



File No.: 1AR-POL0311

To: Polaris Distribution List

Date: November 14, 2014

Subject: Type “A” Water Licence 1AR-POL0311 Written Comments of the Nunavut Water Board Regarding Licensing of Undertakings Nearing the End of the Project Lifecycle

As noted in Appendix D of the Commitment List attached to the Pre-Hearing Conference Decision Report issued by the Nunavut Water Board (NWB or Board) on August 29, 2014 in relation to the Type “A” Water Licence 1AR-POL0311, it was requested by the Applicant, Teck Resources Ltd. (Teck) that all participants in the water licensing process, including the NWB, provide written submissions on the issue of regulatory requirements for abandonment and final reclamation under the Licence (including an outline of the process for cancelling a licence and being released from future obligations). With the recognition that the Public Hearing for this matter is scheduled to proceed on December 4 and 5, 2014, the Board provides the following response to Teck’s request.

Licensing Requirements For Undertakings That Are No Longer Operating Mines

As the Board understands it, the central question of the Applicant is:

Does a licensee of an undertaking that is no longer operating and has been substantially reclaimed continue to require a licence under the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*, S.C. 2002, c. 10 (NWNSTRA) and if so, at what point in the decommissioning is a licence no longer required?

It is important to remember that the Board licenses “undertakings” not individual water uses or deposits of waste, so once the Board has issued a Type “A” Licence governing a mining undertaking, until that appurtenant undertaking has been “abandoned”, the site has been “reclaimed” **and** the obligations in the water licence have been satisfied, a Type “A” Water licence continues to be required.¹ If any activities relating to reclamation, abandonment or

¹ As defined by the Board in the Nanisivik Licence, 1AR-NAN0914 “**Abandonment**”, means the permanent dismantlement of a facility so it is permanently incapable of its intended use. This includes the removal of associated equipment and structures and any measures required to ensure the facility is left in a permanently safe and secure condition and “**Reclamation**” means the process of returning the mine sites and affected areas to viable and, wherever practicable, self-sustaining ecosystems that are compatible with a healthy environment and with human



remediation remain, such as occasionally requiring the discharge of water exceeding background conditions, maintenance of water control structures, etc., an undertaking would not be considered by the Board to truly be reclaimed and the undertaking would still require authorization under an active Type "A" Water licence.

There is currently no legislated definition in Nunavut setting out the criteria that must be considered by the Board to conclude that an undertaking is abandoned, reclaimed and all obligations under the licence have been fulfilled.² Consequently, the Board approaches these questions on a case by case basis and requires technical submissions from the Licensee and intervening parties with respect to the long-term monitoring and any mitigation measures that are considered necessary for a specific licensee to establish that the undertaking is in a "steady state" and a water licence is no longer required.

Regulatory Process When A Licensed Undertaking Has Been Abandoned, Reclaimed and All Obligations of the Water Licence Have Been Met

The secondary question that arises as a result of the preceding discussion is the following:

Once it is determined that a licence is no longer required under the NWNSRTA what is the process for "closing out" the licence and the licensee's obligations under the licence?

Once it is established that an undertaking has been abandoned, reclaimed **and** there are no outstanding obligations under a Type "A" Water Licence, a licensee can apply to the Board or the Board (on its own initiative and with the approval of the Minister) can cancel a licence,³ or

activities. Note: These definitions are consistent with the definitions for these terms adopted by other regulatory agencies and mine reclamation working groups across Canada, as modified by the Board to reflect the specific abandonment and reclamation realities of Nunavut.

² The NWB has recently requested that greater definition on key concepts such as the end of life of an undertaking be included in the Board's governing legislation, but it does not appear that additional regulatory definitions will be forthcoming. See for example the response to the Board's submissions in respect of Bill S-6: An Act to amend the Yukon Environmental and Socio-economic Assessment Act and the Nunavut Waters and Surface Rights Tribunal Act, to the Standing Senate Committee on Energy, the Environment and Natural Resources following the testimony provided by the Board's Chairperson and Executive Director on September 23, 2014 – in the transcripts available on-line at:

http://www.parl.gc.ca/Content/SEN/Committee/412/enev/15ev-51579_e.htm?Language=E&Parl=41&Ses=2&comm_id=8.

³ Sections 43(1) and 56(1) of the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*, S.C. 2002, c. 10 (NWNSRTA) govern the cancellation of a Type "A" licence:

43(1) Subject to this Act, the Board may... (c) cancel a licence



the licence can be allowed to expire. From the Board's perspective there is a significant distinction between a cancellation and an expiry because the cancellation process requires evidence that the Licensee's obligations have been satisfied and requires the exercise of discretion on the part of the Board. In contrast, the expiry process occurs as a matter of course when the term of a licence expires.

As such, it is the Board's view that the cancellation process, which is more rigorous, evidence-based and requires the exercise of discretion on the part of the Board and Minister is to be preferred, as it provides the public and all parties, including Aboriginal Affairs and Northern Development Canada's inspectors, the authority with enforcement jurisdiction for water licences in Nunavut, with greater certainty that all outstanding obligations for a licensed undertaking have been met. The Board also notes that the information necessary to support a cancellation application is likely to be required by the Minister when considering the extent to which any security required under the licence could be released and is therefore likely being prepared by the licensee in any event.⁴

It is, however, important to note that regardless of whether a former licensee has cancelled the licence or allowed it to expire, in the event that obligations of the licensee have not been fully met, the NWNSRTA preserves several mechanisms that may be used by Aboriginal Affairs and Northern Development Canada to enforce outstanding obligations under the previous licence and/or to prevent adverse effects resulting from improper abandonment and reclamation. At the outset, regardless of whether the licence was cancelled or expired, a former licensee remains responsible for meeting the obligations under the previous licence as specifically set out under s. 46.⁵ In addition, in the event that any of the works related to the use of water or the deposit of waste under the prior licence are resulting in adverse effects, under the remedial powers provided

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- (i) on application by the licensee,
 - (ii) where the licensee, for three successive years, fails to exercise the licensee's rights under the licence, or
 - (iii) where the Board considers the cancellation to be in the public interest.

56(1) The issuance, amendment, renewal and cancellation of a type A licence and, if a public hearing is held, a type B licence are subject to the approval of the Minister.

⁴ See s. 76(5) of the NWNSRTA regarding the Minister's jurisdiction to release security, which states:

Where the Minister is satisfied that an appurtenant undertaking has been permanently closed or permanently abandoned or the licence has been assigned, any portion of the security that, in the Minister's opinion, will not be applied under subsection (2) shall be returned to the licensee without delay.

⁵ Section 46 of the NWNSRTA expressly states that the obligations under a licence continue to subsist regardless of whether the licence has expired or been cancelled, stating as follows:

The expiry or cancellation of a licence does not relieve the holder from any obligations imposed by the licence.



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under s. 87 of the NWNSRTA an inspector may direct "any person" (which would include a former licensee) to take such reasonable measures as the inspector may specify, to counteract, mitigate or remedy the resulting adverse effects. Further, under s. 89 of the NWNSRTA where the Minister, on reasonable grounds, determines that a person has closed or abandoned, temporarily or permanently, a work related to the use of waters or the deposit of waste in Nunavut and the past operation of the work or its closure or abandonment may cause a danger to persons, property or the environment, the Minister may take any reasonable measures to prevent, counteract, mitigate or remedy any resulting adverse effect and may recover the costs incurred as a result in a debt action.

If you have any questions with respect to the above, please contact the undersigned, Ben Kogvik, Board Secretary and Acting Executive Director. Mr. Kogvik can be reached via e-mail at ben.kogvik@nwb-oen.ca or telephone: (867) 360-6338 or fax: (867) 360-6369. If your inquiries are of a technical nature, please contact Sonia Aredes, Technical Advisor at sonia.aredes@nwb-oen.ca or David Hohnstein, Director Technical Services at david.hohnstein@nwb-oen.ca.

Sincerely,

A handwritten signature in black ink, appearing to read "Ben Kogvik", is written over a printed name.

Ben Kogvik
Board Secretary/Acting Executive Director
Nunavut Water Board

cc: NWB Public Registry