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NUNAVUT WATER BOARD
NUNAVUT IMALIRIYIN KATIMAYINGI
OFFICE DES EAUX DU NUNAVUT

March 4, 2019

NWB File No: 2AM-MEA1526

By Email

Jamie Quesnel
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Luis Manzo
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Re: Follow Up Guidance of the Nunavut Water Board (NWB) Regarding NWB Jurisdiction to Conduct a Water Compensation Determination in Relation to the Amendment to Water Licence No: 2AM-MEA1526 by Agnico Eagle Mines Limited to Allow In-Pit Tailings Deposition at the Meadowbank Gold Mine

Dear Messrs. Quesnel and Manzo:

As indicated in the teleconference on February 28, 2019 hosted by the Nunavut Water Board (NWB or Board) to discuss general process questions pertaining to the NWB's Water Compensation Determination Process in Relation to the Amendment to Water Licence No: 2AM-MEA1526 by Agnico Eagle Mines Limited to Allow In-Pit Tailings Deposition at the Meadowbank Gold Mine (the Amendment Application) this correspondence has been prepared by the Board in response to the jurisdictional question raised by Agnico Eagle Mines Limited (Agnico Eagle or the Applicant) at the commencement of the teleconference regarding whether the Board has jurisdiction to conduct a Water Compensation Determination in the current circumstances.

Briefly put, Agnico Eagle suggested the requirements set out in Article 20 of the *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada (Nunavut Agreement)* as brought forward under ss. 62-68 of the *Nunavut Waters and Nunavut Surface Rights Tribunal Act, 2002, c. 10 (NWNSRTA)* should not apply because to the NWB's consideration of the Amendment Application because:

- There is already a water compensation agreement in place for the overall Meadowbank Gold Mine Project between Agnico Eagle and the Kivalliq Inuit Association (KIA) that could govern the activities as modified under the Amendment Application until an updated agreement is negotiated; and
- The language used in s. 63 of the *NWNSRTA* states the Board shall not issue "a licence in respect of a use of waters or a deposit of waste that may substantially affect the quality, quantity or flow of waters flowing through Inuit-owned land, unless...", and in this case,

the NWB is not issuing a “licence” but rather an amendment to a Licence.

During the teleconference, the NWB indicated that as these challenges to the Board’s jurisdiction to conduct a Water Compensation Determination as required by the *Nunavut Agreement* and as set out in the *NWNSRTA* had not been identified in advance of the teleconference, the Board would not require the parties to address these issues further, the Board would consider the questions and would provide the Board’s views, and if necessary additional Board guidance regarding this question.

On this basis, the Board provides the follow up guidance below. At the outset, the Board notes that the starting point in the analysis of the Board’s jurisdiction to require confirmation that water compensation has been provided to the Designated Inuit Organization for licensed water uses and waste deposits or to conduct a water compensation determination process to determine the appropriate water compensation is found in Article 20. As set out below, the wording in Article 20, Section 20.3.1 makes it clear that the trigger for requiring water compensation by agreement or via NWB determination is when a proponent of a “project or activity” for which a licence is sought and may cause loss or damage due to the change in quality, quantity or flow of water flowing through Inuit Owned Lands.

20.3.1 No project or activity within the Nunavut Settlement Area which may substantially affect the quality of water flowing through Inuit Owned Lands, or the quantity of such water, or its flow, shall be approved by the NWB unless the applicant for a licence has entered into a compensation agreement with the DIO for any loss or damage which may be caused by the change in quality, quantity or flow of the water or the NWB has made a determination in accordance with Section 20.3.2. [underlining added for emphasis]

20.3.2 The applicant and the DIO shall negotiate in good faith for the purpose of reaching an agreement on compensation referred to in Section 20.3.1, but in the event that they are unable to reach agreement, either may refer the determination of the appropriate compensation to the NWB, and the decision of the NWB shall be binding.

Given that the broad wording of the *Nunavut Agreement* establish the NWB’s jurisdiction and obligations in this regard, with the specific wording in the *NWNSRTA* only providing more detail regarding the process and procedure for the NWB’s exercise of that jurisdiction, Agnico Eagle’s suggestion that the Amendment Application does not trigger the requirement for water compensation to be confirmed (by the agreement of Agnico Eagle and the KIA) or be determined by the NWB because it involves an amendment and not a new licence is incorrect as it does not reflect the requirements of Article 20 of the *Nunavut Agreement*.

Similarly, the Board also does not find Agnico Eagle’s assertion that because there is already a water compensation agreement in place between Agnico Eagle and the KIA for the overall Meadowbank Gold Mine Project the NWB should not “hold up” the Board’s consideration of the Amendment Application while the parties negotiate an updated agreement to reflect the activities

as modified under the Amendment Application to accurately reflect the requirements of Article 20 and s. 63 of the *NWNSRTA*. Clearly, unless and until there is a compensation agreement in relation to the specific loss or damage which may be caused by the change in quality, quantity or flow of the water associated with the water use and waste deposit activities proposed in the In-Pit Tailings Deposition Project outlined in the Amendment Application, the NWB shall not approve the project or activity under the Licence.

Consequently, as set out by the Board in correspondence on February 27, 2019:

As indicated previously, as required under s. 63 of the Nunavut Waters and Nunavut Surface Rights Tribunal Act, S.C. 2002, c. 10 (NWNSRTA) the NWB cannot consider the issuance of an amendment to a water licence unless there is confirmation that the applicant (Agnico Eagle) has entered into an agreement with the Kivalliq Inuit Association (KIA) to pay compensation for any loss or damage that may be attributable to the amendments to the current Meadowbank Licence necessary to approve the In-Pit Tailings Disposal Proposal. The NWB requires confirmation of compliance with s. 63 before the record for the Amendment application can be closed and the matter remitted to the NWB's duly appointed Panel for decision-making.

As the Board's jurisdiction as established under the *Nunavut Agreement* appears to the Board to be plain and obvious, the Board does not see any benefit in delaying the NWB's Water Compensation Determination Process further by seeking submissions of the parties in respect of this point. If Agnico Eagle wishes for the NWB to not proceed with a Water Compensation Determination, Agnico Eagle can withdraw their request under s. 63(1)(b) before the Board undertakes any further steps in the conduct of the determination.

If the Board does not receive a withdrawal request from Agnico Eagle by March 7, 2019 the Board will continue with the Water Compensation Determination Process and will, as requested by Parties issue further procedural guidance when the Board has been able to convene their decision-making panel for the file, this guidance is expected to include timing and form of hearing that will be required by the Board.

In closing, the Board appreciates Agnico Eagle and the KIA filing their responses to the Board's general questions in accordance with the very short timelines set out on Thursday. These submissions will be considered by the Board's decision-making Panel to determine next steps, as will the Guide to Water Compensation Determinations, including the Discussion Draft Water Compensation Determination Process Agreement that was appended to the Board's February 27, 2019.

If you have any questions or require further direction while you await further Board guidance with respect to this matter, please contact Assol Kubeisnova, Technical Advisor, at (867) 360-6338 or via e-mail at assol.kubeisnova@nwb-oen.ca or Karén Kharatyan, Director of Technical Services, at (867) 360-6338 or via e-mail at karen.kharatyan@nwb-oen.ca.

Regards,

Stephanie Autut
Executive Director
Nunavut Water Board

cc Kimberley Gilson, KIA Legal Counsel, Duboff Edwards Haight & Schacter
Christine Kowbel, Legal Counsel Agnico Eagle, Lawson Lundell