

Mackenzie Valley Land and Water Board



July 3, 2018

Dr. Joe Dragon
Deputy Minister
Department of Environment and Natural Resources
Government of the Northwest Territories

Via email Joe_Dragon@gov.nt.ca

Mr. Willard Hagen
Deputy Minister
Department of Lands
Government of the Northwest Territories

Via email Willard_Hagen@gov.nt.ca

Mr. Mark Hopkins
Director General
Natural Resources and Environment Branch
Northern Affairs Organization
Crown and Indigenous Relations and Northern Affairs
Government of Canada

Via email Mark.Hopkins@canada.ca

Dear Messrs. Dragon, Hagen, and Hopkins,

Re: Scoping of Water Licences and Commencement Dates

In the past, the Boards have received comments from parties about:

- how proposed activities under the thresholds listed in the regulations should be scoped and regulated under licences and permits;
- why water use fees should be paid for water use volumes less than threshold; and
- the commencement date(s) of an authorization and the development, which can be linked to what is scoped under the authorization.

Regarding the second bullet above, currently under the Boards' [Water Use Fee Policy](#), water use fees are required for volumes less than threshold. This is in part due to Crown and Indigenous Relations and Northern Affairs' (CIRNA) position on the matter. For example, the [water use fee calculator](#) (calculator) that was issued by CIRNA on June 6, 2012 provides an example of this scenario (please see Example #2 on Tab 3 of the calculator).

As these are important issues that require clarification, the Boards have obtained a legal opinion (please see attached) and are now seeking your input on these matters. The Boards would be pleased to meet to discuss the above prior to receiving a written response. We would appreciate a joint response by August 31, 2018.

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

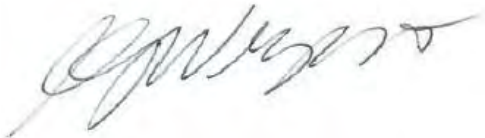
Yours sincerely,



Mavis Cli-Michaud
Chair
Mackenzie Valley Land and Water Board



Joseph Mackenzie
A/Chair
Wek'èzhii Land and Water Board



Liz Wright
Chair
Gwich'in Land and Water Board



Larry Wallace
Chair
Sahtu Land and Water Board

Attachment: Legal Opinion (Questions about Scope of Board Authorities in Relation to Water Licensing)

Copied to: Mr. Robert Jenkins, Assistant Deputy Minister, Department of Environment and Natural Resources, Government of the Northwest Territories
Mr. Conrad Baetz, Assistant Deputy Minister, Department of Lands, Government of the Northwest Territories
Mr. Gilles Binda, A/Director, Resource Policy and Programs, Natural and Resources and Environment, Northern Affairs Organizations, Government of Canada



Ms. Mavis Cli-Michaud, Chair
Mackenzie Valley Land and Water Board

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Ms. Elizabeth Wright, Chair
Gwich'in Land and Water Board

Mr. Larry Wallace, Chair
Sahtu Land and Water Board

Mr. Joseph Mackenzie, A/Chair
Wek'èezhì Land and Water Board

Re: Scoping of Water Licences and Commencement Dates

The Government of the Northwest Territories (GNWT) Department of Lands (Lands) and Department of Environment and Natural Resources (ENR) received your letter dated July 3, 2018 regarding scoping of water licences, water use fees and commencement dates.

The Land and Water Boards of the Mackenzie Valley are seeking the GNWT's position on the following three questions:

- whether/how proposed activities under the thresholds listed in the regulations should be scoped and regulated under licences and permits;
- whether water use fees should be paid for water use volumes less than threshold; and
- whether commencement date(s) of an authorization and the development are to be linked to what is scoped under the authorization.

The GNWT provides the response to each of these questions below.

Q. Whether/how proposed activities under the thresholds listed in the regulations should be scoped and regulated under licences and permits?

The GNWT agrees that there is no clear legislative guidance with respect to drafting the scope of a water licence or land use permit (LUP). Without clear guidance on scoping a water licence or land use permit, it is a matter of Board discretion.

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The GNWT is cognizant of activities that could be under threshold but still cause a high degree of harm or risk of environmental damage. In these situations, if evidence supports the need for conditions pursuant to water use even though the use is under threshold for a licence, the Board could include conditions on use to protect the environment (i.e. avoid potential significant adverse effects). Likewise, if evidence supports a need for conditions pursuant to the deposit of waste even though it is under threshold for a licence, the Board could include conditions on waste disposal to protect the environment. The authority for the Board to include such conditions in these situations is apparent from s. 4(1)(a) of the Waters Regulations. However, a water licence does not otherwise become a de facto authorization for both the use of water and deposit of waste if only one of the above triggers the licence¹. Only if circumstances warrant, consistent with s. 4(1)(a) of the Waters Regulations, could the scope of the licence and conditions of the licence include both water use and waste disposal. This is consistent with the broad environmental protection authorities of the Board.

Regarding LUPs, activities related to a use that triggers the need for a permit can and must be scoped into such permit and, once scoped into it, cannot be done without such permit or without conforming to the requirements contained in it. Ss. 4 and 5 of the *Mackenzie Valley Land Use Regulations* (MVLURs) define very specifically what uses of land require LUPs. These sections prohibit anyone from conducting “any activity that involves...” any of the various activities/uses listed in the subsections of ss. 4 and 5. This seems intentionally phrased to ensure that any larger project that involves any of the listed uses/thresholds must be covered in full by a permit, rather than just the use/activity sub-part specified in ss. 4 and 5. In cases where a proponent argues that one “activity” conducted by it is too unrelated to an above-threshold “use” or “activity...involve[ing]” such “use” to be scoped into the LUP for such “use”, the Boards have broad discretionary jurisdiction to determine whether the allegedly unrelated activity should or should not be scoped into the LUP. Further, once a sub-threshold activity/use has been determined to be an “activity that involves” a use requiring a permit, it must be scoped into a permit and a proponent can no longer carry out such a sub-threshold work without a permit and/or without conforming to the requirements of such permit.

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¹ Water licence triggers and classes are outlined in Schedule D through H of the Waters Regulations.

The *Waters Act* similarly provides some further considerations for the conditions in a water licence. Specifically, s. 27(1) outlines that the licence should cover the use of water; deposit of waste; how waste is to be deposited; studies, works to be constructed, plans to be submitted and monitoring programs; and, future closure of the appurtenant undertaking². Therefore, the GNWT is of the opinion that the scope of the undertaking should include construction, operation and closure. The Board should consider the impact of the undertaking on the environment in drafting the scope as well as licence requirements (e.g. plans and mitigations) and conditions (compliance limits) including requirements for final closure and reclamation of the undertaking (licence or land use permit).

As the GNWT has previously expressed to the Boards, it generally supports consolidating uses and activities into as few authorizations as is reasonably possible, but does acknowledge that there are times when arguably geographically or conceptually similar activities/uses being conducted by the same proponent are best handled under separate authorizations. However, while this logic would also apply to sub-threshold activities, the GNWT would prefer that as a matter of policy the Boards, within the limits of their discretionary power, err on the side of scoping what would otherwise be unpermitted, sub-threshold activities/uses into a permit or permits held by the same proponent.

Finally, the GNWT agrees that project descriptions in authorizations should be inclusive to ensure that a proponent is authorized to carry out the full extent of the works it wishes to without later needing amendments to its authorization(s), but notes that incorporating by reference the project description contained in the proponent's original application may not be ideal because the project design can be modified throughout assessment and regulatory proceedings.

Q. Whether water use fees should be paid for water use volumes less than threshold?

A direct reading of s 4(1) of the Waters Regulations suggests that no water use fees need to be paid for water use under threshold. However, as discussed in the above response on scoping, if a water licence includes water use limits (even those below threshold) water use fees should be paid. The GNWT acknowledges that the fees for less than 100 m³/day of water use are marginal.

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² Under separate cover, the GNWT has provided its opinion on the scope and class of a water licence with regard to closure (response to LWB letter dated July 25, 2008).

The GNWT is aware of the Land and Water Board Water Use Fee Policy which requires payment of fees pursuant to the Water Use Fee Calculator. ENR would like to highlight that it is currently working to amend the *Waters Act* and will be reviewing water use fees as part of amendments to the Water Regulations. Clarifying fee requirements and when to pay fees will be part of that review.

Q. Whether commencement date(s) of an authorization and the development are to be linked to what is scoped under the authorization?

The commencement date of the licence is the date it is issued by the Board. The licensee requires a water licence, if it is triggered as per the Waters Regulations, before they can begin the appurtenant undertaking (i.e., use of water, channel alterations or deposit of waste).

Regarding the commencement dates of LUPs, the MVLURs at s. 26(5) are mostly clear. S. 26(5) requires the relevant Board to set a term for a LUP that is based on the estimated commencement and completion dates of the activity in the underlying LUP application and limits the term of a LUP to five years at most. By requiring LUP terms to be based on the estimated commencement date of an activity, this regulation requires a definite commencement date to be contained in the LUP reasonably based on evidence provided in the application as to when a proponent will commence the activity for which it has applied for a LUP – the regulation therefore prevents Boards from issuing LUPs with terms based on temporally indefinite commencement criteria, such as “whenever the proponent actually begins work”. Additionally, if a proponent is unable or unwilling to provide reasonably defined estimates of the time it plans to commence the activities for which it is applying for a LUP, then the Board would be unable to issue such LUP.

However, the way the regulation is written does not require the commencement date of a LUP to be its date of issuance. Such a delayed commencement of the term would not subtract from its five-year maximum. While Boards appear to have latitude in delaying commencement dates, it cannot be indefinite. Proponents can do nothing to prevent the running of the LUP’s term: the regulation’s requirement that the commencement date be based on estimated dates “set out by the permittee in the permit application” probably prevents proponents from applying for and receiving amendments to this term in their LUPs based on new estimated commencement dates.

Otherwise, authorizations should avoid, if at all possible, the inclusion of specified development dates (e.g. construction dates and timing). Delays to these dates are common. Avoiding inclusion of such dates to the extent possible will minimize situations where a final development plan conflicts with the water licence or land use permit.

Once the appurtenant undertaking is authorized, all activities pursuant to that undertaking are subject to the conditions in the authorization (water licence and/or land use permit).

Closing Remarks

Thank you for providing this opportunity to further clarify our position on these matters. We encourage Board staff to discuss these matters in person with GNWT officials at venues such as the quarterly meetings among Board and government staff. If the Boards have any questions regarding the content of this letter, please contact Mr. Nathen Richea, Director, Water Resources, at [Nathen Richea@gov.nt.ca](mailto:Nathen.Richea@gov.nt.ca) or 767-9234 ext. 53110, or Ms. Lorraine Seale, Director, Securities and Project Assessment, at [Lorraine Seale@gov.nt.ca](mailto:Lorraine.Seale@gov.nt.ca) or 767-9180 ext. 24020.

Sincerely,



Dr. Joe Dragon
Deputy Minister
Department of Environment and Natural Resources



Willard Hagen
Deputy Minister
Department of Lands

- c. Mr. Mark Hopkins, Director General
Natural Resources and Environment Branch, Crown-Indigenous
Relations and Northern Affairs Canada

