

Land and Water Boards of the Mackenzie Valley



Outline of General Board Process for Considering Water Compensation Claims

Background

Claims for water compensation for the effects of a proposed project's water use and/or waste deposit are considered during the water licensing proceeding.

The Land and Water Boards of the Mackenzie Valley (LWBs or Boards) regulate the use of water and the deposit of waste in the Mackenzie Valley through the issuance and management of water licences (licences). The [Mackenzie Valley Resource Management Act](#) (MVRMA), the [Waters Act](#), and their associated regulations¹ require the LWBs to consider compensation for affected parties if the use of water or the deposit of waste proposed in a licence application could:

- cause adverse effects that cannot be mitigated on the water use(s) of certain other parties (e.g., domestic users, licence holders, property owners, and others);²
- substantially alter the quality, quantity, or flow of waters flowing through Inuit-owned land;³
- substantially alter the quality, quantity, or rate of flow of waters on, flowing through, or adjacent to Gwich'in or Sahtú First Nation lands;⁴
- substantially, and unavoidably, alter the quality, quantity, or rate of flow of waters on, flowing through, or adjacent to Tłı̄chǫ First Nation lands.⁵

If the effects listed above can't be avoided or mitigated, the Board cannot issue, amend, or renew a licence until it is satisfied that a compensation agreement is in place, or appropriate compensation has been or will be paid. Sometimes, if the parties involved cannot agree on their own, the Board will need to determine whether, and how much, compensation the applicant will have to pay to claimants if the licence is issued.

For some affected parties, the Board can only issue, amend, or renew a licence if a compensation agreement is in place (i.e., the Board can't make its own decision on compensation). This applies to

¹ The [Mackenzie Valley Federal Areas Waters Regulations](#) and the [Waters Regulations](#), respectively.

² See paragraphs 26(5)(b) of the [Waters Act](#) and 72.03(5)(b) of the [MVRMA](#).

³ See subsections 28(2) of the [Waters Act](#) and 72.05(1) of the [MVRMA](#).

⁴ See section 77 of the [MVRMA](#).

⁵ See section 79.1 of the [MVRMA](#).

existing licensees and applicants with precedence⁶ whose water use would be significantly adversely affected by the proposed licence activities.⁷ The Acts don't set out a process for these parties to request a compensation determination from the Board if an agreement can't be reached. In these cases, the affected parties should file a Notice of Intent to File a Water Compensation Claim Form and contact Board staff to discuss next steps.

Important things to know before submitting a compensation claim to the LWBs

- The MVRMA and *Waters Act* define who is eligible to make claims for compensation⁸ and the factors⁹ that a LWB must consider when determining compensation.
- The LWBs' authority to order compensation is forward-looking only.
 - The LWBs do not have the authority to order compensation for past damages.¹⁰
 - The LWBs can only order compensation if adverse effects or damages are proven during the proceeding.
- The claimant and the licence applicant must try to negotiate compensation directly first.
 - Ideally, this will happen during engagement before the licence application is submitted to the Board, but it can continue during the licensing process.
 - The parties involved must let the Board know whether they have been able to reach an agreement or not. If a compensation agreement is negotiated, it typically does not need to be submitted to the Board, but the Board will need a written statement confirming the agreement and signed by both parties.
 - If negotiations are unsuccessful for claims related to Inuit-owned, Gwich'in, Sahtú, or Tłı̨chǫ lands, either the licence applicant or the claimant will need to formally request a compensation determination from the Board.¹¹
 - For all other types of claims where negotiations are unsuccessful,¹² or the Board is not satisfied that appropriate compensation has been or will be paid as required,¹³ the Board must make a compensation determination on any claims submitted as part of the licensing proceeding.
 - In all cases, the Board will require information from both parties to make sure a compensation agreement is in place or to make a compensation determination.

⁶ This includes parties that have already applied, or are authorized in an existing licence, to use water from the water sources potentially affected by the water use or deposit of waste proposed in the licence application. See section 59 of the [Waters Act](#) and section 72.26 of the [MVRMA for more information](#).

⁷ See paragraph 26(5)(a) of the [Waters Act](#) and paragraph 72.03(5)(a) of the [MVRMA](#).

⁸ See paragraphs 26(5) (a) and (b) of the [Waters Act](#), and paragraphs 72.03(5) (a) and (b), 72.05(1)((a), 77(a), and 79.1(b) of the [MVRMA](#).

⁹ See subsection 26(6) and section 30 of the [Waters Act](#), and subsection 72.03(6), section 72.07, or subsections 79(2) or 79.3(2) of the [MVRMA](#), as applicable.

¹⁰ Where possible, past damages must be recovered through civil action. See *Carter v. Northwest Territories Power Corp.*, 2014 NWTSC 19.

¹¹ See subparagraph 28(2)(b)(i) of the [Waters Act](#), subparagraph 72.05(1)(b)(i), subsection 79(1), and subsection 79.3(1) of the [MVRMA](#).

¹² See subparagraphs 26(5)(a)(ii) of the [Waters Act](#) and 72.03(5)(a)(ii) of the [MVRMA](#).

¹³ See paragraphs 26(5)(b) of the [Waters Act](#) and 72.03(5) (b) of the [MVRMA](#).

Outline Of Board Process For Compensation Claims

Initial steps in the LWBs' process for considering compensation claims

During the licensing proceeding, the claimant(s) and the licence applicant will be expected to continue to try to reach an agreement and advise the Board of the results of these efforts.

- 1) **Claimant files Notice of Intent to File a Claim for Water Compensation Form.** To make a compensation claim, the claimant must submit this Form to the Board by the deadline set out by the Board in the licence application work plan.
- 2) **Claimant files Claim Form for Water Compensation.** Claimants must then submit more detailed information in the Claim Form by the deadline set out by the Board (the Claim Deadline) in the licence application work plan.
 - a. Note that this Form and all information received by the Board is posted to the Online Public Registry. If there is any information in a claim that a claimant wants to be kept confidential, a request for ruling must be submitted to the Board with the completed Claim Form (see the LWB [Rules of Procedure](#)).
- 3) **Board issues work plan.** If the Board receives any completed claims by the Claim Deadline, the Board will issue a work plan to set out the process and timelines for considering the claim(s). This may be part of a new or updated work plan for the licensing proceeding, so that all parties understand the entire process for the licensing and compensation claim proceedings. The process and timelines for the compensation claim proceeding usually only involve parties to the compensation claim(s); however, they may affect the process and timelines for the licensing proceeding.
- 4) **Licence applicant responds to claim(s).** Within the period set out in the compensation work plan, the licence applicant will have an opportunity to review and respond to the claim(s).
- 5) **Claimant(s) respond to licence applicant.** The claimant(s) will have an opportunity to respond to comments made by the licence applicant on their claim(s).
- 6) **Board reviews the information.** If more information is required from any claimant(s) or the licence applicant, the Board will issue information requests.
- 7) **Public hearing, if necessary.** If the parties still can't reach an agreement by the time the steps listed above are finished, the Board may establish a public hearing process to support its potential decision on each claim.¹⁴

¹⁴ See subsection 41(1) of the [Waters Act](#) and section 24 and subsection 72.15(1) of the [MVRMA](#).

Public Hearing Process (if necessary)

A compensation claim hearing will be limited to the issue of compensation. It will involve only the claimant(s) and licence applicant and will not be open for general comment. The hearing will be open to the public to attend and observe but there will not be opportunities for public input.

- 1) **Board issues work plan.** The Board will send out a directive, including a work plan, to outline the process and timelines for the compensation claim hearing. This may be part of a new or updated work plan for the licensing proceeding.
- 2) **Parties file written submissions, if needed.** The claimant(s) and the licence applicant may be required to submit final written submissions in preparation for their presentations at the compensation claim hearing.
- 3) **Parties attend pre-hearing conference.** Prior to the hearing, Board staff usually schedule a brief pre-hearing conference for the claimant(s) and the licence applicant to review the hearing procedure and agenda; to find out who will participate from each party, and how much time they will need for their presentation; and to talk about any legal issues.
- 4) **Board conducts hearing.**

Draft Licence Conditions

Later on in a licensing proceeding, a draft licence is usually circulated for public review, followed by a chance for the licence applicant to respond to the review comments. The draft licence could include possible conditions intended to reduce, minimize, or eliminate the effects identified in the compensation claims. It could also include conditions related to possible compensation that the licensee must pay to the claimant(s).

Board Determination

At the end of the licensing and compensation proceedings, the Board will carefully review all the evidence available on the record and will make its decision on the compensation claim(s) at the same time it considers the licence.

If the Board determines that compensation is appropriate, the Board will direct the water licence applicant and the claimant(s) to enter into a compensation agreement or satisfy the Board that the required compensation has been or will be paid. The Board will also reflect the compensation requirements, if any, in the licence conditions. If there are standard or project-specific licence conditions that can mitigate or eliminate the identified adverse effects, the Board will include them in the licence in addition to, or instead of, compensation conditions.