On May 27th, 2016 Diavik Diamond Mines Inc. (Diavik) submitted a letter to your office requesting that you deny approval of the Wek'eezhii Land and Water Board’s (the Board) recommended amendment to the Type A water license (W2015L2-0001). The amendment in question was recommended following a hearing before the Board in which Diavik requested a slackening of existing limits around Total Suspended Solids during the construction of the A21 dyke. During the hearing, the proponent and the interveners, which included the Yellowknives Dene First Nation (YKDFN), had ample opportunity to make their position clear.

In response to Diavik’s letter, the Minister denied the Board’s recommendation. The YKDFN finds this very troubling for a number of reasons. Diavik’s letter misrepresents both the tone and the substance of the hearing. Diavik’s letter gives a false impression of consensus among participants in the hearing and does not capture Diavik’s bad-faith approach to the hearing and their engagement in sharp practices. Diavik’s one-sided portrayal of the hearing is not surprising; however, the Minister’s reliance on Diavik’s argument to disregard the recommendations of the Board is.

Diavik’s letter to the Minister is an excellent example of the approach Diavik has taken throughout the proceedings. Diavik complained that the Board did not adhere to procedural fairness. To support this claim Diavik submitted that they did not know the Board’s decision before it was made, and that they did not have an opportunity to respond to the amendment proposed by the Board. Diavik’s response is to this was to sidestep the Board and request a decision from the Minister that none of the proponents could respond to and all parties were surprised by. The YKDFN trusts that the irony of this is not lost on the Minister.

Diavik’s complaints are dressed up as legal arguments about procedural fairness. The YKDFN sees Diavik’s letter as little more than an attempt to lobby the Minister directly. Diavik’s intent is to hold Northerners hostage by threatening their jobs and prosperity in the North. Perhaps this is a good time to point out that Diavik has not met its obligations with respect to hiring Northerners.

If Diavik were serious about its legal position and arguments it would seek judicial review of the Board’s recommendations. This is the correct course of action when a party disagrees with the outcome of an administrative board. In fact, this is a course of action that the Yellowknives have undertaken in the past when faced with Board decisions we did not agree with. The Yellowknives understand that you can’t always get what you want, but we also respect the Board and process. We don’t try to derail it through direct appeal to the Minister.

As the Minister is aware, the Board makes its decision by drawing on the input of its skilled staff, contracted experts from multiple fields of expertise, traditional knowledge holders, the proponent (in this
case Diavik), and interveners representing interests from across the North. What’s more, the Board retains legal counsel with significant expertise in administrative law and regulatory matters. The Board members themselves are appointed based on their connection to the North and their knowledge of issues affecting Northerners.

The Board is structured to ensure that the regulatory process is open, fair, and transparent. The perception of openness, fairness, and transparency are what gives confidence to the interveners and proponents that the time, effort and expense of participating in the Board’s hearings are worthwhile. This is why the Minister’s actions are so corrosive to the Yellowknives’ confidence in the regulatory process.

The YKDFN participates in hearings and other matters before the Board in good faith. This good faith relies on knowing that all participants are subject to the same rules and that, in principle, all parties stand on equal footing. In practice, of course, we don’t stand on equal footing. Unlike Diavik or the GNWT, the YKDFN does not have teams of scientists, engineers, and lawyers to work through the regulatory process. Instead we have one staff member to attend to all regulatory matters before all the Boards in the North. Without confidence that committing our very limited resources to laborious and expensive hearings will result in fair consideration of our concerns it becomes hard to justify our participation at all.

The Yellowknives are not aware of any other instance in the Northwest Territories where a Minister has denied a recommendation from a regulatory board. This is not a coincidence. The Boards themselves are well staffed with skilled individuals to assist the board in interpreting the evidence presented to them. The Board retains legal counsel to ensure their adherence to the principles of administrative law. The proponent and the interveners bring evidence, expertise, and arguments to the hearing. This process ensures that the Board’s recommendations are well reasoned and thoughtful.

Hearings before administrative boards are well-trodden ground. The appropriate course of action for the dissatisfied is well established. If Diavik does not agree with the Board’s recommendations they should seek judicial review. Lobbying the Minister undermines the entire process. Further, the Minister relying on lobbying to inform decisions erodes the public trust.

The Yellowknives Dene First Nation, and all Northerners, relies on confidence in the Board’s to justify participation in the regulatory process. We request that the Minister rely on the significant expertise of the Board to inform his decision. In short, we request that the Minister accept the Board’s recommendation.

Sincerely,

[Signature]

Chief Edward Sangris, Dettah
Yellowknives Dene First Nation