

GIANT MINE Oversight Board



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Mackenzie Valley Land & Water Board

File MV 2007L8-0031

MAY 25 2018

Mackenzie Valley Land and Water Board
Attention: Shelagh Montgomery, Executive Director
4922 – 48th Street 7th Floor, YK Centre Mall
Yellowknife, NWT X1A 2P6

Application # _____
Copied To JM / Permits

May 24, 2018

Re: Interim Water Licence for Giant Mine

This letter is filed on behalf of the Giant Mine Oversight Board (the “Oversight Board”) with respect to type A water license application MV2007L8-0031.

The Oversight Board independently monitors, promotes, advises and broadly advocates for the responsible management of the remediation of the former Giant Mine site (the “Site”). The Oversight Board was established pursuant to the *Giant Mine Remediation Project Environmental Agreement*¹ (the “Agreement”) and its mandate includes (among other duties):

- monitoring and reporting on the environmental aspects of the Giant Mine Remediation Project (the “Project”);
- participating in and providing advice regarding the process followed by Indigenous and Northern Affairs Canada (“INAC”) for assessing options for the management of Baker Creek;
- intervening in regulatory processes in relation to the Project, subject to the discretion of the Mackenzie Valley Land and Water Board (the “MVLWB”).

¹ Giant Mine Remediation Project Environmental Agreement was signed on June 9, 2015 by the: Government of Canada (Indigenous and Northern Affairs Canada - INAC); Government of the Northwest Territories (GNWT); Yellowknives Dene First Nation; North Slave Métis Alliance; Alternatives North; and the City of Yellowknife.

Motion Requested

Rule 22 of the *Mackenzie Valley Land and Water Board Rules of Procedure, Including Public Hearings* (the “**Rules**”) states:

Any issue that arises in the course of a proceeding that requires a decision or ruling from the Board shall be brought to the Board’s attention by way of a written motion. The motion shall include a clear, concise statement of the relevant facts, an indication of the decision or ruling being sought from the Board and the reasons why the decision or ruling should be granted.

Pursuant to Rule 22 of the Rules, the Oversight Board submits this letter as a motion to request that INAC be ordered to apply for an interim water licence to regulate its ongoing discharges until the parameters of its type A water licence for the Project have been finalized (the “**Motion**”).

The Oversight Board respectfully submits that a narrowly-focused five-year type B water licence that addresses effluent discharge would be appropriate.

Facts

In 1999, the Government of Canada assumed responsibility for the Site after the Giant Mine’s previous owner went bankrupt.² The Project involves the remediation of the Site. Since 2005, INAC and its predecessors have managed the Project.

In 2007, INAC submitted a type A water licence application MV2007L8-0031 to the MVLWB for the Project (the “**Application**”). The Application was referred to an environmental assessment before the Mackenzie Valley Environmental Impact Review Board (the “**MVEIRB**”). In 2013, the MVEIRB released its *Report of Environmental Assessment on the Giant Mine Remediation Project* (the “**Report**”)³, which stipulated 26 legally-binding measures (the “**Measures**”). The Minister responsible approved the Report by letter on August 14, 2014, after modifying the wording of certain Measures (the “**Letter**”).⁴

In 2015, the Oversight Board was established as set out by the Giant Mine Remediation Project Environmental Agreement (the “**Agreement**”).⁵

² 2015-16 Annual Report of the Giant Mine Remediation Project submitted by INAC to the Board in 2016.

³ *Report of Environmental Assessment and Reasons for Decision: Giant Mine Remediation Project*, EA0809-001 (June 20, 2013).

⁴ Letter from Minister Valcourt, INAC, to Chairperson Deneron, Mackenzie Valley Environmental Impact Review Board, dated August 11, 2014.

⁵ Giant Mine Remediation Project Environmental Agreement was signed on June 9, 2015 by the: Government of Canada (Indigenous and Northern Affairs Canada - INAC); Government of the Northwest Territories (GNWT); Yellowknives Dene First Nation; North Slave Métis Alliance; Alternatives North; and the City of Yellowknife.

The water licensing process before the MVLWB has not yet resumed; however, INAC has continued to operate without a water licence, and has discharged treated effluent into Baker Creek each summer.

In our 2016 Annual Report, the Oversight Board expressed concerns regarding INAC's routine multi-year discharges of treated effluent into Baker Creek in the absence of a water licence. Since then, INAC has not applied for an interim water licence and continues to discharge effluent to Baker Creek. INAC argues that it is exempted from requiring a water licence for its ongoing discharges based on section 89 of the *Mackenzie Valley Resource Management Act*⁶ (the "MVRMA").⁷ The Oversight Board reiterated its concerns on this matter in its 2017 Annual Report.

Legal Basis for the Motion Sought

The Oversight Board respectfully submits that the Motion should be granted for the following reasons:

1. INAC's 2007 Application is an ongoing regulatory process and the Oversight Board has standing to intervene;
2. The MVLWB has jurisdiction to decide whether INAC requires a water licence;
3. INAC requires a water licence to discharge water into Baker Creek;
4. INAC's reliance on s. 89 of the Act is unreasonable; and
5. An application for an interim water licence would not trigger an environmental assessment.

INAC's 2007 Application is an ongoing regulatory process and the Oversight Board has standing to intervene.

INAC submitted the Application to the MVLWB in 2007. All proceedings before the MVLWB are subject to the Rules. According to the Rules, a MVLWB "proceeding commences once the Board deems that an application for a water licence...is complete."⁸ The MVLWB approved the Application as complete on October 26, 2007.⁹ On August 20, 2014, the MVLWB informed INAC of the information the MVLWB requires from INAC to "reinitiate" the water licence application (File: MV2007L8-0031).¹⁰ The environmental assessment before the MVEIRB (EA0809-001)

⁶ SC 1998, c 25.

⁷ The Giant Mine Remediation Project - INAC response to the Giant Mine Oversight Body's Establishment Report. May 16, 2017. Accessible at: <https://www.aandc-aandc.gc.ca/eng/1494606254152/1494606321168>

⁸ Rules, #36.

⁹ Reasons for Decision. Preliminary Screening of Water Licence MV2007L8-0031. Accessible here: http://www.reviewboard.ca/upload/project_document/EA0809-001_MVLWB_Reasons_for_Decision.pdf

¹⁰ Letter from the Board to INAC, dated August 20, 2014. Accessible here: <http://registry.mvlwb.ca/Documents/MV2007L8-0031/MV2007L8-0031%20-%20AANDC%20->

has concluded but the regulatory process for the Application (File: MV2007L8-0031) is still ongoing. According to the Agreement, the Oversight Board has jurisdiction to intervene in ongoing regulatory processes:

Subject to the discretion of the applicable regulatory body, the Oversight Body may intervene in regulatory processes in relation to the Project.¹¹

Since the Rules allow an application to be initiated in writing¹², the Oversight Board is not barred from filing this Motion to request that INAC be ordered to apply for an interim water licence to regulate its ongoing discharges until the parameters of its type A water licence have been finalized.

The MVLWB has jurisdiction to decide whether INAC requires a licence

The MVLWB “has jurisdiction in respect of all uses of waters...in a federal area in its management area for which a licence is required...”¹³ The MVLWB “may issue directions on general policy matters or on matters concerning the use of land or waters or the deposit of waste that, in the Board’s opinion, require consistent application throughout the Mackenzie Valley.”¹⁴ The *MVRMA*’s prohibition on the use of waters in a federal area without a licence applies to any “person.”¹⁵ The meaning of “person” includes INAC.

There is nothing barring the MVLWB from issuing a direction that requires INAC to apply for a water licence. Further, the MVLWB has jurisdiction under the *Regulations* to issue a type B water licence for INAC’s ongoing discharges to Baker Creek since such discharges can be characterized as deposits of “waste” within the meaning of the *MVRMA*.¹⁶ Under these circumstances, the water licence would be an interim type B water licence until such time as the requirements of the MVEIRB are met and INAC receives its type A water licence for closure.

INAC requires a licence to discharge water into Baker Creek

The Site is a “federal area” within the meaning of the *MVRMA*. Since INAC’s ongoing discharges into Baker Creek are occurring within the boundaries of the Site, INAC is discharging effluent located in a “federal area”.¹⁷

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¹¹ *Agreement*, s. 3.1 (f).

¹² *Rules*, #22.

¹³ *MVRMA*, s. 60(1).

¹⁴ *MVRMA*, s. 106.

¹⁵ *MVRMA*, s. 72(1).

¹⁶ Pursuant to Schedule V, Item 3(v), Column III of the *Regulations*, the MVLWB has jurisdiction to issue a type B licence for “[a]ny direct or indirect deposit of waste to surface waters”.

¹⁷ Since devolution in 2014, the Government of Canada has retained responsibility for the “Management” of certain “waste sites”, as those terms are defined in the *MVRMA*. For the purposes of the *MVRMA*, a “waste site” is defined in the Northwest Territories Lands and Resources Devolution Agreement (the “DA”) as “an Abandoned Site where an Alteration Requiring Remediation exists.” “Management” in respect of a “waste site” means “the

According to section 72(1) of the *MVRMA*, INAC can only use water in a federal area with a licence or in accordance with the *Mackenzie Valley Federal Areas Waters Regulations*¹⁸ (the “**Regulations**”). “Licence” means “with respect to a federal area, a type A or type B licence permitting the use of waters or the deposit of waste, or both, issued by the Board...”¹⁹ “Board” means the MVLWB.²⁰

According to section 5(1) of the *Regulations*, INAC “may use water and deposit waste without a licence if the proposed use...has no potential for significant adverse environmental effects...” In the absence of evidence to the contrary, it can be assumed that INAC’s current practice of pumping and treating arsenic contaminated water without any water licence poses the “potential for significant adverse environmental effects.” The fact that INAC has already applied for a type A water licence as part of its remediation plan for the Project does not exempt INAC’s current discharges to Baker Creek from the scope of the *MVRMA*. The underlying purpose of INAC’s current discharges to Baker Creek – whether for maintenance or remediation – does not exempt such discharges from the scope of the *MVRMA*. As such, the *Regulations* do not exempt INAC from requiring a water licence issued by the MVLWB.

INAC’s reliance on s. 89 of the Act is unreasonable

INAC argues that it cannot advance its water licence application until “several” of the 26 measures in the Report are “partially or fully addressed.”²¹

In the interim, INAC argues that section 89 of the *MVRMA* allows INAC to “release treated effluent to Baker Creek since this needs to be completed as an interim measure given there is no viable alternative discharge.”²² INAC has characterized the “danger” in this case as water that will flood the underground storage tanks and release arsenic to the surrounding environment if it is not discharged.²³ These conditions have existed since at least 2005 when INAC finally assumed

process of the identification, assessment, and Remediation of that Waste Site.” In practical terms, a “waste site” is a contaminated site for which the Government of Canada has assumed responsibility for remediation. The Federal Contaminated Site Index (the “FCSI”) is the Government of Canada’s central database containing all known contaminated sites for which the government has assumed responsibility. The “Giant Mine” is listed as a contaminated site in the FCSI as of August 25, 2017.

¹⁸ SOR/93-303.

¹⁹ *MVRMA*, s. 96(1).

²⁰ *MVRMA*, s. 96(1).

²¹ INAC Responses to Recommendations from Giant Mine Oversight Board (GMOB) Establishment Report (July 2015 to December 2016). Accessible here: <http://www.aadnc-aandc.gc.ca/eng/1494606254152/1494606321168?=&wbdisable=true>

²² INAC Responses to Recommendations from Giant Mine Oversight Board (GMOB) Establishment Report (July 2015 to December 2016). Accessible here: <http://www.aadnc-aandc.gc.ca/eng/1494606254152/1494606321168?=&wbdisable=true>

²³ INAC’s 2007 Type A water licence application, page 3. Accessible here: <http://registry.mvlwb.ca/Documents/MV2007L8-0031/MV07L8-31-%20Application%20Received%20Oct07.pdf>

control of the Site after the care and maintenance agreement between the last operator (Miramar Giant Mine Ltd.) and INAC terminated on June 30, 2005.²⁴

With respect to INAC's reliance on section 89, INAC has misconstrued the purpose of the *MVRMA*. Section 89 provides that INAC "may take any reasonable measures to prevent, counteract, mitigate or remedy any adverse effect, in a federal area, on persons, property or the environment...if the federal Minister has reasonable grounds to believe that...a danger to persons, property or the environment may result from past operation of the work or from its closing or abandonment."²⁵ Section 89 is a safeguard for situations in which a sudden and serious change in circumstances calls for immediate action to avert, control or remedy danger to human life or the environment. Section 89 is not intended to exempt INAC from requiring a water licence for an indefinite period of time when an imminent environmental emergency does not exist.

INAC is not dealing with an emergency. INAC is discharging effluent to Baker Creek as part of its existing operating procedure. The fact that water storage is impossible and that danger to humans or health could result if contaminated water is not pumped from the underground workings of the Site is not indicative of an emergency situation. It is simply the result of the present operating procedure at the Site. Since ongoing discharges to Baker Creek have become part of INAC's operating procedure, INAC should be required to discharge in accordance with an interim water licence until the parameters of its type A water licence have been finalized.

Even if the *MVRMA* allows INAC to discharge effluent without a licence in emergency situations, the powers given to the Minister under section 89 cannot be used to create a back door means of empowering INAC to exempt itself from requiring a water licence for over a decade. INAC's interpretation of section 89 is unreasonable.

INAC's position that it is barred from advancing its water licence application until certain Measures have been completed is also unreasonable. Based on the wording of the Measures in the Report and the Letter, only Measures 5, 10, 22 and 23 require completion before the issuance of "regulatory approvals" or a "water licence". Measure 10 has been completed and Measure 5 is underway. The other Measures may be addressed as part of the type A water licensing process. Alternatively, the MVLWB could issue a direction that requires INAC to apply for an interim water licence and set a deadline for INAC to provide the deliverables required by incomplete Measures as part of such an application.

An application for an interim water licence would not trigger an environmental assessment.

If INAC submitted an application for an interim type B water licence, there would be no requirement for an environmental assessment on the grounds that the interim water licence is still with respect to the existing operations. Such an application would be grandfathered from environmental assessment by virtue of section 157.1 of the *MVRMA*. Section 157.1 states that:

²⁴ See letter to MVLWB from Miramar Giant Mine Ltd, dated June 20, 2005. Accessible here: <http://registry.mvlwb.ca/Documents/NIL2-0043/NIL2-0043-Termination%20of%20Miramar%20Care%20and%20Maintenance%20Agreement-Jun20-05.pdf>

²⁵ *MVRMA*, s. 89 (b)(ii).

“Part 5 does not apply in respect of any licence, permit or other authorization related to an undertaking that is the subject of a licence or permit issued before June 22, 1984, except a licence, permit or other authorization for an abandonment, decommissioning or other significant alteration of the project.”²⁶ The Giant Mine undertaking had a licence issued as of June 22, 1984.²⁷ The application for an interim water licence should be characterized as a continuation of the pre-1984 undertaking that was the Giant Mine²⁸ and not as part of its abandonment or decommissioning, and therefore an EA would not be triggered by virtue of s. 157.1 of the *MVRMA*.

Conclusion

No other operator in the NWT would be allowed to chronically discharge treated effluent into the receiving environment for more than a decade without a water licence. INAC has clearly misinterpreted the legal effect of section 89 of the *MVRMA* as a justification for its routine multi-year discharges of treated effluent into Baker Creek.

The Motion sought by the Oversight Board would serve to correct this error and establish ground rules for future operators in the NWT. The precedential value of granting the Motion at this time is potentially significant given the growing number of closed sites the Federal government is positioned to inherit in the coming years.

This completes the submissions of the Oversight Board. Kindly contact the undersigned with any questions.

Yours truly,



Dr. Kathleen Racher
Chair, Giant Mine Oversight Board

²⁶ See: *North American Tungsten Corporation Ltd. v. Mackenzie Valley Land and Water Board*, 2003 NWTCA 5, para 32.

²⁷ *Report of Environmental Assessment and Reasons for Decision: Giant Mine Remediation Project*, EA0809-001 (June 20, 2013) see discussion at pg. 5.

²⁸ In *Canadian Zinc Corp. v. Mackenzie Valley Land & Water Bd.*, 2005 NWTSC 48 the Court, discussed how an “undertaking” was defined in *North American Tungsten Corporation Ltd. v. Mackenzie Valley Land and Water Board*, 2003 NWTCA 5:

[44] The interveners argued that the term “undertaking” is used in Tungsten in the wider sense of a business or the whole arrangement under which the licence holder in that case operated. I agree that some of the language in Tungsten can be read that way. For example, the Court referred to “if the subject undertaking held a water licence”, “Tungsten’s existing water licence for its undertaking”, “given the location of Tungsten’s undertaking”, and “undertakings requiring water licences”. It also said:

Tungsten operates the Cantung Tungsten Mine ... in the Mackenzie Valley. That Mine has been in place since 1962. Tungsten’s predecessor was first granted a water licence for this undertaking in 1975.