May 27, 2020

Wek’èezhìi Land and Water Board
1-4905 8th Street
Yellowknife, NT X1A 3S3

Attention: Chris Hotson A/Executive Director

Dear Mr. Hotson:

Re: Diavik – Notice of Major Project Application wholly or partly in Mọwhi Gogha Dè Nįtłèè – Diavik, Lac de Gras, NT – File: W2015L2-0001

Thank you for the December 13, 2019 letter in respect of Diavik Diamond Mines (2012) Inc. (“DDMI”) water license amendment application to carry out underground mining of the A21 Kimberlite pipe at the Diavik Diamond Mine (“Project”). In the December 13 letter, the Wek’èezhìì Land and Water Board (“Board”) provided notice that, in the Board’s view, this application is for a “major mining project,” as defined in Chapter 23 of the Tłı̨chǫ Land Claims and Self-Government Agreement (Tłı̨chǫ Agreement”). Accordingly, the Board’s letter requested that both DDMI and Tłı̨chǫ Government submit evidence to the Board for the Minister’s consideration with respect to DDMI and Tłı̨chǫ Government’s negotiations towards an agreement concerning the Project pursuant to section 23.4.1 of the Tłı̨chǫ Agreement. At this time, Tłı̨chǫ Government can confirm for the Board that no agreement with respect to the Project exists between DDMI and Tłı̨chǫ Government, and further, that the Project falls outside the scope of the existing DDMI/Tłı̨chǫ Government Participation Agreement for the Diavik Diamond Mine. Tłı̨chǫ Government’s view is that an agreement with DDMI in respect of the Project is required.

Tłı̨chǫ Government also understands, having reviewed the letter that DDMI submitted to the Board today, that DDMI does not believe that the Project is subject to section 23.4.1 because, in DDMI’s assessment, the Project is not large enough to qualify as a “major mining project” as defined in Chapter 23 of the
Tłı̨chǫ Agreement. While acknowledging DDMI’s perspective, Tłı̨chǫ Government wished to advise the Board that it is not—at this time—in a position to agree with DDMI’s position and is not in a position to concede that section 23.4.1 does not in fact apply to the Project. Given the differing perspectives, it is the view of Tłı̨chǫ Government that, in future, it may be necessary for the Board to conduct a hearing and/or otherwise review and test the relevant evidence in order to issue a ruling as to whether the Project is a “major mining project” for the purpose of section 23.4.1, prior to making a final decision on the water licence application. As set out further below, however, Tłı̨chǫ Government is optimistic that it will be able to reach an agreement with DDMI with respect to the Project that would make any such proceeding and ruling unnecessary.

Tłı̨chǫ Government and DDMI have been engaged in negotiations toward an agreement in respect of the Project since early April. To date, both Tłı̨chǫ Government and DDMI appear to have approached these negotiations in good faith and in a spirit of compromise. We expect that these negotiations will continue in earnest and will ultimately result in an agreement between Tłı̨chǫ Government and DDMI. It is our hope and expectation that an agreement will be reached between Tłı̨chǫ Government and DDMI before the Board completes its review and prior to the Minister’s decision on DDMI’s water license amendment application.

Given the mutual desire of Tłı̨chǫ Government and DDMI to reach an agreement before the Board completes its review and prior to the Minister’s decision, it is not, in Tłı̨chǫ Government’s view, at this time necessary for the Board to provide guidance or issue a ruling about the applicability of section 23.4.1 to the Project so as to resolve the differing perspectives on this point. If an agreement ultimately cannot be reached, Tłı̨chǫ Government may prevail upon the Board to provide that type of guidance and ruling in future.

These circumstances also highlight the need for the Board, Tłı̨chǫ Government, and industry proponents to engage early-on to determine the applicability of section 23.4.1 to new projects and the expansion of existing projects. We believe that taking a proactive approach will provide greater clarity about the applicability of Section 23.4.1 for all parties and will help to ensure the certainty that section 23.4.1—and the Tłı̨chǫ Agreement as a whole—was intended to provide. Tłı̨chǫ Government would be happy to work the Board to further explore and develop the processes and guidelines necessary to do so.
Section 23.4.1 of the Tłı̨chǫ Agreement is a critical provision of our modern treaty and helps to establish the role of the Crown in ensuring that proponents contemplating projects in Mǫwhi Gogha Dè Nıtłèè engage with Tłı̨chǫ Government and reach agreements to mitigate impacts and share benefits of those projects. Due to unfortunate delays by government, this important provision was not implemented for far too long and now that the necessary policy direction has been issued to the Board, it is imperative that we work together to ensure an effective and fulsome approach to implementing that provision and that policy direction.

In Tłı̨chǫ Unity,

Laura Duncan
Tłı̨chǫ Executive Officer
Tłı̨chǫ Government

Cc. Gord MacDonald, DDMi