KITIKMEOT INUIT ASSOCIATION
WRITTEN HEARING SUBMISSION
August 26, 2011

NUNAVUT WATER BOARD REVIEW OF DRAFT *NUNAVUT WATER REGULATIONS*

A. INTRODUCTION AND ISSUES:

In a letter dated February 22, 2011, the Department of Indian and Northern Affairs Canada, now Aboriginal Affairs and Northern Development (AANDC), referred the Draft Nunavut Waters Regulations (Draft Regulations) to the Nunavut Water Board (Board or NWB) for review under subsections 82(1)1 and 82(2)2 of *the Nunavut Waters and Nunavut Surface Rights Tribunal Act* (*NWNSRTA* or Act).

The NWB is currently conducting its public review of the Draft Regulations. The submissions of the Kitikmeot Inuit Association (KitIA) on the Draft Regulations are set out below.

The Board requested that the Hearing submissions be organized based on the issues set out by the Board in its Pre-Hearing Conference Decision of June 29, 2011. These submissions address the following issues from that list:

- Reclamation security (Draft Regulations section 10)
- Licensing fees (Draft Regulations sections 11 and 12) (p. 5 PHC Decision)

THE ISSUES:

These submissions address three issues in relation to the Draft Regulations. They are:

Reclamation security (Draft Regulations section 10)

1. The double bonding problem which has emerged in relation to security for closure and reclamation of projects developed on Inuit Owned Land.
2. The security matching criteria issue, caused by the fact that the security criteria in s. 10(a) of the Draft Regulations do not match the criteria for the Minister's application of security under s. 76(2) of the *NWNSRTA,* which may result in inadequate security in the event of an incident requiring the Minister to access security for purposes other than closure and reclamation.

Licensing fees (Draft Regulations sections 11 and 12)

3. The double payment of water use fees which arises when Designated Inuit Organizations exercise their rights under section 20.2.2 of the *Nunavut Land Claims Agreement*.

The three issues are discussed in greater detail below.

B. DISCUSSION

1.0 Closure and Reclamation Security – Double Bonding

1.1 Overview of Issue and AANDC's Response

These submissions address this issue even though AANDC has stated that it does not want to address it in s. 10 of the Draft Regulations. This is clear from the AANDC document entitled "Responses to Issues raised in the Nunavut Water Board's Technical/Pre-hearing Conference Meetings in Iqaluit and Yellowknife the Week of May 30, 2011", dated June 20, 2011 (AANDC Table of Responses). In relation to the reclamation security issue, AANDC repeats the following statement several times:

> "The Department is committed to addressing the perceived over-bonding issue via a pan-northern focus and does not intend to amend the Regulations at this time."

In that document, AANDC used this comment to reply to the concerns of various parties on the double bonding of reclamation security. The Department has given no indication when this very important matter will be addressed.

The NWB has addressed the double bonding issue in the past. An overview of the Board's findings is provided in Appendix A, up to the NWB's decision on Agnico-Eagle Mines Limited Meadowbank Gold Mine, June 9, 2008. In its decisions, the NWB has consistently refused to split land and water related reclamation activities when determining the amount of security. It is submitted that the Board should continue to consider land and water related costs together for the purpose of assessing the total cost of closure and reclamation for security purposes.

The double bonding issue is likely the single most important issue to be considered in relation to the Draft Regulations, in the view of Inuit. It is our submission that this matter can and should be resolved in these Draft Regulations. This is in spite of the AANDC position not to address it in them. The Board's review of the Draft Regulations offers the chance for the double bonding issue to be resolved without the further delay of another process. We submit that this issue should be addressed now, even if it means delaying the completion of the Draft Regulations.

1.2 Double Bonding under the Current Regulations

Double bonding occurs when an applicant, a licensee or a prospective assignee must provide security, related to a licensed undertaking, to more than one payee. The *NWNSRTA* and the current Regulations allow the Crown to take and hold security required by a water licence. This security is primarily required in order to ensure proper closure and reclamation of licensed sites but it can, pursuant to the Act, also be used to compensate adversely affected users and for the reimbursement of the Crown should the licensee not take necessary preventive or remedial measures to protect the environment and the Crown must do so.

We submit that the approach taken to water licence security under the Act has mixed up the regulatory regime's role in environmental protection with the interests of private land owners when a development requiring a water licence takes place on private land. The overlap problem is worse when the private lands are Inuit Owned Lands (IOL) because Inuit have other unique rights, under Articles 6, 20 and 21 of the Nunavut Land Claims Agreement (NLCA), which are affected by development and which are not part of the public law environmental protection framework.

Under s. 76 of the *NWNSRTA*, the NWB may require a licensee (and others) to provide security to the Minister of AANDC. Subsection 76(1) of the Act reads:

> 76(1) The Board may require an applicant, a licensee or a prospective assignee to furnish and maintain security with the Minister in the form, of the nature, subject to such terms and conditions and in an amount prescribed by, or determined in accordance with, the regulations or that is satisfactory to the Minister. [underlining added]

The security can be required for various reasons, including for closure and reclamation activities. The remaining subsections of s. 76 state how the security may be applied by the Minister and the limits on its application.

In our submission, an amendment to s. 76(1) of the *NWNSRTA* could help to solve the double bonding issue. Under the current s. 76(1), the Board may only require that security be furnished and maintained with the Minister. However, this could be changed so that the Board could require that security be provided to another party, such as a DIO. That way, the Crown could hold land and water security for portions of a project located on Crown land and the DIO could hold it for portions located on IOL.

We submit that the Board should recommend a change to s. 76(1) of the *NWNSRTA* to resolve the double bonding issue. The Board has the authority make such a recommendation to the Minister even though the Act is not being reviewed.

The Northwest Territories Waters Regulations[1], made under the *Northwest Territories Waters Act*[2] currently apply to the requirement for security under the *NWNSTRA*.[3] The issue of security is addressed in s. 12 of these Regulations. However, s. 12 does not address the problem of double bonding.

1.3 Draft Regulations Do Not Address the Double Bonding Issue

The effects of s. 10 of the Draft will be the same as s. 12 of the current Regulations. The NWB will continue to have the problem of the double bonding issue unresolved by the Regulations or by the *NWNSRTA*. See Table A below for a side by side comparison of the text of the current and Draft regulations.

[1] SOR/93-303
[2] SC 1992, c 39.
[3] Northwest Territories Water Regulations, S.O.R./93-303 [hereinafter Regulations] and Application of Regulations made under paragraph 33(1)(m) or (n) of the Northwest Territories Waters Act in Nunavut Order, S.O.R./2002-253.

Table A: Comparison of Security Clauses

Draft Nunavut Waters Regulations	Northwest Territories Waters Regulations
10. (1) For the purposes of subsection 76(1) of the Act, the Board may fix the amount of security required to be furnished by an applicant for a licence, a licensee or a prospective assignee in an amount not exceeding the aggregate of the costs of (a) the abandonment of the undertaking; (b) the restoration of the site of the undertaking; and (c) any ongoing measures that may remain to be taken after the abandonment of the undertaking.	12.(1) The Board may fix the amount of security required to be furnished by an applicant under subsection 17(1) of the Act in an amount not exceeding the aggregate of the costs of (*a*) abandonment of the undertaking; (*b*) restoration of the site of the undertaking; and (*c*) any ongoing measures that may remain to be taken after the abandonment of the undertaking.
(2) In fixing an amount of security, the Board must have regard to (a) the ability of the applicant, licensee or prospective assignee to pay the costs referred to in subsection (1); and (b) the past performance by the applicant, licensee or prospective assignee in respect of any other licence. [underlining shows changes]	(2) In fixing an amount of security pursuant to subsection (1), the Board may have regard to (*a*) the ability of the applicant, licensee or prospective assignee to pay the costs referred to in that subsection; or (*b*) the past performance by the applicant, licensee or prospective assignee in respect of any other licence.
(3) Security must be in the form of (a) a promissory note guaranteed by a bank listed in Schedule I or II to the Bank Act and made payable to the Receiver General; (b) a certified cheque drawn on a bank listed in Schedule I or II to the Bank Act and made payable to the Receiver General; (c) a performance bond approved by the Treasury Board for the purposes of paragraph (c) of the definition “security deposit” in section 2 of the Government Contracts Regulations; (d) an irrevocable letter of credit from a bank listed in Schedule I or II to the Bank Act; or (e) a cash payment. [underlining shows changes]	(3) Security referred to in subsection (1) shall be in the form of (*a*) a promissory note guaranteed by a bank in Canada and payable to the Receiver General; (*b*) a certified cheque drawn on a bank in Canada and payable to the Receiver General; (*c*) a performance bond approved by the Treasury Board for the purposes of paragraph (*c*) of the definition “security deposit” in section 2 of the *Government Contract Regulations*; (*d*) an irrevocable letter of credit from a bank in Canada; or (*e*) cash.

The wording in s. 10 of the Draft is almost identical to the wording in s. 12 in the Northwest Territories Waters Regulations. The Draft Regulations do not address or resolve the double bonding problem caused by the current legislation and practice.

1.4 The NWB's Decisions Discuss Double Bonding

There have been a number of proceedings over the last decade in which the NWB has required an applicant, a licensee or a prospective assignee to provide security to the Minister but where the Inuit, as the landowner of IOL, also needed security to protect Inuit rights and interests. An example of a problematic situation related to security that results in double bonding would be:

1. The project is located on Inuit Owned Lands
2. NWB orders joint water and land security to be provided and for the security to be held by the Minister, where the Minister is the payee
3. The KIA cannot draw on that security because KIA is not a joint payee and AANDC will not accept securities which are payable to another party in addition to the Crown
4. Therefore, to secure Inuit interests, the KIA requires an additional security amount from the company so that the KIA can access it as needed for protection of IOL
5. The company has to pay security twice – there is double bonding.

In NWB proceedings where this issue has arisen, Canada as represented by Indian and Northern Affairs Canada (INAC) [as it was then called] has generally (though not always) argued that the NWB should split the land and water security. However, this splitting of security does not accord with the Inuit view of the "land". It is also technically problematic. For example, the evidence in the 2007 Doris licence proceeding showed how two responsible professionals seeking to divide up land and water security could come to very different answers.[4]

In our submission, the *NWNSRTA* and the Regulations do not provide for security splitting. Section 76 of the Act makes it clear, when read in combination with section 12 of the current Regulations, that the NWB has the discretion to order security in relation to the "undertaking". There is no suggestion anywhere in the Act or the current Regulations that the Board can only order security in relation to the water related aspects of the appurtenant undertaking.

In our view, reclamation security cannot be separated into land and water security and in fact that approach is consistent with the statutory framework. It is more consistent with it than the approach still suggested by AANDC, which would split the land and water components of security.

The language in s. 76(1) gives the NWB the discretion to order security. This discretionary language would likely lead a court to find that deference should be given to the NWB in determining the amount of security and also whether land-related reclamation activities should be included in the security required. The only limit on the Board's powers relate to the upper limit on the amount of security. It is limited to the aggregate of the costs of the three criteria listed in s. 10(1) of the Draft Regulations.

Inuit Associations have argued against security splitting before the NWB on several occasions. The NWB has held, in several of its decisions, that land and water are interconnected and therefore that security for each must be determined and provided as one amount.

[4] See the evidence of John Brodie, P. Eng. and Larry Connell, P. Eng.

The NWB has discussed the issue of reclamation security and the Board's decision not to split land and water security, in many of its decisions including:

- BHP Boston Licence (February 1999) and Assignment to Cambiex (October 1999)
- Lupin Water Licence (July 1, 2000)
- Boston (HBJV) Water Licence Renewal Application (October 2001)
- Amendment of Lupin Water Licence December 19, 2001
- Nanisivik Mine - CanZinco 2002
- Polaris Mine - TeckCominco Ltd (April 24, 2003)
- Doris North Mine (September 2007)
- Meadowbank - Agnico-Eagle Mines Limited (June 9, 2008)

In two of these decisions, Doris North and Meadowbank, the issue of double bonding was also raised. Excerpts from these decisions are set out in Appendix A.

Double bonding has occurred in the context of many developments in Nunavut. The amount of money tied up as security because of double bonding can be quantified by looking at the amounts held in security by AANDC and KIA.

For example, for the Doris North Mine under water licence 2AM-DOH013:

- The Crown holds $11.714M
- The KitIA holds $8M

The total security required by the Board for the Doris water licence is $11.714M.

An example of the double bonding situation that currently exists at Meadowbank under licence 2AM-MEA0815:

- The Crown currently holds $34M as a Standby Letter of Credit as at January 1, 2011 (The Crown first held $26M on approval of the Licence. Another $8M was added during 2010-2011. The Licence states the Crown will hold $43.9 million at January 1, 2014.)
- The Kivalliq Inuit Association required $14.9M.

The total security currently held by the Minister as required by the Board is $34M.

Therefore, in the situation of Meadowbank, the double bonding of Agnico-Eagle Mines Limited was in the order of millions of dollars. In the 2010 amendment of the licence the security amounts were not changed.

To the our knowledge, in the Kitikmeot region alone the amounts being held by the Crown and KitIA due to double bonding are in the tens of millions of dollars.

1.5 Effects of the Failure of the Draft Regulations to Address Double Bonding

Double bonding is likely the most significant and consistent issue which arises in water licensing proceedings involving large developments on IOL. Based on the NWB decisions excerpted in Appendix A, it is clear that this problem has absorbed a lot of Board time and resources as well.

Double bonding has the potential to be a barrier to development in Nunavut. Most advanced stage mining projects in Nunavut are currently all or partially on IOL. The examples of the double bonding amounts provided as security for specific projects, discussed in Part 1.4, show

how much money developers have tied up in security. This places a financial strain on such developers. It may also delay or even prevent development because of the amount of money required for provision of security to the Crown and to the Inuit landowner.

The failure of the Draft Regulations to deal with this problem is not an oversight. AANDC has indicated that it does not want to address this issue in the Draft Regulations. Considering how long it has taken to get the Draft Regulations to the stage where public consultation can take place, it is unclear how long it might take to get the changes necessary to address double bonding in place. To the best of our knowledge, there is no timetable for these changes and AANDC has identified no clear plan to address this issue.

We therefore, respectfully request that the Board make the unacceptability of the AANDC approach to double bonding clear in any report that it makes to the Minister or the public.

In a July 20, 2011 letter to the Minister of AANDC, NTI provided three options to resolve the double bonding issue, since AANDC does not want that done during this regulatory review. NTI stated that the options "could reduce the costs to industry, the risks to Inuit and the uncertainties to the Crown". These options are discussed in Appendix B. However, these options are not relevant to the Board's review of the Draft Regulations since they do not involve changes to the Regulations.

2.0 Security Application Criteria in s. 76(2)(a) of the *NWNSRTA* do Not Match the Security Determination Criteria in s. 10(1) of the Draft Regulations

2.1 Description of the Mismatching of Criteria

The Board has the authority to require a licensee to provide security related to a water licence. There are three criteria to determine the security to be provided, under subsection 10(1) of the Draft Regulations. The s. 10(1) criteria do not match the criteria under s. 76(2) of the *Nunavut Waters and Nunavut Surface Rights Tribunal Act* (*NWNSRTA*) that allow the Minister to apply that security. The s. 10(1) criteria do not include the power to require security for compensation under s. 13 of the *NWNSTRA*. This is not consistent with s. 76(2)(a) which allows the Minister to apply the security to compensate a person, including a Designated Inuit Organization.

The mismatching of criteria could result in there being an inadequate total amount of security if the Minister has to apply security after a particular incident. For example:

- a developer is required to provide $2M in security under s. 10(1) of the Draft Regulations
- after 6 months, the Minister applies the security based on a compensation claim by an Inuit landowner and makes a payment of $300,000 to the landowner
- the developer goes bankrupt
- the Crown must conduct the closure and reclamation.

In this case, the remaining amount of security ($1.7M) would likely not be enough to conduct the required closure and reclamation activities for the site. The Crown would then have to pay the difference. If the development was also on IOL, there might be inadequate security to restore IOL, if the Crown was holding security for both Crown lands and IOL. In the case of the Tahera Mine, the Crown has spent security amounts for care and maintenance costs and there may not be enough for reclamation costs.

The Minister may apply the security provided to pay for s. 13 compensation under s. 76(2)(a) of the *NWNSTRA* which reads:

> (2) The security provided by a licensee may be applied by the Minister
>
> (a) to compensate, fully or partially, a person, including the designated Inuit organization, who is entitled to compensation under section 13 and who has been unsuccessful in recovering that compensation, if the Minister is satisfied that the person has taken all reasonable measures to recover it; and
>
> (b) to reimburse Her Majesty in right of Canada, fully or partially, for reasonable costs incurred by Her Majesty in right of Canada under subsection 87(4) or, subject to subsection (3), under subsection 89(1).

The *NWNSRTA*'s s. 76(2) criteria for the application of security are inconsistent with the criteria used to determine the security to be provided under s. 10(1) of the Draft Regulations.

The Board's powers to fix the amount of security are limited by the criteria in s. 10(1) of the Draft Regulations. It states that the required security must not exceed total costs of three measurable criteria:

> 10. (1) For the purposes of subsection 76(1) of the Act, the Board may fix the amount of security required to be furnished by an applicant for a licence, a licensee or a prospective assignee in an amount not exceeding the aggregate of the costs of
>
> (a) the abandonment of the undertaking;
>
> (b) the restoration of the site of the undertaking; and
>
> (c) any ongoing measures that may remain to be taken after the abandonment of the undertaking.

These three criteria can be calculated by experts in such areas, by estimation of the project's size, type, location, environment, etc.

Subsection 76(2)(b) allows the Minister to apply the security to reimburse the federal Crown, fully or partly, for reasonable costs for remedial measures or for closure and reclamation costs. Under s. 10(1) of the Draft Regulations, there is no criterion that permits the Board to fix a security amount for compensation under s. 13. Since the Act overrules the Regulations, the Minister can apply security for a s. 13 compensation matter under s. 76(2)(a) of the *NWNSTRA*. However, if the Minister does this, there may not be enough security left to cover the total amounts for the three criteria that security was provided for under s. 10(1). The Crown may be left to pay for the remainder of those costs.

The three criteria in s. 10(1) are the same ones in s. 12(1) of the current Northwest Territories Waters Regulations. This may still cause a shortfall issue as discussed above. Therefore, this issue must be addressed by changing s. 10(1) of the Draft Regulations.

Further, the potential s. 13 compensation that might be required by the Board under s. 10(1) of the Draft Regulations cannot be calculated if the reasons for the compensation are not known and the person(s) potentially affected are not known. However, the means to calculate compensation security could be determined by the Board after the power is granted. For example, it could be done with guidelines.

2.2 Suggested Revision to s. 10(1) of Draft Regulations

As suggested by NTI in its May 26, 2011 letter to the Board, the criteria in s. 10(1) of the Regulations could be made to match the criteria in s. 76(2)(a) of the *NWNSRTA*. This could be done by adding a new subparagraph before the three criteria already listed in s. 10(1) as set out below:

> 10. (1) For the purposes of subsection 76(1) of the Act, the Board may fix the amount of security required to be furnished by an applicant for a licence, a licensee or a prospective assignee in an amount not exceeding the aggregate of the costs of
>
> <u>(a) compensating, fully or partially, a person, including the designated Inuit organization, identified in subsection 76(2)(a) of the Act;</u>
>
> (b) the abandonment of the undertaking;
>
> (c) the restoration of the site of the undertaking; and
>
> (d) any ongoing measures that may remain to be taken after the abandonment of the undertaking.

It should be noted that this issue was not addressed by the AANDC in its Table of Responses.

3.0 Double Payment of Water Use Fees

3.1 Draft Regulations Still Include Water Use Fees

The third issue for these submissions is that section 12 of the Draft Regulations includes the payment of water use fees, which can result in the double payment of water use fees on IOL. This problem occurs when an Inuit land owner attempts to exercise its exclusive right to water use on IOL, under Article 20.2.2 of the Nunavut Land Claims Agreement, to charge a fee for water use on IOL. Article 20.2.2 reads:

> Subject to the Agreement and any exception identified in the property descriptions of Inuit Owned Lands, the DIO shall have the exclusive right to the use of water on, in, or flowing through Inuit Owned Lands.

The Designated Inuit Organization (DIO) for Article 20 for a particular region of Nunavut has the exclusive right to the use of water on, in or flowing through IOL. This right has an economic dimension and includes the right to charge for the use of the water on IOL.

The double payment of water use fees arises when the Crown charges a fee for water use under the *NWNSRTA*, including for water use on IOL. The DIO also charges a fee for water use on IOL. The NTI Water Policy (November 2003) was developed by NTI and DIOs as an exercise of authority under Article 20 of the NLCA. It allows DIOs to charge fees for the use of water on IOL. For example, the KitIA charges water use fees through its leases and KivIA utilizes water compensation agreements.

The opportunity for Inuit to take full advantage of their land claim right to exclusive use of water on IOL is constrained by the fact that the Crown continues to charge a water use fee on IOL.

The DIO must keep its water use fees low because the developer must pay water use fees to both AANDC and to the DIO. This negatively affects the DIO's right to extract a benefit from its exclusive right to use water on IOL. The double charging for water use on IOL could also be a barrier to development on IOL.

The Draft Regulations still include sections on water use fees. However, there is no exemption from payment of such fees for developers with projects on IOL. This is the same as the current Regulations. The full text of sections 11 and 12 of the Draft Regulations is in Appendix C to these submissions, where section 12 is compared to section 9 of the current Regulations.

The only change to s. 12 on water use fees, in relation to IOL, is found in s. 12(6) of the Draft Regulations which states:

> (6) No licence fees are payable by a designated Inuit organization or Inuit for the right to the use of waters on, in or flowing through Inuit-owned Lands.

This revision to s. 12, which is to not charge water use fees to Inuit or DIOs, misses the point. Further, one must appreciate the irony of Canada granting Inuit the exclusive right to the use of water on IOL and then grudgingly agreeing not to charge Inuit licensees a fee for using water to which they already have exclusive use rights.

The real problem is the double charging of water use fees to non-Inuit industrial licensees on IOL. The Crown continues to charge the fees, which essentially takes money from Inuit, since Inuit have the exclusive right to water use on IOL. Inuit could charge higher fees for water use on IOL if the Crown was not also charging for its use.

There is no mention in s. 12 of the Draft Regulations of an exemption from payment of water uses fees on IOL for anyone else, including developers. We submit that section 12 should be changed to exempt developers on IOL from payment of water use fees under the *NWNSRTA* to AANDC. This would respect the Inuit right under Article 20 to the exclusive use of waters on, in or flowing through IOL. It would reduce the cost of development on IOL and it would enhance Inuit benefits from development.

3.2 AANDC Response to this Issue

The AANDC responded to this issue in its Table of Responses. Its reply was:

> The Board collects water use fees. Under Article 20, the DIO negotiates compensation for loss and damage caused by water use or deposits. The department is currently exploring this issue.

Inuit have the exclusive right to use water under Article 20.2.2 of the NLCA. AANDC is referring to water compensation, which is addressed in Article 20.3.1 of the NLCA. Inuit are compensated for damages as set out in Article 20. The issue for the double payment of water use fees is not compensation. The issue is that the NLCA gives Inuit the exclusive right to the use of water on IOL and then AANDC charges the developer to use the water, when the exclusive right to use the water was given to Inuit.

With respect, AANDC has misunderstood the issue. It is respectfully submitted that the Board address this issue in any report that it makes to the Minister or the public.

3.3 NTI Suggested Change to s. 12 to Resolve this Issue

In its May 26, 2011 letter to the NWB, NTI suggested a change to s. 12 of the Draft Regulations that would prevent the double payment of water use fees. The KIA would prefer to revise the language in NTI"s letter and be more specific. That is, if a licensee on IOL pays water use fees to the DIO, the Regulations should relieve that licensee of also paying water use fees to the Crown. Water use fees should not be payable twice. The licensee would have to provide proof of payment of water use fees on IOL to a DIO, in order to be relieved from paying them to the Crown.

This change would respect the exclusive right of the DIO to use waters on IOL and it would prevent the payment of additional water use fees on IOL by a developer. We respectfully submit that s. 12 should be revised in this way.

3.4 Effect of the Failure of the Draft Regulations to Address Double Payment for Water Use

The issue of double payment of water use fees on IOL is a significant one for Inuit land owners (KIA) and also for developers on IOL. It should have been addressed in the Draft Regulations. Failure to address it will mean that developers will still have to make two payments for water use on IOL, one to the Inuit land owner and one to AANDC. This limits the value of the Inuit land owner's right under Article 20 of the NLCA to have the exclusive use of water on IOL and to benefit from that exclusive use by charging developers a reasonable fee for use of those waters.

Again, considering how long it has taken to get the Draft Regulations to the stage where public consultation can take place, it is unknown how long it might take to get the changes necessary to address double payment of water use fees in place.

We respectfully request that the Board address this issue of double payment for water use on IOL in any report that it makes to the Minister or the public.

C. CONCLUSION (SUMMARY OF SUBMISSIONS)

This public review of the Draft Regulations, conducted by the NWB, will have important and lasting impacts in Nunavut for many years to come. The Draft Regulations are the result of much work on the part of AANDC and other parties. However, this review has shown that there are still important issues in the Draft Regulations that need to be resolved. These submissions have addressed three issues that we view as extremely important.

Unfortunately, AANDC has decided unilaterally that it will not resolve the double bonding issue as part of the text of the Draft Regulations. We submit that this issue, if not dealt with in these Draft Regulations, must be addressed by AANDC as soon as possible to reduce the financial burden on developers which could otherwise become an increasing barrier to development on Inuit Owned Lands.

Notwithstanding AANDC's stated position on the double bonding issue in its Table of Responses, that it "is committed to addressing the perceived over-bonding issue via a pan-northern focus and does not intend to amend the Regulations at this time", we still ask the Board to repeat its views on the issue to guide future discussions by AANDC with other parties on this issue. Addressing the issue of double bonding can proceed concurrently with the NTI/AANDC discussions.

We submit that the double bonding issue should be addressed by the Board in its Report to the Minister and the public. This would be enthusiastically received by Inuit land owners and by developers on Inuit Owned Lands.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th of August, 2011:

Geoffrey Clark, Director Lands and Environment Kitikmeot Inuit Association

Appendix A

Nunavut Water Board's Decisions Related to the Issue of Security

The Nunavut Water Board (NWB) has addressed the issue of security and its jurisdiction in the in many hearings. The NWB has consistently refused to split land and water related reclamation activities when determining the amount of security.

A) BHP Boston Licence (February 1999) and Assignment to Cambiex (October 1999)

The NWB dealt with an amendment application for BHP's 1998 Boston water licence in February 1999. The application requested a decrease in the security amount. There were joint payees for the security since some of the mine was on Inuit Owned Land and some was on Federal Crown land.

On October 27, 1999 the licence was assigned to Cambiex Exploration Inc..

In the assignment the NWB noted that

> …DIAND expressed concerns, but primarily with respect to the Board's April 21, 1999 Boston decision regarding: (a) the inclusion of land- and water-related matters in the assessment of the amount of the security deposit; (b) the requirement to have the Crown and KIA designated beneficiaries of the security deposit.[5]

Despite DIAND's concerns, in the October 1999 assignment to Cambiex, the NWB had Cambiex post the security in the same amount and under the same terms as BHP had done under the licence. That is, everything in the security remained the same: the terms and conditions in the Boston Licence (and the Windy Lake and Wolverine Lake Permits); the amount of the security; and the joint payees. Only the identity of the licensee was changed to Cambiex.

B) Lupin Water Licence (July 1, 2000)

In the Lupin water licence decision the NWB reiterated its statements of the interconnectedness of land and water as it had set out in 1999 BHP Boston decision. In this case there was only one landowner, the Federal Crown. In the decision the Board referred to the fact that DIAND had supported the interconnectedness of land and water:

> The interconnectedness of land and water are obvious and they cannot be reclaimed in isolation. This is supported by the DIAND, who in this hearing stated that the distinction between land and water related reclamation costs is difficult to make due to their interconnected nature.[6] The Board acknowledges that their authority is limited to issuing water licenses and not land use approvals[7] but we also base our decision supporting the

[5] p. 2 of the 1999 Boston Assignment Decision

[6] D. Livingstone, Indian and Northern Affairs, Renewal of Water Licence NWB2ULU9700 (March 17, 2000). (NWB footnote)

[7] L. Webber, DIAND, Applications by Echo Bay for renewals of Lupin and Ulu water licenses; Reply submissions (April 25, 2000). Among other things, Mr. Webber reiterated that the Board can determine quantum for the security deposit but the form of the security is to be determined between the licensee and the Minister of Indian Affairs and Northern Development. (NWB footnote)

> link between land and water on a broad interpretation of the fresh water cycle.[8] [underlining added]

It is interesting to note that DIAND *supported* the interconnectedness of land and water in the Lupin context in 2000. However, in that situation there was also only one landowner, the Federal Crown, and there was no issue of joint payees for the land and water security.

The Board in this Lupin decision also stated that it

> "…did not receive any compelling evidence that would suggest that an accurate distinction between land and water components could in this case be made in the assessment of abandonment and restoration costs. Therefore, consistent with its analysis contained in previous decisions, the Board has decided not to separate land and water related components of the overall abandonment and reclamation plan and resulting cost assessment.[9]

What might constitute "compelling evidence" that distinctions between land and water could be made would depend on the circumstances of each case.

C) Boston (HBJV) Water Licence Renewal Application (October 2001)

In its October 5, 2001 decision in the Hope Bay Joint Venture's (HBJV) Boston Gold Project's water licence renewal, the NWB reiterated its view that land and water are interconnected. The NWB stated that KIA and DIAND had presented the Board with "strong diverging positions" on whether land and water should be assessed separately when deciding on security and who the payee should be. The NWB cited its two previous decisions of *Re BHP Diamonds Inc*.[10] (the 1999 BHP Boston decision) and the Lupin Licence Renewal in 2000 in which the Board had found that land and water were "clearly connected".[11]

In this vein the Board wrote in its 2001 Boston Renewal decision:

> The NWB takes a holistic but also practical approach to reclamation: on the one hand, the NWB believes that the elements of the environment, including land and water, are interconnected; what affects one part of the environment can ultimately have an impact on other environmental elements (water and vegetation, for example). By altering the natural elements of the environment, traditional Inuit culture and use of the water can be directly affected; on the other hand, the NWB believes, where possible, that a proponent should be required to submit one single reclamation plan, without segregating land-related reclamation and water-related reclamation because reclamation activities upon abandonment will likely be more efficient and undoubtedly less onerous if conducted at the same time by the same person.[12] (underlining added)

Again the Board stated that there was a lack of evidence suggesting that land and water should be separated:

> The Board did not receive any persuasive evidence from DIAND or other interveners that would suggest that an accurate distinction between land and water components

[8] 2000 Lupin Decision, p. 27
[9] Lupin 2000 Decision, p. 27.
[10] (1999), 29 C.E.L.R. (N.S.) 248
[11] At page 42 of the 2001 Boston Decision
[12] 2001 Boston Decision p. 43

> could in this case be made in the assessment of abandonment and restoration costs. The line is hard to draw. Therefore, consistent with its analysis contained in previous decisions and its precautionary approach to Nunavut's fragile aquatic ecosystems, the Board has decided not to separate land and water related components of the overall abandonment and reclamation plan, and consequently decides that the financial security shall continue to name DIAND and the KIA as joint payees. Nevertheless, if possible, the NWB recommends that the management of all land and water reclamation activities at Boston be under the direction of a single party, and the managing party either be one of the joint security holders, as decided by mutual consent, or a third-party jointly selected by the security holders. Again, this latter point is a recommendation.[13] (underlining added)

Again, it is interesting to wonder what would be sufficient evidence for the separation of land and water.

D) Amendment of Lupin Water Licence December 19, 2001

The amendment application for the water licence was made by Echo Bay Mines, for a reduced security amount. The payee for the security deposit was the Federal Crown, there was no joint payee. In this decision the NWB again discussed the interconnectedness of land and water and again cited its earlier decisions. The Board stated:

> While the Board has decided to slightly decrease the security amount, it should remain relatively high for other reasons. As stated in its *Lupin Licence Renewal 2000* and an earlier decision,[14] the Board felt it was difficult for anyone assessing security or reclamation costs to draw distinctions between land and water (i.e., to totally exclude land). The NWB has not changed its mind about guarding fresh water and the environment that it nurtures. As the Board has unequivocally stated:
>
> > All elements of the environment, including land and water, are interconnected; what affects one part of the environment can ultimately have an impact on the other environmental elements. By altering the natural elements of the environment, traditional Inuit culture and use of the land and water can be directly affected. The Board recognizes that […] factors related to water, from mining activities, can affect Inuit culture.[15]
>
> This interconnectedness is reflected in the above precautionary principle example which recognizes the integral role of water in environmental and human health--especially for our Inuit culture that thrives on the land.[16]

Therefore, in that 2001 decision the NWB still was of the opinion that land and water components should not be separated in order to calculate security.

In February 2009 the licence for Lupin Mine was renewed for five years. At the time, the mine continued to be on care and maintenance, as it had been by February 2008 when the renewal application was made. It its 2009 decision, the NWB did not address the issue of the interconnectedness of land and water in relation to its statements on security.

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[13] 2001 Boston Decision p. 43

[14] *Re: Security Deposit for BHP Boston Gold Project.* See pages 16 to 20. (citation of NWB)

[15] *Lupin Licence Renewal 2000* at p. 26. The factors listed are omitted. This decision also noted the land/water relationship recognized in governments' definitions of the environment. (citation of NWB)

[16] *Re: Lupin Licence Security Amendment 2001, p. 19.*

E) Nanisivik Mine - CanZinco 2002

This decision related to the licence application for the closure and reclamation of the Nanisivik Mine filed by CanZinco Limited. The NWB addressed the issue of "Environmental Unity" in this decision as well. The Board stated:

> Regarding reclamation activities and the posting of security, the principle of environmental unity, which the NWB articulated in *BHP Diamonds*[17], is restated in this case. This principle is based, not only on the interconnected biophysical nature of the environment, but also on the broad and liberal interpretation consistently afforded to environmental water jurisdiction by the courts.[18] In finding that the separation of land from water reclamation activities is an artificial distinction, and that their mandate includes both direct and indirect water related impacts, the NWB in the BHP Diamond case summarized the holistically connected nature of the environment by concluding:
>
> > "Given that ecosystems operate on the principle that water supports all forms of life, and that fishing is linked to water quality, and that aquatic organisms are linked to water quality, and that public health is linked to water quality; that the local Inuit customs including harvesting is based in part on land use activities, and this is also linked to water quality, we must therefore accept the several submissions in this hearing cautioning the Board not to separate water from land in the assessment of the security deposit required by BHP."[19] (page 34 of Nanisivik decision)

In the Nanisivik hearing the Government of Nunavut (GN) had urged the NWB to "again use a purposive approach in carrying out its mandate by re-emphasizing the "unity of the environment" principle."[20] The GN argued that this required "the complete remediation of adverse effects caused by the Applicant's activities, and that this must be ensured in establishing the amount and terms of security."[21] The Board agreed with the GN and reaffirmed what it had said in the BHP Diamond case. The Board also stated that: "…the extensive and pervasive freshwater link to the entire northern environment via the freshwater *permafrost* leaves little doubt that a holistic approach to the NWB's jurisdiction is entirely proper and scientifically defensible."[22]

However, it is interesting that the NWB also had this to say in the Nanisivik decision:

> …the issue of environmental unity is not really in dispute in this case because the NWB agrees with DIAND that in this case it is possible to make a distinction between most water-related versus land-related components of the mine.[23] [Underlining added]

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[17] *BHP Diamonds Inc., Re* (1999), 29 C.E.L.R. (N.S.) 248.

[18] See: *Qikiqtani Inuit Assn. V. Canada (Attorney General)* (1998), 155 F.T.R. 161 (Fed. T.D.); *Curragh Resources Inc. v. Canada (Minister 0f Justice)* (1992), 8 C.E.L.R. (N.S.) 94 (Fed. T.D.), on appeal, (1993), 11 C.E.L.R. (N.S.) 173 (Fed. C.A.); *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 7 C.E.L.R. (N.S.) 1 (S.C.C.); *Quebec (Attorney General) v. Canada (National Energy Board)* (1994), 14 C.E.L.R. (N.S.) 1 (S.C.C.) (NWB Cite)

[19] *BHP Diamonds,* at p. 264.

[20] Government of Nunavut, *supra,* note 5 at p. 12.

[21] Nanisivik Decision, p. 35.

[22] Nanisivik Decision, p. 35

[23] Nanisivik Decision, p. 35.

It is interesting that the NWB made the statement that it might be possible to distinguish between land and water components in the context of the Nanisivik mine.

F) Polaris Mine - TeckCominco Ltd (April 24, 2003)

This was an application related to the water licence for the closure and decommissioning of the Polaris Mine. All of the land belonged to the Federal Crown. In this decision the Board restated its stance on environmental unity.

The Applicant, TeckCominco Ltd., submitted a cost estimate of $47.5 million for the decommissioning, reclamation and monitoring of the Polaris Mine. However, evidence was given at the hearing that $13.9 million had already been spent on reclamation activities as of December 31, 2002 which reduced the remaining cost to $34.5 million. It is significant that the Applicant divided this total into land and water reclamation components. The Applicant estimated that only $1.7 million of the remaining total was directly related to the Water Licence and the water-related components of the project.

However, DIAND disagreed with the Applicant over what constituted the water-related components. The Board wrote about the issue of separating the components:

> The difficulty of separating the water-related components from the land-related components, both of the mine site and of reclamation activities, is acknowledged by DIAND in their submission to the Board.[24] Accordingly, any apportionment of decommissioning and reclamation costs will not be exact. DIAND concludes:
>
> > "We would like to note that DIAND is confident that the Licensee will perform the reclamation work required; a confidence earned by the company's excellent and pro-active environmental work during the course of its operations. As a transparent application of our Mine Reclamation Policy, however, we must request for security equal to the full current liability of the mine site."[25] (underlining added)

The Board agreed with DIAND that "…it is inherently difficult to separate water and land related components of projects."[26] The NWB also stated that "[a]s evidenced in prior decisions, the Board's preference is to base evaluations regarding security postings on a holistic approach that recognizes both the difficulty of separating water related components, as well as the fundamental importance of fresh water to the environment."[27] The Board then cited its decision in *BHP Diamonds* and its articulation of the principle of environmental unity and stated that it applied "...equally to the activities necessary for the closure and reclamation of the Polaris Mine. Separating water from land related project components would create an artificial distinction that does not recognize the interconnected biophysical nature of the environment or support the holistic approach necessary for environmentally sound reclamation activities."[28]

[24] DIAND's Written Intervention to the NWB, at p. 6. (NWB citation) p. 26 of Polaris Decision
[25] DIAND's Written Intervention to the NWB, at p. 6. (NWB citation) p. 26 of Polaris Decision
[26] Polaris Decision p. 26
[27] Polaris Decision p. 26.
[28] Polaris Decision p. 27.

G) Doris North Mine (September 2007)

Again, in the 2007 Doris North hearing, the NWB restated that it should not separate land and water in setting the amount of security. INAC submitted that "…the Board's jurisdiction to order a licensee to post security against reclamation is limited to consideration of abandonment and restoration components related to water."[29] KIA and the Applicant, Miramar, disagreed with this submission. As well, Miramar objected to being put into a double bonding position to KIA and to INAC because of INAC's assertion.

As part of its supplemental submission on water, INAC reviewed the NLCA and the *NWNSRTA* to identify sections from which the NWB's jurisdiction derives. INAC asserted that the NWB's jurisdiction begins and ends with water and that matters which are not related to water are beyond its jurisdiction, including security deposits pursuant to s. 76 of the *NWNSTRA*. Subsection 76(1) of the *NWNSRTA* states:

> 76(1) The Board may require an applicant, a licensee or a prospective assignee to furnish and maintain security with the Minister in the form, of the nature, subject to such terms and conditions and in an amount prescribed by, or determined in accordance with, the regulations or that is satisfactory to the Minister.

INAC also stated that the Minister only has the power to draw upon security for matters related directly to water. Despite the NWB's prior practice of declining to distinguish between land and water components, INAC encouraged the Board to depart from this.[30]

KIA argued that the NWB does have the power to order land-related security. KIA also reviewed the NLCA and the *NWNSRTA* and submitted that neither the Act nor the Regulations suggested that the Board is limited to ordering security for water-related aspects of the appurtenant undertaking. KIA also reviewed INAC's *Mine Site Reclamation Policy* for Nunavut and found that it did not call for land and water security to be split in the water licensing context.

Miramar concurred with KIA that the NWB had the jurisdiction to impose security for land and water components. Miramar also cited the case of *CanZinco Ltd. v. Canada (Minister of Indian Affairs and Northern Development)* (*CanZinco*)[31], for the way it interpreted s. 76(1) and Miramar stated that:

> In *CanZinco Ltd. v. Canada (Minister of Indian Affairs and Northern Development)* ("*CanZinco*"), the Court concluded that subsection 76(1) of the Act gives the Board the jurisdiction to determine the amount of the security; that it is within the Minister's discretion to require a licensee to provide the security, in the amount determined by the Board, in a form or nature that is satisfactory to the Minister; and that the Minister has the discretionary power to approve or reject the Licence in its entirety.[32]

The Board accepted the submissions of both KIA and Miramar.

The Board found that its jurisdiction under s. 76(1) and s. 70(1)(d) and s. 12 of the NWT Water Regulations provide the NWB with the jurisdiction to determine both land and water-related security for the Project.

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[29] INAC Supplementary Information August 2, 2007 at p. 2.
[30] INAC Supplemental Submission, p. 5
[31] 2004 FC 1264 (CanLII).
[32] MHBL Supplemental Submission on Financial Security, at p. 3.

The Board reaffirmed its reasons in the 2001 Boston Renewal Decision and agreed with Miramar that this decision is consistent with the Federal Court's interpretation of s. 76(1) of the *NWNSRTA* in the *CanZinco* case. The Board urged INAC to reconsider its narrow interpretation of the Minister's power to draw upon security.[33]

H) Meadowbank - Agnico-Eagle Mines Limited (June 9, 2008)

In this decision, the issues of the separation of security for land and water and of double bonding had still not been resolved between the NWB, the Kivalliq Inuit Association (KivIA) and INAC. The NWB still stated that it had jurisdiction to order both land and water security and that they should not be separated and held by two payees, as it had decided in previous water licence decisions.

KivIA supported the NWB's earlier decisions that found that security should not be divided between land and water, and stated that "all parties' interests would be best served if there was one security held jointly by KivIA and the Minister."[34] KivIA stated that the security should be held in a trust.[35] INAC stated that "a trust for holding security for this project is not possible at this time due to the time it would take to prepare this."[36] KivIA also submitted, and the Board agreed with it, that the Board "does not have the express regulatory authority to require a trust, and absent agreement by the Minister that a trust is satisfactory, the Board is unable to require that the security be held in trust."[37]

The Board also addressed KivIA's worry about reclamation security and KivIA's ability to access it:

> KIA further submitted that should security for land and water be ordered and held only by the Minister, there are two other alternatives that are acceptable to KIA: reaching an agreement with Canada setting out how security held by the Minister will be applied to provide KIA with assurances that the security will be used to protect IOL; or INAC agrees to indemnify KIA against any liabilities for the abandonment and reclamation of the project. 67 KIA submitted that INAC has not agreed to either of these options. [38]
>
> Absent an agreement with Canada, KIA submitted it is "forced to request its own additional security under its lease agreements". As a result, KIA informed the Board that it intends to require security in the amount of $14.79 million, the amount KIA estimates as the land related security required to the end of the mine life. KIA acknowledged that this may create a "double bonding requirement" for AEM, unless the Board requires the Minister to hold only water related security, estimated by KIA as $29.08 million. Even then, KIA acknowledged that the risk remains that any security held by the Minister for water may not be applied to Inuit Owned Land related reclamation.[39]

INAC recommended that the Board require Agnico Eagle Mining (AEM) to only provide reclamation security for water-related reclamation costs.[40] INAC also submitted that this would

[33] Doris Decision p. 25
[34] Meadowbank Decision p. 10
[35] Meadowbank Decision p. 25
[36] Meadowbank Decision, p. 25
[37] Meadowbank Decision p. 25
[38] Meadowbank Decision p. 25
[39] Meadowbank Decision p. 25-26

allow other parties, such as KivIA, to "negotiate separate reclamation security outside of the water licensing process and limits the risk of overburdening AEM with excessive security costs."[41]

AEM addressed the issue of double bonding and the Board cited it in the Reasons:

> On a very large scale, that double bonding could add tens of millions of dollars to a reclamation bonding requirement, which would make development of mining projects on Inuit-owned land at a disadvantage compared to Crown land where you don't have those two owners or two responsible parties. So it places a disadvantage, this double bonding, the ability for mines to actually move forward on Inuit-owned lands. It's also an issue that would be unfair to industry as it does result in us having to put more money into a bond at the front end than is actually needed to do reclamation.[42]

The Board wrote:

> Again, the Board agrees with AEM. Absent evidence of an agreement between various holders of security, in this case INAC and KIA, on how total financial security for final reclamation will be held such that the total outstanding reclamation liability for land and water combined is secured, and will be executed such that land and water related reclamation will be approached holistically, the Board is not prepared to split land and water security.[43]

Ultimately, KivIA and INAC were unable to agree on how security could be held by both of them, so this was another situation in which there was double bonding. The Board left the form of security to be decided by the Minister, after consultation with AEM and KivIA.

[40] Meadowbank Decision p. 24
[41] Meadowbank Decision p. 24
[42] Meadowbank Decision p. 27
[43] Meadowbank Decision p. 27

Appendix B

NTI's Options to Resolve the Double Bonding Issue

In a July 20, 2011 letter to the Minister of AANDC (copied to the KIA), NTI provided three options to resolve the double bonding issue, since AANDC does not want that done during this regulatory review. NTI stated that the options "could reduce the costs to industry, the risks to Inuit and the uncertainties to the Crown".

They include:

1. In the immediate future, the development of a bilateral understanding between you, as the Minister representing the Crown under the *Act*, and NTI, supplying Inuit land owners with an assurance that they will be provided appropriate priority in the use of security held by the Crown;
2. Also, in the immediate future, consideration of approaches, including statutory amendments, that address the problem of double bonding for closure and reclamation security which occurs when large scale development on Inuit Owned Land creates risks for both Inuit land owners and the Crown; and
3. In the longer term, examination of options, entailing statutory amendments for creating, for Nunavut, a regime for unanticipated and catastrophic environmental risks that is separate from the regime that pertains to reasonably foreseeable adverse impacts. A broad precedent for such a regime exists in relation to marine transportation of oil in Canadian waters.

Appendix C

Comparison of Water Use Fees Clauses

Draft Nunavut Waters Regulations	**NWT Waters Regulations**
11. A fee of $30 is payable on the submission of an application for a licence, an application for the amendment, renewal, cancellation or assignment of a licence or an application under section 77 of the Act.	
12. (1) Subject to subsections (4) to (6), the fee payable by a licensee for the right to use waters, calculated on an annual basis, is (a) in respect of an agricultural undertaking, the greater of (i) $30, and (ii) $0.15 for each 1 000 m3 that is authorized by the licence; (b) in respect of an industrial or mining undertaking, or the undertaking set out in item 8, column 1 of Schedule 1, the greater of $30 and the aggregate of (i) for the first 2 000 m3 per day that is authorized by the licence, $1 for each 100 m3 per day, (ii) for any quantity greater than 2 000 m3 per day but less than or equal to 4 000 m3 per day that is authorized by the licence, $1.50 for each 100 m3 per day, and (iii) for any quantity greater than 4 000 m3 per day that is authorized by the licence, $2 for each 100 m3 per day; and (c) in respect of a power undertaking, (i) for a Class 0 power undertaking, nil, (ii) for a Class 1 power undertaking, $1,500, (iii) for a Class 2 power undertaking, $4,000, (iv) for a Class 3 power undertaking, $10,000, (v) for a Class 4 power undertaking, $30,000, (vi) for a Class 5 power undertaking, $80,000, and (vii) for a Class 6 power undertaking, $90,000 for the first 100 000 kW of authorized production and $1,000 for each 1 000 kW of authorized production in excess of 100 000	9. (1) Subject to subsections (4) and (5), the fee payable by a licensee for the right to the use of water, calculated on an annual basis, is (a) in respect of an agricultural undertaking, the greater of (i) $30, and (ii) $0.15 for each 1 000 m3 authorized by the licence; (b) in respect of an industrial, mining and milling or miscellaneous undertaking, the greater of $30 and the aggregate of (i) for the first 2 000 m3 per day that is authorized by the licence, $1 for each 100 m3 per day, (ii) for any quantity greater than 2 000 m3 per day but less than or equal to 4 000 m3 per day that is authorized by the licence, $1.50 for each 100 m3 per day, and (iii) for any quantity greater than 4 000 m3 per day that is authorized by the licence, $2 for each 100 m3 per day; and (c) in respect of a power undertaking, (i) for a Class 0 power undertaking, nil, (ii) for a Class 1 power undertaking, $1,500, (iii) for a Class 2 power undertaking, $4,000, (iv) for a Class 3 power undertaking, $10,000, (v) for a Class 4 power undertaking, $30,000, (vi) for a Class 5 power undertaking, $80,000, and (vii) for a Class 6 power undertaking, $90,000 for the first 100 000 kW of authorized production and $1,000 for each 1 000 kW of authorized production in excess of 100 000 kW.

kW.	
(2) For the purposes of paragraph (1)(b), if a licence authorizes a use of waters on a basis other than a daily basis, the licence fee payable must be calculated by converting the rate of authorized use to an equivalent daily rate.	(2) For the purposes of paragraph (1)(b), where a licence authorizes the use of water on a basis other than a daily basis, the licence fee payable shall be calculated by converting the rate of authorized use to an equivalent daily rate.
(3) If the volume of water is specified in a licence to be total watercourse flow, the licence fee must be calculated using the mean daily flow of the watercourse, calculated on an annual basis.	(3) Where the volume of water is specified in a licence to be total watercourse flow, the licence fee will be calculated using the mean daily flow of the watercourse, calculated on an annual basis.
(4) Licence fees are payable only for the portion of the year during which the licence is in effect.	(4) Licence fees are payable only for the portion of the year during which the licence is in effect.
(5) No licence fees are payable in respect of a diversion of waters where the waters are not otherwise used	(5) No fees are payable under subsection (1) in respect of a diversion of water where the water is not otherwise used.
(6) No licence fees are payable by a designated Inuit organization or Inuit for the right to the use of waters on, in or flowing through Inuit-owned Lands.	(6) Licence fees shall be paid or, in the case of an initial payment, deducted from the deposit (a) in respect of a licence for a term of one year or less, at the time the licence is issued; and (b) in respect of a licence for a term of more than one year, (i) for the first year of the licence, at the time the licence is issued, and (ii) for each subsequent year of the licence, or for any portion of the final year of the licence, in advance, on the anniversary of the date of issuance of the licence.
(7) Licence fees shall be paid or, in the case of an initial payment, deducted from the deposit (a) in respect of a licence for a term of one year or less, at the time the licence is issued; and (b) in respect of a licence for a term of more than one year, (i) for the first year of the licence, at the time the licence is issued, and (ii) for each subsequent year of the licence, and for any portion of the final year of the licence, on the anniversary of the date of issuance of the licence.	(7) Where the licence fee payable under this section is less than the amount of the deposit remitted under subsection 6(1), the difference shall be refunded accordingly.