April 17, 2020

Kate Hearn
Department of Lands
Government of the Northwest Territories
P.O. Box 1320, 4923 – 52nd Street
Yellowknife, NT X1A 2L9

Nathen Richea
Department of Environment and Natural Resources
Government of the Northwest Territories
P.O. Box 1320, 600-5102 50th Avenue
Yellowknife, NT X1A 2L9

Dear Kate Hearn and Nathen Richea,


The Wek’eezhii Land and Water Board (WLWB or the Board) has received your letter of April 9, 2020 and met to discuss your concerns.

Diavik Diamond Mines (2012) Inc. (DDMI) has indicated that planning timelines are very tight for the Processed Kimberlite (PK) to pits project, which was the subject of Environmental Assessment 1819-01 (the EA). DDMI advised the WLWB that any preliminary steps that can be taken to prepare for the potential regulatory process related to the amendment could contribute to the potential for a go-ahead decision on the project.

Board staff have ensured that DDMI is aware that any action on their part is “at their risk”, pending a Government of Northwest Territories (GNWT) decision on EA1819-01. The WLWB has been equally clear that the review of the DDMI Engagement Plan and Independent Panel Terms of Reference is preliminary and that no final decisions can or will be made until after a GNWT decision on the EA is released by the
Minister of Lands.\textsuperscript{1,2} The Board fully appreciates that such a decision can only be made after Crown consultation on the EA has been completed.

In our view the Board’s actions do not and were not intended to detract from the clear importance of Crown consultation and the GNWT decision-making process. Sections 62 and 118 of the Mackenzie Valley Resource Management Act (MVRMA), however, only prohibit the issuance of regulatory instruments before final Part 5 decisions are made. We understand that any steps taken to prepare to respond to recommended measures advanced by the Mackenzie Valley Review Board may have to be adjusted in light of a Ministerial decision on EA 1819-01.

Board staff will continue to ensure that all communications with Parties involved in the DDMI licence amendment proceeding in relation to the matters you have raised clearly indicates the preliminary nature of these efforts and the possibility that they may need to be adjusted once a Ministerial decision on the EA is available.

Sincerely,

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Ryan Fequet,
Executive Director WLWB

cc. Diavik Distribution List

Attachment: GNWT Letter to WLWB Re. Procedural Concerns

\textsuperscript{1} Item for Review for DDMI’s Engagement Plan: http://lwbors.yk.com/LWB_IMS/ReviewComment.aspx?appid=12952
\textsuperscript{2} Item for Review for DDMI’s Terms of Reference: http://lwbors.yk.com/LWB_IMS/ReviewComment.aspx?appid=12956
Chairperson Joseph Mackenzie  
Wek’eezhí Land and Water Board  
1-4905 48th STREET  
YELLOWKNIFE NT X1A 3S3

Dear Mr. Mackenzie:

Notice of Procedural Concerns –  
Public Review of Material for WL2015L2-0001 Associated with the  
Environmental Assessment EA1819-01 for Diavik Diamond Mines Incorporated

The Mackenzie Valley Environmental Impact Review Board (MVEIRB) issued its recommendation on Diavik Diamond Mines Incorporated’s (Diavik) proposal to deposit processed kimberlite into mine workings and underground (the Project) on January 6, 2020. At that time the responsible ministers entered a decision period. Responsible ministers have not yet made a decision on the Project (EA1819-01). The Government of the Northwest Territories (GNWT) has identified procedural concerns with the Wek’eezhí Land and Water Board’s (WLWB) formal public review of material pertaining to the Diavik’s proposed project prior to the issuance of a final Mackenzie Valley Resource Management Act (the Act) s.130(1) decision from the responsible ministers for EA1819-01. The GNWT would like to respectfully inform you of the following GNWT positions:

1. The GNWT will not participate in the review of any material associated with the Project until a final s.130(1) decision is issued.

The GNWT does not comment on project related material when a MVEIRB recommendation on said project is before responsible ministers for decision. Therefore, the GNWT will not be commenting on the Diavik Engagement Plan

Version 3 or the Diavik Terms of Reference for the Independent Review Panel, which have been posted for public comment on the WLWB Online Review System (ORS). Should any other material related to the Project be posted prior to a final s.130(1) decision, the GNWT will continue to refrain from commenting.
2. It is unclear that the material posted for public comment is not being formally reviewed or approved by the WLWB prior to a final s.130(1) decision.

From conversations with WLWB staff, the GNWT understands that WLWB Board members will not be formally reviewing or approving the Diavik Terms of Reference for the Independent Review Panel, that is posted to the ORS, prior to when responsible ministers have made a final s.130(1) decision on EA1819-01 (decision on the environmental assessment). It is unclear if the WLWB will be reviewing and approving the Diavik Engagement Plan Version 3 prior to a final s.130(1) decision on EA1819-01. We request that the WLWB provide clarification on its public registry when the WLWB will be reviewing and making decisions on these two documents. It is important that reviewers have sufficient future opportunity to review and comment on the documents after a final s.130(1) decision. Such clarification would also assure reviewers that regulatory activities are not preceding the responsible ministers' decision for EA1819-01.

The GNWT is of the view that the WLWB does not have the authority to commence a formal review or make any decision on project related material when a MVEIRB recommendation (other than a recommendation under s.128(1)(a) of the Act on said project) is before responsible ministers for decision. Under s.130(5) of the Act, the only way that the WLWB, a regulatory authority, can ensure that it acts in conformity with the final s.130(1) decision is by waiting for that decision. Following that, the WLWB can commence a formal review or make any decision. S.129(a) of the Act sets out the only circumstance in which a regulatory authority may commence a formal review or make any decision on project related material when a MVEIRB recommendation on said project is before responsible ministers for decision.

3. Indigenous governments and organizations (IGOs) must be given a formal and reasonable opportunity to provide input on measures-related material after a s.130(1) decision.

The duty to consult and, where appropriate, accommodate, must be satisfied prior to the Minister of Environment and Natural Resources (ENR) approving a water license or water license amendment. If Diavik's Project proceeds to regulatory (i.e., if the responsible ministers decide to adopt the recommendation of the MVEIRB), in order to fulfill the consultative duty, IGOs must be given enough formal opportunity to offer input on items related to the water license amendment once a final s.130(1) decision is made. Any informal opportunity provided for input prior to a final s.130(1) decision may not be taken into consideration by the Minister of ENR in determining what constitutes sufficient and formal consultation.
To avoid any delays in potential regulatory processes, it is recommended that after a final s.130(1) decision is made, the WLWB provide sufficient formal opportunity for IGOs to offer input on material related to the Project. If enough formal opportunity is not provided, the duty to consult may not be fulfilled. This would therefore impact the Minister of ENR’s decision on the water license amendment.

Thank you for your consideration on this matter.

Sincerely,

Kate Hearn  
Assistant Deputy Minister  
Planning and Coordination  
Lands

Nathen Richea  
A/Assistant Deputy Minister  
Environment and Climate Change  
Environment and Natural Resources

c. Chief Louis Balsillie and Band Council  
Denínu Kúqé First Nation  
President Lloyd Cardinal  
Fort Resolution Métis Government

President Allan Heron  
Fort Smith Métis Council

President Trevor Beck  
Hay River Métis Government Council

President Stanley Anablak  
Kitikmeot Inuit Association

Chief Darryl Marlowe and Band Council  
Łutselk’e Dene First Nation

President Clem Paul  
Mountain Island Métis

President William Enge  
North Slave Métis Alliance
President Garry Bailey  
Northwest Territory Métis Nation

Grand Chief George Mackenzie  
Tłíchǫ Government

Chief Edward Sangris and Band Council  
Yellowknives Dene First Nation (Detah)

Chief Ernest Betsina and Band Council  
Yellowknives Dene First Nation (Ndîlǫ)

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Ms. JoAnne Deneron  
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Principal Advisor  
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Diavik Diamond Mines Inc.

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Mr. Jason Snaggs
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