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July 21, 2022

W2015L2-0001

The Honourable Shane Thompson
Minister of Environment and Natural Resources
Government of the Northwest Territories

Dear Minister Thompson,

RE: Diavik Diamond Mines (2021) Inc. type A Water Licence Amendment – W2015L2-0001

The Wek'èezhìi Land and Water Board (WLWB or the Board) received your letter of June 29, 2022 (the Letter)¹ setting out your decision on the Amended Licence W2015L2-0001 and the Reasons for Decision forwarded to your attention by the WLWB on June 2, 2022.² The concerns identified in the Letter have been carefully reviewed by the Board and its legal counsel. The WLWB's response is set out below. The Board respectfully requests your consideration of this response, and it has instructed its staff to engage with Government of the Northwest Territories (GNWT) Environment and Natural Resources (ENR) staff as set out below.

The Letter identifies three legal issues that prevented your approval of the recommended Amended Licence. Following an overview of the issues raised by GNWT during the proceeding, we have responded to each of these concerns in turn below and then offered suggestions for a way forward towards approval of an amendment for DDMI and a resolution of the interpretation of subsection 27(5) of the *Waters Act*.

Overview of Issues Raised by the GNWT During the Proceeding

In consideration of DDMI's Water Licence Amendment Application (the Proceeding), the Board reviewed and considered:

- The comments and recommendations, evidence, and submissions received from Parties during the regulatory proceeding;
- The Land and Water Board Policies and Guidelines; and
- Legislative requirements related to licence issuance.

The WLWB fully considered the input provided by the GNWT in its decision. This included consideration of all submissions made by the GNWT-ENR, which participated as an Intervener, and by the GNWT-Lands, which provided input through the public review of the Application and Draft Water Licence.

¹ See WLWB Online Registry at www.wlwb.ca for [Diavik - WL Amendment - Progressive Reclamation - Minister's Decision Letter - Jun 29 22.pdf](#)

² See WLWB Online Registry for [Diavik – WL Amendment – Progressive Reclamation – RFD and Recommendation to Minister – June 2 22.pdf](#)

The approach to regulating the new points of discharges was the main topic of this proceeding. The Application did not propose effluent quality criteria (EQC) for the new points of discharge,³ nor did it provide technical information related to anticipated water quality of discharges to support the development of EQC. Instead, the Applicant proposed that a Decommissioning Plan would be submitted post-issuance of the Licence to provide the technical information to assess the quality and acceptability of the proposed discharge. As a result, determining what details would be required in the Decommissioning Plan to achieve this, and subsequently determine whether EQC or other related licence conditions are necessary, was a central topic of the proceeding.

The Board heard a variety of opinions on how this specific waste, and waste in general, should be regulated. In its decision, the Board concluded that not all components of Waste deposits may have the potential to adversely affect water quality in the receiving environment, and therefore, not all of the components of Waste necessarily require an EQC as outlined in the LWBs' *Water and Effluent Quality Management Policy*. As discussed in the Board's Reasons for Decision, the GNWT-ENR raised two legal issues through this proceeding that it stated could interfere with the ability of the Minister to sign the Water Licence.⁴ The GNWT-ENR argued that any new Waste deposit requires EQC as a licence condition, and that these must include, at minimum, all Metal and Diamond Mining Effluent Regulations (MDMER) limits. Otherwise, the GNWT argued this would be a contravention of sections 27(5) and 37 of the *Waters Act*.

The Board did not include the GNWT-recommended EQC (i.e., MDMER limits) in the Amended Licence because there was no evidence provided to indicate that the recommended EQC would offer any additional protection,⁵ and because the setting of EQC without adequate evidence to consider whether they are protective of the receiving environment would not be consistent with the LWBs' policies and guidelines. Instead, the Board has required additional technical evidence be submitted in the Decommissioning Plan to determine whether an amendment to include new EQC will be required in the future. In addition, and as indicated in the Reasons for Decision, the evidence necessary to allow identification of all parameters of potential concern, which may or may not include MDMER parameters was not provided for the proposed discharge. Therefore, a process to further consider water quality information post-issuance, such as the one set out in the Amended Licence and the Board's Reasons for Decision, would have been necessary regardless of the WLWB decision on MDMER limits.

In section 6.7.2 and Appendix A of the Board's Reasons for Decision, the WLWB provided a thorough response to the GNWT's position on sections 27(5) and 37 of the *Waters Act*. The Board notes that the Letter reiterates the concerns raised by the GNWT-ENR regarding sections 27(5) and 37 of the *Waters Act* (i.e., Point 2 and 3 of the Letter) but does not appear to consider the legal arguments put forward by the Board in its decision. In addition, Point 1 raised in the Letter appears to imply that, in the GNWT's opinion, the Application should not have been considered complete. This position was not previously raised as an issue that could interfere with Licence issuance and should have been raised in the initial review of the Application.

³ See WLWB Online Registry for [Diavik - WL Amendment - Progressive Reclamation - Application - Oct 13 21.pdf](#)

⁴ See WLWB Online Registry for [Diavik - WL Amendment - Progressive Reclamation - RFD and Recommendation to Minister - June 2 22.pdf](#); section 6.7.2 and Appendix A

⁵ See WLWB Online Registry for [Diavik - WL Amendment - Progressive Reclamation - RFD and Recommendation to Minister - June 2 22.pdf](#); Pg. 30

Point 1: Missing Key Foundational Information Required by the Regulations

The Letter states that the Board’s process was “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)”; specifically, that required under items 8 and 10 of Schedule C of the Waters Regulations. These items are discussed separately below.

Item 8 of Schedule C

Item 8 of Schedule C addresses the “quantity, quality, treatment and disposal” for the new waste deposit. Section 8 of the Boards’ Water Licence Application form requires proposed waste management methods, including “For activities that involve the deposit of waste into water, provide proposed effluent quality criteria (EQC) in accordance with the MVLWB Water and Effluent Quality Management Policy and MVLWB/GNWT Guidelines for Effluent Mixing Zones.” Proposed EQC are one method of allowing the Board to fulfill its mandate regarding water management and environmental protection, so are not necessarily required for all water licence applications to be considered complete.

The Application describes that this amendment proposes an “approach to regulate uncontrolled closure surface water runoff in both the short- and long-term post-closure” and explains why no new technical information was provided.⁶

Once it is determined that all the basic requirements of Schedule C have been addressed, an application is distributed through the Online Review System (ORS). The Board relies on reviewer input, including the GNWT, to assist it in identifying any outstanding technical, procedural, or legal issues with an application and the Board has the authority to request additional information be provided for the record where required.

In its initial ORS comments, the GNWT identified uncertainties that could be addressed by research (GNWT-ENR comments 8 and 9), however, did not raise a concern with the lack of water quality information provided to consider the Application.⁷ Later in the proceeding, GNWT-ENR did raise concerns with the limitations to developing EQC given the lack of water quality information provided with the Application. However, the Letter is the first time that GNWT has indicated that it considers this information to be a legal requirement that could impact the Minister’s ability to approve the Amended Licence. Such a position was never articulated until the Letter, after the WLWB had closed the record and recommended the Licence for your approval.

The WLWB also notes that this new legal position is not consistent with the GNWT’s recent approval of the Point Lake amendment for the Ekati Mine’s water licence. Similar to the DDMI Application and Amended Licence, information on water quality predictions for minewater was not provided during the proceeding,⁸ and the questions of whether additional EQC are required will also be determined based on a post-issuance submission.⁹ Additionally, although existing EQC apply to the new waste deposit in the interim, the evidence on the record identified parameters of potential concern that do not currently have an applicable EQC.¹⁰ The GNWT was questioned on the timelines for development of EQC at the Point Lake Public Hearing.¹¹ No concerns with deferral of the question of whether EQC would be needed were

⁶ See WLWB Online Registry for [Diavik - WL Amendment - Progressive Reclamation - Application - Oct 13 21.pdf](#).

⁷ See WLWB Online Review System for [Diavik - Type A WL Amendment – Progressive Reclamation](#)

⁸ See WLWB Online Registry for [Ekati - Amendment - Point Lake - Minister Approval - May 12 22.pdf](#)

⁹ See WLWB Online Registry for [Ekati - Point Lake Project - RFD and Recommendation to Minister - Apr 08 22.pdf](#) ; section 5.10

¹⁰ See WLWB Online Registry for [Ekati - Point Lake Project - RFD and Recommendation to Minister - Apr 08 22.pdf](#) ; section 5.11

¹¹ See WLWB Online Registry for [Ekati - Point Lake Project - Public Hearing - Day 4 Transcript - Nov 26 21.pdf](#); pg 72

raised by the GNWT in this process and no legal concerns were raised by the GNWT before Ministerial approval occurred. Consequently, the rationale for your current concerns and rationale for this apparent contradiction are not clear to the Board.

As stated in the Reasons for Decision, the Board has required additional technical evidence be submitted in the Decommissioning Plan to determine whether an amendment to include new EQC will be required. The Amended Licence does not preclude the WLWB from determining that new EQC or other conditions will be required for these collection ponds. The Board relies on input from all Parties in review of submissions it receives, and the GNWT would have the opportunity to comment on the need for an amendment should there be evidence indicating need for EQC. It appears premature to conclude that that the proposed process in the Licence and explained in the Board's Reasons for Decision will not work as intended.

Item 10 of Schedule C

Item 10 of Schedule C addresses the information required regarding potential environmental impacts and mitigations. DDMI indicated its position that the Application should be exempt from preliminary screening and, after public review and comment, the Board agreed stating "Acceptable criteria for reconnection and closure will be determined through a future regulatory process based on the evidence put forward at that time. Long-term water treatment remains a contingency should water quality not meet acceptable thresholds."¹² The GNWT did not make any submissions on this exemption decision and the time for any challenge to the Board's decision under part 5 of the *Mackenzie Valley Resource Management Act* (MVRMA) is long past.¹³

The requirements of section 62 and Part 5 of the MVRMA have been met, as indicated in the Board's Reasons.¹⁴ In the Board's respectful view, Items 8 and 10 of Schedule C are not at issue.

Point 2: Schedule 8 Conditions 3(e)(ix) and (x) are not appropriate for inclusion in a Schedule

The Letter asserts that Schedule 8, Conditions 3(e)(ix) and (x) are not appropriate to be included in the schedule of the Water Licence. Schedule 8, Conditions 3(e)(ix) and (x) require the Decommissioning Plan to include:

(ix) A description of the parameter screening, if any, completed for the proposed Discharge water chemistry; and

(x) Rationale for whether the existing requirements of Part G (i.e., Part G, Conditions 33 to 37, and 40) are appropriate or additional/revised Effluent Quality Criteria may be required.

The Board notes that very similar items were included in Schedule 8 in the Draft Licence that was distributed for public review on March 17, 2022.¹⁵ At that time, the GNWT-ENR raised no legal concerns about their inclusion in the Licence.¹⁶ However, in its Closing Arguments the GNWT-ENR stated that including requirements related to the discharge of waste in a schedule of a licence or in a document that

¹² See WLWB Online Review System for [Diavik - WL Amendment - Progressive Reclamation - Preliminary Screening Determination - Jan 24 22.pdf](#)

¹³ See WLWB Online Review System for [Diavik - Type A WL Amendment - Progressive Reclamation](#)

¹⁴ See WLWB Online Registry for [Diavik - WL Amendment - Progressive Reclamation - RFD and Recommendation to Minister - June 2 22.pdf](#) section 5.12 of the Reasons.

¹⁵ See WLWB Online Registry for [Diavik - WL Amendment - Progressive Reclamation - Draft WL - Track Changes - Mar 17 22.pdf](#)

¹⁶ See WLWB Online Review System for [Diavik - Type A WL Amendment - Progressive Reclamation - Draft Water Licence](#)

is required by a licence, instead of a condition of a licence (e.g., EQC), circumvents the requirement for Ministerial approval and therefore is in contravention of section 37 of the *Waters Act*.

The WLWB notes that this legal position is not consistent with the previous Ministerial approval of the Jay Project, which included similar information requirements in its schedule to support a re-evaluation of EQC.¹⁷ No concerns with the Jay schedule requirements were raised by the GNWT through that process and no legal concerns were raised before Ministerial approval. The rationale for this apparent contradiction of approach between these Licences is unclear to the Board.

As noted above, the Application was very clear that no technical information had been provided. Throughout this proceeding DDMI reiterated that it had not done the analysis necessary to develop EQC for all collection pond discharges. Instead, DDMI proposed that the Licence require the submission of a Decommissioning Plan that would include the information required to assess the water quality of the potential discharge. The Plan would require a public review and Board approval prior to any discharge taking place. Given the approach set out in the proposed Licence, new EQC, if required, will be the subject of Ministerial approval and they would, consistent with LWB practice, be set out in the Licence and not within a schedule.

Point 3: The Exclusion of the *Metal and Diamond Mining Effluent Regulations (MDMER)* Limits for new “Waste” release violates s. 27(5) of the *Waters Act*

It is the Board’s understanding that the Diavik Mine is subject to the requirements of MDMER regardless of the contents of its Water Licence – no Party disagreed with this during the proceeding. Throughout the proceeding the GNWT made the argument set out in the Letter – that MDMER limits must also be included in the Amended Licence as EQC.

The Letter states that “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.” Subsection 27(5) does not speak to the evidence required by the Board in order to include conditions in a licence. It speaks to minimum standards (i.e., conditions recommended by the Board may not be “less stringent than the provisions of those regulations”) for licence conditions addressing substances regulated by MDMER.

Throughout the proceeding, the GNWT’s position has been that MDMER requirements must be included in the licence despite the lack of evidence to support the development of EQC and notwithstanding the fact that some of the substances regulated by the MDMER have never been identified as parameters of interest for this project. The Board took careful note of the GNWT’s position during this proceeding, questioned GNWT-ENR at the hearing,¹⁸ secured Undertakings to provide additional information,¹⁹ and directed interested Parties to address this issue in their Closing Arguments.²⁰ The GNWT did not offer any evidence to support its position or to demonstrate that the proposed EQC would be consistent with the LWBs’ *Water and Effluent Quality Management Policy*. When asked in the hearing whether the MDMER could be inserted into the Licence by force of law, the GNWT representative demurred. Accordingly,

¹⁷ See WLWB Online Review System for [W2012L2-0001 - Ekati - Water Licence - Amendment - Jay Development - Jul 6 17.pdf](#); Part H Condition 22 and Schedule 6, Condition 5(c)

¹⁸ See WLWB Online Registry for [Diavik – WL Amendment – Progressive Reclamation – Public Hearing Transcript – Day 1 – Feb 22 22.pdf](#) and [Diavik – WL Amendment – Progressive Reclamation – Public Hearing Transcript – Day 2 – Feb 23 22.pdf](#) pgs. 87-114

¹⁹ See WLWB Online Registry for [Diavik - WL Amendment - Progressive Reclamation - Public Hearing - Undertakings - Feb 24 22.pdf](#)

²⁰ See WLWB Online Review System for [Diavik - Type A WL Amendment - Progressive Reclamation - Draft Water Licence](#)

having carefully reviewed the evidence and arguments, the WLWB was not able to accept the interpretation of subsection 27(5) proposed by the GNWT. The WLWB is of the view that the onus of proof to support this position and the associated recommendation was on the GNWT; however, the Letter suggests that the Board was in error by not insisting the information required to support the GNWT's recommendation was provided in the Application. The Board respectfully suggests that there is another way to look at this situation. DDMI placed a case for progressive reclamation and decommissioning of collection ponds before the Board on the understanding that in future, and under the framework of the Licence, additional information would be generated to either show that any collection pond discharge would not be harmful to the environment, or that further amendments to the Licence, including EQC if appropriate, would be required. The Board suggests that both this approach and the similar approach in the Point Lake Amendment properly leaves the onus on the licensee rather than GNWT-ENR or other Parties to provide the required information and analysis.

Regardless, there is a clear divergence of views about the proper legal interpretation of subsection 27(5). There is no new information or argument in the Letter to support a reconsideration of the Board's interpretation of this subsection of the *Waters Act*. Appendix A in the Board's Reasons for Decisions sets out the rationale for its interpretation and the rejection of the GNWT interpretation in detail.

The WLWB notes that this issue would appear to apply at any site subject to MDMER that has a water licence and may therefore be relevant to other type A licensing recommendations forwarded to the Minister for consideration.

Conclusion

The WLWB respectfully suggests that points #1 and #2 in the Letter should be considered resolved. Regarding point #3, the Board suggests that an expedited effort to secure a binding interpretation on the proper interpretation of subsection 27(5) of the *Waters Act* be sought. If you agree, the Board has instructed its staff and counsel to prioritize efforts to identify a way forward towards approval of an amendment for DDMI and will reach out to GNWT-ENR staff in a timely manner.

Yours truly,

A handwritten signature in black ink, appearing to read 'Mason Mantla', written in a cursive style.

Mason Mantla, Chair,
Wek'eezhii Land and Water Board