



Environment
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YUKON WATER BOARD
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APPL. NO. Q206-074

June 19, 2007

Bruce Willis, Chair
Yukon Water Board
Range Road
Whitehorse, Yukon

Dear Mr. Willis

RE: ELSA RECLAMATION AND DEVELOPMENT CORPORATION'S APPLICATION FOR A TYPE B LICENSE – UNITED KENO HILL MINESITE

In early June of this year, the Water Resources Section of the Yukon Department of Environment ("Water Resources") received a copy of a legal opinion submitted to the Yukon Water Board (the "Board") by the Elsa Reclamation and Development Corporation ("ERDC") in reference to ERDC's application for a type B water license. The opinion was prepared by M.B. Pockey, Fasken Martineau, and is dated March 15, 2006 (the "Pockey opinion").

A couple of weeks prior to receiving the Pockey opinion, Water Resources obtained a copy of a letter prepared by Ms. Kelly Boutilier, dated April 12, 2007, which indicated that the issue of whether the ERDC required a type A or a type B license, if it was an issue, could be addressed at the time the notice of application was published in accordance with the *Waters Act*.

The issue of the type of license required by ERDC is an issue of concern to Water Resources. However, we believe it is an issue that must be addressed prior to the publication of the notice of application and should be addressed, optimally, prior to the application being deemed adequate by the Board. The following presents our views on these two points.

A. Item 2(5) of Schedule 7 of the Water Regulation – Type A or Type B License

The Pockey opinion reviews the issue of what type of water license is required by ERDC for the proposed care and maintenance activities at the United Keno Hill Property (the "property"). On page 7 of the Pockey opinion the following conclusion is made:

[I]n summary, pursuant to the provisions of the Waters Act and the Waters Regulation, a type B license would be required for the deposit of waste and no

license should be required for any other aspect of the care and maintenance treatment activities. However, if a water license is required by the Water Board for the use of water from an adit or for the treatment activities at the Valley Tailings, then nothing more onerous than a type B license could or should be required, if at all, in the circumstances.

With respect to Ms. Pockey, Water Resources does not agree with her conclusion and asserts that a type A water license is required based upon the information submitted to date by ERDC in support of its application for a license. In particular, we are of the view that item 2(5) of Schedule 7 of the *Water Regulation* requires a type A license in this circumstance.

In relation to item 2(5), the Pockey opinion states the following on page 6:

“... A type A license is required only for “construction of a dam the maximum height of which is 8m or higher, where 60,000m³ or more cubic metres of water is stored or where a hazard is posed.” Because the dams in this case have already been constructed and have operated for many years, and because no hazard is posed by any of them, a type A license would not be required. A type B license is required for “construction of a dam the maximum height of which is 3 or more metres but less than 8m and no hazard is posed, or where 10,000 cubic metres of water but less than 60,000m³ of water is stored and no hazard is posed”. The language of this provision does not provide for the scenario where more than 60,000m³ of water is stored behind a dam. On strict interpretation of this provision, a type B license would also not be required for the storage activities at the Valley Tailings because the volume of water stored there exceeds 60,000m³. However, we would not be surprised if the Water Board were to take a contrary position and require a license for such activity given the volumes currently estimated to be stored. Based on the assumption that no hazard is posed by any of the dams or such water storage, in our opinion, no license is required for such activity, but if the Water Board insists on requiring that Alexco obtain one, then nothing more than a type B water license should be required.”

Based upon the preceding paragraph, in our view, the Pockey opinion has both misinterpreted column 4 of item 2(5) and made an assumption that Water Resources does not support. Each of these matters is addressed below.

1. Construction of a Dam and Storage of Water

Water Resources is of the view that column 4 of item 2(5) could be interpreted in two ways with respect to construction of a dam and storage of water. The first is to read “construction of a dam the maximum height of which is 8m or higher” and “where 60,000m³ or more cubic metres of water is stored” conjunctively such that a type A license is required when the undertaking involves construction of a dam eight metres or higher which will store 60,000m³ or more cubic metres of water and not in relation to storage of water in and of itself. This interpretation is, we believe, that offered in the Pockey opinion.

The second interpretation would treat the construction of a dam and the storage of 60,000m³ or more cubic metres of water as two separate items. The practical effect of this interpretation is that a type A license is required in relation to the construction of a dam where the maximum height of the dam is eight metres or higher and where 60,000m³ or more cubic metres of water is stored. If this second interpretation is applied to ERDC's application, a type A license would be required as the volume of water stored in relation to the Valley Tailings, as noted in the Pockey opinion, exceeds 60,000m³.

As between the two interpretations, Water Resources is of the view that the latter is the more reasonable. We assert this based upon a review of the text of columns 2 and 3 of item 2(5) and our understanding of the overall purpose and intent of the *Waters Act*.

In our view the three columns identified in item 2(5) of Schedule 7 build upon each other, starting with column 2 which identifies when no license is required and moving to columns 3 and 4 which identify when a type B and type A license, respectively, is required. Column 3 builds upon the criteria established in column 2.

Column 3 of item 2(5) states "construction of a dam the maximum height of which is 3 or more metres but less than 8m and no hazard is posed, or where 10,000 cubic metres of water but less than 60,000m³ of water is stored and no hazard is posed". We interpret this to mean that a type B license is required when the undertaking involves either the construction of a dam having a maximum height between three and eight metres or when water will be stored behind a dam or dike in a volume between 10,000 and 60,000 cubic metres. In both cases, no hazard must be posed by the construction or storage of water.

The language of column 4 must be read in conjunction with the other two columns, and particularly column 3. Put another way, column 4 takes over where column 3 leaves off. With respect to construction of a dam, column 3 captures those undertakings that involve dams that are between 3 and 8 metres; column 4 captures those undertakings that involve dams that are 8m or higher. With respect to hazards, column 3 captures situations where no hazard is posed; column 4 captures situations where a hazard is posed. With respect to storage of water, Water Resources suggests that a similar relationship exists between column 3 and 4. Column 3 requires a type B license where between 10,000 and 60,000 cubic metres are stored; column 4 provides that a type A license is required where 60,000 cubic metres or more of water is stored.

To read column 4 absent the context provided by column 3, with respect to storage of water, would leave a gap in the regime. Clearly this could not be what was intended by the Legislative Assembly when it enacted the statute.

In our view, interpretation we suggest is also more consistent with the purpose and intent of the statute. The *Waters Act* establishes the regime for managing water use and regulating the deposit of water into waste in the Yukon. Pursuant to s.10 of the *Waters Act*, the Board has the object of providing for the conservation, development and utilization of waters in a manner that will provide the optimum benefit from them for all

Canadians and for the residents of the Yukon in particular. To suggest that column 4 of item 2(5) of Schedule 7 should be interpreted such that the storage of more than 60,000 cubic metres of water is not addressed cannot, in our view, be said to be consistent with the purpose of the statute or the objects of the Board.

Based upon the above, Water Resources suggests that the Board adopt the interpretation of column 4 of item 2(5) of Schedule 7 that avoids unreasonable regulatory gaps and supports the overall intent and purpose of the *Waters Act* and require ERDC to apply for a type A water licence.

2. Where a Hazard is Posed

The last criterion identified in column 4 of item 2(5) is "where no hazard is posed." The Pockey opinion appears to assume that no hazard is posed by either the dams or the water storage behind those dams. Water Resources does not believe that this is a correct assumption. It is our understanding that the dams are holding back contaminated water that, if released, would impair the downstream environment. Furthermore, there would also be detrimental impacts from erosion and sedimentation to the downstream environment from the flow of water if any of the dams were to fail. There may also be the potential for danger to humans or property. These facts suggest that a hazard is posed.

With respect to this issue, we suggest that the Board make inquiries on this point before a conclusion is drawn as to whether a hazard is or is not posed.

B. Timing of Resolution of Type of Licence

As noted in the introduction to this letter, on April 12, 2007, Ms. Kelly Boutilier wrote to ERDC advising it of a number of deficiencies in their application for a water license. With respect to the issue of whether a type A or type B license was required (a type B having been applied for by ERDC), Ms. Boutilier indicates that the Yukon Government may have a different view than that expressed in the Pockey opinion and, if so, the issue would be addressed when the notice of application was published in accordance with the *Waters Act*.

As discussed in Part A of this letter, Water Resources does take a different view than that expressed in the Pockey opinion. However, with respect to Ms. Boutilier, we think that the issue of whether a type A or type B license is required for the proposed undertaking should be resolved by the Board prior to issuance of the notice of application and optimally prior to the Board determining whether the application is adequate.

Our view on this is driven simply by the fact that the processes established in the *Waters Act* are significantly different for type A and type B licences. For example, it is our understanding that in a notice of application for a type B license, the Board would be seeking input as to whether a member of the public believes that a public hearing should

be held and if so, the Board will determine if they agree (or disagree) that such a hearing would be in the public interest. For a type A application, a public hearing will be held unless the conditions described in subsection 19(3) of the *Waters Act* come into play. In Water Resources' view given the differing processes it is too late to wait until the notice of application is published to resolve this issue.

Paragraph 31(1)(c) of the *Waters Act* establishes that the Commissioner in Executive Council may make regulations setting out the criteria to be applied by the Board in determining whether a proposed use of waters or deposit of waste for which a licence is required under this Act requires a type A license or a type B license. The schedules to the *Water Regulation*, including Schedule 7 which applies to ERDC's application, establish, in our view, the criteria referred to in paragraph 31(1)(c).

We urge the Board to apply the criteria contained in Schedule 7 of the *Waters Regulation* and make a determination in advance of publishing the notice of application as to whether a type A or a type B license is appropriate in the circumstances. In this context, we wish the Board to consider the views expressed in this letter, just as it will consider the Pockey opinion. To leave this matter to a later time, in our view, will create a number of procedural concerns and may lead to significant delays in the Board considering the application. Such an approach does not appear to be in the interest of ERDC, Water Resources, the public or the Board.

Should you have any questions on the above, please contact me at the above listed number. I look forward to hearing of the Board's decision on this matter.

Yours truly



Kevin McDonnell
Chief, Water Resources Section
Environmental Programs