

Mackenzie Valley Land and Water Board



November 02, 2017

Mr. Joe Dragon
Deputy Minister
Department of Environment and Natural Resources
Government of the Northwest Territories
P.O. Box 1320
Yellowknife NT X1A 2L9

Via Email Joe_Dragon@gov.nt.ca

Dear Mr. Dragon:

Proposed Amendments to the *Waters Act* and Waters Regulations

As per paragraph 106.1(2)(b) of the *Mackenzie Valley Resource Management Act* (MVRMA), attached are proposed amendments to the *Waters Act* and Waters Regulations recommended by the Land and Water Boards of the Mackenzie Valley (the Boards).

The Boards understand that the Department of Environment and Natural Resources (ENR) is advancing legislative proposals to amend various pieces of legislation, including the *Waters Act* and Waters Regulations, to meet a key commitment within the Mandate of the 18th Legislative Assembly. The Boards recommend that ENR consider the Boards' proposed amendments as part this legislative initiative. Our recommendations stem from many years of operational experience, and we believe they will assist in the government's objective to evolve our northern legislative, regulatory, and policy systems through which the lands and resources of the Northwest Territories are managed.

On a related note, the Boards have conducted a review of the Draft Framework Document that outlines the key amendments that are being proposed by ENR to the *Waters Act* and Waters Regulations. The Boards are concerned that most of these amendments depart from the MVRMA framework as it now exists and from the framework upon which land claim provisions relate to the Boards. Because of the way the MVRMA and the *Waters Act* are intertwined, the Boards recommend that great care should be taken to ensure that any amendment to the *Waters Act* be in alignment with the MVRMA and Land Claim Agreements. The Boards look forward to working with ENR on this legislative endeavor.

Finally, the Land and Water Boards also recommend that the federal and territorial governments work together to draft legislative amendments in a coordinated manner to ensure consistency, particularly for projects that are located on split interest areas.

Should you have any questions about our recommendations, please contact Angela Plautz at (867) 766-7461 or aplautz@mvlwb.com.

Yours sincerely,



Mavis Cli-Michaud
Chair
Mackenzie Valley Land and Water Board



Violet Camsell-Blondin
Chair
Wek'èzhìi Land and Water Board



Paul Sullivan
Chair
Gwich'in Land and Water Board



Larry Wallace
Chair
Sahtu Land and Water Board

Copied to: Erin Kelly, Assistant Deputy Minister, Corporate and Strategic Planning, ENR, GNWT
Willard Hagen, Deputy Minister, Department of Lands, GNWT
Gilles Binda, Acting Director, Resource Policy and Programs, Natural Resources and Environment Branch, Northern Affairs Organization, Indigenous and Northern Affairs Canada

Attachments:

- Table 1. Recommended Amendments to the *Waters Act*
- Table 2. Recommended Amendments to the Waters Regulations

Table 1. Recommended Amendments to the *Waters Act* – As of October 31, 2017

Recommended Amendment #	Sub-heading	Section	Subsection	Paragraph	Subparagraph	Comments	Suggested change/modifications to the Act
1	Term of licence	26	(2) A licence under subsection (1) may be issued for a term	(a) not exceeding 25 years, in the case of a type A licence in respect of a prescribed class of undertakings or in the case of a type B licence; or		The Boards rely on the evidence submitted during a proceeding to determine the term of a licence on a case by case basis. This comment also applies to paragraph 36(1)(a).	At this time, the Boards do not have a recommendation about which type A licences should be on the prescribed list.
2	Factors in determining compensation	26	(6) In determining the compensation that is appropriate for the purpose of paragraph (5)(b), the Board shall consider all relevant factors, including, but not limited to,	(c) the extent and duration of the adverse effect, including the incremental adverse effect; (c) l'importance et la durée des effets négatifs, y compris les effets négatifs cumulatifs;		The English and French versions of paragraph (c) could be interpreted differently. "Incremental" and "cumulatifs" could have different meanings. This needs to be clarified, as this difference could impact the determination of compensation.	The English and French versions of paragraph (c) need to be made the same.
3	Board may require security	35	(1) The Board may require an applicant for a licence, a licensee or a prospective assignee of a licence to furnish and maintain security with the Minister, in an amount specified in, or determined in accordance with, the regulations made under paragraph 63(1)(g) and in a form prescribed by those regulations or a form satisfactory to the Minister.			For land use permits (see subsection 38(1) of the Mackenzie Valley Land Use Regulations (MVLUR)), the Boards may change security for assignments. It is not clear if the Boards can do this for water licences. Further, if the Boards are able to change security, it is difficult for prospective assignees to post security if the security amount might change during Board deliberations.	The legislation needs to clarify: 1) if the LWBs can change security for an assignment of a water licence; and, 2) if so, when security should be posted for an assignment. Ideally the LWBs could approve an assignment on the condition security will be posted (see subsection 71(1) of the <i>Mackenzie Valley Resource Management Act</i> (MVRMA) for land use permits). Consequently, the assignment would not be effective until the Board has received confirmation from the Minister that security has been posted.

4	How security might be applied	35	(2) The security may be applied by the Minister in the following manner:	(a) if the Minister is satisfied that a person who is entitled to be compensated by a licensee under section 60 has taken all reasonable measures to recover compensation from the licensee and has been unsuccessful in that recovery, the security may be applied to compensate that person, either fully or partially		The Waters Regulations (section 11) do not include compensation as a factor to consider when calculating security. Reductions in security held to compensate other water users could affect the funding available for closure and reclamation. Operationally, one way to incorporate it would be to add it as a contingency factor to the security model.	The Regulations may need to include compensation as a factor for the LWBs to consider when determining security.
5	Refund of security	35	(5) Where the Minister is satisfied that	(a) an appurtenant undertaking has been permanently closed or permanently abandoned, or		There is a significant amount of uncertainty around the final security refund, when and how a licence would be closed, and liability relinquishment. This uncertainty should be addressed as soon as possible.	The Boards would like to collaborate with the federal and territorial governments (e.g. establish a working group) on these issues, and until more work is done, it is difficult to propose specific legislative changes on this topic. However, legislative amendments related to closure and reclamation and security should be consistent with the 2002 Mine Site Reclamation Policy for the NWT (should it continue to be adopted by the GNWT), and subsequent updates.
6	Renewal, amendment and cancellation of licences	36	(1) Subject to subsections (2) and (3), the Board may	(a) renew a licence, with or without changes to its conditions, for a term not exceeding 25 years in the case of a type A licence in respect of a prescribed class of undertakings or in the case of a type B licence, or for a term not exceeding the anticipated duration of the undertaking in		The difference between a renewal without changes to conditions and an amendment to term is not clear. (The possibility of an amendment to term is noted under paragraph 41(2)(b) of the <i>Waters Act</i> .)	The Boards recommend that an amendment to term be like an extension to a land use permit – up to a two-year extension without any changes to conditions. In this case, a public hearing shouldn't be a mandatory requirement. So, for example, if a water licence for a mine was about to expire, operations were to remain the same, and there was only a year of mine life

				the case of any other type A licence,.... (b) amend, for a specified term or otherwise, any condition of a licence			left, the company could apply for an amendment to term to “extend” the water licence for that relatively short period of time.
7	Application to cancel licence	36	(3) An application to cancel a licence must be in the form and contain the information that is prescribed by the regulations.			An application to cancel a licence should be included in the regulations.	The LWBs recommend that an application to cancel a licence be developed and included in the regulations.
8	Authorization of assignment of licence	39	(2) The Board shall authorize the assignment of a licence if it is satisfied that	(a) the sale or other disposition of any right, title or interest of the licensee in the appurtenant undertaking at the time, in the manner and on the terms and conditions agreed to by the licensee, and		The requirement of an application for the assignment needs to be included in this provision. Currently, it is not clear what the assignee and assignor need to do according to this provision. The requirements for the assignment of a land use permit are clearer (see subsection 38(2) of the MVLUR). The assignment requirements for licences and permits should be harmonized as much as possible.	The LWBs recommend that this subsection be amended so it is clear what the assignor and prospective assignee need to do to for the assignment process (e.g. fill out an application form). It should be amended to ensure that it is congruent with the assignment process for land use permits.
9	PUBLIC HEARINGS AND PROCEDURE Cases where subsection (2) does not apply	41	(3) Subsection (2) does not apply	(a) if	(ii) after giving notice of a public hearing in connection with the matter under section 43, the Board receives no notification on or before the tenth day before the day of the proposed hearing that any person or body intends to appear and make representations in connection with the matter	Ten days can present logistical issues. Most venues and airlines require more notice than 10 days' cancellation notice, so the cancellation of a hearing can become costly. Further, more notice will help parties make alternate arrangements.	The LWBs recommend a 20-day time period, rather than a 10-day time period to reduce costs and to schedule the remainder of the process.

10	Decision of Minister and reasons	47	(3) The Minister shall, within 45 days after the Board's decision is referred to him or her, notify the Board whether or not the decision is approved and, if it is not approved, provide written reasons in the notification.			If the Minister does not approve the Board's decision, it is not clear what the timelines are for the Board to address the matter. If timelines are going to be implemented, the Boards recommend that a period of nine months be considered. The nine-month time limit should re-start after the day the Minister notifies the Board of the decision and would not include the time it takes for the proponent to provide information or studies.	If the Minister does not approve the Board's decision, the Boards recommend that a new timeline of at least nine months be considered for the Boards to address the Minister's decision.
11	Absence of decision	47	(5) If the Minister does not notify the Board whether or not the decision is approved within the time limit referred to in subsection (3) or (4), whichever is applicable, the Minister is deemed to have given approval.			This provision might help streamline the approval process; however, it may become an issue if there are any technological or mailing issues (e.g. a decision to not approve a licence is lost in cyberspace or the mail, and it was then assumed that the licence was approved). Further, the Minister's signature is still required for the approval process, so it is still important that the Minister provides notification of his or her approval.	This provision should be amended, so that is it similar to subsection 47(3).

12	Public Register	53	(1) The Board shall maintain at its main office a register, in the form prescribed by the regulations made under paragraph 63(1)(t) and convenient for use by the public, in which shall be entered, with respect to each application received by the Board and with respect to each licence, the information prescribed by those regulations.			The LWBs maintain a public registry at their respective offices and online. This provision should be updated to reflect current technology. It is noted that the MVRMA was amended so that the Review Board's registry is available online.	The LWBs recommend that this provision be updated to clarify that the Boards can also maintain an online registry, so both options for the registry are available.
13	Register to be open to inspection	53	(2) The register referred to in subsection (1) must be open to inspection, during normal business hours of the Board, by any person on payment of a fee, if any, prescribed by the regulations made under subparagraph 63(1)(k)(iii).			Any fees on accessing copies to the registry can limit some members of the public from access to public registry materials. The Boards' practice is not to collect fees.	Removal of "on payment of a fee" should be removed. This recommendation should also be applied to subsection 53(3).
14	Remedial Measures	67				The language in section 67 of the <i>Waters Act</i> is different than section 86.1 of the MVRMA. Section 67 refers to "direction", whereas section 86.1 refers to an "order". Further, subsection 86.1(2) outlines what the order should include. ENR may want to consider including a similar provision.	The LWBs recommend that ENR consider ensuring section 67 of the <i>Waters Act</i> is similar to section 86.1 of the MVRMA to the extent possible.
15	Principal Offences	70				Fine amounts seem insufficient for large infractions, particularly for type A licences (e.g. large mines or oil and gas development).	Fine amounts need to be re-evaluated.
16	Regulations (Administrative Monetary Penalties)	79				Ideally, the federal and territorial Administrative Monetary Penalties (AMPs) Regulations will be consistent, as some undertakings can overlap federal and non-federal areas.	The LWBs encourage the GNWT and INAC to work together to ensure the AMPs Regulations are similar to ensure consistency.
	Other:						

17	Notice (for posting security)					As per subsection 71(2) of the MVRMA, the Minister shall notify a board of the posting of security so required for land use permits. The equivalent should be included in the <i>Waters Act</i> for water licences.	A provision should be included in the <i>Waters Act</i> whereby the Minister is to notify a board of the posting so required for a water licence.
18	Time limit – other licences					The MVRMA has section 72.2 which states: On an application for the issuance, renewal or amendment of a licence in respect of lands outside a federal area — other than a type A or type B licence — or, if the board intends to consider, on its own initiative, the renewal or amendment of such a licence, the board shall make a decision within a period of nine months after the day on which the application is made or on which notice of the board’s intention is published under subsection 72.17(2). The <i>Waters Act</i> does not have a similar provision. Further, currently it seems under subsection 72.24(1) of the MVRMA, it is the federal Minister and not the territorial Minister that would approve an extension of the time limit for these types of water licences.	ENR should clarify if the <i>Waters Act</i> should include: <ol style="list-style-type: none"> 1) provisions relating to water licences other than type A or B licences; and, 2) if so, the territorial Minister (and not the federal Minister) would approve extensions of the time limit.
19	Eligibility Requirements (for water licences)					There is an eligibility requirement for land use permits (section 18 of the MVLUR); however, there isn’t one for water licences. In most cases, activities that trigger a water licence also require a land use permit,	The LWBs recommend that eligibility requirements be clarified for undertakings, particularly if there is no related land use permit.

						so eligibility is dealt with through the permitting process. However, there are some cases, particularly within local government boundaries where a water licence is triggered but a land use permit is not (because of different land use triggers within a local government boundary). If someone wants to build a permanent dock, which may involve a bank alteration, there should be an eligibility requirement to show that the applicant has the right to conduct this work.	
20	Name changes					In some cases, companies do not update the Boards about when the name of their company has changed. It is important for the Boards to have this information to ensure authorizations are updated.	It is recommended that the legislation is clear about name change requirements.

Table 2. Recommended Amendments to the Waters Regulations – As of October 31, 2017

Recommended Amendment #	Sub-heading	Section	Subsection	Paragraph	Subparagraph	Comments	Suggested change/modifications to the Act
1	INTERPRETATION	1. “undertaking” means an undertaking in respect of which water is to be used or waste is to be deposited, of a type set out in Schedule B;				The definition of undertaking needs clarification with respect to how security is calculated and collected.	The definition of undertaking should be reviewed to clarify whether or not it includes the entire undertaking or just the water-related components of the undertaking.
2	INTERPRETATION	1. “undertaking” means an undertaking in respect of which water is to be used or waste is to be deposited, of a type set out in Schedule B;				Currently the Waters Regulations refer to “undertaking”, whereas the <i>Waters Act</i> refers to the “appurtenant undertaking”, which means the work described in a licence. The terminology and definitions should be consistent.	The Boards recommend that the <i>Waters Act</i> and the Waters Regulations have the same terminology and definitions (e.g. undertaking vs. appurtenant undertaking).
3	WATER USE OR WASTE DEPOSIT WITHOUT A LICENCE	4	(1) A person may use water and deposit waste without a licence if the proposed use or deposit	(c) satisfies the criteria set out	(i) in respect of an industrial undertaking, in column II of Schedule D,	The Boards would be interested to hear if other parties have suggestions to update the Schedules.	Any amendments to the schedules of the Waters Regulations and the Mackenzie Valley Federal Areas Waters Regulations should be done in alignment.
4	APPLICATIONS FOR LICENCES	5	(1) An application for a licence or for the amendment or renewal of a licence shall be the form set out in Schedule C and shall contain the information identified in that form and be accompanied by a deposit equal to the water use fee that would be payable under subsection 8(1) in respect of the first year of the licence that is being applied for.			The Application Form currently limits the amount of information provided to the Board.	The Water Licence Application in Schedule C needs to be reviewed and revised. Sections should be added to allow the LWBs to require additional information for specific undertakings and to prompt applicants to provide information required under subsection 5(2).

5	APPLICATION FEES	6 The fee payable on the submission of an application for a licence or for the amendment, renewal, cancellation or assignment of a licence or of an application under section 61 of the Act is \$30.				<p>The fee is minimal and administratively onerous on the LWBs and the GNWT. The application for land use permits is \$150.</p> <p>Municipalities should be exempt from paying any application fees.</p>	<p>It is recommended that the fee be raised to a more appropriate value or removed.</p> <p>It is also recommended that municipalities be exempt from paying any application fees.</p>
6	WATER USE FEES	8	(1) Subject to subsections (4) and (5), the fee payable by a licensee for the right to the use of water, calculated on an annual basis, is			<p>Water use fee amounts are due for a review to reflect the current value of water.</p> <p>There has been confusion about whether water use fees should be paid for volumes less than threshold (e.g. 30m³ per day) if the need for a water licence has been triggered by a deposit of waste.</p>	<p>The Boards recommend that the water use fee amounts be reviewed and updated.</p> <p>The Boards recommend that the Regulations clarify whether water use fees need to be paid for volumes less than threshold (if the trigger for the water licence was the deposit of waste).</p>
7	WATER USE FEES	8	(5) No fees are payable under subsection (1) in respect of a diversion of water if the water is not otherwise used.			<p>In 2014, the Boards sent a letter to ENR and INAC, requesting a joint response about clarifying water use fees with respect to a diversion of water. The Boards asked, "In your view, when would the drawdown of lakes or dewatering of underground workings trigger water use fees? In other words, please define, "if the water is not otherwise used." ENR responded by stating that this will be clarified via amendments to the legislation.</p>	<p>The Boards recommend that water use fees with respect to the diversion of water need to be clarified.</p>
8	APPLICATIONS FOR ASSIGNMENT	9	(1) An application for authorization for the assignment of a licence pursuant to subsection 39(2) of the Act shall be submitted to the Board, accompanied by the fee set out in section 6, not less than 45 days before the date on which the			<p>The process for assigning land use permits and water licences should be similar (e.g. information required, timelines).</p>	<p>The LWBs recommend that this section be amended so that assignments for land use permits and water licences can be harmonized. The Boards agree with the 45-day timeline.</p>

			applicant proposes to assign the licence.				
9	SECURITY	11	(1) The Board may fix the amount of security required to be furnished by an applicant under subsection 35(1) of the Act in an amount not exceeding the aggregate of the costs of	(a) abandonment of the undertaking; (b) restoration of the site of the undertaking; and (c) any ongoing measures that may remain to be taken after the abandonment of the undertaking.		<p>The Waters Regulations do not include compensation as a factor to consider when calculating security. Reductions in security held to compensate other water users could affect the funding available for closure and reclamation (see paragraph 35(2)(a) of the <i>Waters Act</i>). Operationally, one way to incorporate it would be to add it as a contingency factor to the security model.</p> <p>The term “restoration” is outdated in the NT, where the term “closure and reclamation” has been in use for years. The security deposit should cover closure and reclamation of the site, and use of the word “restoration” here may cause confusion.</p> <p>Also, the security deposit should cover long-term monitoring and maintenance. It’s not clear whether this is implicit in this section of the Regulations.</p>	<p>The Waters Regulations may need to include compensation as a factor for the LWBs to consider when determining security.</p> <p>The Boards recommend replacing “restoration” with closure and reclamation” and consider whether “long-term care and maintenance” should also be added.</p>
10	SECURITY	11	(2) In fixing an amount of security pursuant to subsection (1), the Board may have regard to	(a) the ability of the applicant, licensee or prospective assignee to pay the costs referred to in that subsection; or		Costs for security should be consistently applied to all licensees. If a licensee is unable to pay for the security, they might not have the ability to do the operations applied for, including closure and reclamation.	This sub-section should be removed.
11	SCHEDULE B CLASSIFICATION OF UNDERTAKINGS	1. Industrial Undertaking				Currently mineral exploration is not included under industrial undertaking in Item 1 and does not fit the definitions under Item 2 for Mining and milling undertaking.	Mineral exploration should be classified under either “Industrial undertaking” or “Mining and milling undertaking”.
12	SCHEDULE D LICENCING CRITERIA FOR INDUSTRIAL UNDERTAKINGS	Item 3. (d) hydrostatic testing Column III deposit of waste associated with cleaning or				It should state, “deposit of waste associated with cleaning or testing of used storage tanks or pipelines.”	The Boards recommend that “of pipelines” should be changed to “or pipelines”.

		testing of used storage tanks of pipelines					
13	SCHEDULES D - H					<p>The triggers for post-closure licences aren't clear. It is assumed that once the licensee can prove that there is no longer a direct or indirect deposit to surface water, a water licence is no longer required. The question is how long should a site be monitored to ensure this is the case? This is particularly challenging if acid generating waste rock might be an issue. The legislation should be clear about:</p> <ul style="list-style-type: none"> • when a licence is no longer required; • the "final clearance" process; and, • when security can be refunded completely (particularly for large projects, such as mining). 	<p>The legislation should clarify when water licences are no longer required, the "final clearance process" for water licences, and when security can be refunded completely to a licensee.</p> <p>The Boards would like to collaborate with the federal and territorial governments (e.g. establish a working group) on these issues, and until more work is done, it is difficult to propose specific legislative changes on this topic. However, legislative amendments related to closure and reclamation and security should be consistent with the 2002 Mine Site Reclamation Policy for the NWT (should it continue to be adopted by the GNWT), and subsequent updates.</p>
Other:							
14	Name Changes					<p>In some cases, companies do not update the Boards about when the name of their company has changed. It is important for the Boards to have this information to ensure authorizations are updated.</p>	<p>It is recommended that the legislation is clear about name change requirements.</p>