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## **Parliamentary Standing Committee On Aboriginal Affairs and Northern Development**

Bill S-6: An Act to amend the *Yukon Environmental and Socio-Economic Assessment Act* and the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*

### **Written Submissions Of the Nunavut Water Board**

**Date of Appearance: Thursday, March 26, 2015**

#### **Contact Information:**

Ben Kogvik, Board Secretary  
Nunavut Water Board

#### **Written Submission**

#### **The Nunavut Water Board Roles and Responsibilities in Relation to Bill S-6**

#### **Integrated Regulatory System**

These submissions are provided on behalf of the Nunavut Water Board (subsequently the “Board” or “NWB”), an Institution of Public Government established under Article 10, Section 10.1.1 of the *Nunavut Land Claims Agreement* (“NLCA”). Article 13, Section 13.2.1 of the NLCA establishes that the NWB: “...shall have responsibilities and powers over the regulation, use and management of water in the Nunavut Settlement Area.”

The NLCA defines “water” to mean:

*...waters in any river, stream, lake or other body of inland waters on the surface or under ground in the Nunavut Settlement Area, and includes ice and all inland ground waters, but does not include water or ice in marine areas.*



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Reflecting the roles and responsibilities established under the NLCA, the NWB is part of the integrated regulatory system found in Nunavut and is responsible for water management, including processing applications for water licences to authorize the use of freshwater in the Nunavut Settlement Area and the deposit of waste into such waters. Under the integrated regulatory system established by the NLCA, project developments, such as resource exploration, mines, oil and gas development, hydroelectric projects, quarries, etc. are required to progress from land use planning conformity assessment by the Nunavut Planning Commission (if not exempt) to ecosystemic and socio-economic impact assessment by the Nunavut Impact Review Board (if not exempt) prior to the project development proceeding to the licensing and permitting stage, including water licensing by the NWB. As regulatory enhancements to the land use planning and project assessment components of the Nunavut system are the subject of separate legislation, the *Northern Jobs and Growth Act*, S.C. 2013, c. 14 (royal assent June 19, 2013), which, when declared in force will enact the *Nunavut Planning and Project Assessment Act*, the Nunavut portion of Bill S-6 does not affect the land use planning and project assessment aspects of the Nunavut regulatory system.

### **Legislative Framework**

The Nunavut Water Board was established in 1996 and was governed primarily by the NLCA until the Board's specific legislated base, the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*, S.C. 2002 (subsequently referenced as the "NWNSRTA" or "the Act") which came into force in April 2002. The NWNSRTA not only further defined the Board's roles and responsibilities, it also clarified the legal status of the Board (indicating that the Board could hold property in its own name) and allowed for the Board to carry out various functions, including making licensing decisions, through the use of smaller Panels of Members designated by the full Board. The NWNSRTA has remained unchanged since the Act came into force in 2002.

In 2013, following consultations by Aboriginal Affairs and Northern Development and a Public Hearing by the Nunavut Water Board, the *Nunavut Waters Regulations*, SOR/69-2013 came into force. The *Nunavut Waters Regulations* further modified the Board's roles and responsibilities and included key provisions that allow the Board to authorize specific *de minimus* water uses and waste deposits without licences and allow the Board to use an electronic registry system to fulfill the Board's public registry requirements.

### **Participation of the NWB In the NWNSRTA Amendment Process and General Comments on Bill S-6**

In January 2014, the NWB was invited to participate in a Working Group considering various amendments to the NWNSRTA. With a clear interest and commitment to supporting the process of regulatory enhancement in Nunavut, the Board's Executive Director and legal counsel



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participated in the Working Group, attending several teleconferences, in person meetings and providing several written submissions from January-April 2014 with the goal of ensuring that the amendments are effective and practical in:

- streamlining water licensing processes in Nunavut;
- ensuring timely and predictable consideration of water licence applications, including thorough and appropriate engagement of a variety of stakeholders; and
- providing additional and expanded tools for enforcement of the Act, thereby enhancing water stewardship and more effective water resource management.

When Bill S-6 was introduced, the Board was pleased to note that many of the proposed revisions reflected the discussions, concerns, comments and views of the Working Group participants. Accordingly, the Board generally supports the amendments as proposed in Bill S-6.

## Key Areas of Specific Comment

### 2.2.2 Term of Licence (Replacement of s. 45)

As described under Item 2.2.2 of the Legislative Summary of Bill S-6,<sup>1</sup> under the proposed section to replace the existing s. 45 of the NWNSRTA, the Board is expressly authorized to issue licences in certain circumstances that exceed 25 years and extend to the whole of the “anticipated duration of the appurtenant undertaking”. The Board has concerns that in the absence of a regulatory definition of “anticipated duration” or greater clarity around concepts such as the “end of life” with respect to mining or other industrial undertakings, and in the absence of consensus amongst regulators and enforcement authorities regarding precisely when an undertaking is at an end and no longer requires an active water licence, the NWB will be required to develop a working definition of “anticipated duration” on a project-specific basis.

It appears to the NWB that the Minister of Aboriginal Affairs and Northern Development, in his role as the holder of financial security, is best situated to provide guidance on precisely when a mining undertaking has truly reached the “end of life” and no longer requires regulatory authorizations, as contemplated in the *Mine Site Reclamation Policy for Nunavut*, which states:

<sup>1</sup> Legislative Summary, S. Bankes, *Bill S-6: An Act to amend the Yukon Environmental and Socio-economic Assessment Act and the Nunavut Waters and Nunavut Surface Rights Tribunal Act*, Publication No. 41-2-S6-E (Library of Parliament: Ottawa, June 18, 2014), subsequently “Legislative Summary of Bill S-6”.



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*When the Minister is satisfied the operator has met the requirements for decommissioning under the relevant legislation and that the objectives of the plan have been fully met, the Minister will provide the mining company with a written acknowledgement to that effect.<sup>2</sup>*

Without some definition or discussion of the factors to be considered in assessing what the term of “anticipated duration” is intended to encompass, it is unclear whether the “anticipated duration” of an undertaking should include post-reclamation monitoring for a specified period or should be limited solely to the point in time when the appurtenant undertaking has permanently ceased operation. Alternatively, the endpoint of the “anticipated duration” of an undertaking may be when the appurtenant undertaking has been reclaimed to the point where no water use or active waste deposit is occurring, but there may yet be on-going monitoring taking place to confirm that the site remains in a steady state. “Anticipated duration” could also be considered to extend until the undertaking has been permanently abandoned with no remaining requirements for monitoring of the site at all.

Without certainty on this key concept, the Board does not see that this replacement of s. 45 actually furthers the goals of regulatory certainty for all parties when the Board is asked to issue, at the outset, a licence for the entire “life of mine” for a given undertaking.

The Board has recently considered two (2) licence renewals where the life of mine issue was a central issue in the consideration of these applications.<sup>3</sup> Throughout the Board’s processing of these applications it was apparent that there was no consensus amongst stakeholders as to what point in abandonment and reclamation an undertaking can truly be said to be fully reclaimed and no longer requiring a water licence.

In addition, although the Board has recognized in past decisions the desire on the part of applicants to have regulatory certainty regarding the applicable licence terms and conditions for the life of an undertaking, the Board also recognizes the central role of the water licensing renewal process in ensuring on-going opportunities for meaningful community engagement with licensees and the Nunavut regulatory system. As summarized in the NWB’s Reasons for Decision denying the Applicant’s request for a full life of mine term in the Shear Diamonds (Nunavut) Corp. Renewal Application for a Type “A” Water Licence:

*Although the Board commends the Applicant’s commitment to transparency and maintaining a dialogue with the mine’s regulators during the term of the Licence and recognizes the Applicant’s willingness to provide quarterly reports and a compliance*

<sup>2</sup> *Mine Site Reclamation Policy for Nunavut*, Minister of Indian Affairs and Northern Development, (Ottawa: Minister of Public Works and Government Services Canada, 2002) at p. 11.

<sup>3</sup> Renewal and Amendment of Licence 1AR-NAN0914 (Reclamation Project for the Nanisivik Mine site); and Renewal of Water Licence 1AR-POL0311 (Reclamation and Post-Closure Monitoring of the Polaris Mine Site).



*report at the half way point of a 14-year term, the Board emphasizes that while these measures are useful to the regulators, such written reporting is not a substitute for the engagement of community members and interested parties that occurs during the public hearing processes associated with a renewal application. As was apparent in the participation of community members at this Hearing, a licence renewal gives the community an opportunity to ask questions regarding monitoring data,<sup>4</sup> review and consider proposed mitigation measures and provide the Applicant with the benefit of local knowledge and wisdom regarding effects that may not otherwise be identified solely through the monitoring and reporting measures required by regulators.*

*In addition, under the NLCA and the Board's Rules, the Board is responsible for ensuring the NWB processes give "due regard and weight to Inuit culture, customs and knowledge,"<sup>5</sup> and the Applicant's proposed filing of several technical written reports over the course of the proposed 14 year term does not reflect the strong oral tradition inherent in Inuit culture. These measures also do not provide sufficient opportunity for elders and other community members to share their local and traditional knowledge and their concerns in a format that is appropriate and respectful of their customs. Although the Board is not suggesting that the NWB's licensing process is the only way the Applicant can engage the community, the Board does note that this is an essential and important component of the Board's licensing process that is not addressed by the measures proposed by the Applicant.<sup>6</sup>*

In addition, the Board notes that concerns have been expressed by participants in water licensing that even for terms that extend beyond 10-15 years there is concern that a licence issued at the construction phase will not be responsive to technological improvements over the operating life of an undertaking. The Board notes that a similar concern was noted by Senator Ringuette in the Senate Committee on Energy, the Environment and Natural Resources during the presentation of Bill S-6 by the Honourable Minister Valcourt, on September 18:

***Senator Ringuette:** I can understand Senator Lang and the desire for certainty in the future. However, going from one end of the spectrum to the life-of-the-project licence that could be, as the minister said, 25, 30 years and so forth without any review, we all know that there's constant evolution in regard to environmental equipment and technology and so forth that could be part of conditional licensing.*

*I can understand the desire to have greater certainty, but I'm puzzled by the fact that one*

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<sup>4</sup> See for example comments by Donald Havioyak, Nunavut Water Board Hearing Re: Shear Diamonds (Nunavut) Corp., Hearing Transcript, November 30, 2011, p. 172, lines 3-30 and p. 245, lines 4-20, and comments by Barbara Adjun, Nunavut Water Board Hearing Re: Shear Diamonds (Nunavut) Corp., Hearing Transcript, November 30, 2011, p. 243, lines 12-17.

<sup>5</sup> NLCA, Article 13, Clause 13.3.13(b) and NWB Rules, s. 22.1.

<sup>6</sup> Nunavut Water Board, Record of Proceeding/Reasons for Decision: 2AM-JER1119 Type A--Licence Renewal, December 21, 2011 at pp. 37-38.



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*could have a licence for 25, 30 years without any review or needed condition with regard to environmental protection due to the constant evolution “rapid evolution” of environmental technology and equipment and so forth.<sup>7</sup>*

### 2.2.3 Time Limits (ss. 55.1-55.6)

#### **Board Appointments**

Although the Board recognizes and supports the goals of regulatory certainty and timeliness that underlie the amendments proposed to impose general timelines on the water licensing process, the Board does have concerns that these provisions are not sufficiently flexible to account for the issues beyond the NWB’s control that can - and regularly do - affect the Board’s ability to process applications in compliance with the 9 month time limit proposed under s. 55.2. For example, the Board has no control over ensuring that Board Member appointments are conducted in a timely manner that do not compromise the Board’s ability to make quorum, to ensure Panels are properly balanced as required under the NWNSRTA and the NLCA and to reasonably allocate the Board’s workload amongst the Board Members (all of whom are part-time).

A case in point is that until October 2014, when the Board finally achieved a full complement of 9 (nine) Board Members, two positions on the Board had been vacant for almost two (2) years (2012-2014). As a result of late appointments and staggered 3 year terms, there is also the potential every 2 and ½ years for the Board to lose quorum when, in a single year, the term of up to five (5) Board Members end. In those years (December, 2012 was the most recent one and 2016-2017 is the next 12 month period when 7 Board Member’s terms are set to expire) if Board Members’ terms are allowed to expire before reappointment and/or there is a delay while new Board Members are appointed, the Board loses quorum when there are only 4 active members. Although some Board business can continue via Board Panels, this situation creates undue strain on the existing Board Members, and often requires that the Chair extend, for specific purposes, the terms of expired Members to fully complete their decision-making role in respect of matters for which they can be said to be seized. Overall, such disruptions in membership threaten the Board’s ability to conduct timely consideration of water licence applications and are outside of the Board’s control.

#### **Board Funding**

In the Board’s previous written submissions to the Senate Committee on Energy, the Environment and Natural Resources in September, 2014, the Board also identified chronic Board underfunding and the uncertainty inherent in the annual budgeting process as also potentially

<sup>7</sup> Unrevised/Draft Transcript, ENEV51572, September 18, 2014, 0800 at pp. 20-21.



impacting the Board's ability to fulfill their licensing obligations in accordance with the timelines prescribed in Bill S-6. Just recently, the Board has been advised by Aboriginal Affairs and Northern Development Canada's Implementation Branch that the significant funding shortfall that has plagued the Board for more than a decade is being addressed with a substantial increase to the Board's core funding. While the Board is grateful and hopeful that this increase will support a more sustainable and long-term mechanism for funding the Board's operations during an unprecedented increase in the Board's workload, some issues surrounding the annual budgeting process and the potential for gaps in the approval and disbursement of funds associated with those budgets (particularly at times such as the fiscal year end) remain to be worked through. Although cautiously optimistic, the Board remains concerned about the adverse effect that funding gaps may have on the Board's ability to meet the timelines prescribed in Bill S-6.

### **Capacity of all Participants**

In addition to concerns about the Board's internal capacity to meet the growing workload, the Board is also beginning to notice that there are limits on the extent to which stakeholders such as government agencies, designated Inuit Organizations, local Hunters and Trappers Organizations and community representatives have the time, expertise, human and financial resources to participate in a meaningful way in the water licensing processes that rely so heavily on such active input. These capacity challenges are limiting the ability of stakeholders to respond to Board mandated timelines, information requests and expectations to provide expertise. It should be remembered that, in contrast to other parts of Canada, there is currently no participant funding program in place for any of the regulatory processes in Nunavut. Accordingly, non-governmental participants such as community groups or hunters and trappers organizations do not have access to funding to support their involvement in the Board's processes. This point was recently emphasized by Nunavut Tunngavik Inc. in the context of a Nunavut Impact Review Board Hearing in respect of the proposed Meliadine Gold Mine Project but the observations apply in the context of the NWB licensing processes as well:

*One of the things we've been working on, or, I guess, stressing, have had discussions with the NIRB Board as well before, is the lack of a participant funding program in Nunavut. For the HTOs or the RWOs to participate, they need capacity, whether it's staff or the financial resources to be able to hire consultants or people that are specialists in this area to help them prepare and participate in the NIRB hearing process...the point we would like to make is, it's important to have the resources and the capacity to contribute and participate fully in this process so that we're able to identify any issues and concerns now, as opposed to a year or two down the road when it's a lot more difficult to address*



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*any concerns or issues the communities may have.*<sup>8</sup>

In addition, the Board has noticed recently that governmental participants are also identifying financial and human resource limits on their ability to provide technical input that is vital to the comprehensive and integrated consideration of licence applications. This lack of stakeholder capacity can jeopardize the goals of effective licensing, as noted in one of the Board's recent decisions:

*(...) the NWB relies upon the expertise and experience of interested parties, such as Environment Canada and the Department of Fisheries and Oceans Canada to ensure all technical issues are defined in the full and proper assessment of the Amendment Application both at the Technical Meeting and at the Public Hearing stages of the Board's licensing process. A lack of participation and limits on the contributions of these parties is a serious concern to the NWB and threatens the achievement of the Board's objectives of a comprehensive, thorough, integrated and timely licensing process.*<sup>9</sup>

Without the addition of amendments to address these capacity and funding challenges, the NWB has concerns about having the obligation to comply with timelines that may be adversely and unavoidably influenced by circumstances beyond the Board's control.

### **Other Coordination Initiatives**

Finally, although Bill S-6 recognizes that the Board's time limits may be paused during periods of coordination with the Nunavut Planning Commission and the Nunavut Impact Review Board, the NWB is also working on agreements similar to the NIRB/NWB Detailed Coordinated Process Framework with other regulators such as the National Energy Board, the Canadian Nuclear Safety Commission and other agencies with jurisdiction over the assessment of projects outside the Nunavut Settlement Area (NSA) but with the potential for transboundary impacts on waters within the NSA. By not referencing suspension of the NWB's timelines under s. 55.5 during periods of coordination with these other regulators and their processes, the NWB may have difficulty reconciling the Board's interjurisdictional water management obligations under Article 13, sections 13.10.1 and 13.10.2 of the *Nunavut Land Claims Agreement* and the time limits imposed under s. 55.2.

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<sup>8</sup> B. Dean, Nunavut Tunngavik Inc., NIRB Public Hearing File No.: 11MN034, Transcript, August 21, 2014 at pp. 145-146, lines 11-19 and lines 9-16.

<sup>9</sup> Nunavut Water Board, Type "A" Water Licence 3AM-GRA1015: Pre-Hearing Conference Decision regarding Application for Amendment, at p. 2.





### 2.2.5 Security (s. 76.1)

Turning to our last key area of specific comment, the Board notes that under the proposed additions to s. 76 with respect to security, that s. 76.1 will allow for the Minister, the applicant/licensee and the designated Inuit organization to enter into a written arrangement to address security in the form of a tripartite arrangement that the Board may then take into account. The Board recognizes that this may greatly assist in addressing a problem that has been identified for some time as “double-bonding” or “over-bonding”. As noted in the Board’s decision with respect to the Mary River Type “A” Water Licence:

*Overbonding arises where the aggregate security posted across all instruments [including land based security such as a land lease held by the landowner and security held under the water licence] exceeds the aggregate liability.<sup>10</sup>*

However, the Board is unclear with respect to the intended mechanism to allow the Board to revisit security in accordance with the periodic review of security allowed for under the proposed additional section of s. 76.1(1)(b). For example, how is the finality of the Board’s determination with respect to the total amount of security intended to be balanced with the Board’s ability to revisit security arrangements - i.e. is such a security review and potential adjustment to the amount of security that must be furnished under the licence intended to constitute an amendment to the licence that would be subject to a public hearing (assuming the security is furnished under a Type “A” water licence)? The Board’s preference, as stated in the Mary River decision was that the Board would not consider the periodic review or any required adjustments to the security amount held under the water licence to constitute an amendment to the terms and conditions of a licence, but “rather a component of the required annual planning and reporting that is required to keep the Licence up to date and reflective of the phases of project development and associated levels of activity.”<sup>11</sup>

However, the Minister, in his correspondence in response to the Board’s Reasons for Decision and recommended terms and conditions of Water Licence 2AM-MRY1325 expressed doubts about the Board’s approach to the annual security review and the ability to modify the licence without Ministerial approval on key issues such as the security amount and a review of the annual reclamation plans.<sup>12</sup> On this basis, the Board would prefer to have greater direction on the jurisdiction of the Board and mechanics contemplated to fulfill the requirements proposed under s. 76.1(1)(b).

<sup>10</sup> Nunavut Water Board, Record of Proceeding/Reasons for Decision: 2AM-MRY1325, Type “A” Licence Application, at p. 56.

<sup>11</sup> *Ibid*, at p. 63.

<sup>12</sup> Correspondence dated July 15, 2013 from the Honourable B. Valcourt, Minister of Aboriginal Affairs and Northern Development to Thomas Kabloona, Chairperson, Nunavut Water Board.



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## Conclusions

In summary, the Board appreciates the opportunity to present these submissions to the Standing Committee and to have participated in the Working Group consulted during the development of these amendments. The Board looks forward to a continuation of this positive working relationship with all the interested parties as Bill S-6 progresses through to eventual implementation.