Sea Steering Committee ("BSSC") as the final report of Task Group 3. It sets out the concerns of the Environmental Impact Review Board ("EIRB") expressed in the Isserk and Kulluk hearings with respect to the compensation and remedial and mitigative obligations of a developer. It examines the legislative overlap of the Inuvialuit Final Agreement ("IFA"), Arctic Waters Pollution Prevention Act ("AWPPA"), and Oil and Gas Production and Conservation Act ("OGPCA"), and studies how such overlap affects the liability and financial instruments provisions of the IFA. It then reports on progress made by Task Group 3 to develop guidelines which might be used to assess "instruments of financial responsibility" required pursuant to section of the IFA. Task Group 3 is also developing a draft wildlife compensation agreement which is the subject of Part E of this paper.

The complexity of the issues examined by Task Group 3 have prevented us from making definitive recommendations at this time. However, continuing efforts are being taken to reach a satisfactory conclusion.

B. BACKGROUND

In 1984, the Inuvialuit Final Agreement (the "IFA") was signed by the Inuvialuit and the Government of Canada. Section 13 of the IFA imposes a wildlife compensation and liability regime for damages resulting from development. A copy of section 13 is included as Appendix "A" to this report.

The IFA is not alone in imposing liability on developers for loss and damage caused by an environmental incident. The Arctic Waters Pollution Prevention Act ("AWPPA") and the Oil and Gas Production and Conservation Act ("OGPCA") contain provisions that parallel the liability provisions of the IFA.

In 1988, Esso Resources Canada submitted an application to the Environmental Impact Screening Committee ("EISC") to drill the Isserk I-15 well in the Beaufort Sea. The application was referred to the EIRB, which held a public review in Tuktoyaktuk on October 24, 25 and 26, 1989. The EIRB expressed concern over the different interpretations of the IFA held by Canada and the Inuvialuit. The EIRB therefore

suggested that "DIAND convene a workshop to examine all aspects of compensation and financial responsibility and to initiate necessary changes in legislation and policy".

Subsequently, Gulf Canada Resources Ltd. submitted an application for a 3-year Drilling Program Approval ("DPA") in the Beaufort Sea. This application was referred to the EISC for review and referred to the EIRB on March 4, 1990. Public meetings were held on June 4 to 9, and 18, 1990.

The EIRB expressed a number of concerns in these meetings, including:

a) whether the IFA can be used to limit the absolute liability of a developer;

b) if so, whether DIAND's present $40 million limit on the absolute liability of a developer is adequate;

c) whether Canada's obligation to assume the liability of the developer is therefore also limited; and

d) whether financial instruments accepted by Canada are adequate for exploration and drilling activities in the Beaufort Sea.

These concerns form the basis of discussions in this paper.

C. FORMATION OF THE BEAUFORT SEA STEERING COMMITTEE AND TASK GROUP #3

The Minister of Indian Affairs and Northern Development subsequently called for the formation of the Beaufort Sea Steering Committee ("BSSC") to address the concerns and recommendations of the EIRB in the Isserk and Kulluk hearings. Task Group 3 was formed under the BSSC to address the following issues:

> Isserk 1: To proceed towards a generic wildlife compensation agreement, generally applicable to all oil and gas operators in the Inuvialuit Settlement Area.
>
> Isserk 4: Re-examine the issue of financial capability including the type and level of financial instruments presently available under all relevant legislation including the AWPPA, OGPCA and Inuvialuit Final Agreement.
>
> Kulluk 4: The work currently being done by the Department of Indian Affairs and Northern Development on all aspects of compensation and liability, as

recommended by the Board after the Isserk I-15 Public Review, must be continued and accelerated. A final report to address these issues should be produced and tabled by December 31, 1990.

Kulluk 5: Proper quidelines must be prepared for assessing instruments of financial responsibility.

The following members were appointed to Task Group #3:

Name	Organization
Andy Carpenter	IGC
Brian Gibson	DIAND
Shawn Gill	COGLA
Roger Gruben	IRC
Manfred Hoefs	YTG
Doug Matthews	GNWT
Frank Mitton	CPA
Richard Pashelka	CPA
James Rogers	IRC (Task Group Leader)
Norm Snow	IGC

Task Group 3 held an informal meeting on October 31, 1990, and formal meetings on November 6 and 7, November 28, 1990, and February 5, 1991. During the first formal meeting, Task Group 3restated the issues before it as follows:

1. To examine issues of financial capability of a Beaufort Sea developer, and to recommend appropriate combinations of financial instruments to be accepted by the competent government authority pursuant to section 13 of the IFA.

2. To develop a draft generic wildlife compensation agreement acceptable to all oil and gas operators in the Inuvialuit Settlement Region.

D. FINANCIAL INSTRUMENTS

1. IFA Provisions

The first issue before Task Group 3 is complicated by the divergent views held by Canada, industry, and the Inuvialuit regarding the extent of liability imposed on a developer by section 13 of the IFA.

The IFA appears to envision that a developer may be liable:

(a) to compensate Inuvialuit for "actual wildlife harvest loss", defined in subsection 13(2) as

> "... provable loss or diminution of wildlife harvesting or damage to property used in harvesting wildlife, or both...",

and

(b) to take remedial and mitigative measures to restore damaged habitat as nearly as practicable to its original state.

The obligation of a developer to take remedial and mitigative measures appears to be imposed by reference in subsection 13(2) to "damage to habitat" in the definition of "future harvest loss":

> "... provable damage to habitat or disruption of harvestable wildlife having a foreseeable negative impact on future wildlife harvesting."

and by references to "remedial and mitigative measures" as are found in subsections 13(4), 13(15), 13(16), and 13(18)(c).

Subsection 13(15) imposes liability on a developer where "development" causes "actual wildlife harvest loss" or "future harvest loss":

> 13.(15) Where it is established that actual wildlife harvest loss or future harvest loss was caused by development, the liability of the developer shall be absolute and he shall be liable without proof of fault or negligence for compensation to the Inuvialuit and for the cost of mitigative and remedial measures as follows:
>
> (a) where the loss was caused by one developer, that developer shall be liable;
>
> (b) where the loss was caused by more than one developer, those developers shall be jointly and severally liable; and
>
> (c) where the loss was caused by development generally, but is not attributable to any specific developer, the developers whose activities were of such nature and extent that they could reasonably

> be implicated in the loss shall be jointly and severally liable.

If a developer is unable or fails to meet its liability under subsection 13(15) that its liability shifts to Canada:

> 13.(16) Subject to subsections (5) and (6), if any developer who has caused actual wildlife harvest loss or future harvest loss is unable or fails to meet his responsibilities therefor, Canada acknowledges that, where it was involved in establishing terms and conditions for the development, it has a responsibility to assume the developer's liability for mitigative and remedial measures to the extent practicable.

Recognizing that the liability of some developers could exceed their ability to pay, subsections 13(13) and 13(14) require developers to prove "financial responsibility", and permit the government authority to "ensure" such financial responsibility in the form of a financial instrument:

> 13.(13) Every developer, other than a government but including a Crown corporation, shall be required to prove financial responsibility before being authorized to undertake any development in the Inuvialuit Settlement Region.
>
> 13.(14) The government authority empowered to permit the development and set the terms and conditions thereof may require a developer to provide for and ensure financial responsibility with respect to the obligations and undertakings provided in this section in the form of a letter of credit, guarantee or indemnity bond or any other form satisfactory to the government authority.

The government authority has a discretion to decide whether such instruments will be required and if so, in what amounts.

2. Review of the AWPPA and OGPCA

The AWPPA and OGPCA also impose liability on developers in the Beaufort Sea. The AWPPA applies to a wide range of pollution in all waters north of the 60th parallel to a distance of 100 nautical miles of shore. It is administered by DIAND. The OGPCA is more restrictive in scope; it applies only to drilling pollution, albeit in all Canadian offshore waters, to a distance of 200 nautical miles.

In arctic waters, the OGPCA and AWPPA overlap in many respects. Both impose some form of absolute liability on a developer for pollution, and allow Canada to require some form of security to be posted. Both also expressly allow regulations to be passed which limit the extent of the absolute liability.

At present, DIAND policy is to avoid imposing cumulative absolute liability on a developer under the AWPPA and OGPCA. Consequently, Section 3 of Regulation SOR/87-331, enacted under the OGPCA provides that:

> 3. For the purposes of section 19.2 of the [Oil and Gas Production and Conservation] Act, the limits of liability are:
>
> a) in respect of any area of land or submarine area referred to in paragraph 6(1)(a) of the Arctic Waters Pollution Prevention Act, the amount by which forty million dollars exceeds the amount prescribed [by regulation] pursuant to section 9 of that Act in respect of any activity or undertaking engaged in or carried on by any person or persons described in paragraph 6(1)(a) of that Act...

The equivalent AWPPA regulation provides for a limit of absolute liability of 40 million dollars. Thus, the aggregate absolute liability imposed under the AWPPA and OGPCA is 40 million dollars.

3. DIAND Interpretation of Section 13

DIAND takes the position that clauses 13(18)(c), 13(9) and others, read in context of section 13 as a whole, allow the government authority to limit the liability of a developer on a case-by-case basis. DIAND has not claimed that the total liability of the developer can be limited, and suggests that a developer may be liable for the totality of the costs of taking remedial and mitigative steps under the common law. However, to prevent further cumulative absolute liability under the IFA and AWPPA, DIAND has permitted the $40 million instrument to satisfy the financial instruments provisions of both the IFA and AWPPA. DIAND has also required developers to post a $5 million security under the IFA for the costs of compensating Inuvialuit for actual wildlife harvest loss.

If a developer's liability under the IFA can be limited, Canada's obligation to "backstop" the developer's liability for taking remedial and mitigative steps may be similarly limited. The Invuvialuit have taken exception to the concepts that the developer's liability can be limited under the IFA, and that Canada's "backstop" liability can be similarly limited.

This disagreement affects how financial instrument guidelines are developed pursuant to subsection 13(14) since the monetary limits that must be set are directly affected. Discussions are currently taking place between Canada and the Inuvialuit regarding how to resolve this impasse.

Industry members have declined to take an official position on this issue, preferring that the Inuvialuit and Canada come to their own resolution.

4. Recommendations Regarding Types and Limits of Financial Instruments

In spite of the difficulties which have arisen from the several interpretations of section 13, Task Group 3 has examined various financial instruments available to industry for demonstrating financial responsibility in the event of default.

Briefly stated, the petroleum industry prefers that any financial instruments required by the government authority:

(a) do not unduly affect the developer's balance sheet,

(b) cost as little as possible to purchase, and

(c) do not unduly restrict the developer's ability to borrow.

The Inuvialuit, on the other hand require in the case of a developer's default:

(a) quick access to funds immediately after an incident to compensate for actual wildlife harvest loss;

(b) longer term compensation for actual wildlife harvest loss, and

(c) assurances that damaged habitats within the Inuvialuit Settlement Region are repaired to the extent practicable.

It is also an Inuvialuit concern that should the developer default in its obligations, the funds secured by such instruments for income and subsistence loss will not require financial ability on their part to access, such as through litigation, and will not be subject to execution or garnishment by judgment creditors of the developer so as to reduce the amount of money available for compensation. Canada must be able to immediately access funds secured for taking remedial and mitigative steps, which should again be earmarked only for those purposes.

(a) Types of Instruments Available

Subsection 13(14) of the IFA permits the government authority to require a developer to provide a "letter of credit, guarantee or indemnity bond, or any other form satisfactory to the government authority". Following is a summary of a number of financial instruments, and their strengths and weaknesses. They are not arranged in any order of acceptability.

i) Audited Financial Statements: An audited financial statement is not a financial instrument in the same sense as a letter of credit or a policy of insurance, but can be used to indicate the financial strength of a developer. It will not result in the creation of a fund of money, but will indicate the likelihood that a developer will default in its obligations in the event of a catastrophe. Financial statements may be rated by a service such as the Dominion Bond Rating service or the Canadian Bond Rating Service in terms of the quality of assets held by the company and the company's ability to generate revenues to meet its obligations.

ii) Insurance Policies: These can be negotiated to very high policy limits, although the cost of such policies will depend upon their terms. The purchase cost of a policy of insurance will not appear as a contingent liability on the developer's balance sheet. Insurance is usually put in place to some extent by a developer as a matter of course, although such policies may cover losses other than those envisioned under the IFA. Proceeds of insurance may be payable to a third party, thereby preventing garnishment by creditors.

The Inuvialuit object to the use of insurance as the sole instrument of financial responsibility, as such policies contain numerous terms and exclusions that can prevent successful recovery and can delay payout for years pending the outcome of litigation.

iii) Corporate Guarantees: These are the commitment of one legal person to assume the liability of another on the occurrence of some specified event. They may take the form of a guarantee by a parent corporation to assume the liability of a subsidiary should that subsidiary fail to meet certain obligations. Guarantees do not make recovery a certainty but, depending upon the terms and conditions of the guarantee, may provide an expeditious mean to settle claims. The guarantee of a parent company can be payable to a third party such as the Crown. Guarantees can be obtained without cost to the subsidiary and can be obtained for terms exceeding one year. The utility of a guarantee will be limited by the reluctance of the prospective guarantor to provide it, since the guarantee must be reflected on the guarantor's balance sheet. Moreover, the effectiveness of the guarantee is limited by the financial capacity of the guarantor.

iv) Letter of Credit: A developer may obtain a letter of credit from a financial institution such as a bank, whereby the financial institution will pay a specified sum of money to a third party in the event of the developer's default under the IFA. Letters of credit can be subject to various conditions, and the nature of such conditions can limit the utility of such instrument. An irrevocable letter of credit with few or no conditions of payment can in the case of a developer's default provide an expeditious means of obtaining funds to settle the claims of injured parties.

From the developer's perspective, a letter of credit is equivalent to a debt, and therefore appears as a contingent liability on the balance sheet, restricting its ability to borrow funds. A financial institution will charge a fee as high as 1% of the principal amount to issue the letter of credit, and may limit the term of the letter to one year.

v) Indemnity Bonds: An indemnity bond is usually issued by a bonding company, which will pay the losses associated with an event if the principal defaults in its obligations. The terms of a bond are usually restrictive, limiting the ability of a claimant to recover. A bonding company may require a developer and its co-venturers to be jointly and severally bound, so that in the event of a developer's default, the surety may have recourse against all parties. The cost of a bond can be high, and the bonding company may require the principal to provide a letter of credit in its favor, creating the associated problems of that instrument.

(b) **Findings**

It has been estimated that loss of income and subsistence to Inuvialuit harvesters which could result from a worst case scenario spill in the Beaufort Sea will not exceed $5 million dollars in the first five years, although Task Group 2 suggests that first year losses could approach $12.185 million, assuming catastrophic harvest losses and without taking into account mitigative efforts by Inuvialuit to secure alternate sources of income. Task Group 2 is also examining costs of taking remedial and mitigative steps.

The potentially high costs of taking remedial and mitigative steps, combined with a need for a ready fund for compensation of injured Inuvialuit for actual wildlife harvest loss will require the use of several financial instruments. With regard to actual wildlife harvest loss, we have discussed the use of instruments such as letters of credit or corporate guarantees. This approach balances the needs of the Inuvialuit for rapid access to compensation and accommodates the needs of industry by not unduly restricting the developer's ability to borrow. Discussions are currently taking place with respect to how best to secure funds for taking remedial and mitigative steps. It is generally accepted by all stakeholders in Task Group 3 that insurance of some form will be acceptable, but further details are being reviewed.

E. GENERIC WILDLIFE COMPENSATION AGREEMENT

1. The Esso and Gulf Agreements

During the Isserk hearings, Esso and the Inuvialuit Game Council entered into a wildlife compensation agreement that was accepted by the EIRB as satisfying the financial instrument requirements of the IFA. This agreement dealt primarily with providing compensation to Inuvialuit harvesters for income and subsistence loss owing to reductions in present and future wildlife populations and was modelled after a 1987 agreement between Gulf and the Inuvialuit Game Council:

(a) sections 1.1 to 1.8 outline the objectives of the agreement, which are to put in place plans for the settlement of claims caused by a developer, and to set out clear and simple procedures for the settlement of such claims. Section 1.8 expresses a preference for compensation in kind or substitution, rather than monetary compensation;

(b) section 2.1 defines the terms used in the agreement;

(c) sections 3.1 to 3.10 set out the types of losses that will be compensated, and specifically exclude "trivial", "cultural and lifestyle" effects and "non-economic components of resource harvesting";

(d) sections 4.1 to 4.6 outline how claims for compensation shall be made;

(e) sections 5.1 to 5.5 outline an arbitration procedure for determining settlements;

(f) sections 6.1 to 6.4 set out how the developer will be notified of harvester's claims, and a reporting provision whereby Esso will keep the IGC informed of the types and numbers of claims and when they are made;

(g) sections 7.1, 7.2, and 8.1 through 8.3 set out the term of the agreement and other miscellaneous provisions.

2. Development of a Generic Agreement

Task Group 3 believes that the Gulf and Esso agreements should form the basis of a generic agreement. Accordingly, the Esso agreement has been modified for general industry use. The IRC and IGC have also expressed an interest in contractual terms

setting out and clarifying the scope of the developer's obligation to take remedial and mitigative steps. Draft language to that effect has been prepared and `discussed.

3. **Further Review**

The draft generic wildlife compensation agreement must undergo further review and approval. It will also be necessary to consider concerns which have been identified by Task Group 2.

F. CONCLUSION

To date, Task Group 3 has examined section 13 of the IFA and the relevant sections of the OGPCA and AWPPA to determine how they affect the type and extent of financial instruments that are required to ensure the financial responsibility of a developer. Canada and the Inuvialuit have agreed to meet and discuss this issue. We have also examined how financial instruments should be structured and layered, but cannot resolve the issue without clarifying the scope of section 13 of the IFA. Finally, we have generalized the Gulf and Esso wildlife compensation agreements for use by all Beaufort operators. The agreement requires further discussion and revision.

APPENDIX A

SECTION 13 OF THE
INUVIALUIT FINAL AGREEMENT

WILDLIFE COMPENSATION

13.(1) The objectives of this section are:

(a) to prevent damage to wildlife and its habitat and to avoid disruption of Inuvialuit harvesting activities by reason of development; and

(b) if damage occurs, to restore wildlife and its habitat as far as is practicable to its original state and to compensate Inuvialuit hunters, trappers and fishermen for the loss of their subsistence or commercial harvesting opportunities.

DEFINITIONS AND GENERAL PRINCIPLES

13.(2) In this section,

"actual wildlife harvest loss" means provable loss or diminution of wildlife harvesting or damage to property used in harvesting wildlife, or both;

"future harvest loss" means provable damage to habitat or disruption of harvestable wildlife having a foreseeable negative impact on future wildlife harvesting.

13.(3) Subject to this section, the Inuvialuit shall be compensated for actual wildlife harvest loss resulting from development in the Inuvialuit Settlement Region.

13.(4) Subject to this section, the Inuvialuit shall benefit from environmental protection measures designed to reduce future harvest loss resulting from development in the Inuvialuit Settlement Region.

13.(5) The provisions of this section do not apply to development activities on lands owned by the Inuvialuit under paragraph 7(1)(a) except developments proposed for lands presently the subject of outstanding leases or other existing rights.

13.(6) Where, in accordance with section 10, Participation Agreements are entered into that by voluntary agreement establish mitigative and remedial obligations for developers, subsection (16) does not apply.

WILDLIFE IMPACT ASSESSMENT

13.(7) Every proposed development of consequence to the Inuvialuit Settlement Region that is likely to cause a negative environmental impact shall be screened by the Screening Committee

to determine whether the development could have a significant negative impact on present or future wildlife harvesting.

13.(8) If the Screening Committee determines that a proposed development could have a significant negative impact on present or future wildlife harvesting, it shall refer the proposal for an environmental impact assessment and review in the manner provided by subsections (9) and (10).

13.(9) Where a proposed development is subject to environmental impact review that, in the opinion of the Screening Committee, adequately encompasses or will encompass the assessment and review function and includes or will include in its evaluation adequate terms and conditions of development and limits of liability, the Screening Committee shall refer the proposal to the body carrying out the environmental impact review.

13.(10) If, in the opinion of the Screening Committee, the review body does not or will not adequately incorporate within its review each element of the process set out in subsection (9), or if the review body declines to do so, the proposal shall be referred to the Review Board.

13.(11) Where, pursuant to subsection (10), a proposal is referred to the Review Board, it shall, on the basis of the evidence and information before it, recommend to the government authority empowered to approve the proposed development:

(a) terms and conditions relating to the mitigative and remedial measures that it considers necessary to minimize any negative impact on wildlife harvesting; and

(b) an estimate of the potential liability of the developer, determined on a worst case scenario, taking into consideration the balance between economic factors, including the ability of the developer to pay, and environmental factors.

13.(12) The Government agrees that every proposed development of consequence to the Inuvialuit Settlement Region that is within its jurisdiction and that could have a significant negative impact on wildlife habitat or on present or future wildlife harvesting will be authorized only after due scrutiny of and attention to all environmental concerns and subject to reasonable mitigative and remedial provisions being imposed.

FINANCIAL RESPONSIBILITY

13.(13) Every developer, other than a government but including a Crown corporation, shall be required to prove financial

responsibility before being authorized to undertake any development in the Inuvialuit Settlement Region.

13.(14) The government authority empowered to permit the development and set the terms and conditions thereof may require a developer to provide for and ensure financial responsibility with respect to the obligations and undertakings provided in this section in the form of a letter of credit, guarantee or indemnity bond or any other form satisfactory to the government authority.

LIABILITY FOR DAMAGE

13.(15) Where it is established that actual wildlife harvest loss or future harvest loss was caused by development, the liability of the developer shall be absolute and he shall be liable without proof of fault or negligence for compensation to the Inuvialuit and for the cost of mitigative and remedial measures as follows:

(a) where the loss was caused by one developer, that developer shall be liable;

(b) where the loss was caused by more than one developer, those developers shall be jointly and severally liable; and

(c) where the loss was caused by development generally, but is not attributable to any specific developer, the developers whose activities were of such nature and extent that they could reasonably be implicated in the loss shall be jointly and severally liable.

13.(16) Subject to subsections (5) and (6), if any developer who has caused actual wildlife harvest loss or future harvest loss is unable or fails to meet his responsibilities therefor, Canada acknowledges that, where it was involved in establishing terms and conditions for the development, it has a responsibility to assume the developer's liability for mitigative and remedial measures to the extent practicable.

13.(17) No recourse pursuant to subsection (18) may be taken against a developer unless a claim is made under subsection (19) within three years from the time when the loss in respect of which the recourse is exercised occurred or first occurred, as the case may be, or could reasonably be expected to have become known to those affected thereby.

RECOURSES OF THE INUVIALUIT

13.(18) Where actual wildlife harvest loss or future harvest loss results from development, the Inuvialuit may exercise the following recourses:

(a) respecting actual wildlife harvest loss, Inuvialuit hunters, trappers and fishermen who depend on hunting, trapping or fishing for a material part of their gross income have the right to obtain compensation for damage to or loss of harvesting equipment and for loss or reduction of hunting, trapping or fishing income. Inuvialuit claimants may act individually or collectively or through duly authorized representatives, subject to the right of the other parties to verify the representative quality or capacity of the group or representative and the validity of the claims. The types of compensation that may be claimed include the cost of temporary or permanent relocation, replacement of equipment, reimbursement in kind subject to harvestable quotas, provision of such wildlife products as may be obtainable under existing Acts and regulations, payment in lump sum or by instalments or any reasonable combination thereof. The claimant shall be entitled to indicate his preference as to type of compensation in making his claim, but the compensation award shall be subject to subsections (22) and (23);

(b) respecting actual wildlife harvest loss, Inuvialuit who harvest renewable resources for subsistence purposes have the right to obtain compensation for damage to or loss of harvesting equipment and for any material reduction in wildlife take or harvest. Inuvialuit claimants may act individually or collectively or through duly authorized representatives, subject to the right of the other parties to verify the representative quality or capacity of the group or representative and the validity of the claims. For greater certainty, the subsistence harvester may claim compensation measured by reference to his prior total take or harvest, notwithstanding that some part or all of it may have been directed to or used by others. The types of compensation that may be claimed include the cost of temporary or permanent relocation, replacement of equipment, reimbursement in kind subject to harvestable quotas, provision of such wildlife products as may be obtainable under existing Acts and regulations, payment in lump sum or by instalments or any reasonable combination thereof. The claimant shall be entitled to indicate his preference as to type of compensation in making his claim, but the compensation award shall be subject to subsections (22) and (23); and

(c) respecting future harvest loss, any definable Inuvialuit group or community affected, including consumers of renewable resource products, collectively or through duly authorized representatives, subject to the right of the other parties to verify the representative quality or capacity of the group or representative and the validity of the claims, have the right to seek recommendations of the Arbitration Board pursuant to section 18 with respect to remedial measures, to the extent reasonably practicable, including cleanup, habitat restoration and reclamation. Such recourse shall be governed by subsection (24). The obligation of a developer for the taking of mitigative and remedial measures is subject to any limits established by the authority empowered to approve the proposed development.

PROCEDURE FOR CLAIMS, MEDIATION AND ARBITRATION

13.(19) Every claim for actual wildlife harvest loss or future harvest loss alleged to have resulted from development shall be made in writing by the appropriate Inuvialuit claimant by means of a notice given by the claimant to the developer.

13.(20) During the sixty (60) day period following the giving of the notice referred to in subsection (19), the claimant and the developer shall attempt to settle the claim and, for that purpose may, by mutual consent, appoint a mediator. If the claim is not settled within that period, the claimant may forward his allegations in writing to the Arbitration Board for hearing and decision in accordance with section 18.

13.(21) In order to succeed before the Arbitration Board, the claimant must prove, on a balance of probabilities:

(a) actual wildlife harvest loss or future harvest loss or both; and

(b) that the actual wildlife harvest loss or future harvest loss or both results from development.

13.(22) Where recourse is claimed pursuant to paragraph (18)(a) or (b), the onus is on the claimant to prove the loss on a balance of probabilities. The Arbitration Board shall take into account the priorities expressed by the claimant as to the nature of the compensation desired, but if it rules in favour of the claimant it must select the most reasonable type of compensation given the nature and extent of the loss.

13.(23) In making an award on the claim pursuant to paragraph (18)(a) or (b), the Arbitration Board shall estimate the duration of the impact of the development on wildlife harvesting and

determine compensation accordingly. Saving in exceptional circumstances, the award for compensation should not be made with the intention of providing a guaranteed income in perpetuity and compensation should be on the basis of a diminishing scale for a limited time. The claimant shall, as far as reasonable in the circumstances, mitigate his damages and should subsequent events, including the effect of any mitigative or remedial measures, materially affect the claim, any party to the original proceedings may cause the hearing to be reopened in order that the decision may be rescinded or appropriately varied.

13.(24) Where recourse is claimed pursuant to paragraph (18)(c) and a governmental authority has jurisdiction to enforce mitigative and remedial measures, the Arbitration Board, having regard to the terms and conditions established by the authority empowered to authorize the development, shall recommend to that authority appropriate remedial measures if it is satisfied that the claimant has proven, on a balance of probabilities, future harvest loss resulting from development. Where the government authority does not comply with those recommendations, it shall give the reasons therefor in writing within sixty (60) days after the making of the recommendations.

LEGAL RIGHTS AND RECOURSES

13.(25) The wildlife compensation provisions and procedures in this section are without prejudice to the legal rights and recourses of the parties, but where the provisions of subsections (19) to (23) are applied, the decision of the Arbitration Board is final and binding on the parties to the arbitration, subject only to the review provisions of this Agreement.