



June 29, 2022

Mason Mantla
Chair
Wek'èezhì Land and Water Board
Box 32
WEKWEÈTÌ, NT X0E 1W0

Dear Mr. Mantla:

Diavik Diamond Mines (2012) Inc – Type A Water Licence Amendment – W2015L2-0001

On June 02, 2022, the Government of the Northwest Territories – Environment and Natural Resources (ENR) received the Wek'èezhì Land and Water Board's (the Board) recommendation to approve the amendment of the Water Licence W2015L2-0001 (Water Licence) for Diavik Diamond Mines (2012) Inc. (DDMI) for Progressive Reclamation. The Board requested Ministerial approval and signature, as per Section 72.13 of the *Mackenzie Valley Resource Management Act* (MVRMA), as delegated under Schedule A of the Delegation Instrument under the MVRMA.

I am writing today to inform you that I am unable to approve the Water Licence at this time due to three legal issues that have been identified in the review of the package, which I have outlined below.

There is missing Key Foundational Information required under the Waters Regulations

The Board has carried out a process that has been flawed in that DDMI did not provide and the Board did not subsequently require all information required under s. 5(2)(f)(iv) and s. 5(1) of the Waters Regulations; specifically, that under part 8 of Schedule C, regarding waste deposited, and the information required under part 10 of Schedule C, regarding predicted environmental impacts. This information is required for any application for a new, amended or renewed licence and is a fundamental part of ensuring the appropriately informed input of intervenors and regulation of any deposit of "Waste" by the Board. This key foundational information must be provided to the Board and all parties as it is the essence of what is intended to be scrutinized during the Board's process. Given the broad definition of "Waste" in the *Waters Act*, the discharge from the collection ponds will clearly constitute "Waste" under part (b) of that definition.

The Board noted in their decision that they disagree with DDMI's original assertion that this proceeding was an "administrative update" and later noted that *"the lack of technical evidence provided through this proceeding has impacted the ability of the WLWB to provide definitive direction for expectations of the Decommission Plan"* (p. 9/183). It is also apparent that this lack of foundational technical evidence led to no discharge criteria being included as a component of the Board's current decision.



The Board claims that the GNWT provided no evidence to warrant the inclusion of EQC. However, the GNWT, and all intervenors, must have the key foundational information from the proponent as required under the *Waters Regulations* to be able to carry out a meaningful assessment of that evidence, provide any counterevidence, and substantiate any recommendations. Further, I note that the Board has the authority to request information from parties at any time throughout the proceeding. The GNWT has noted their concern in previous proceedings that insufficient information provided with applications is a significant concern (Information Request response provided to the Board on February 12, 2019 related to DDMI's PK to Mine Workings Amendment). In that response, the GNWT noted the following:

"As per sub-paragraph 5(2)f(iv) of the Water Regulations, information required under an application for deposit of waste includes 'an assessment of the qualitative and quantitative effects on the waters into which the waste is to be deposited'.....Additionally, Schedule C of the Water Regulations outlines the information required within the water licence application which includes 'Predicted Environmental Impacts of Undertaking and Proposed Mitigation' which should include detailed information on impacts of the waste to the receiving environment."

Further, as noted by ENR staff during the public hearing (Day 2, pp.73-74), Section 8 of the Board's Water and Effluent Quality Management Policy (2011) requires information to be submitted by the applicant to allow the Board and parties to develop effluent quality criteria during the proceeding. Despite these requirements, and extensive discussion throughout the proceeding, the Board did not request additional information from DDMI to proceed with this evaluation, and as mentioned above, has now noted in its decision that a lack of technical information has limited the Board's ability to make a comprehensive decision on effluent limits associated with this application.

The Board notes that they believe that this information can be delayed as *"Diavik bears the burden of proving that its Decommissioning of the ponds will not adversely affect the quality of water in the Receiving Environment. Such an approach is consistent with the Board policy and does not violate S.37 of the Act"* (p.28/83). I cannot accept this approach as it is not consistent with s. 5(1) and 5(2)(f)(iv) of the *Waters Regulations*.

Schedule 8 Conditions 3(e)(ix) and (x) are not appropriate for inclusion in a Schedule

Schedule 8 Conditions 3(e)(ix) and (x) are not appropriate for inclusion in a Schedule as these conditions provide the only potential basis in the Water Licence for any subsequent addition of new effluent quality criteria for discharge from the collections ponds and the Board could remove or alter these conditions at any time through Part B, Condition 8. The potential subsequent removal or alteration of these conditions by the Board could have potential consequences for future effluent quality. A change to such a significant condition related to effluent quality would require both the approval of the Minister under s. 37 of the *Waters Act* and a call for a public hearing under s. 41(2)(b) of the *Waters Act*. If conditions 3(e)(ix) and (x) are retained in a new water licence, despite the concerns noted in this letter, they must be moved to the body of the Water Licence to comply with the *Waters Act*.



The Exclusion of Metal and Diamond Mining Effluent Regulations (MDMER) Limits for the new “Waste” release violates s. 27(5) of the Waters Act

By not including effluent quality criteria for the decommissioned pond(s) at least as stringent as *MDMER* parameters in this Water Licence, the Board has contravened S. 27(5) of the *Waters Act* as there has been no evidence provided to the Board that the effluent from the decommissioned pond(s) would not have the potential to exceed *MDMER* parameters. In fact, it is noted that modelling indicates that runoff and seepage from the waste rock piles will need mixing zones in excess of 100m into Lac de Gras before water quality meets AEMP Benchmarks, clearly indicating that EQCs for these *MDMER* parameters are required for effluent from the decommissioned ponds. ENR notes that Lac de Gras would be considered fish frequented waters. As such, the Board must include *MDMER* limits in the body of the licence for the new “Waste” discharge at a minimum to ensure the Water Licence does not contravene any federal legislation, such as the *Fisheries Act*.

The Board made the following statement in its decision: “... Copying federal requirements into LWB licences is duplicative, and requiring proponents to monitor *MDMER* parameters that are irrelevant to the project could add unnecessary complexity, regulatory burden and costs to the proponent (p.71/183).” Regardless of the Board’s views on duplication, duplication is specifically contemplated in s. 27(5) of the *Waters Act* and is required in the Water Licence for the reasons noted in the previous paragraph.

In closing, I agree with the Board’s conclusion that this regulatory process does not fit with the scope of an “administrative update”. However, proceeding with this understanding by the Board resulted in the Board not requiring the evidence necessary to regulate the proposed release of “Waste” as defined under the *Waters Act*, which resulted in a flawed proceeding being completed. The deficiencies noted above have resulted in my inability to approve the Water Licence at this time. In returning this Water Licence, it is my opinion that the process has not been completed, not that the process needs to end or start over again. I believe the remaining steps are: evidence should be provided by the proponent on the quality of “Waste” which is to be released from the decommissioned pond(s) (consistent with s. 5(1) and 5(2)(f)(iv) of the *Waters Regulations*), a fulsome review and assessment by interveners, and subsequently a decision by the Board in line with legislation and the Board’s Water and Effluent Quality Management Policy (2011).

Sincerely,

A handwritten signature in blue ink, appearing to be 'S. Thompson'.

Shane Thompson
Minister
Environment and Natural Resources



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