



July 16, 2015

**APPEAL FILE: 2015-WAT-004**

**VIA EMAIL: [harding@younganderson.ca](mailto:harding@younganderson.ca)**

Young Anderson  
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**Attention: Reece Harding**

Dear Mr. Harding:

**Re: *Water Act* Appeal - City of Nanaimo v. April 29, 2015 Order of the Comptroller of Water Rights regarding CWL C061424 & C061423 Colliery Dams – Compliance and Enforcement**

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As you are aware, Nanaimo City Council ("Council") decided this week not to take steps to comply with the Comptroller's Order of April 29, 2015 (the "Order") by the Comptroller's deadline of July 24, 2015. Instead, a majority of Council passed a motion (the "Motion") at the Committee of the Whole meeting on Monday, July 13, 2015 (the "Meeting") to form a "Select Committee" and return to studying options for the dams. The Motion also directed staff to retain GeoStabilization International and seek an overtopping design for the Middle Dam.

I refer you to my correspondence of June 24, 2015, in which I communicated the Comptroller's rejection of a similar proposal set out in a letter from Mayor and Council dated June 23, 2015. Much like that proposal, the Motion passed yesterday does not meet the scope or intention of the Order. The Comptroller remains committed to the terms of the Order. The Motion will not bring the City of Nanaimo into compliance with the Order.

It was also apparent from the Meeting that questions remain among councillors and agents of your client regarding the consequences of not complying with the Order. Before Council meets next Monday, July 20, 2015 (its final scheduled meeting before the Comptroller's July 24 deadline) and given the paucity of time in which to act, we thought it may be of assistance to provide information about the full range of possibilities should a licence holder under the *Water Act*, R.S.B.C 1996, c. 483 (the "Act"), such as the City of Nanaimo, not comply with an order of the comptroller where a stay application to the EAB has been unsuccessful.

The City holds two licences under the Act relating to the Colliery Dams. These licences are subject to the Act and regulations, the terms of the licences and the orders of the Comptroller (see section 6 of the Act). Section 23 of the Act addresses suspension and cancellation of rights and licences for failing to comply with an order of the Comptroller:

### **Suspension and cancellation of rights and licences**

23 ...

(2) The rights of a licensee under a licence are subject to suspension for any time by the comptroller or a regional water manager, and a licence and all rights under it are subject to cancellation in whole or in part by the comptroller or a regional water manager for any of the following:

...

(g) the licensee's failure to comply with an order of the comptroller or a regional water manager or an engineer;

...

Compliance with orders of the Comptroller is necessary to preserve a licence and retain the amenity of a dam and its surroundings. Cancelling the licence of a dam owner would facilitate the wholesale removal by the Province of works that pose significant ongoing risks to the public.

In addition to providing the Comptroller the option to suspend or cancel water licences, the Act establishes that failing to comply with the Order is an offence, and conviction attracts punitive consequences:

### **General offences**

93 ...

(2) A person who does any of the following commits an offence:

...

(p) fails to do an act or thing required to be done by the person under this Act or under an order of the comptroller, regional water manager, engineer or officer;

...

(4) A person who commits an offence under this section is liable on conviction to the following:

(a) in the case of an offence that is not a continuing offence, a fine of not more than \$200 000 or imprisonment for not longer than 6 months, or both;

(b) in the case of a continuing offence, a fine of not more than \$200 000 for each day the offence is continued or imprisonment for not longer than 6 months, or both.

Where an order of the Comptroller is proven to be willfully contravened, section 94 applies:

### **High penalty offences**

**94** (1) A person who does any of the following commits an offence:

...

(h) willfully contravenes this Act or an order of the comptroller, a regional water manager, an engineer or an officer;

...

(2) A person who commits an offence under this section is liable on conviction to the following:

(a) in the case of an offence that is not a continuing offence, a fine of not more than \$1 000 000 or imprisonment for not longer than 1 year, or both;

(b) in the case of a continuing offence, a fine of not more than \$1 000 000 for each day the offence is continued or imprisonment for not longer than 1 year, or both.

In addition to the punitive remedies in ss. 93 and 94, we draw your client's attention to the creative sentencing provisions in s. 95 of the *Water Act*.

During the Meeting, questions were raised regarding the personal liability of individual representatives of the City, including councillors and staff. Section 97 of the Act states as follows:

## Liability of individuals for offences committed by a corporation

97 If a corporation commits an offence under this Act, an employee, officer, director or agent of the corporation who authorized, permitted or acquiesced in the offence commits the offence whether or not the corporation is prosecuted for the offence.

Finally, section 86 of the Act provides that where the order of a Comptroller is disobeyed, the Comptroller may authorize another person to do the things ordered—including the removal of works—and recover the expense of so doing from the person to whom the order was directed.

To further assist you and your client in understanding the relevant compliance and enforcement regime, we enclose the following documents:<sup>i</sup>

- *Dam Safety Compliance and Enforcement Policy – MFLNRO, MOE*
- *Strategy and Procedures for Compliance and Enforcement (Dam Safety Program) – MFLNRO*
- *Compliance and Enforcement Policy and Procedure – MOE*

The Comptroller is considering each of the options available to him in the event of non-compliance with the Order.

Effective regulatory regimes depend upon maintaining confidence that non-compliance will be met with enforcement. Ensuring dam owners meet their obligations to address potential safety hazards and preserving public confidence in the regulation of dams both rely on the Comptroller using the statutory remedies set out above to enforce the Act and associated regulations in the face of non-compliance.

Sincerely,

  
for Pamela Manhas  
Barrister and Solicitor

PM/rw

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<sup>i</sup> Some of these documents are also available online at: [http://www.env.gov.bc.ca/wsd/public\\_safety/dam\\_safety/c&e\\_index.html](http://www.env.gov.bc.ca/wsd/public_safety/dam_safety/c&e_index.html).