A. Introduction

On May 27, 2016 Diavik Diamond Mines (2012) Inc. (DDMI) filed a request with the Minister of Environment and Natural Resources (ENR) GNWT\(^1\) to deny approval of the amendment recommended by the Wek’èezhii Land and Water Board.\(^2\)

On June 24\(^{th}\), 2016, the Minister returned the draft Water Licence to the Board citing concerns about procedural fairness and (after clarification) making it clear that he did not consider the proceeding to have been terminated.\(^3\) The Minister asked the Wek’èezhii Land and Water Board (Board or WLWB) to “undertake an efficient process”, if the Applicant for the TSS amendment (DDMI) wanted to revisit the Board’s TSS decision, in relation to the draft.

After the Minister’s letter was released, DDMI made it clear they intended to file additional submissions (evidence and argument) to take advantage of the Minister’s decision. On July 15\(^{th}\), DDMI filed a “Discussion Paper” with the Board outlining their views about the TSS limit and proposing a revision to that component of the Draft.\(^4\) DDMI submitted further information on July 22, 2016.\(^5\)

The WLWB has notified the parties and will comply with the Minister’s decision and attempt to address the TSS concerns raised by DDMI on an efficient and expedited basis. A meeting is scheduled for Tuesday, July 26\(^{th}\) to initiate that process (the “Review” process).

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\(^1\) See WLWB Online Registry at www.wlwb.ca for Diavik – Amendment – TSS – DDMI Request to Minister to Deny Amendment – May 27 \_16

\(^2\) See WLWB Online Registry for Diavik – Amendment – TSS – WLWB Recommendation to Minister – May 11 \_16

\(^3\) See WLWB Online Registry for Diavik – Amendment – TSS – Proposed Amendments - Ministerial Decision – Jun 24 \_16

\(^4\) See WLWB Online Registry for Diavik – Amendment – TSS – Diavik Discussion Paper – Jul 15 \_16

\(^5\) See WLWB Online Registry for Diavik – Amendment – TSS – DDMI Response to WLWB Notice of Reconsideration Process – Jul 22 \_16
B. The “Review” process

- The Minister has directed an “efficient” (i.e. expedited) process. The Board has indicated that it would comply and instructed staff and counsel accordingly.

- Board staff are not here to engage in a debate about the merits of the Minister’s decision. That is not the Board’s role. If parties feel aggrieved by the Minister’s decision we suggest that they look elsewhere for a remedy. For greater certainty, we will not spend time reconsidering the “fairness” of the Board’s original decision in this Review. Nor will we consider the appropriateness of the Minister’s actions.

- The Minister returned the draft Water Licence to the Board. Although this is an unusual step, there is precedent for such a decision in both NWT and Nunavut, under similar legislation.

- The Minister made clear, and the Board accepts, that the result of his decision is that the amendment proceeding for Licence W2015L2-0001 is simply continuing. This is a key point.

- The WLWB wishes to emphasize that the Minister made his decision on the basis of concerns about fairness. This is another key point. The Board intends to ensure that the Review meets these all legal requirements associated with the rules of fairness.

- If any party has concerns or questions about fairness we ask that they be brought to our attention today or as soon as they arise during the Review.

- Because the DDMI Licence amendment proceeding is simply continuing, the WLWB may be reopening the record following the meeting on the 26th, to allow the filing of additional evidence and argument. Again, although not common, there is precedent for such action.

- DDMI has filed materials as a basis for the discussions to be held at this meeting. DDMI and the parties will have the opportunity to file additional evidence and argument before completion of the Review.

- This July 26th meeting is intended to enable participants to explore the technical issues set out in the request and the new information provided by DDMI. The Board sees such a meeting as a mechanism for expediting the Review process.

- This is not a public hearing. The Board is not present. The results of this meeting, however, will be summarized and, after the participants have the opportunity to comment on the summary, placed on the record.

- The purpose of the meeting is for an open, collaborative exchange to ensure participants have the best understanding of the DDMI request and new information.

- Because this is a continuation of the original proceeding it means that the legislative requirement for a hearing has also been satisfied. The Board is not proposing another hearing at this time.

- We want to emphasize, however, that fairness requirements are dynamic and that the Board will give them precedence over the dictates arising from the Minister’s direction to be efficient if so required.
It is important to highlight the basic elements of fairness and the Board’s Review:

**Notice:**

The statutory notice requirements for the original amendment application and hearing were satisfied and are not in issue.

The DDMI complaint of May 27th is on the record. The Board has been transparent about any other documents received or sent to date, including the Minister’s decision, and up to and including the response filed by DDMI on July 22nd. They are all on the record.

The Board will continue to update its website and to place all materials generated by the review on the record for this proceeding.

The Board has notified the DDMI distribution list of this Review and placed notice of this Review on its website. The Board has taken steps to ensure that Tlicho communities and the Tlicho Government are aware of this Review and can participate if they so choose.

The Minister’s decision and reactions to it are matters that have been addressed in the media. They are “in the public eye”. As is its general practice, the Board will not engage with the media during the Review and once it makes a decision it will speak to it using either revised or supplemental Reasons for Decision as required by law.

The Board does not propose to further publish notice of this Review.

Any participant that has concerns about notice should discuss them with Board staff or counsel.

**The Onus and the Case to be met:**

DDMI initiated the request that resulted in the Minister’s decision and direction to the Board. As with any matter raised in a Board proceeding, the onus or burden of proof to show that the TSS limits and sampling procedures set out in the draft Licence are not appropriate rests with DDMI. Some new information about those concerns is on the record.

Subject to the timelines for the Review to be established by the Board, DDMI will have the opportunity to file whatever additional evidence it feels is relevant to the new TSS limits which it proposes.

Any other party wishing to advocate for a different outcome will have the opportunity to review the DDMI evidence and then will have to file sufficient evidence to support its position.

Once the new evidence has been filed, the parties will have the opportunity to argue.

DDMI will file first, then response from those other parties which choose to argue, and the final reply from DDMI.

**Review Process Timing and Timelines:**

There is little value in a response from the Board after the close of the DDMI construction season. The Minister was clearly aware of the need for an early decision as indicated in his letter of June 24th. The Board will do everything it can to respond to this instruction.

The counterbalancing consideration is of course the need to be fair, as also emphasized by the Minister.
After the July 26th meeting the Board will take the results into consideration and set out a process, including timelines for the Review in a Board Directive.

We ask for your full cooperation as we move to satisfy the Minister’s instructions. Time is of the essence.

C. Proposed Agenda for the July 26 Technical Meeting

1. Open of meeting;
2. Brief introductory comments;
3. Formal introduction to process [based on A and B above];
4. Comments on agenda;
5. DDMI to set out concerns with the Draft Licence and proposal for change (i.e., explain problems with Draft Licence and how to fix it in their view);
6. Q&A with DDMI;
7. Any other party wanting to speak to Draft Licence contents;
8. Q&A;
9. Establish timelines for conclusion of Review;
10. Any further discussion or questions?