



Resource Management Directorate  
Nunavut Regional Office  
P.O. Box 100  
Iqaluit, NU, X0A 0H0

September 23, 2016

INAC reference  
CIDM# 1101283

NWB reference  
#2AM-DOH1323

Karen Kharatyan  
A/Manager of Licencing  
Nunavut Water Board  
Gjoa Haven, NU, X0E 1J0

**Re: INAC written comments in regards to reclamation security pertaining to  
Licence 2AM-DOH1323 – Application to Amend Submitted by licensee  
TMAC Resources (TMAC)**

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Dear Mr. Kharatyan,

By letter dated September 16, 2016, the Nunavut Water Board (“the Board”) requested written submissions on TMAC’s proposed amendments to the Water Licence and on the topic of reclamation security. INAC’s comments on TMAC’s blackline version of the licence have been submitted under separate cover. Comments pertaining to item 2 (as shown below) are included in this correspondence.

- *the Applicant, TMAC and the intervener, INAC, will also be permitted to file their written submissions addressing the issues of total quantum of security as agreed to by TMAC and INAC during the Public Hearing, as well as their views regarding the amount the total quantum of reclamation security that should be held under the amended Water Licence (i.e. the allocation of the total quantum of reclamation security split between the Water Licence and the land-instruments granted by the KIA to TMAC).*

This letter sets out INAC’s recommendations to the Nunavut Water Board regarding the fixing of security under section 76(1) of the *Nunavut Waters and Nunavut Surface Rights Tribunal Act* (“the Act”) and section 10 of the *Nunavut Waters Regulations*, in furtherance of the Department’s role under the Act and the *Department of Indian Affairs and Northern Development Act*.

At the hearing, after revision of earlier estimates by both parties, TMAC and INAC agreed on a global reclamation cost estimate of \$30,721,116. Following the hearing TMAC checked their tabulation of costs and determined the amount should be **\$30,725,648**. INAC accepts this revised estimate for the total cost of reclamation. (*Note that TMAC’s costs tables also contain cost estimates for the security that will be*



*required for reclamation of the marine infrastructure, which is a combined total of \$563,673. Security for these marine components is outside the Board's jurisdiction and will be held under INAC land authorizations.)*

Given the Minister's obligation in ensuring that the public interest is properly protected, INAC recommends as the default position that the full reclamation cost estimate of \$30,725,648 (as agreed to between TMAC and INAC) be required as security under the Water Licence as the surest way of ensuring the project is not under-secured and no undue burden is placed on taxpayers.

However, INAC recognizes that the KIA is the private land owner, and that the KIA also has an interest in ensuring their own interests are secured. INAC also recognizes that the proponent should not be put in a situation of excessive over-bonding.

On the assumption that the Board may receive evidence of private security held by the KIA, INAC submits that any discounting based on privately-held security must not leave the Crown under-secured for reclamation costs for Crown land or any waters on or in Crown land or Inuit Owned Land. This is to say that, per the Nunavut Mine Site Reclamation Policy, we recognize that there are aspects of this project that fall outside of the Crown's jurisdiction, namely as it relates to privately held Inuit-owned lands. In accordance with our policy, the Department would be satisfied to accept discounting, based on the Board's assessment of evidence of the amount held by the KIA, and evidence that it is held for the purpose of reclamation and in an appropriate form, in an amount that represents the equivalent of liabilities on such privately held lands.

In terms of the allocation between land and water, RECLAIM 7 modelling identifies that 52.6% of the reclamation security costs are related to water based components and the remaining 47.4% of the security costs are related to land components (this apportionment was determined from an allocation of direct costs as determined in AMEC Foster Wheeler's calculations (see INAC submission of September 12, 2016)). For this reason INAC submits that no less than 52.6% (\$16,161,690) of the total reclamation cost estimate should be appointed by the NWB as security to be held by the Minister under the Water Licence regardless of the amount held by the KIA. This represents an increase of \$3,071,691 to the currently furnished \$13,090,000 under the existing License 2AM-DOH1323.

In respect of the basic principles of the Department's policy on Mine Site Reclamation, every mining operation should be able to support the cost of reclamation, and existing mining operations will be held accountable for their reclamation liabilities. Further, adequate security should be provided to ensure the cost of reclamation, including shutdown, closure and post-closure, is born by the operator of the mine rather than the Crown.

To fulfill these objectives, it is crucial that the Board discount only to a percentage of the total amount of security where it is satisfied on evidence before the Board that the land owner actually holds security, and where the Board has reviewed the terms of that security arrangement, and come to the conclusion that the security stands as adequate



security that would otherwise have been fixed by the Board as a condition of the licence, for the purposes of privately held lands.

For the Board's consideration, a discussion paper further detailing criteria to consider privately held security has been included with INAC's submission.

TMAC proposed a change in timing for the provision of security once the Minister approves a licence; the proposal states that *the licensee shall within forty-five (days) of approval of the license by the Minister, furnish and maintain security with the Minister...* INAC has no objections to this proposed change from thirty (30) days to 45 days..

#### Procedures for Future Changes to the Application of Privately Held Security

INAC suggests that the Board should require the licensee to promptly inform the Board of any material change in a private security arrangement that forms the basis for discounting. This is because the amount of private security and the terms of that security are subject to change without notice or approval of the Board. In case of a material change, it would be necessary for the Board to reassess the Water Licence security and potentially fix a new licence security amount by amendment of the licence, to ensure that the total amount held by INAC and the KIA combined is no less than the global reclamation cost estimate.

INAC recommends that the Board *should not* insert procedural requirements for security re-assessment in the licence itself (either for periodic re-assessment or for re-assessment after a material change). Appropriate processes can be developed at the relevant time based on the Board's own judgment and expertise and the flexibility provided by sections 43(1)(b)(iii), 49 and 52(1)(a) of the Act and section 9 of the *Nunavut Waters Regulations*.

As stated during the Public Hearing, the Department remains open to discussions with the Kitikmeot Inuit Association with the aim of co-management of security for reclamation purposes. INAC will advise the Board if these discussions result in any agreement that impacts security requirements under the Water Licence.

Respectfully,

*Original signed by*

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Attachment/



## **Discussion Paper – Criteria for the Consideration of Privately Held Security**

Reducing the global amount of security should occur only where the Board is satisfied that the land owner actually holds security, and where the Board has reviewed the terms of that security arrangement, and come to the conclusion that the security stands in good substitute for security that would otherwise have been fixed by the Board as a condition of the licence.

In considering the privately held security instrument, and any contracts or other limitations governing its access and use, the Department views relevant criteria as including:

- Is the private security available for the same purposes as licence security under section 76(2) (b) of the Act?
- Does the land owner intend to use the security for the same purposes as licence security under section 76(2) (b) of the Act? Is the land owner accepting responsibility to ensure that the purposes of the Act are carried out? Does that include responding to an inspector's direction under section 87 of the Act?
- Can the private security be used for purposes other than those covered in section 76(2) (b) of the Act? If so, the private security could be reduced without fulfilling the purposes of the Act.
- Is the private security more vulnerable to the operator's or land-owner's creditors than Act-based security would be?

Absent clear Board findings that the land-owner actually holds security, and that the security reasonably approximates Crown-held security, the Board should not discount the Water Licence security.

In exercising its jurisdiction towards setting an amount of security under the Water Licence, the Board may consider privately-held security. The following criteria are what the Department sees as important factors that should be satisfied when considering privately held security:

1. On the basis of evidence submitted to the Board, determine what the total cost of abandonment and reclamation of the appurtenant undertaking is likely to be. This is a finding of fact (i.e. via RECLAIM). The evidence in support of this should be provided to the Board well in advance of a hearing on the matter.
2. On the basis of evidence submitted to the Board, determine what private security is held by the land-owner outside of the statutory scheme, including the terms of its access and use. This is a finding of fact. Again, the evidence in support of this should be provided to the Board well in advance of a hearing on the matter.
3. On the basis of the Board's findings of fact about the private security held outside the license regime, determine whether in the Board's view the private security reasonably approximates Crown-held security. This is a decision, not a finding of fact, and requires complex analysis and judgment.



4. On the basis of the above, the Board can then determine how much security to fix within the license for the purposes of 76(1) of the Act and section 10 of the *Nunavut Waters Regulations*, which security would then be furnished and maintained with the Minister of Indigenous and Northern Affairs.
5. Any Type A licence is of course subject to the approval of the Minister of Indigenous and Northern Affairs in accordance with section 56 of the Act.