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FILE NUMBER MV2011L2-0004

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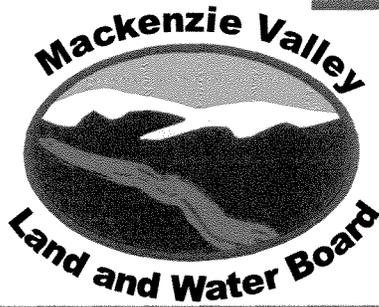
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REASONS FOR DECISION

Preliminary Screener:	MVLWB
Reference/File Number:	MV2011L2-0004
Applicant:	De Beers Canada Inc. (De Beers)
Project:	Mining and Milling – Snap Lake NT Water Licence Amendment

**DECISION from Mackenzie Valley Land and Water Board (the Board)
 Panel Meeting of**

January 21, 2014

Reasons for Decision

Referred to the Mackenzie Valley Environmental Impact Review Board for an Environmental Assessment pursuant to paragraph 126(2)(a) of the *Mackenzie Valley Resource Management Act (MVRMA)*

Reasons for the Board’s referral to Environmental Assessment (EA) Pursuant to section 121 and Paragraph 126(2)(a) of the MVRMA

History of the Application:

- Initial identification of issue and submission from De Beers on October, 7, 2013;
- Comments on De Beers October 7, 2013 submission from the Yellowknives Dene First Nation (YKDFN) on October, 29, 2013;
- Comments on the preliminary issue from Aboriginal Affairs and Northern Development (AANDC) on November 5, 2013 and clarification on December 16, 2013;
- Reply submission from De Beers November 25, 2013;
- December 20, 2014 – Amendment Application submitted to the Board by De Beers pursuant to section 6 of the *Northwest Territories Waters Regulations (NWTWR)*;
- December 23, 2014 – Board notification to the distribution list that De Beers had submitted an Amendment Application which would be processed, pending a preliminary ruling on jurisdiction related to the amendment of a licence condition derived from a measure in an Environmental Assessment (EA);
- Final reply from De Beers on January 6, 2014; and

- January 21, 2014 – Board met and referred the Amendment Application to Environmental Assessment.

The Submissions by the Parties

On October 7, 2013, in advance of the Amendment Application, De Beers provided a submission regarding the Board's jurisdiction to amend a licence condition based directly on a measure of an EA approved by the federal Minister, namely the Effluent Quality Criterion (EQC) in WL2011L2-0004 setting a TDS limit of 350mg/L. The Board circulated this submission for review and comment by the Snap Lake distribution list on October 15, 2013. Responses were received from YKDFN and AANDC (the "reviewers"). The initial response was received from AANDC on November 5, 2013. Subsequently, at the Board's request, AANDC provided a clarification of their submission on December 16, 2013. This was followed by an additional review period and by a reply from De Beers. No other parties on the Snap Lake distribution list participated in this matter.

The following statements summarize the reviewers' submissions. Note that all submissions can be viewed in their entirety on the Mackenzie Valley Land and Water Board's Public Registry at Snap Lake MV2011L2-0004 Amendment Application and Related Documents.

Both AANDC and the YKDFN argue that a water licence condition based on a measure approved in an EA can only be reconsidered by the Mackenzie Valley Environmental Impact Review Board (or Review Board).

The Yellowknives Dene First Nation's (YKDFN) submission dated October 29, 2013 states that:

'This is a development, it is not exempt from preliminary screening, it represents a significant public concern with potentially significant environmental impacts and YKDFN fully expect this issue to be referred to the Review Board, which is the only venue with the proper jurisdiction to address modification to this limit.'

AANDC's December 16, 2013 letter of clarification stated that:

'Given the clarity provided on the MVLWB's authorities in the MVRMA, AANDC's position is that Water License MV2011L2-0004 must maintain TDS limits of 350mg/L until such a time that the measure might be amended (or maintained) though a decision made by the Minister under s. 130 of the MVRMA following a report of Environmental Assessment completed by MVEIRB.'

On December 20, 2013, De Beers submitted the Amendment Application which proposed changes to some definitions and conditions, the majority of its current EQC's, as well as the TDS limit. To see the entire list of proposed changes please refer to the Concordance Table provided in the Amendment Application on the Mackenzie Valley Land and Water Board's Public Registry.

De Beers' final submission on the preliminary legal matter dated January 6, 2014 stated that:

'De Beers expects that AANDC and MVLWB will agree to a process to review De Beers' application to amend its water licence that fulfills all legal and procedural requirements to make any such recommendations and decision, if warranted. Should it be determined by the MVLWB and AANDC that a s.130 decision pursuant to the Mackenzie Valley Resource Management Act is required on the specific aspect of the application related to TDS, De Beers anticipates that MVLWB will cooperate with the Mackenzie Valley Review (sic) Board to conduct an efficient and focused process to review this specific aspect of the application before it.' (emphasis in original)

The Board met on January 21, 2014 to review these submissions and make a ruling. As indicated, the De Beers amendment application was referred to EA pursuant to section 126(2)(a) of the MVRMA.

The Board's reasons for this decision are set out below.

The Decision to Refer the Amendment to EA

1. Questions about the Development and Modifications –

The EQC for TDS currently found in WL2011L2-0004 is a direct result of the EA conducted on the Snap Lake Diamond mine by the Review Board in 2003, specifically, measures 5 and 10. These measures were reviewed and ultimately approved by the responsible and federal Ministers. As a result, section 62 of the MVRMA requires that these measures be included in the Snap Lake water licence. The MVRMA is not explicit in relation to where the authority to amend such a licence condition rests.

The October 7, 2013 submission by De Beers argued that no EA was necessary because the TDS amendment did not constitute a "development" as that term is defined in the MVRMA. This argument was based on the suggestion that only the TDS EQC needed to be amended and that no structural or facilities changes would take place. A further argument was advanced by De Beers that even if the EQC change constituted a development it was exempt from screening under the *Exemption List Regulations*.

In any event, the amendment application eventually filed by De Beers proposed a number of other changes to the licence, in addition to the change requested in the TDS EQC.

In the Board's view, the amendment application does constitute a development. The 2003 MVEIRB Report of Environmental Assessment p.11 section 1.3.1(b) clearly determined that the "reintroduction of managed waste waters into Snap Lake" was part of the Scope of the Development. It is the Board's view that the amendment proposed affects that portion of the scope of development, specifically as it relates to TDS in the effluent. The question of whether a development includes simply physical facilities or whether activities associated with the development should also be included was explored in a case called *Canadian Zinc Corporation v. MVLWB*, 2005 NWTSC 48. In that case, the court held that some activities were appropriately included in a development (see paragraphs 43 to 53).

Based on this authority and on the number of changes proposed to the licence by the De Beers application, the Board decided that this amendment proposal is a development. In addition, the list of licence changes proposed in the amendment will, in the Board's opinion, result in modifications to the development. Thus the Board held that the development proposed in the Amendment Application is not exempt from screening.

This analysis may, however, be moot as the overarching issue of Board's jurisdiction to amend a condition based on a measure approved by the Minister must be addressed.

2. Amending a Licence Condition Derived from an EA Measure –

The analysis and positions advanced by both AANDC and the YKDFN assert that the federal Minister must approve such an amendment and that it is necessary to conduct an EA in order to do so. In essence they say the federal Minister must approve such a change before the Board can amend the licence. The De Beers submission on January 6, 2014 took no issue with those positions; in fact the Board reads the De Beers reply to indicate that such an approach is acceptable to the licensee, as long as the EA and amendment processes are expedited and that the boards collaborate in "an efficient and focused process".

Considering the unusual nature of the issues involved in this matter, the concerns expressed by the YKDFN and especially the submissions made about jurisdiction and process by AANDC, the Board decided to expedite this process and exercised its authority under paragraph 126(2)(a) of the MVRMA to make a referral decision, without taking the time to conduct a preliminary screening. In the Board's opinion, these legal questions have already been placed before the Snap Lake distribution list and the Board has heard from those parties with an interest. The Board accepts the argument put forward by the YKDFN and AANDC and exercised its authority accordingly.

3. Scope of Environmental Assessment

It should be noted that the Board in exercising its authority to refer the Amendment Application to EA was restricted by the scope of the application before it. i.e., De Beers chose to apply for a number of changes to the licence within the application, and therefore the Board was required in its referral to send the entire application to the Review Board.

While a screening could have assisted the Review Board by focussing the issues which might be considered in an EA, the scope of the EA is a matter for the Review Board's discretion.

Certainly in this Board's view, the TDS and Chloride issues are matters identified by the reviewers which warrant careful attention. There are also a number of other changes proposed to the De Beers water licence that the Review Board may consider examining.

The MVLWB will actively participate in the EA scoping process to identify the issues to which Review Board attention should be addressed and which, if resolved at the EA stage, would expedite the water licence amendment proceeding.

4. Coordinated Process

The MVLWB strongly recommends that a coordinated hearing process as provided for by section 24.1(a) of the MVRMA be developed for the review of this application.

Conclusion

The Board, having due regard to the facts and circumstances, the merits of the submission made to it, and to the purpose, scope, and intent of the MVRMA and Regulations has determined that the December 20, 2013 Amendment Application for Water Licence MV2011L2-0004 will be referred to the Review Board because the development proposal might have a significant adverse impact on the environment and be of public concern.

The Board notes that coordination and collaboration of its activities with those of the MVEIRB would allow for the efficient and effective review of the TDS measure and the Application.

SIGNATURE

Mackenzie Valley Land and Water Board
Preliminary Screening Organization



Chair

January 21, 2014

Date

Amanda Gauthier

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Sent: Wednesday, February 05, 2014 3:47 PM
To: Erica.Bonhomme@debeerscanada.com
Cc: 'CAU-UCA@aandc.gc.ca'; 'Charlene.Coe@aandc-aadnc.gc.ca'; 'consultationsupportunit@aandc.gc.ca'; 'intergov@aandc-aadnc.gc.ca'; 'Laurie.McGregor@aandc.gc.ca'; 'Lionel.Marcinkoski@aandc-aadnc.gc.ca'; 'marc.lange@aandc.gc.ca'; 'mdd@aandc-aadnc.gc.ca'; 'Nathen.Richea@aandc-aadnc.gc.ca'; 'Patrick.Kramers@aandc.gc.ca'; 'Robert.Jenkins@aandc-aadnc.gc.ca'; 'Scott.Stewart@aandc-aadnc.gc.ca'; 'scellis@eastarm.com'; 'screeningofficer@eastarm.com'; 'david.alexander@cannor.gc.ca'; 'Marie.Adams@cannor.gc.ca'; 'Matthew.Spence@cannor.gc.ca'; 'jbreannan@yellowknife.ca'; 'veronica.chisholm@debeerscanada.com'; 'Alexandra.Hood@debeerscanada.com'; 'Erica.Bonhomme@debeerscanada.com'; 'Putnam.David@debeerscanada.com'; 'czoechoocolate@denenation.com'; 'admin_dkfn@northwestel.net'; 'ima_dkfn@northwestel.net'; 'sao@enterprise-nt.ca'; 'EC.EA.NWT@ec.gc.ca'; 'Sarah-Lacey.McMillan@ec.gc.ca'; 'fisheriesprotection@dfo-mpo.gc.ca'; 'fieldworker.frmc53@northwestel.net'; 'frmc@northwestel.net'; 'rhonda_batchelor@gov.nt.ca'; 'gnwt_ea@gov.nt.ca'; 'patrick_clancy@gov.nt.ca'; 'Sean_Whitaker@gov.nt.ca'; 'doug_carr@gov.nt.ca'; 'duane_fleming@gov.nt.ca'; 'Steven_Shen@gov.nt.ca'; 'Tim_Hibbs@gov.nt.ca'; 'Russell_Teed@gov.nt.ca'; 'Emerald_Murphy@gov.nt.ca'; 'mark_davy@gov.nt.ca'; 'alsnow@golder.com'; 'Hilary_machtans@golder.com'; 'lyoung@golder.com'; 'Paul_Bedell@golder.com'; 'Peter_Chapman@golder.com'; 'Tasha_Hall@golder.com'; 'Carolc.lands@gmail.com'; 'hrmc@northwestel.net'; 'landsnresources@katlodeeche.com'; 'fortsmithmetisCouncil@northwestel.net'; 'chief.lkdfn@gmail.com'; 'lkdfnlands@gmail.com'; 'preliminaryscreening@reviewboard.ca'; 'jpotten@mvlwb.com'; 'lindsey@mvlwb.com'; 'mcasas@mvlwb.com'; 'permits@mvlwb.com'; 'rchouinard@mvlwb.com'; 'eric.binion@nsma.net'; 'president.nwtmn@northwestel.net'; 'rcc.nwtmn@northwestel.net'; 'chief.srfn@northwestel.net'; 'chief@slfn196.com'; 'lands@slfn196.com'; 'exec@slema.ca'; 'zliu@slema.ca'; 'vgibson@interchange.ubc.ca'; 'kerrigarner@tlichoc.com'; 'jhood@fortsmith.ca'; 'dsteele@hayriver.com'; 'wpfn@northwestel.net'; 'environment@ykdene.com'; 'esangris@ykdene.com'; 'tslack@ykdene.com'; Mark - MVEIRB (mcliffephillips@reviewboard.ca); rnicol@mvlwb.com; Zabey Nevitt (zabey@mvlwb.com); Rebecca Chouinard
Subject: MV2011L2-0004 - De Beers Canada Inc. - Snap Lake Mine - Reason's for Decision - EA Referral
Attachments: MV2011L2-0004 - De Beers Canada Inc. - Snap Lake - EA Referral - Reason's for Decision.pdf

Good day all,

Please see the attached documents. If you have any questions, please contact us.

Regards,

Amanda Gauthier

Executive Coordinator

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February 7, 2014

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[NWT Metis Nation - Not for Canadian Zinc Files]	Tim Heron	NWTMN IMA Coordinator	(867)872-2772; rcc.nwtmn@northwestel.net ;
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