

**GOVERNMENT OF THE NORTHWEST TERRITORIES
ENVIRONMENT AND CLIMATE CHANGE
INTERVENTION**

FOR

**NORTHWEST TERRITORIES POWER CORPORATION
TYPE A WATER LICENCE RENEWAL
W2023L4-0001**

SUBMITTED TO:

**WEK'ÈEZHÌ LAND AND WATER BOARD
4922 - 48TH STREET
YELLOWKNIFE, NT X1A 2P6**

NOVEMBER 10, 2023

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LIST OF ACRONYMS & ABBREVIATIONS

Closure and Reclamation Plan	CRP
Dogrib Power Corporation	DPC
Department of Environment and Climate Change	ECC
Government of the Northwest Territories	GNWT
Information Request	IR
Northwest Territories Power Corporation	NTPC
Tłıchǫ Government	TG
Wek'èezhì Land and Water Board	WLWB or Board

SUMMARY OF RECOMMENDATIONS

- 1. GNWT-ECC recommends that the term of the renewed Type A Licence be 25 years at most in accordance with the *Waters Act*.**
- 2. GNWT-ECC recommends NTPC explain the operational limitations that must be considered by NTPC, while also minimizing potential impacts to the environment with regards to the proposed dates or duration which it would recommend to limit drawdown of Big Spruce Reservoir and the Snare Falls Forebay to the proposed lower limits.**
- 3. GNWT-ECC recommends the Water Licence require a report from the Septic Field Verification Study be submitted for Board approval.**
- 4. GNWT-ECC recommends the Water Licence require the submission of a Geochemical Characterization and Management Plan, for Board approval, at least 90 days prior to use of quarry rock as construction material. GNWT-ECC notes this submission should not be constrained by a distance from a waterbody where construction material will be used.**
- 5. GNWT-ECC recommends the Water Licence include the Standard Water Licence Conditions Part E Conditions 5 and 8.**
- 6. GNWT-ECC recommends the Water Licence require the submission of all plans requiring revisions, for Board approval, post-issuance of the Water Licence.**
- 7. GNWT-ECC recommends the Water Licence include a condition requiring the submission of an interim CRP within a timeframe determined by the Board, in advance of any closure and reclamation, including progressive reclamation or temporary closure.**

1. Introduction

The following concerns and issues have resulted from the Government of the Northwest Territories, Department of Environment and Climate Change (GNWT-ECC) review of submissions and responses related to Northwest Territories Power Corporation's (NTPC) Water Licence Renewal Application (W2023L4-0001) to use, store, and divert water for the hydroelectric power undertaking associated with the Snare River Watershed at the Snare Rapids, Snare Falls, Snare Forks and Snare Cascades. This Technical Intervention details GNWT-ECC's concerns and provides recommendations for the Wek'èezhì Land and Water Board's (the WLWB or the Board) consideration. This submission takes into consideration the documents provided throughout the Renewal process including items from the Water Licence Renewal Application and Information Request (IR) responses. GNWT-ECC appreciates the opportunity to express its concerns and provide recommendations and suggestions to assist the WLWB in making a decision related to the proposed Water Licence Renewal.

1.1. Application Background

As part of this Renewal, NTPC has applied to combine Water Licences N1L4-0150 and W2014L4-0001 into one licence. On August 14, 2023, GNWT-ECC and other parties submitted comments on the Application. NTPC provided their response to the public review comments on August 28, 2023. On September 26, 2023 the WLWB hosted a Technical Session to discuss and clarify issues raised by Parties in the review of the Renewal Application. Following the Technical Session, the WLWB requested additional information from GNWT-ECC and NTPC. Responses to the IRs were provided to the WLWB on October 5 with the exception of IRs #10 and #11 which were provided to the WLWB on October 13. Following the response to IRs, the WLWB issued GNWT-ECC's response to IR #7 for public review on October 6. On November 3, 2023, comments were received from NTPC and Tłı̨chǫ Government (TG).

GNWT-ECC's review in its entirety is conducted pursuant to the *Waters Act* and *Waters Regulations*, which are Territorial legislation that cover the use of water and deposit of waste in the Northwest Territories. This legislation mirrored the previous federal legislation without any substantive changes and came into force on April 1, 2014. GNWT-ECC conducted this review in part to ensure that the Water Licence Renewal Application is in accordance with s. 34 of the *Waters Act*, which identifies that an application for a licence shall be in a form and contain the information prescribed by the regulations, as set out in s. 5 and Schedule C of the *Waters Regulations*.

2. Water Licence Term

NTPC has applied for a water licence term of 39 years. As outlined in the cover letter to the Application, NTPC states: "This term is timed to expire one year after the lease agreement with Dogrib Power for Snare Cascades. This will allow NTPC and [Dogrib Power

Corporation (DPC)] to adjust the next water licence with the updated terms of the new lease agreement.”

First, GNWT-ECC would like to note that there is no sound reason why whatever clauses and requirements will be in the renewed lease between Dogrib Power and NTPC should have any bearing on the term of this renewed water licence. NTPC will be legally bound by the clauses and requirements of the renewed lease, so there will be no need for WLWB to reflect what is required in any lease clause as a condition in the subsequent renewed water licence. There is no legal or practical problem if the subsequent renewed water licence and renewed lease contain separate requirements related to use of water and deposit of waste or set differing standards. Both the subsequent renewed water licence and renewed lease will be legally binding and NTPC will therefore be legally obliged to comply with the most stringent requirement.

Further, in review of the Application, [GNWT-ECC comment #2](#) identified that “the *Waters Act* does not allow a type A licence of a prescribed class of undertaking to be renewed for a term of more than 25 years. Schedule B of the *Waters Regulations* likely prescribes power undertakings as a class of undertaking in this respect. As this undertaking clearly falls under that class of undertaking, the maximum term of the renewed water licence is 25 years. As such, GNWT-ECC recommended that the term of the renewed type A Licence be 25 years at most. GNWT-ECC notes this position is unchanged and has therefore included this recommendation herein.

At the Technical Session, on September 26, 2023, GNWT-ECC was issued IR #7 to provide further explanation regarding their interpretation of s. 26(2) of the *Waters Act*. GNWT-ECC’s [response to IR #7](#) was then issued by the Board for review. GNWT-ECC’s submissions in reply to TG’s and NTPC’s responses are set out below for WLWB’s consideration, prior to WLWB making any decision on the review item generally or in the specific context of this Renewal. GNWT-ECC maintains the interpretation set out in the review item that all classes of Type A undertaking are prescribed through Schedule B of the *Waters Regulations* for the purpose of s. 26(2)(a) of the *Waters Act* and are therefore currently subject to a maximum term of 25 years.

In reply to the TG’s response submissions, though GNWT-ECC respectfully disagrees with TG on whether a Type A licence can currently be issued for a term of more than 25 years, GNWT-ECC shares TG’s perspective that there is considerable ambiguity regarding the interpretation of this issue.

In reply to NTPC’s response submissions, GNWT-ECC states the following:

GNWT-ECC respectfully disagrees with NTPC’s interpretation set out in its response. NTPC’s response does not consider or analyze whether upon the repeal and replacement of the *Northwest Territories Waters Act* with the *Waters Act* and the amendments, as part of Bill C-15, related to maximum term length set out in s. 26(2) of the *Waters Act*, the *Waters Regulations*, though not amended from the preceding *Northwest Territories Waters Regulations* in any respect relevant to this issue, could be interpreted as now prescribing all classes of Type A undertakings in relation to s. 26(2)(a) of the *Waters Act*. It appears that

this possibility also was not considered by the Governor in Council or anyone in the Government of Canada in conjunction with Bill C-15. The oversight of not adding any regulation-making authority to correspond to these amendments makes this seem all the more likely.

The statement of Tara Shannon (Director, Resource Policy and Programs Directorate, Northern Affairs, Department of Indian Affairs and Northern Development) to the Standing Committee on Aboriginal Affairs and Northern Development, quoted in paragraph 34 of NTPC's response, is integral to NTPC's argument that this water licence may be renewed for a term of more than 25 years. At most, limited weight can be accorded to this statement in interpreting this issue as it is Hansard. C.J. Wagner, for the majority of the Supreme Court of Canada, stated the following in paragraph 89 of *Reference re Impact Assessment Act*, 2023 SCC 23 regarding the role of Hansard in statutory interpretation:

This Court has observed that parliamentary debates should be approached with caution. In *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 35, this Court noted that the "frailties of Hansard evidence are many", though it recognized that such evidence "can play a limited role in the interpretation of legislation". In *Morgentaler*, Sopinka J. noted the criticism that Hansard evidence "cannot represent the 'intent' of the legislature, an incorporeal body", and cautioned that courts must remain "mindful of the limited reliability and weight of Hansard evidence" (p. 484). Courts must approach parliamentary debates with great care, acknowledging that the record will often be full of contradictory statements, that speakers may make inadvertent errors in presenting and discussing legislation and that it is bad practice to cherry-pick seemingly helpful passages from the record.

As the statement about legislative intent in this case was made by an unelected official, it should be accorded even less weight than if the statement had been made by an Executive Council member or other elected representative. To an even greater extent than an elected representative, an unelected official "cannot represent the 'intent' of the legislature".

All that can be reasonably concluded from the Hansard noted in NTPC's response to the review item is that Parliament's likely intention was to remove a legal barrier to issuing licences for a term of more than 25 years. However, there is no indication that any consideration was given by Governor in Council or anyone within the Government of Canada to whether the existing regulations would then be interpreted as prescribing all classes of Type A undertaking in relation to what is now s. 26(2)(a) of the *Waters Act*, thereby imposing another barrier that needed to be addressed to actually allow some or all Type A licences to be issued for a term of more than 25 years.

There are a number of respects in which NTPC misconstrues or misunderstands the submissions of GNWT-ECC set out in the item for review:

In paragraph 21, NTPC inaccurately indicates that the GNWT-ECC's submissions in the review item are that a class of Type A undertaking would have to be prescribed as being exempt from a maximum term of 25 years in the *Waters Regulations* to actually be exempt.

To clarify, GNWT-ECC's submission is that all classes of undertaking are currently prescribed as being subject to the maximum 25-year term limit in relation to s. 26(2)(a) of the *Waters Act*; not that any class of Type A undertaking would need to be prescribed as being exempt from this term limit for a longer term to be possible. GNWT-ECC also did not point to the absence of any regulation allowing certain classes of Type A undertakings to be licenced for more than 25 years in its submissions. If the Commissioner in Executive Council ever wants to exempt any class of Type A undertaking from the maximum 25-year term limit, that could be achieved by amending the *Waters Regulations* without prescribing exemptions.

Paragraphs 22 and 41-45 are premised on the same misconstrual or misunderstanding of GNWT-ECC's submissions and position noted in paragraph 21. GNWT-ECC's position is not that there is a presumptive 25-year term limit for all classes of Type A undertakings unless an express exemption applies. GNWT-ECC's position is that Schedule B of the *Waters Regulations* achieves two purposes: (1) classifies purposes/types of use of waters in any water management area; and (2) prescribes the classes of Type A undertakings for the purpose of s. 26(2)(a) of the *Waters Act* to which a 25-year term limit applies: currently all classes of undertakings.

Regarding paragraphs 28-30 and 37, GNWT-ECC notes that the relevant provisions and schedule in federal legislation (the *MVRMA* and *Mackenzie Valley Federal Areas Waters Regulations*) are analogous to those in Northwest Territories legislation. GNWT-ECC consequently interprets all classes of Type A undertakings in a federal area to currently be subject to a 25-year term limit as well.

Regarding paragraphs 35-36, as noted above, all that can be reasonably concluded from the legislative history is that Parliament intended to remove a barrier to terms of more than 25 years for licences; not that no other barrier would exist.

In reply to paragraph 46-50, GNWT-ECC's interpretation does not result in a tautology or redundancy of s. 26(2)(b) of the *Waters Act*. Under GNWT-ECC's interpretation, the Commissioner in Executive Council could amend the *Waters Regulations* to no longer prescribe all classes of Type A undertakings for the purpose of s. 26(2)(a) of the *Waters Act*. There are various ways in which such amendments could be made. S. 26(2)(b) of the *Waters Act* is therefore not redundant under GNWT-ECC's interpretation.

Regarding paragraph 51, GNWT-ECC's interpretation certainly is not that a land and water board would have to issue a licence for the maximum term of any prescribed Type A undertaking. As always, a land and water board has discretion within the scope of the applicable legislation to issue a licence for whatever term it believes is appropriate; up to 25 years in the case of a prescribed Type A undertaking if the anticipated duration of the undertaking is 25 years or more.

Regarding paragraphs 52-54, though it is not of any apparent consequence, GNWT-ECC remains of the view that the regulation-making authority applicable to s. 26(2)(a) of the *Waters Act* is s. 63(1)(w) as no class of undertaking necessarily has to be prescribed for the

purpose of s. 26(2)(a). The s. 63(1)(v) regulation-making authority refers to anything that “is to be prescribed under this Act”. It therefore only applies if something must be prescribed for the purpose of the applicable provision of the *Waters Act* for the regime to be functional.

Recommendation:

- 1. GNWT-ECC recommends that the term of the renewed Type A Licence be 25 years at most in accordance with the *Waters Act*.**

3. Minimum Water Levels

As part of the Application, NTPC has requested that the minimum water levels listed in the Licence for the Big Spruce Reservoir and the Snare Falls forebay each be reduced by 0.3 m. NTPC has outlined that the requested lower level for the Big Spruce Reservoir is a result of low water years and this request has previously been approved by the Board on two occasions in accordance with Part C, Condition 2 of Water Licence N1L4-0150. NTPC has also outlined that the requested lower level for the Snare Falls forebay is a result of the need to complete inspections on upstream infrastructure and that wave action and wind may dip the value below the limit that is in the current Licence.

As a result of discussions during the Technical Session, IR #1 required “NTPC to propose the exact dates or duration which it would recommend to limit drawdown of Bigspruce Reservoir and the Snare Falls Forebay to the proposed lower limits. NTPC to also propose criteria (including inflow rate) that would identify the need for NTPC to access the lower limit for Bigspruce Reservoir [sic]. The response should explain the operational limitations that must be considered by NTPC, while also minimizing potential impacts to the environment.” On October 5, 2023, NTPC provided a response to IR #1. As outlined below, GNWT-ECC has identified that further information should be provided based on NTPC’s response in order to fully respond to the IR.

In [response to IR #1](#), NTPC proposed that if inflows to Big Spruce Reservoir are below the threshold of 70.43 cubic metres per second on September 1, the new lower limit may be required from April 15 to August 15 of the following year in the Big Spruce Reservoir. Further NTPC proposes that the temporary lower elevation of the Snare Falls forebay during planned maintenance would be for a maximum of 14 calendar days in a continuous period and that this drawdown could occur at any time between May 1 and October 31.

As explained by Board staff during the Technical Session, NTPC’s requested change to the minimum water levels means that these levels could be used every year whereas the previous approvals were approved on a one-time basis ([Technical Session Transcript](#), page 48). It is GNWT-ECC’s understanding that NTPC does not anticipate the need to use the lower water level for the Big Spruce Reservoir every year, however, as this is the requested authorization in the Water Licence, this maximum potential impact requires assessment. Further, concern was noted during the Technical Session regarding a timing restriction on

the lower water levels due to the potential of impacting fish spawning habitat ([Technical Session Transcript](#), page 53).

GNWT-ECC notes that the IR specifically requested that *the response should explain the operational limitations that must be considered by NTPC, while also minimizing potential impacts to the environment*, which was not provided in NTPC's response. At this time, GNWT-ECC is not recommending alternative timing windows for the requested lower water level limits to NTPC's proposal provided in response to IR #1. However, GNWT-ECC believes this information to be necessary in order to understand the potential impacts of the proposed timing windows for the minimum water levels provided in response to IR #1 and understand the operational implications to the Snare Facility. GNWT-ECC therefore requests the information requested by IR #1 regarding both the Big Spruce Reservoir and the Snare Falls forebay be provided.

Recommendation:

- 2. GNWT-ECC recommends NTPC explain the operational limitations that must be considered by NTPC, while also minimizing potential impacts to the environment with regards to the proposed dates or duration which it would recommend to limit drawdown of Big Spruce Reservoir and the Snare Falls Forebay to the proposed lower limits.**

4. Septic Field Verification

In [response to IR #3](#), NTPC proposed a Special Study to verify that the septic fields are not depositing waste either directly or indirectly into receiving waters. NTPC indicated in this response that the Special Study could be submitted to the Board for approval within 90 days following issuance of the Licence. As well, NTPC proposed a schedule of requirements that could be included in the Licence. GNWT-ECC supports NTPC's proposal and notes that one of the proposed requirements in the schedule is the submission of a final report. GNWT-ECC notes that the submission of this report should be a requirement of the Water Licence and be for Board approval, instead of a requirement of a schedule.

Recommendation:

- 3. GNWT-ECC recommends the Water Licence require a report from the Septic Field Verification Study be submitted for Board approval.**

5. Geochemical Characterization and Management Plan

In [response to IR #5](#), NTPC proposed that the Licence require the submission of a Geochemical Characterization and Management Plan, at least 90 days prior to the use of quarry rock for construction material within 100 meters of a waterbody. NTPC also proposed a schedule of requirements for inclusion in the Licence.

GNWT-ECC agrees with NTPC's proposal of requiring the submission of a Geochemical Characterization and Management Plan. However, GNWT-ECC notes that typically such a plan is not limited to the use of material within a certain distance from a waterbody. For example, the Water Licence for the Tłıchǫ All Season Road (W2020L8-0001) requires the submission of a Quarry Operations Plan that does not constrain the plan's application to material that is placed within a given distance from a waterbody. This specification should not be included as negative environmental impacts from acid rock drainage and metal leaching can occur regardless of the proximity to a waterbody. By ensuring that the quarry itself, in addition to any stockpiled material, meets the geochemical criteria outlined in the management plan, the risk to the environment is minimized.

This understanding also aligns with the definition of Receiving Environment in the draft Licence and the Standard Water Licence Conditions (LWB, 2023), which is "the natural environment that, directly or indirectly, receives any Waste from the Project". This definition is not constrained to aquatic environments, which is appropriate unless evidence is provided that any waste will not enter an aquatic environment, which has not occurred during this renewal.

GNWT-ECC also notes that Standard Water Licence Conditions, Part E Conditions 5 and 8 (LWB, 2023), are also applicable. Condition 5 requires material used in construction to meet the geochemical criteria outlined in the management plan, and Condition 8 requires the maintenance of geochemical records of construction materials.

Recommendation:

- 4. GNWT-ECC recommends the Water Licence require the submission of a Geochemical Characterization and Management Plan, for Board approval, at least 90 days prior to use of quarry rock as construction material. GNWT-ECC notes this submission should not be constrained by a distance from a waterbody where construction material will be used.**
- 5. GNWT-ECC recommends the Water Licence include the Standard Water Licence Conditions Part E Conditions 5 and 8.**

6. Plan Updates

In review of the Application, several comments were submitted regarding updates to various plans; see [GNWT-ECC comments](#) #3, #13, #14, #18, #19. These included the following plans: Waste Management Plan, Spill Contingency Plan and, Emergency Preparedness Plan. Therefore, the Water Licence should require these plans be re-submitted for Board approval post-issuance of the Water Licence. Further, should there be any plan that does not conform to licence requirements once the Licence has been issued, the Water Licence should require these plans be submitted for Board approval post-issuance.

Recommendation:

- 6. GNWT-ECC recommends the Water Licence require the submission of all plans requiring revisions, for Board approval, post-issuance of the Water Licence.**

7. Closure Water Licence Conditions

As part of the Application, NTPC included a Closure and Reclamation Plan (CRP). However, as noted in [GNWT-ECC comment #22](#) in review of the Application, only two conditions were proposed by NTPC in the draft Licence related to closure and reclamation. These two conditions consisted of the requirement to submit a final CRP a minimum of two years prior to the end of operations and the requirement for the licensee to endeavor to carry out progressive reclamation as soon as is reasonably practicable. There is therefore no condition within the Licence proposed by NTPC to have the CRP that was submitted with the Application approved by the Board in the interim, in advance of final closure.

As identified by NTPC in response to comments on the Application (response to GNWT-ECC comment #22 and WLWB staff comment #19), GNWT-ECC understands that NTPC does not have any intention to conduct progressive reclamation, nor temporary or permanent closure. Further, GNWT-ECC understands that NTPC has not proposed to include a condition requiring the submission and approval of an interim CRP to reduce regulatory burden given the facility will not be closing and therefore NTPC stated the closure plan would not be used ([Technical Session Transcript](#), page 89).

In [response to IR #2](#), NTPC identified agreement with the inclusion of Standard Water Licence Conditions, Part I, Conditions 3 and 5-11 (LWB, 2023) in the Water Licence. NTPC further identified that there is no value in the inclusion of Standard Water Licence Conditions Part I, Conditions 1 and 2 (LWB, 2023) as there is no reasonably foreseeable circumstance in which the Snare Hydroelectric Facility would be closed.

GNWT-ECC notes that Part I, Condition 5 is: “The Licensee shall endeavor to carry out approved Progressive Reclamation as soon as is reasonably practicable.” However, NTPC has not proposed a condition to require the submission and approval of an interim CRP. Therefore, there would be no mechanism for the Board to approve progressive reclamation prior to final closure. GNWT-ECC notes that during the Technical Session, it was proposed by NTPC that a path forward may be to include a condition in the Licence to require the submission of a CRP in the event closure and reclamation is planned to occur at a future date ([Technical Session Transcript](#), page 93). Given the rationale provided by NTPC for not requiring a CRP in the Licence in advance of final closure, GNWT-ECC agrees that this is an acceptable path forward and that the condition of the Licence should stipulate a timeframe that the CRP is provided in advance of any progressive reclamation or temporary closure.

Recommendation:

- 7. GNWT-ECC recommends the Water Licence include a condition requiring the submission of an interim CRP within a timeframe determined by the Board, in advance of any closure and reclamation, including progressive reclamation or temporary closure.**

8. Closing

GNWT-ECC would like to thank the WLWB for providing the opportunity to submit this Intervention for the Water Licence Renewal process for the Snare Hydroelectric Facility. GNWT-ECC does not intend to appear and make representations or see the need for a public hearing in any form. However, if one or more other Parties request a public hearing, GNWT-ECC is prepared to participate in that public hearing at the Board's request.

GNWT-ECC is of the view that a public hearing could potentially be dispensed with according to the provisions of the *Waters Act*. Subsection 41(2)(a) of the *Waters Act* outlines that a public hearing is required for a Type A Water Licence Renewal. However, subsection 41(3)(a) of the *Waters Act* allows for the requirement in 41(2)(a) to not apply if:

- (i) the applicant or the licensee, as the case may be, consents in writing to the disposition of the matter without a public hearing, and
- (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

GNWT-ECC notes that the provisions of the *Waters Act* do not require concerns noted by Parties to be addressed by the Proponent as a prerequisite for cancelling a hearing. GNWT-ECC refers the Board to the Type A Water Licence Renewal for the NTPC Bluefish Hydroelectric Facility (MV2005L4-0008) (see the [Reasons for Decision, 2021](#)). In this proceeding, Parties submitted written Interventions and the Mackenzie Valley Land and Water Board (MVLWB) did not receive indication from any Party that they wished to appear in-person before the Board and NTPC (the applicant/Licensee) agreed that no public hearing was required. The MVLWB did not receive notification that any person intended to appear regarding the Application ten days prior to the scheduled hearing date. Therefore, the public hearing was cancelled in accordance to paragraph 41(3)(a) of the *Waters Act*.

9. References

Land and Water Boards of the Mackenzie Valley (LWB). (2023). Standard Water Licence Conditions Template Version 2.1.