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NUNAVUT WATER BOARD  
NUNAVUT IMALIRIYIN KATIMAYINGI  
OFFICE DES EAUX DU NUNAVUT

FILE NO: 2AM-LUP0914

May 25, 2009

Honourable Chuck Strahl, P.C., M.P.  
Minister of Indian Affairs & Northern Development  
and Federal Interlocutor for Métis and Non-Status Indians  
21<sup>st</sup> Floor, 10 Wellington  
Gatineau, Quebec K1A 0H4

**Attention: Adria Minski**

**By fax: (819) 953-4941**

Dear Minister Strahl,

**Re: Amendment of Type A Water Licence 2AM-LUP0914 for the Lupin Gold Mine**

I am writing further to your letter of April 8, 2009 and in response to your request for the Board to address the concerns you expressed in that correspondence. To meet your needs, the Board has considered options for a different approach that responds to those matters, pursuant to clause 43(1)(b)(iii) of the *Nunavut Waters Nunavut Surface Rights Tribunal Act*. Through that process, the Board has determined that it is in the public interest to amend condition Part A: Item 2(d) of the Type A Water Licence 2AM-LUP0914 (Licence) issued for the Lupin Gold Mine.<sup>1</sup>

The amended Licence has deleted previous condition: "Part A: Scope, Enforcement and Definitions, Item 2(d): Enforcement" and now contains a new condition "Part J: Conditions Applying to Monitoring, Item 11: Site Monitoring by Canada." We attach the same for your approval.

As the Board noted in our April 14, 2009, letter to you, the current licence for the Lupin Gold Mine Project expired on March 31, 2009 and the site is now operating without a valid water licence. Not having heard from you in the interim, and given this exigency, the Board sends this amendment to you and requests the favour of a reply at the Minister's earliest convenience.

Sincerely,

Thomas Kabloona  
Chair  
Nunavut Water Board

cc: Lupin Mines Incorporated  
Distribution List

<sup>1</sup> Clause 43(1)(b)(iii) of the NWNSRTA states:

**43.** (1) Subject to this Act, the Board may

...(b) amend, for a specified term or otherwise, any condition of a licence

... (iii) where the Board considers the amendment to be in the public interest;

# **NUNAVUT WATER BOARD**

## **AMENDMENT TO LICENCE NO: 2AM-LUP0914**

### **REASONS FOR DECISION – AMENDMENT**

#### **LUPIN GOLD MINE**

**May 25, 2009**

#### **Reasons for Amendment**

As set out in the Board's Reasons for Decision for 2AM-LUP0914 (Decision) issued with the Type A Water Licence 2AM-LUP0914 (Licence) issued for the Lupin Gold Mine (Project) on February 25, 2009,<sup>2</sup> section 70 of the NWNSRTA permits the Board to specify responsibilities of Her Majesty the Queen in the right of Canada for monitoring programs.<sup>3</sup> Pursuant to section 70, the Board issued the Licence with the following condition as Part A: Scope, Enforcement and Definitions, Item 2(d): Enforcement (Part A: Item 2(d)):

#### **2. *Enforcement***

...

(d) Section 70 of the Act permits the Board to specify responsibilities of Her Majesty in right of Canada for monitoring programs. INAC shall carry out a series of inspections annually during Care and Maintenance, to monitor the status of Abandonment, Reclamation and Closure, including a minimum of:

- i. Once in the spring following the initial freshet;
- ii. Once in July, to be conducted in conjunction with the Annual Geotechnical Inspection under Part E, Item 6(g); and
- iii. Once in the 4<sup>th</sup> quarter following receipt of the Engineer's report on the Geotechnical Inspection under Part E, Item 6(g).

Following a request from the Minister to review concerns raised about this condition and consider options for a different approach that responds to those concerns,<sup>4</sup> and pursuant to clause 43(1)(b)(iii) of the Nunavut Water Surface Rights Tribunal Act (NWNSRTA),<sup>5</sup> the Board has determined that it is in the public interest to amend the Licence by deleting Part A: Item 2(d),

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<sup>2</sup> Nunavut Water Board, Record of Proceeding/Reasons for Decision for 2AM-LUP0914, February 25, 2009. [Hereinafter "Decision"].

<sup>3</sup> Section 70 of the NWNSRTA states:

70(1) Subject to this Act and the regulations, the Board may include in a licence any conditions that it considers appropriate, including conditions relating to

...

(c) the studies to be undertaken, works to be constructed, plans, including contingency plans, to be submitted and monitoring programs to be undertaken...

...

(2) The monitoring programs referred to in paragraph 1(c) may specify responsibilities of the applicant, the Nunavut Impact Review Board or Her Majesty in right of Canada.

<sup>4</sup> Letter from Chuck Strahl, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, to Thomas Kabloona, Chair, Nunavut Water Board, dated April 8, 2009.

<sup>5</sup> Clause 43(1)(b)(iii) of the NWNSRTA states:

**43. (1)** Subject to this Act, the Board may

...

(b) amend, for a specified term or otherwise, any condition of a licence

...

(iii) where the Board considers the amendment to be in the public interest;

and adding the following condition as Part J: Conditions Applying to Monitoring, Item 11: Site Monitoring by Canada (Part J, Item 11):

**11. Site Monitoring by Canada**

The Licensee is responsible for the monitoring during Care and Maintenance as set out in this Part. In the event the Licensee fails to carry out monitoring requirements set out in this Part, that are essential to ensuring the integrity of significant site components, including fuel storage, general site deterioration, tailings containment, and water and sewage management, Canada shall carry out such monitoring during periods of highest risk to fresh water.

As set out in the Decision, the condition in Part A: Item 2(d) was established on the basis that increased monitoring of the Lupin mine site by INAC is warranted given the extended five year period of care and maintenance.<sup>6</sup> In the Decision, the Board found this to be consistent with INAC's recommendation to the Board for regular site inspections (which in this context, the Board understands as monitoring) as a proactive measure to avoid potential problems:

A water and wastewater plan should be implemented at the Lupin Site to manage run-off and sewage while the project is in Care and Maintenance. This plan should include regular site inspections as a proactive measure to avoid problems with the accumulation of run-off water as well as wastewater retention and release.<sup>7</sup>

The Board continues to believe that the extended, further five year period of care and maintenance requires close monitoring of the site. By its very nature, an extended period of care and maintenance poses increased risk to the environment, and in particular water resources. There will be prolonged periods of time when there are no employees on site. Furthermore, the site was closed for reasons of economic feasibility.<sup>8</sup> Without revenue generated from operations, there is a risk that over time pressure to minimize the costs of care and maintenance will have an impact on the monitoring of the Project.

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<sup>6</sup> The Decision, at page 18, states (footnotes omitted):

Section 70 of the NWNSRTA permits the Board to specify responsibilities of Her Majesty in right of Canada for monitoring programs. Given the anticipated extended five year period of care and maintenance, the Board has determined that increased monitoring of the Lupin mine site by INAC is warranted. The Board notes that this is consistent with INAC's recommendation regarding the need for regular site inspections as a proactive measure to avoid problems with the accumulation of run-off water as well as wastewater retention and release.

Accordingly, in Part A of the Licence the Board has specified responsibilities for INAC to monitor the mine site through a minimum of three regular inspections to be carried out annually during the period of time the mine site is under care and maintenance: one inspection in the spring following the initial freshet; one inspection in July, to be conducted in conjunction with the annual geotechnical inspection required under Part E, Item 6(g) of the Licence; and one inspection in the fourth quarter of the year following receipt of the engineer's report on the geotechnical inspection under Part E, Item 6(g) of the Licence.

<sup>7</sup> Indian and Northern Affairs Canada, Re: 2AM-LUP0008 – Type A, Water Licence Renewal Application – Lupin Mines Inc. (Zinifex Canada Inc.) – Written Public Hearing Comments pursuant to Section 52 of the Nunavut Waters and Nunavut Surface Rights Tribunal Act, December 3, 2008, at p. 3. [Hereinafter "INAC Written Submission"]

<sup>8</sup> See OZ Minerals, Re: 2AM-LUP Type A Water Licence Renewal Public Written Hearing Lupin Mines Inc., January 6, 2009, at pp. 1-2.

In this case, the Board also notes that the Project is a legacy site that is not subject to the conditions of a Nunavut Impact Review Board Project Certificate and associated monitoring permitted under Article 12 of the Nunavut Land Claims Agreement (NLCA). Moreover, approving an extended period of care and maintenance effectively approves deferring the reclamation obligations of the operator and the environmental protection afforded by full reclamation.

However, upon review of Part A: Item 2(d), the Board defers to the Minister's opinion that the condition as it is presently worded and its location under Part A of the Licence titled "Scope, Enforcement and Definitions", may not fully accord with the Board's jurisdiction pursuant to section 70 of the Act. The Board also agrees with the Minister that it is possible to incorporate greater flexibility in the Licence to ensure that Canada is only required to carry out the monitoring when the Licensee is in non-compliance with the monitoring requirements set out in the Licence, and still achieve the Board's objective of ensuring critical components of the site are monitored. Further, the Board is of the view that the monitoring may be carried out by departments other than INAC, and while there are critical times for monitoring certain aspects of the site, more flexibility is possible. The revised condition set out in Part J: Item 11 is intended to address these matters.

### **Other Matters:**

The Minister also expressed concern regarding the Board's decision to issue the Licence with the condition that a Care and Maintenance Plan be submitted no later than 30 days following the approval of the Licence by the Minister.<sup>9</sup> The Board appreciates the Minister's understanding that there are challenges in determining which plans should be included in an application for it to be considered complete. The Board relies heavily on submissions by Federal and Territorial Departments and Agencies to assist the Board with making these sometimes difficult determinations, particularly in circumstances where a site is already operating and in various states of compliance with an existing licence.

In this case, through the course of the Hearing and based on the submissions of parties, the Board determined that a number of issues needed to be addressed in an updated Care and Maintenance Plan. These issues included addressing the covering exposed tailings to a standard consistent with the updated Abandonment, Closure and Reclamation Plan, or justify to the Board any lesser or interim approach to covering exposed tailings; addressing stormwater and wastewater management issues; and potential harm to migratory birds and wildlife from frequenting water within tailings facilities.<sup>10</sup>

In its Decision, the Board acknowledged INAC's request to have an updated Care and Maintenance Plan submitted prior to the Board issuing the Licence.<sup>11</sup> However, that request was not submitted to the Board until INAC's January 13, 2009, closing submission for the Hearing. In INAC's earlier written submission dated December 3, 2008, the issue of timing for the updated Care and Maintenance Plan was not raised:

The Lupin Project is considered to be in a state of Care and Maintenance (C&M). It is suggested that Zinifex Canada Inc provide a formal C&M Plan for the Lupin

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<sup>9</sup> Part I: Conditions Applying to Abandonment, Reclamation and Closure Planning, Item 2 states: The Licence shall, no later than thirty (30) days following approval of the Licensee by the Minister, submit to the Board for approval, a Care and Maintenance Plan that shall be prepared in accordance with Schedule I, Item 2.

<sup>10</sup> See Decision, at p.21.

<sup>11</sup> See Decision, at pp. 21-22.

Project which would include water quality monitoring, fuel storage, equipment storage, site maintenance, water usage and all other components associated with the Lupin site.<sup>12</sup>

Accordingly, at the close of the Hearing, the Board was in the position of having to decide whether to place the Licensee in a position of not holding a valid water licence during the time the Care and Maintenance Plan was updated and approved as requested by INAC; or, issue the Licence subject to the condition that an updated Care and Maintenance Plan addressing the issues raised at the Hearing be submitted within 30 days of approval of the Licence.

In making its decision, the Board saw no gain in the former, particularly given the decision by the Board, with the approval of the Minister, in October 2008, to amend the term of the Lupin Licence on an emergency basis (i.e. without public notice, and without public hearing) to March 31, 2009, to allow LMI to carry out the normal functions under the existing licence.

Looking to the future, the Board appreciates the Minister's acknowledgement of the work the Board is doing to clarify the expectations for completeness of water licence applications through the development of Guides. The Board also appreciates the ongoing participating of INAC in assessing applications and participating in the Board's review processes.

A handwritten signature in dark ink, appearing to read 'T. Kabloona', with a long horizontal flourish extending to the right.

Thomas Kabloona  
Chair  
Nunavut Water Board

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<sup>12</sup> INAC Written Submission, at p. 3.