



April 22, 2015

Your file - Votre référence  
2AM-MRY1325

Our file - Notre référence  
IQA-N9545-2-3.2AM.MRYA

Phyllis Beaulieu  
Manager of Licensing  
Nunavut Water Board  
GJOA HAVEN, NU X0E 1J0

**Re: Submission on Mary River Project Baffinland Iron Mines Corporation's Application to Amend Water Licence #2AM-MRY1325**

Dear Ms. Beaulieu:

I am responding to the Nunavut Water Board's Pre-Hearing Conference Decision dated February 25, 2015 with Aboriginal Affairs and Northern Development Canada's submission in the Mary River Project water licence amendment process.

In addition to this cover letter, AANDC's submission includes the technical memorandum prepared by AANDC staff, dated April 22, 2015 (attached).

AANDC's submission is provided in furtherance of our Department's role under the *Nunavut Waters and Nunavut Surface Rights Tribunal Act* ("the Act") and the *Department of Indian Affairs and Northern Development Act*.

This letter sets out AANDC's recommendations to the Nunavut Water Board regarding the terms of the amendment requested by Baffinland, including the fixing of security under section 76(1) of the Act and section 10 of the *Nunavut Waters Regulations*. This letter begins with recommendations specific to this application, following which we provide some important background explanation on security discounting in the subsequent section.

Part I: Site Specific Water Licence Security Recommendations:

1. The existing Part C and the existing Schedule C of the licence are capable of being misread. It is not sufficiently clear that the Board has no jurisdiction over the private security held by QIA outside the water licence. Part II of this submission addresses more generally the role of the Board in relation to private security held outside the licence.

AANDC recommends that both Part C and Schedule C be thoroughly revised to more clearly indicate that the *only* security within the Board's jurisdiction is the security fixed the Board within the licence and accordingly furnished to the Minister of Aboriginal Affairs and Northern Development. AANDC believes that Part II of this letter provides useful terminology and we would be happy to provide more specific suggested changes, if the Board would find that helpful.

Without limiting that broader recommendation, AANDC suggests that the Board not accept Baffinland's suggested changes to licence Part, C paragraph 1 to the extent that they address the QIA security. The licence should deal only with matters within the jurisdiction of the Board. This recommendation is for the purposes of clarity and should not affect the substance of Baffinland's request.

2. This project has just undergone a security quantification process within the 2015 Annual Security Review Process. If the 2015 Work Plan that formed the basis of the 2015 ASR remains an accurate reflection of what Baffinland intends to do in the 2015-2016 period, then the 2015 ASR's assumptions remain valid and the Board does not need to re-evaluate security at this time. However if Baffinland intends to exceed the scope of work that was assessed in the 2015 ASR, then Baffinland must provide the evidence of the increased scope of work and the reclamation cost estimates associated with that increase.
3. If it is necessary for the Board to reconsider security quantum because the 2015 ASR assumptions are no longer valid, then the following recommendations apply:
  - a. AANDC recognizes that there is a private land owner seeking to ensure that its own interests are also secured. However, in the absence of necessary evidence on private security for the marginal increased reclamation cost estimates, AANDC recommends that the entire increase should be secured in the water licence.
  - b. Because a small portion of the project takes place on Crown land, AANDC reminds the Board of its submissions throughout the Baffinland licensing process that discounting based on private security must not leave the Crown under-secured either for reclamation costs for Crown land or waters in or on Crown lands.
  - c. If BIMC and QIA enter into further security arrangements after the Board is able to take them into account in this process, then BIMC can apply to the Board at the appropriate time for a reduction in security as part of an amendment process. At that point, BIMC would still need to provide the evidence and submissions referred to in this letter and the Board would have to determine whether that security arrangement is a good substitute for security under the Act, and therefore a reasonable basis to discount the licence security.
4. AANDC is aware that both Baffinland and QIA are interested in moving away from a rigid annual approach to security re-estimation and reconsideration. AANDC sees merit in this approach.

From the outset, Baffinland has requested that the Board take a graduated approach to reclamation cost estimation and security requirements. As a result, this licence authorizes a project scope that is greater than the basis on which reclamation cost is currently being estimated. Therefore the Board must take steps to keep work plan assumptions and security requirements aligned.

To support this alignment between work plans and security, AANDC recommends that the licence clearly limit the permitted scope of work to an approved work plan, whether work plans are developed for one-year periods, longer periods or for phases or milestones.

Underlying this recommendation is the assumption that before approving a work plan, the Board must determine that all components of the work plan have been secured – either by appropriate private security, or by security fixed by the Board within the licence – in consideration of the peak reclamation cost estimated to occur under that work plan.

It is not clear why the matters in Schedule J are being addressed separately from the matters addressed in Part C and Schedule C. AANDC recommends that the Board consider further integrating those matters.

5. The licence should require Baffinland to inform the Board promptly of any material change in a private security arrangement that has formed the basis for discounting. The rationale for this recommendation is explained in Part II of the letter.
6. Schedule C should be amended to give the Board more procedural flexibility in conducting re-evaluations of the security. The rationale for this recommendation is explained in Part II of the letter.
7. Schedule C can be read as suggesting that the security under the licence could be changed without amendment to the licence. AANDC recommends that the licence should be amended to remove that implication.
8. For all future security re-evaluation processes, AANDC recommends that the Board should adopt the evidence-based approach to discounting on the basis of private security that is discussed more fully in Part II of the letter.
9. AANDC recommends that the Board reconsider the text in Part B, section 16. A term or condition of a licence cannot be altered except by amendment of the licence.

## Part II: The Approach to Discounting

In the last several years, AANDC has supported an approach in which the Nunavut Water Board reduces the amount of security it orders under the water licence on the basis of private security held outside the water licence regime. The purpose of this approach is to reduce 'over bonding', which can occur when an operator must secure the same reclamation activities to two secured parties, in this case the Crown under the Act and the private landowner under their contractual arrangements.

AANDC's support for discounting to avoid over-bonding is conditional. The primary consideration is that in case of operator insolvency, there is adequate security to ensure that environmentally responsible shut-down, interim care and maintenance, and reclamation can be conducted without the Crown or the landowner incurring costs that should have been borne by the operator.

To achieve this objective, it is crucial that the Board discount only where it 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.

While the Board has decision-making responsibility in fixing the amount of security under the water licence, the operator bears the burden of proving that private security outside the licence is a good

substitute for water licence security. That requires the operator to furnish the necessary evidence in a timely way, and provide a satisfactory explanation of why reliance on this private security justifies the Board exercising its jurisdiction to secure less than the full reclamation cost estimate.

Looking at both the security instrument, and any contracts or other limitations governing its access and use, the operator, potentially with the support of the land-owner, would have to establish that:

- The private security available for the same purposes as licence security under section 76(2)(b) of the Act;
- The land owner intends to use the security for the same purposes as licence security under section 76(2)(b) of the Act;
- The land owner is accepting responsibility to ensure that the purposes of the Act are carried out, including responding to an inspector's direction under section 87 of the Act;
- The private security cannot be used for purposes other than those covered in section 76(2)(b) of the Act. Unless that is the case, the private security could be reduced without fulfilling the purposes of the Act. For example, if the security could be drawn as compensation for damages, as opposed to funding physical remediation, the purposes of the Act would not be fulfilled; and
- The private security is no 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.

It should be clear from the above that the Board does not establish how much security a private land-owner might negotiate with an operator on their land, nor does the Board control the terms of that arrangement. Rather, the Board can consider privately-held security in coming to its conclusion in how to exercise its own jurisdiction in fixing security within the licence. The following sets out what the Department sees as the Board's role in this process:

1. On the basis of evidence, determine what the total cost of abandonment and reclamation of the appurtenant undertaking is likely to be. This is a finding of fact.
2. On the basis of evidence, determine what private security is held by the land-owner outside of the statutory regime, including the terms of its access and use. This is a finding of fact. 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 statutory 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.

In AANDC's view, the Board could only be in a good position to conduct this analysis if it is supported by written submissions on that point by the operator, provided well in advance of the hearing. The security arrangement and proponent's submissions, once provided to the Board, would be available for public review so that that AANDC, the landowner, and other interveners would be able to assess and provide comment. Cross-examination on relevant issues may also

be helpful to the Board.

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

#### Discounting – Procedural Issues for Future Changes

AANDC 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.

AANDC 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*. In AANDC's experience, the procedural requirements of a given situation are difficult to predict, and therefore should not be fixed in a licence because that makes them unmodifiable without a licence amendment.

It is hoped that the information the department has provided is of assistance to the Board in carrying out its roles and responsibilities in the water licensing process. If you have any questions or need more information, please do not hesitate to contact Sarah Forté, Water Management Coordinator at [Sarah.Forte@aandc-aadnc.gc.ca](mailto:Sarah.Forte@aandc-aadnc.gc.ca) or telephone at (867) 975-3876.

Sincerely,

*Original signed by*

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Encl.

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