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Subject: MV2007L8-0031 MV2019X0007 - DIAND-GIANT - Water Compensation Claims Discussion
Date: July 15, 2019 3:31:31 PM
Attachments: [MVLWB - Outline of the Legislative Framework for Water Compensation Claims \(June 28, 2019\).pdf](#)
[MVLWB - Notification Requirements for a Claim for Water Compensation \(June 28, 2019\).pdf](#)

Good afternoon,

Last week Board staff hosted a technical session for the Giant Mine Remediation Project ([MV2019X0007](#) and [MV2007L8-0031](#)). In the technical session [agenda](#) it had indicated that the water compensation requirements and process would be discussed on Day 4. Due to time constraints, this topic was not discussed at the technical session. If your organization is interested in meeting with Board staff to discuss the water compensation requirements and process, please contact me using the information provided below, or Tyree Mullaney at (867) 766-7464, preferably before the end of July.

Water compensation notifications are due on August 15, 2019 (see attached documents). Thank you,

Kimberley Murray, MSc

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June 2019

Brief Outline of the Legislative Framework for Water Compensation Claims

Introduction

The Mackenzie Valley Land and Water Board (the Board) is providing this outline of the framework for water compensation claims to assist parties in the Giant Mine Remediation Project proceeding understand the legislative framework for such claims, who may be eligible, and the notification requirements for potential claimants as established by the Board. This document only summarizes the water compensation provisions set out in legislation. If there are any discrepancies, the legislation prevails. Potential claimants are encouraged to review the legislation to ensure they fully understand the compensation regime and/or consult with legal counsel.

Board Authority and Responsibility for Water Licensing

Under the *Mackenzie Valley Resource Management Act*¹ (MVRMA), the *Waters Act*², and their associated regulations,³ the Land and Water Boards of the Mackenzie Valley (the Boards) regulate the use of water and the deposit of waste in federal and non-federal areas through the issuance and management of water licences (licences). If adverse effects caused by the use of water or the deposit of waste proposed in a licence application are unavoidable, the *Waters Act* and the MVRMA (the Acts) set out requirements for the Boards to consider water compensation when an affected party advances a claim. The Acts define who is eligible to make claims for compensation (subsection 26(5) of the *Waters Act* and subsection 72.03(5) of the MVRMA) and list the factors that the Boards must consider in determining compensation (subsection 26(6) of the *Waters Act* and subsection 72.03(6) of the MVRMA).

In an appropriate case the Boards must determine the appropriate compensation to be paid by a water licence applicant to existing water licensees who would be significantly adversely affected or eligible claimants who would be adversely affected, as the case may be, by the proposed water use or deposit of waste.⁴

¹ S.C. 1998, c.25.

² S.N.W.T. 2014, c.18.

³ The *Mackenzie Valley Federal Areas Waters Regulations* and the *Waters Regulations*, respectively.

⁴ Subsection 26(5) of the *Waters Act* and paragraph 60(1.1)(d) and subsection 72.03(5) of the MVRMA.

The Boards' authority to order compensation is forward-looking only. The Boards do not have the authority to order compensation for past damages.⁵ Likewise, the Boards can only order compensation if adverse effects or damages can be proven at the time of the application.

Claimant Eligibility

For the Giant Mine Remediation Project proceeding, categories of claimants eligible to apply for water compensation could be: Existing Licensees (and Applicants with Precedence) and Eligible Claimants.

Eligible Claimants are specified in the Acts⁶ and include:

- ii) domestic users,*
- iii) in-stream users,*
- iv) authorized users,*
- v) authorized waste depositors,*
- vi) persons who use waters or deposit waste (without a licence) under territorial law,*
- vii) persons referred to in paragraph 61(d) of the Nunavut Waters and Nunavut Surface Rights Tribunal Act,*
- viii) owners of property,*
- ix) occupiers of property, and*
- x) holders of outfitting concessions, registered trapline holders, and holders of other rights of a similar nature.*

If significant adverse effects on Existing Licensees or Applicants with Precedence are not avoidable, the Board needs to be satisfied that a compensation agreement is in place prior to licence issuance, amendment, or renewal.⁷ If adverse effects on Eligible Claimants are not avoidable, the Board "shall not" issue, amend, or renew a licence until compensation that the Board considers appropriate has been or will be paid.⁸

To advance a compensation claim, a claimant must:

1. File a notice with the Board by the time specified (August 15, 2019 for the Giant Mine Remediation Project proceeding); and
2. Fill out a Claim for Compensation Application form (will be due at a later date to be set by the Board).

If a Claimant files a Notice of Claim on time, they will then be required to provide a Claim for Compensation Application that will require the following:

- Satisfactory evidence to the Board that they are eligible, as identified above;
- Evidence that they were eligible at the time the Water Licence Applicant filed their application with the Board; and,

⁵ *Carter v. Northwest Territories Power Corp.*, 2014 NWTSC 19. Where possible, past damages must be recovered through civil action.

⁶ Paragraphs 26(5)(b) of the *Waters Act* or 72.03(5)(b) of the MVRMA

⁷ Paragraphs 26(5)(a) of the *Waters Act* and 72.03(5)(a) of the MVRMA.

⁸ Paragraphs 26(5)(b) of the *Waters Act* and 72.03(5)(b) of the MVRMA.

- Evidence that a proposed water use or the deposit of waste will adversely or significantly adversely, as the case may be, affect their use of waters.

Factors in Determining Compensation

In order to establish a right to compensation, a Claimant must demonstrate that the Water Licence Applicant's proposed water use or deposit of waste will "more likely than not" cause a loss or damage or other adverse effect, or significant adverse effect (for Existing Licensees), on their use of waters. Once the loss, damage, or other adverse effect is proven, the Board will determine what constitutes reasonable compensation. This is done by considering, at a minimum, the following factors:⁹

- (a) provable loss or damage
- (b) potential loss or damage
- (c) the extent and duration of the adverse effect(s), including the incremental adverse effect(s);
 - These are future-looking in nature and can include effects resulting from, or likely to result from, the proposed activities which may accumulate over the duration of the licence. The Claimant must have evidence which describes in detail any provable or potential effects, including the expected duration of the effect, how the proposed licensed activities will create or increase these effects, how widespread the effects will be, and how these effects will impact the Claimant's use of water;
- (d) the extent of the use of waters by person(s) who would be adversely affected; and
- (e) nuisance, inconvenience and noise;
 - Nuisance is an interference with another person's use or enjoyment that is both substantial and unreasonable. It includes not only physical interference but also impacts on the health, comfort, or convenience to the Claimant. Noise is an example of a nuisance.

⁹ Subsections 26(6) of the *Waters Act* and 72.05(6) of the MVRMA



Requirements for a Notification of an Intent to file a Claim for Water Compensation

Notifications must be received by the Board no later than August 15, 2019.

1 Information about the Application or File

Water Licence application or file number(s) associated with this claim:	
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2 Information about the Claimant

Claimant's Name (individual or group/association):			
Group or Association legal entity:			
Mailing Address:			
Email:		Tel.:	

3 Information about Eligibility

Please identify the category/categories that best describe your relationship with the waters potentially affected by the subject Licence.

Subsection 72.03(5) of the MVRMA or 26(5) of the <i>Waters Act</i>		
(a)(i)(A) or (B)	Existing licensee or Applicant with precedence	
(b)(ii)	Domestic users	
(b)(iii)	In-stream users	
(b)(iv)	Authorized users	
(b)(v)	Authorized waste depositors	
(b)(vi)	Persons who use waters or deposit waste (without a licence) under the territorial law	

(b)(vii)	Persons referred to in paragraph 61(d) of the <i>Nunavut Waters and Nunavut Surface Rights Tribunal Act</i> ,	
(b)(viii)	Owners of property	
(b)(ix)	Occupiers of property	
(b)(x)	Holders of outfitting concessions, registered trapline holders, and holders of other rights of a similar nature	

Please provide information regarding the nature of your use, the duration of your use, and extent of your use of the waters in question.

4 Information about Potential Impacts

Please provide information regarding the potential impacts resulting from the subject Licence on the use of waters described above.