KITIKMEOT INUIT ASSOCIATION SUBMISSION

NUNAVUT WATER BOARD REVIEW OF DRAFT *NUNAVUT WATER REGULATIONS*

INTRODUCTION:

The Nunavut Water Board (NWB) is conducting a public review of the draft Nunavut Water Regulations (the "Regulations). The NWB called for submissions in response to the Regulations in an April 20, 2011 letter to Mr. Glen Stephens of Indian and Northern Affairs Canada (INAC). The Kitikmeot Inuit Association (KIA) submission on the Regulations is set out below.

THE ISSUES:

The KIA submission addresses two issues in relation to the Regulations. They are the double bonding problem which has emerged in relation to security for closure and reclamation of projects found on Inuit Owned Land and the double payment of water use fees which arises when Designated Inuit Organizations seek to exercise their rights under section 20.2.2 of the Nunavut Land Claims Agreement. These issues are explained in greater detail below.

1.0 Description of the Double Bonding Issue

1.1 Double Bonding under the Current Regulations

Double bonding occurs when a licensee must provide security, related to a development project, to more than one payee.

Under s. 76 of the *NWNSRTA* the Nunavut Water Board (NWB) can require a licensee to provide security to the Minister of INAC. The security provided can be required for various reasons, including to conduct abandonment and reclamation activities. 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 remaining subsections of s. 76 state how the security may be applied, that is "used" by the Minister and the limits on its application.

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 those Regulations. However, s. 12 does not address the problem of double bonding.

There have been several 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 Kitikmeot Inuit Association (KIA), as the landowner of Inuit Owned Lands (IOL), also needs 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 both Inuit Owned Lands and on Federal Crown 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. KIA cannot draw on that security because KIA is not a joint payee
4. Therefore, to secure Inuit interests, KIA requires an additional security amount from the company so that 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) has generally 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 technically problematic and based on an analysis of the *NWNSRTA* and the Regulations this is not, in KIA's submission, possible (KIA has argued this position 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.

Some excerpts from KIA submissions to the NWB in the Doris Hearing are set out below to illustrate these points:[4]

> <u>Argument from KIA's Doris North Water Licence August 2007 submission</u>:
>
> "How can KIA be sure that it is holding the amount of land-related Security it needs to protect Inuit interests if the Board orders that only water-related Security be paid and KIA may only take the remainder up to the estimated total project liability?" (p. 3)
>
> "The argument that land and water related Security should be split is based on INAC's suggestion that the Board does not have the legal authority to order that Security be paid

[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.
[4] Appendix "A" to this submission includes additional excerpts from NWB Decisions on the 'double bonding" issue.

in relation to land-related matters. KIA submits that this INAC argument is based on an inaccurate reading of the Nunavut Waters and Nunavut Surface Right Tribunal Act (the "Act") and the Northwest Territories Waters Regulations. Furthermore it is inconsistent with the historical antecedents of northern and western water legislation. "(p. 3)

"We should note that section 76 makes the ordering of Security discretionary and that it vests that discretion in the Board, subject to the Regulations. Section 12 of the Regulations sets out more guidance on this issue:" (p. 4)

"Considering the scheme of the Act and Regulations, KIA submits that it is clear that a water licence is issued in relation to an appurtenant undertaking… Section 76 of the Act makes it clear, when read in combination with section 12 of the Regulations, that NWB has the discretion to order Security in relation to the undertaking…(p. 5)

There is no suggestion anywhere in the Act or the Regulations that the Board can only order Security in relation to the water related aspects of the appurtenant undertaking. KIA submits that the argument that reclamation Security cannot be separated into land and water Security is in fact more consistent with the statutory framework than the approach suggested by INAC. (p. 5)

We further submit that careful review of the *Mine Site Reclamation Policy for Nunavut* does not indicate that it calls for land and water Security to be split in the water licensing context. The policy calls for 100% of the project related liability to be secured but it does not specify that land and water related Security should be split. (p. 5)

In KIA's view the approach to the handling of Security suggested by INAC is simply the result of historical choices made by INAC for developments on Crown lands where the government holds all the Security and it is more convenient to hold some under the water licence and some under a Crown lease. This approach is not useful for mine developments on IOL. In fact, as KIA has argued, it leaves the landowner at risk if the Security held by the Crown is insufficient to completely close and reclaim a site. This approach leads inevitably to the double bonding problem…" (p.5)

"It is KIA's submission that the NWB has the jurisdiction and authority to order Security for the whole of [a project.] The Board is not legally required to take full Security but it cannot take more than is allowed by section 12 of the Regulations. (p. 7)

In the end, it is the Board that decides on the appropriate amount of Security for the appurtenant undertaking. The Minister of INAC has no role in that process. The statutory scheme only allows the Minister to determine if the form of the Security is acceptable or not." (p. 7)

Like s. 12 of the current Regulations, the new Draft Water Regulations that have been circulated by the NWB for comment do not address the issue of double bonding.

2.0 Draft Regulations Do Not Address Double Bonding Issue

2.1 Current Regulations

As discussed in Part 1, the Northwest Territories Waters Regulations, made under the *Northwest Territories Waters Act*, currently apply to the issue of security under the *NWNSTRA*.[5] The issue of security is addressed in s. 12 of the Regulations.

The NWT Waters Regulations set out that an application for a licence or for an amendment or a renewal of a water licence must include "plans for the abandonment, or any temporary closing, of the proposed undertaking (s. 2(2)(h)). Section 12 addresses the MVLWB's security jurisdiction and the acceptable forms of that security:

> 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
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> (*a*) abandonment of the undertaking;
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> (*b*) restoration of the site of the undertaking; and
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> (*c*) any ongoing measures that may remain to be taken after the abandonment of the undertaking.
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> (2) In fixing an amount of security pursuant to subsection (1), the Board may have regard to
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> (*a*) the ability of the applicant, licensee or prospective assignee to pay the costs referred to in that subsection; or
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> (*b*) the past performance by the applicant, licensee or prospective assignee in respect of any other licence.
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> (3) Security referred to in subsection (1) shall be in the form of
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> (*a*) a promissory note guaranteed by a bank in Canada and payable to the Receiver General;
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> (*b*) a certified cheque drawn on a bank in Canada and payable to the Receiver General;
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> (*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.

2.2 Draft Regulations are Virtually Identical

The new Draft Water Regulations do not address the issue of double bonding. The wording in s. 10 of the Draft is almost identical to s. 12 in the Northwest Territories Waters Regulations. The effect of s. 10 of the Draft in relation to double bonding will be

[5] 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.

the same as the current Regulations. The NWB will continue to have the problem of the double bonding issue unresolved by the Regulations or by the NWNSRTA.[6]

2.3 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 on Inuit lands and in Nunavut. Most of the advanced stage mining projects in Nunavut are currently all or partially on IOL.

The failure of the draft Regulations to deal with this problem is not an oversight. INAC staff have advised KIA that this choice was deliberate. Considering how long it has taken to get even the Draft Regulations to the stage where public consultation can take place, KIA is left to wonder 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 and INAC has identified no clear plan to address this issue.

KIA respectfully requests that the Board make the unacceptability of the INAC approach to double bonding clear in any report that it makes to the Minister or the public.

3.0 Double Payment of Water Use Fees on IOL

3.1 Draft Regulations Still Include Water Use Fees

The second issue that KIA is concerned about which is also not addressed in the Draft Regulations is the double payment of water use fees. This problem occurs when KIA 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.

KIA is the Designated Inuit Organization (DIO) for Article 20 in the Kitikmeot Region. KIA therefore has the exclusive right to the use of water on, in or flowing through 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. KIA also charges a fee for water use on IOL.

[6] See Appendix "B" for a side by side comparison of the text of the current and draft regulations.

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. KIA must keep its water use fees low because the developer must pay water use fees to both INAC and to KIA. This negatively affects KIA'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, to be applied in Nunavut. 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 only change to the section on water use fees in relation to IOL is in s. 12(6) of the Draft Regulations[7] 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.

There is no mention in that section of the Draft Regulations of an exemption from payment of water uses fees on IOL for anyone else.

3.2 Effect of 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 KIA and 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 KIA and one to INAC. This limits the value of KIA'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, KIA is not sure how long it might take to get the changes necessary to address double payment of water use fees in place.

KIA respectfully requests 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.

ALLOF WHICH IS RESPECTFULLY SUBMITTED this 20th of May 2011:

Geoffrey Clark, Director Lands and Environment KIA

[7] Appendix B includes a table that shows a comparison of the current Regulations and the Draft Regulations sections on water use fees.

Appendix A

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

The Nunavut Water Board (NWB) addressed the issue of security and its jurisdiction in the 2007 Doris North hearing and in other previous NWB 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.[8]

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.[9] The Board acknowledges that their authority is limited to issuing water licenses and not land use approvals[10] but we also base our decision supporting

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

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

[10] 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

> the link between land and water on a broad interpretation of the fresh water cycle.[11] (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 Lupin 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.[12]

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*.[13] (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".[14]

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.[15] (underlining added)

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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)

[11] 2000 Lupin Decision, p. 27

[12] Lupin 2000 Decision, p. 27.

[13] (1999), 29 C.E.L.R. (N.S.) 248

[14] At page 42 of the 2001 Boston Decision

[15] 2001 Boston Decision p. 43

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 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.[16] (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 was made by Echo Bay Mines. 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 at page 19:

> 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,[17] 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.[18]
>
> 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] 2001 Boston Decision p. 43

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

[18] *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)

Therefore, the NWB still felt that land and water components should not be separated in order to calculate security.

E) Nanisivik 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*[19], 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.[20] 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:
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> > "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."[21] (page 34 of Nanisivik decision)

In the Nanisivik hearing the 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."[22] 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."[23] 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."[24]

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

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

[20] 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)

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

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

[23] Nanisivik Decision, p. 35.

[24] Nanisivik Decision, p. 35

> …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.[25] (Underlining added)

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 (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.[26] 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."[27] (underlining added)

The Board agreed with DIAND that "…it is inherently difficult to separate water and land related components of projects."[28] 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."[29] 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

[25] Nanisivik Decision, p. 35.
[26] DIAND's Written Intervention to the NWB, at p. 6. (NWB citation) p. 26 of Polaris Decision
[27] DIAND's Written Intervention to the NWB, at p. 6. (NWB citation) p. 26 of Polaris Decision
[28] Polaris Decision p. 26
[29] Polaris Decision p. 26.

does not recognize the interconnected biophysical nature of the environment or support the holistic approach necessary for environmentally sound reclamation activities."[30]

G) Doris North (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."[31] 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.[32]

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*)[33], 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

[30] Polaris Decision p. 27.
[31] INAC Supplementary Information August 2, 2007 at p. 2.
[32] INAC Supplemental Submission, p. 5
[33] 2004 FC 1264 (CanLII).

the Licence in its entirety.[34]

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. Section 12 of the NWT Waters Regulations is discussed below.

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 *CanZinco.* The Board urged INAC to reconsider its narrow interpretation of the Minister's power to draw upon security.[35]

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. KIA 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 KIA and the Minister."[36] KivIA stated that the security should be held in a trust.[37] 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" KivIA 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."[38]

INAC recommended that the Board require Agnico Eagle Mining (AEM) to only provide reclamation security for water-related reclamation costs.[39] INAC also submitted that this would 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."[40]

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.[41]

[34] MHBL Supplemental Submission on Financial Security, at p. 3.
[35] Doris Decision p. 25
[36] Meadowbank Decision p. 10
[37] Meadowbank Decision p. 25
[38] Meadowbank Decision p. 25
[39] Meadowbank Decision p. 24
[40] Meadowbank Decision p. 24
[41] Meadowbank Decision p. 27

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.[42]

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.

[42] Meadowbank Decision p. 27

Appendix B

Comparison of Security and Water Use Fees Clauses

1. Security

Draft Nunavut Waters Regulations Regs	NWT 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.	(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	(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*;

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.	(*d*) an irrevocable letter of credit from a bank in Canada; or (*e*) cash.

2.0 Fees for Water Use

Draft Nunavut Waters Regulations Regs	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,	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,

(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.	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.
(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	(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.

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.	