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Your file - Votre référence
NWB1NAN0208
Our file - Notre référence

February 7, 2003

Nunavut Water Board
P.O. Box 119
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By Fax to (867) 360-6369
and

By email to:

- nwbexec@polarnet.ca and
- nunavutwaterboard@nt.sympatico.ca
- and
- nwblic@polarnet.ca

Dear Mr. di Pizzo:

Re: Water Licence NWB1NAN0208, for Nanisivik minesite
and re: Letter dated January 23/03 from the Board (P. di Pizzo) to Breakwater Resources Ltd. (R. Carreau)

Thank you for the copies of the above-noted letter which you forwarded to Minister Nault and to this office. I would like to provide the following comments in response.

1. In its letter, the Board proposes that a public hearing be held in Arctic Bay toward the end of May 2003. From what is said at the top of page 2, I gather (subject to point 2 below) that the Board envisions that the purpose of this hearing would be to examine and discuss the five documents which the Board mentions at the bottom of page 1 and top of page 2.

- (a) Regarding the first four documents, DIAND certainly agrees that they are all extremely important, and that they will deserve close scrutiny by the Board, the residents of Arctic Bay, and all other interested parties. DIAND notes, however, that once these four documents have been filed, several other documents – that is, documents which will also be building-blocks of the final A&R plan – will still remain to be filed. These include (but are not limited to) the following critical reports:

Report

**Licence
Item**

**Due Date (according
to schedule approved by
Board)**

Report assessing the proposed covers	G(4)	September 30/03
Report assessing the postulated talik	G(5)	August 31/01
West Twin Disposal Area Closure Plan	G(15)	October 31/03
Landfill Closure Plan	G(17)	October 31/03

The A&R plan itself – licence item G(3) – is due only on December 15, 2003.

Given this scheduling, DIAND is concerned that a hearing at the end of May might be premature, and might not be the most beneficial allocation of time and resources for this file, as well as for others which the Board and various interested parties must attend to. On balance, holding a hearing in late May might actually reduce the amount of time and attention which is devoted to the Nanisivik matter, and the thoroughness with which clean-up plans are examined, and this would be highly undesirable.

Therefore, DIAND proposes that a hearing concerning the licensee's reports and the licensee's projected A&R programme be held only after the licensee has duly filed all of the relevant documents, including the A&R plan itself.

The Board and the residents of Arctic Bay may indeed find it useful for there to be a public information session in the Hamlet at some earlier date – perhaps at the end of May as the Board has suggested. This session could speak to developments which have occurred and to plans for the site. Residents of Arctic Bay would have an opportunity to ask questions and to make comment. DIAND would be pleased to attend such a session.

The documents mentioned in the Board's letter would still be distributed to the Hamlet of Arctic Bay and to the other interested parties as those documents are filed. The interested parties could then provide the Board with comments in writing.

- (b) The choice of a hearing date should take account of the need to give parties adequate time in which to review all the material on which the licensee will rely. This is a consideration which the Board clearly has in mind, as indicated at the top of page 2 of its letter. Only if parties receive the material well in advance of the hearing can the licensee's plans and proposals be effectively and fully analyzed and critiqued.
- (c) The fifth of the documents mentioned on pages 1-2 is an updated estimate of mine closure liability. DIAND asks that the Board make clear, well in advance of any hearing, whether the Board plans to consider the possibility of altering the security amount stipulated in licence item B(2).

2. On page 2 of the letter (2nd-to-last paragraph), it is stated that “the Board may be forced at the next proposed hearing to consider its terms of reference to be an application ... to cancel the licence in the public interest.”

- (a) The procedure envisioned in this statement is not altogether clear. DIAND is concerned that the Board might be contemplating a situation in which a cancellation proposal is not initially designated as the subject-matter and focus of the scheduled hearing, but in which the Board will nevertheless reserve the option of “switching tracks” at some later stage, and possibly at the hearing itself, to a considering of cancellation.

It is desirable and indeed necessary that all interested parties be given adequate notice of the hearing’s subject-matter, including an adequate delimitation of that subject-matter. Without this, they are likely to encounter difficulty in focusing their preparatory efforts and directing their arguments. In short, if cancellation is to be the hearing’s issue, the parties should be advised of this early on, so that there will be no potential for a breach of fairness or natural justice.

- (b) DIAND does not support the idea of the Board’s addressing the issue of cancellation (i.e. conducting a hearing on the issue). DIAND is of the view that such a step would be counter-productive. With cancellation of the licence there would likely be a termination of Breakwater/CanZinco’s licence obligations. This, together with the termination of the entitlements that flow from the licence, might well introduce considerable uncertainty regarding the clean-up obligations of Breakwater/CanZinco, and considerable uncertainty as to the availability of enforcement powers and options. DIAND respectfully takes issue with the suggestion that enforcement efforts have been lacking (see point 3 below), and with the notion that the status of the public record of enforcement affords a basis for entertaining the possibility of cancellation. DIAND respectfully submits that to turn to the consideration of a cancellation proposal would be to divert time and resources away from more appropriate efforts and activities.

3. Toward the end of the letter’s page 2, the Board makes certain references to enforcement. The Board indicates some doubt as to whether DIAND has taken any action by way of enforcement.

DIAND would welcome the opportunity to meet with the Board to discuss appropriate matters regarding DIAND’s enforcement mandate.

Enforcement action by DIAND can take several forms. If, in any given case and at any given time, the enforcement efforts have not entered the public view by virtue of steps such as the issuance of an inspector’s direction or the laying of charges, that does not warrant an inference that nothing is being done. Likewise, if compliance has not yet been achieved, that does not mean DIAND is failing to pursue compliance, by appropriate methods. And if at some stage one method is being employed, and is taking time to carry out, it does not follow that other possible avenues are not being considered and explored. Enforcement involves the

exercise of discretion, on an ongoing basis. In choosing its methods, DIAND must take account of all relevant circumstances. The harshest or most flamboyant step will not always be the most likely to secure compliance with licence conditions – or, more generally, be the step that is responsible, justified, prudent, likely to be successful, and most likely to produce a result which is in the public interest. A dramatic, public step may serve to foster a public perception that “something is being done”; however, enforcement is not properly approached as an exercise in public relations, and DIAND does not approach the issuance of a direction, the laying of a charge, or any other enforcement measure on that basis.

As DIAND has repeatedly stressed before the Board, in the Nanisivik matter and others, DIAND is concerned about the safeguarding of the public purse. No one has been more emphatic than DIAND about the need to ensure that the costs of minesite remediation do not fall on the taxpayer, but rather are borne by the mine operator. In a number of recent cases where minesites have been abandoned, DIAND-administered funds have been the particular compartment of the public purse which many have looked to for the financing of remediation, so for DIAND the consequences of the operator’s not paying are much more than just an abstract concern.

The Board, DIAND, other federal departments, and departments of the GN all have roles to play with regard to Nanisivik and other operations in Nunavut. I am sure all concerned agree that the oversight of those operations is most effective, and the public interest is best served, when the efforts of each regulatory agency complement the efforts of the others, when each agency respects the mandates of the others, and when each recognizes the good faith and conscientiousness of the others.

Let me reiterate that DIAND would be happy to meet with the Board for appropriate discussions concerning DIAND’s enforcement mandate.

4. On page 2 of its letter, the Board requests that DIAND file a compliance report with respect to Nanisivik.

Since DIAND has already filed compliance reports which together cover the period to the middle of August 2002, I understand the Board to be asking for a report covering the period from mid-August 2002 to the date of the new report.

DIAND’s usual practice is to file a compliance report for each calendar year, and to do so after the licensee’s annual report for that year has been submitted. In the case of Nanisivik, licence item B(6) requires that the Annual Report be filed by March 31st, and therefore DIAND would file its regular report for 2002 sometime after March 31/03. However, from time to time DIAND has also filed special compliance reports covering less than a full calendar year, and the compliance report filed in connection with the July/02 Nanisivik hearing was an example of this.

In answer to the Board’s request, and being mindful that the community of Arctic Bay is anxious to know how the licensee is responding to its obligations, DIAND will endeavour to file a special compliance report for Nanisivik by the end of February 2003. DIAND’s target

will be to file the English version of the special report by that time, and to file the Inuktitut version as soon as possible thereafter.

Please note that, in preparing a report on the licensee's compliance with its obligations, DIAND will have to take into account any limits on what may appropriately be put on the public record.

Thank you for your consideration of these comments.

Yours very truly

Original Signed By: Carl McLean

Carl McLean
A\Director, Operations

cc.: Mayor J. Akumalik, Hamlet of Arctic Bay
R. Carreau, Manager, Environmental Affairs, Breakwater Resources Ltd.
S. Hardy, Counsel to the Government of Nunavut
D. Searle, Counsel to CanZinco Limited