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VIA ONLINE REVIEW SYSTEM

Re: Submission to the Mackenzie Valley Land and Water Board re determination of type A and type B water licences

Tłı̨chǫ Government thanks the Mackenzie Valley Land and Water Board ("MVLWB") for inviting comments and recommendations on the legal interpretation issue regarding the determination of type A and type B water licences in the context of North American Tungsten Corporation Ltd.'s ("NATCL") application for a type B water licence for care and maintenance activities at the Cantung Mine site, application number MV2023L2-00011.

We have carefully considered this issue, in light of the relevant statutory and regulatory framework, the role of MVLWB and the other Land and Water Boards in the Mackenzie Valley (collectively, "the Boards"), and the spirit and intent of the Tłı̨chǫ Agreement and the provisions therein related to the co-management of lands, waters, and resources. We have also reviewed the responses of the Government of the Northwest Territories – Department of Environment and Climate Change ("GNWT-ECC"), Crown Indigenous Relations Canada ("CIRNAC"), and NATCL to the MVLWB's Information Request #3.

The Position of Tłı̨chǫ Government

Tłı̨chǫ Government is of the view that the Boards do have the jurisdiction to issue a type B licence that would replace a type A licence in situations where the activities associated with an undertaking would meet the threshold for type B licensing criteria under regulations. We do, however, have concerns about whether NATCL's specific application meets that threshold, but defer to the role and expertise of the MVLWB to make a fact-based determination on that matter.

The modern principle of statutory interpretation holds that the words of a piece of legislation are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act, and the intention of the legislature. An application of the principle to the legislative regime here demonstrates, in our view, that the Boards have broad discretion to issue type A and type B licences "in accordance with the criteria set out in the regulations made under paragraph 90.3(1)(c) …,"[1] subject to the terms and conditions set out in

[1] *Mackenzie Valley Resource Management Act*, s 72.03(1).

a licence. This aligns with the purpose of establishing the Boards: "to enable residents of the Mackenzie Valley to participate in the management of its resources for the benefit of the residents and of other Canadians," as well as the mandate of the Boards, whose objectives are to "provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of the Mackenzie Valley."[2] Curtailing the Boards' authority to issue type B licences where the original licence for an undertaking is type A in certain instances (i.e., if closure criteria for a mine have not been met or if there remains the potential to seek a new operator) would undermine the Boards' ability to make accurate, reasonable, evidence-based decisions as they attempt to fulfill their mandates. It would also unduly favour type A licences in situations where licensing criteria thresholds for type B licences have been met and a type B licence may be more appropriate.

It is worthy of note that at least one previous Board decision with similar facts to the present case supports our view that type A mining and milling projects can become type B industrial projects for the continuation of care and maintenance activities. In the 2010 Remediation of the Colomac Mine Site decision,[3] the Wek'èezhìı Land and Water Board granted a type B licence for remediation activities at a mine that initially had a type A licence. The reasons given were that "(1) the project is a continuation of remediation activities that were reviewed and approved in the past; none of these activities require a Type A water licence" and "(2) water use and waste deposition are expected to be less than what is currently licensed." In our view, this precedent provides further support for the proposition that licence types can change based on material changes to activities based on licensing criteria.

Response of Tłı̨chǫ Government to GNWT-ECC

Tłı̨chǫ Government would like to directly address some of the assertions in the responses of GNWT-ECC.

GNWT-ECC argues that a mining and milling operation, including projects in receivership if there is any potential to seek a new operator, should continue to require a type A license during care and maintenance until closure criteria have been met, due to the liabilities such projects could create. GNWT-ECC asserts that a mining and milling undertaking cannot be reclassified until a mine is abandoned and a government responsible for remediation, which did not produce minerals from the mine, is the operator. GNWT-ECC expresses concern that a Board could, under a type B licence, authorize a deposit of stored waste that would exceed what was authorized under the type A licence issued during the active operation of the mine, without a

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[2] *Mackenzie Valley Resource Management Act*, s. 101(1).

[3] Wek'èezhìı Land and Water Board, Reasons for Decision W2009L8-0003 – Renewal of MV2004L8-001 (18 February 2010), online: < https://registry.mvlwb.ca/Documents/W2009L8-0003/W2009L8-0003%20-%20Colomac%20-%20WL%20Reasons%20for%20Decision%20-%20Issuance%20-%20Feb%2023_10.pdf

public hearing and without approval of the Minister. GNWT-ECC argues that its interpretation of the regulations, and the constraints such an interpretation would place on the Boards, is needed to avoid what GNWT-ECC characterizes as "absurd consequences." GNWT-ECC also argues that allowing a type B water licence for care and maintenance is impractical and could delay further remediation efforts, rendering the site unattractive to potential purchasers who would need a type A licence immediately to start mining and milling or begin remediation. We find these arguments uncompelling.

In our view, the regulations do not bar the Boards from issuing type B licences for projects that meet the licensing criteria threshold, and indicate that such changes in undertakings and licence types were anticipated by the legislature. For example, the description of industrial undertakings under Schedule II of the Mackenzie Valley Federal Areas Waters Regulations, where the deposit of waste would only trigger a type B licence, explicitly includes "tailings reprocessing." Reprocessing from tailings can fall under both industrial and mining and milling undertakings. This would include mining projects where tailings reprocessing occurs at the mine site after all other mining and milling has stopped. Such projects would, it is trite to observe, have at one time likely been categorized as a mining and milling undertaking. Barring the issuing of a type B licence in such cases, as GNWT-ECC urges, would result in regulatory incoherence and demonstrates that the regulations do not support the approach that GNWT-ECC advocates.

Further, GNWT-ECC's assertion that reclassification from a type A to a type B license should only be available (a) after abandonment and (b) after government has taken control of the site for remediation purposes is tantamount to saying that the determination of whether activities at a site that previously had a type A license can be continued under a type B license is based upon the *identity* of the proponent (only public government) and the *intentions* of the proponent (only remediation). In our view, this proposed approach does not find support in the regulations. Making the possibility of the reclassification of an undertaking contingent on who the operator is and requiring that a licence type determination for projects in receivership be based on a subjective analysis of whether there is any potential to seek a new operator would move away from the activity-based licensing criteria that underpin the regime and towards determinations based on the analysis of proponents and their intentions.

Lastly, the Boards have the expertise and capacity to issue and administer type B care and maintenance licences in accordance with their authority and applicable laws and regulations, set appropriate conditions and information requirements, and provide adequate oversight. This could be further supported through regulatory amendments and with clearer procedures for mining and milling projects with initial type A licences that are under care and maintenance. Moreover, a Board retains the discretion to hold public hearings if it is satisfied that it would be in the public interest, and the Boards should be trusted to do so when circumstances require.

Conclusion

In summary, Tłı̨chǫ Government is of the view that the Boards do have the jurisdiction to issue a type B licence to replace a type A licence where the activities associated with an undertaking would meet the type B licensing criteria. Whether NATCL meets that threshold is for the

MVLWB to determine. The Boards have broad discretion to issue type A and type B licences in accordance with licensing criteria, which aligns with the legislative purpose and mandate of the Boards. Curtailing the Boards' authority to issue type B licences would undermine the Boards' ability to make accurate and reasonable decisions as they attempt to fulfill their mandate, and unduly favour type A licences where a type B licence may be more appropriate.

The regulations do not bar the Boards from issuing type B licences for projects that meet the licensing criteria threshold, and indicate that such changes in undertakings and licence types were anticipated by the legislature, as exemplified in the inclusion of "tailings and reprocessing" under the description of industrial undertakings in the regulatory schedules, which necessarily targets projects that would have at one time been categorized as a mining and milling undertaking. Further, licence type determination under the current regulations is activity-based and does not hinge on who the proponent is or what their intentions are.

In our view, the Boards are already well equipped to avoid "absurd consequences." They have the authority, expertise and capacity to issue and administer type B care and maintenance licences in accordance with applicable laws and regulations, to set appropriate conditions and information requirements, and provide adequate oversight. Rather than curb their authority, we should look to providing the Boards with the tools necessary to best exercise that authority and fulfill their mandate, through regulatory amendments and with clearer procedures for mining projects under care and maintenance.

We recognize that the regulations could be interpreted differently. We continue to call on GNWT and the federal government to take a proactive approach and to come together with Indigenous Government partners to review and, where necessary and appropriate, amend existing regulations for clarity, consistency, and effectiveness, and to adapt them to better meet the needs of our communities as well as those of industry. This can be done in a manner that will drive investment in our region while protecting our lands and resources for present and future generations. We believe there are practical regulatory adjustments that would have broad support and move forward efficiently. Tłı̨chǫ Government is ready to collaborate on this important work.

In Tłı̨chǫ Unity,

Brett Wheler
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