

December 17, 2021

Mr. Jamie Koe
Deputy Minister
Government of the Northwest Territories - Department of Lands
P.O. Box 1320
600, 5102 50th Avenue
Yellowknife, NT X1A 2L9

Dear Mr. Koe,

RE: Outstanding Issues - Arctic Canadian Diamond Company's: Ekati Mine – Point Lake Project – Mackenzie Valley Review Board MVRMA Ss. 126(3) Determination

As you are aware, the Ekati Jay Project was assessed and approved by your Minister subject to the Jay Project Environmental Assessment (EA1314-01) and the adoption of the recommended measures.¹ Subsequently, Arctic Canadian Diamond Company (Arctic) applied to the Wek'èezhì Land and Water Board (WLWB) for authorizations for its proposed Point Lake Project at the Ekati Diamond Mine. The road that the Point Lake Project depends on was built as part of the Jay Project, following mitigations required by the Jay Project EA to reduce impacts on barren ground caribou that use a movement corridor in the vicinity of both projects. Other components of the Jay Project have not been constructed, such as the dike, pit and waste rock management facility.

On October 18, 2021, the Review Board decided not to order an environmental assessment of the Point Lake Project under ss. 126(3) of the *Mackenzie Valley Resource Management Act* based in part on the assumption that several measures from the Jay Project EA would be implemented to mitigate significant potential impacts of the Point Lake Project.² In making this decision, the Review Board considered Arctic's commitments, including those in its letter of July 29, 2021, to remove the Jay Project in its entirety from Arctic's Water Licence. The Review Board also considered the Government of the Northwest Territories' (GNWT's) [Sept. 24, 2021 response](#) to the Review Board's Sept. 6, 2021 information requests.

Uncertainty on how to amend or remove measures from the Jay Project EA

Arctic has requested that the WLWB remove the water licence and permit conditions required to implement the Jay Project Measures from these regulatory instruments. In its [Preliminary Screening Decision on the Point Lake Project](#), the WLWB stated (p. 8) that important procedural and practical questions remain regarding the implementation of the Jay EA Measures approved by the Minister and responsible ministers, in light of the cancellation of the

¹ [Jay Project Report of Environmental Assessment and Reasons for Decision](#)

² Please see the Review Board's [Reasons for Decision](#) for the full rationale for this decision.

Jay Project by Arctic. The Review Board agrees with WLWB’s observation that “there is no provision in the MVRMA to vacate or remove these [Jay Project] Measures.”

In the Review Board’s view, without a new Ministerial decision under s. 130 of the MVRMA, there is no clear path in the legislation that allows 1) a regulatory authority to remove conditions that are required to implement EA measures from a water licence or other regulatory instrument, or 2) for a government department or agency to avoid its legal obligation to implement a measure which is within the scope of its authorities.

This view is reinforced by the responses from officials of the department of Aboriginal Affairs and Northern Development Canada (AANDC) to the Mackenzie Valley Land and Water Board (MVLWB) in 2013 when that department considered questions about the ability of the MVLWB to amend water licence conditions (Effluent Quality Criteria) drafted to implement measures previously adopted by the AANDC Minister.³ We note that as a result of that AANDC advice, the Review Board conducted an expedited EA of the water licence amendment proposed by De Beers Canada Ltd.⁴

The Review Board has recently asked Crown-Indigenous Relations and Northern Affairs Canada for its opinion on what procedure would be required to amend or remove recommended measures as adopted by the decision of the Minister and responsible ministers, as well as any procedure required to cancel such a decision.⁵

The GNWT, in its letter of response on September 24, 2021 to the Review Board’s information requests, states that in GNWT’s opinion, the request to cancel the Jay Project by Arctic means that the Jay Measures are “defunct”. The Review Board requests that you clarify the GNWT’s position on this issue in light of the referenced letters from AANDC to the MVLWB and the response from CIRNAC to the Review Board’s request for clarification of December 15th, 2021.

Development Certificates

In 2014, the Mackenzie Valley Resource Management Act (MVRMA) was amended as part of legislation surrounding the devolution of the Northwest Territories. Among other changes to the MVRMA, the *NWT Devolution Act* included provisions for enforceable development certificates. The development certificate provisions have not yet been called into force.⁶ The

³ Letters from AANDC to MVLWB of [November 5, 2013](#) and [December 16, 2013](#)

⁴ [Report of Environmental Assessment for the DeBeers Snap Lake Water Licence Amendment – EA1314-02](#)

⁵ [MVIERB Letter to CIRNAC – December 15, 2021](#)

⁶ Bill C-88, An Act to amend the Mackenzie Valley Resource Management Act and the Canada Petroleum Resources Act and to make consequential amendments to other Acts, reintroduced many of the provisions that were introduced in the NWT Devolution Act, including the provisions related to development certificates. Bill C-88 received Royal Assent on June 21, 2019.

Review Board has detailed its readiness to implement the provisions of the MVRMA to require development certificates in a reference bulletin.⁷


The ability to amend development certificates will allow the Review Board the flexibility to review and adjust EA measures during the life of a project. In its letter of July 29, 2021, Arctic indicated that the delay occasioned by an EA would leave a gap in the Ekati process plant feed in 2024 that would result in shutdown and closure of the Ekati mine. This indicates the importance of the Review Board being able to adjust EA measures without conducting a new EA, as intended in the development certificates provisions. The Review Board is of the strong opinion that the coming in to force of these provisions, originally planned for April 2016, is both needed and long overdue.

The Review Board has requested an update from Crown-Indigenous Relations and Northern Affairs Canada on when it can expect the provisions for development certificates to come into force. The GNWT views on appropriate timing for these certificate provisions would also be welcome.

Conclusion

In light of the clear legal and procedural issues resulting from Arctic's request to amend its Water Licence and Land Use Permits to remove the conditions that implement Jay Project Measures, the Review Board suggests that the GNWT await the response from Crown-Indigenous Relations and Northern Affairs Canada before taking any actions that would affect the measures from the Jay Project which will mitigate potential impacts from the Point Lake Project.

Respectfully,



Joanne Deneron
Chair
Mackenzie Valley Review Board

Copied to:

Joanna Ankersmit - Director General, Natural Resources and Environment Branch, Northern Affairs Canada

Erin Kelly – Deputy Minister, GNWT- Environment and Natural Resources

Joseph Mackenzie – Chair, Wek'èezhìi Land and Water Board

⁷ [Reference Bulletin on Development Certificates](#), Feb. 2017