



Lutsel K'e Dene First Nation

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April 4, 2016

Matthew Spence
Director General
Norther Projects Management Office

Re: Lutsel K'e Dene First Nation's Written Response to the EA1314-01 Report of Environmental Assessment and Reasons for Decision for the Jay Project, Dominion Diamond Ekati Corporation

On behalf of the Lutsel K'e Dene First Nation, Chief and Council, along with our Wildlife, Lands and Environment Department are submitting Lutsel K'e Dene First Nation's (LKDFN) written response to the EA1314-01 Report of Environmental Assessment and Reasons for Decision for the Jay Project, Dominion Diamond Ekati Corporation.

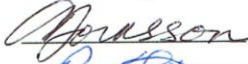
Our submission outlines our participation in the environmental assessment for the proposed Jay Project and our analysis of the mitigation measures, with a focus on the Caribou measures. LKDFN has fully participated in the environmental assessment for the proposed Jay Project to the best of our ability. LKDFN agrees with the Mackenzie Valley Environmental Impact Review Board (MVEIRB) determination that the proposed Jay Project will cause significant adverse impacts on the Bathurst Caribou Herd. Where LKDFN disagrees with the Review Board is the ability of the measures will reduce significant adverse impacts to the environment, and specifically, the Bathurst Caribou Herd. LKDFN believes the proposed Caribou measures are uncertain and experimental. Given the uncertainty of the proposed Caribou measures, LKDFN proposes that the only reasonable and justifiable course of action is to make approval of the proposed Jay Project conditional on: (1) the demonstrated recovery of the Bathurst Caribou Herd to sustainable harvesting level, and (2) evidence that the Caribou mitigation measures are proven to be effective based on implementing, testing, and monitoring of the measures at the existing Ekati mine.

If there are any questions or concern regarding our Final Written Response, please do not hesitate to contact Chief Lockhart.

Respectfully,

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Felix Lockhart, LKDFN Chief

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Addie Jonasson, LKDFN Councilor

A signature in blue ink, appearing to read 'Ron Fatt' with a long horizontal stroke.

Ron Fatt, LKDFN Councilor

A signature in black ink, appearing to read 'Antione Michel' with a long horizontal stroke.

Antione Michel, LKDFN Councilor

A signature in blue ink, appearing to read 'Herman Catholique' with a long horizontal stroke.

Herman Catholique, LKDFN Councilor

A signature in blue ink, appearing to read 'Lauren King' with a long horizontal stroke.

Lauren King, LKDFN Wildlife, Lands & Environment Manager

**Lutsel K'e Dene First Nation's
Written Response to the
EA1314-01 Report of Environmental
Assessment and Reasons for Decision
for the Jay Project,
Dominion Diamond Ekati Corporation**

Lutsel K'e Dene First Nation

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1.0 Executive summary

The Lutsel K'e Dene First Nation (LKDFN) agrees with most of the Mackenzie Valley Environmental Impact Review Board's (MVEIRB or Review Board) determinations regarding the significant adverse environmental and social impacts that the proposed Jay Project will pose. Where our opinions differ is on the effectiveness of the proposed mitigation measures, and on the question of where the onus of proof should lie. The Review Board believes their proposed mitigation measures will eliminate the significant adverse impacts of the proposed Jay Project. LKDFN disagrees, and is concerned that many of the proposed measures are untested, experimental efforts that should be validated, through testing at the existing Ekati mine, not on a new development that the Review Board has determined is likely to have additional significant environmental impacts on the already imperiled Bathurst Caribou Herd.

LKDFN focuses this submission heavily on the threats to the Bathurst Caribou Herd that the proposed Jay Project will create. Though the impacts are certain, the ability of the proposed measures to mitigate these effects into insignificance are uncertain, and considering the perilous current state of the herd, which continues to decline precipitously and is now at less than 5% of its mid-1990s population (GNWT, n.d.), the only reasonable and justifiable action that the responsible Ministers and other responsible authorities can take is to make approval of the Jay Project conditional on:

- 1) The demonstrated recovery of the Bathurst Caribou Herd to sustainable harvesting levels, and
- 2) Evidence that the proposed mitigation measures are proven to be effective, based on implementation, testing, and monitoring at the company's existing Ekati Mine.

Denesoline culture in this region relies heavily on the Caribou; through stories, in lessons, for food, garments, tools, and understanding of the land; the Review Board acknowledged that the Dene and the Caribou are "inseparably linked." The dire state of Caribou in the North right now, coupled with the cultural reliance of the Dene on the Caribou, leads LKDFN to take the perspective that it is unjustifiable and irresponsible to approve the proposed Jay Project unless such approval is conditional on proven mitigation measures and the assured recovery of the Bathurst Caribou Herd to sustainable harvesting levels.

2.0 Introduction

LKDFN has participated in the environmental assessment of the proposed Jay Project since the scoping sessions in January 2014. The most prominent concern raised throughout the environmental assessment by LKDFN, other Indigenous parties, governments, and the Review Board were in regards to the Bathurst Caribou Herd. The Review Board determined that the proposed Jay Project **“is likely to cause significant adverse project-specific and cumulative impacts to the Bathurst caribou herd”** (MVEIRB, 2016, p. 703). The Review Board’s finding are consistent with the views of the LKDFN concerning the status of the Bathurst Caribou Herd and the significance of the adverse impacts of the proposed Jay Project.

Barren-ground Caribou Herds across the North have been in decline, with some herds declining more rapidly than others. The people of the North are well aware of the current dire situation with Caribou declining populations, and though Elders can remember times of limited Caribou, never in the history of the North have the pressures from industrial development and climate change been so apparent that Elders, for the first time, are worried that recovery of the Caribou herds to self-sustaining levels will not happen if we don’t take immediate action to manage human-related impacts on the Caribou herds.

The Review Board acknowledged the public’s grave concerns about impacts of the proposed Jay Project to the Bathurst Caribou Herd in prioritizing “Impacts to caribou from project components,” and “Maximizing benefits and minimizing impacts to communities” as key lines of inquiry, as well as “Impacts to wildlife and wildlife habitat from project components” and “Impacts to cultural aspects from project components” as subjects of note when establishing the terms of reference for the proposed Jay Project (MVEIRB, 2016, p. 73). Impacts to Caribou were also areas of research and consultation that Dominion focused heavily upon in their review of potential impacts from the proposed Jay Project.

Though the reasons for the population decline are not fully understood, the primary management action on the part of the Government of the Northwest Territories (GNWT) to-date has been to limit harvesting. Non-Indigenous harvesting is closed, and Indigenous harvesting has been restricted, and in some cases closed, for almost 10 years. At the same time, the GNWT has permitted new industrial developments within Caribou ranges, while research to understand and

address industrial disturbances on Caribou, mitigate or adapt to climate change impacts, or research and actions towards Caribou recovery have been lagging.

During this very difficult period, the LKDFN has participated in forums organized by the GNWT to discuss mitigation efforts in an attempt to restore the population of several herds, with a focus on the Bathurst Caribou Herd. Those forums have focused primarily on harvesting restrictions and predation control. LKDFN has also participated in several environmental assessments on behalf of the Caribou; sought protection of Caribou calving grounds from exploration and industrial development; and worked on developing our own Caribou Stewardship and Protection Plan.

Having found that the proposed Jay Project is **likely to cause significant adverse project-specific and cumulative impacts to the Bathurst Caribou Herd**, the Review Board then prescribed six measures it believes will mitigate the significant adverse impacts to Caribou. LKDFN does not have confidence in the effectiveness of the six proposed mitigation measures. The mitigation measures proposed by the Review Board are either untested, unproven, or insufficient to adequately address impacts to Caribou from the proposed Jay Project.

In short, LKDFN believes that while the impacts of the proposed Jay Project on Caribou are certain, the effectiveness of the proposed mitigation measures are uncertain.

Given the present dire circumstances of the Bathurst Caribou Herd, the LKDFN believes it would be **irresponsible and unjustifiable** for the responsible Ministers to permit the proponent to carry out what is essentially an experiment to determine whether the proposed mitigation measures will be effective in addressing the significant impacts that the proposed Jay Project will have on the Bathurst Caribou Herd.

LKDFN does not believe that the interests of the developer in timely approvals outweighs constitutionally-protected Aboriginal and Treaty rights of present and future LKDFN members to harvest from a viable Bathurst Caribou Herd or to maintain the cultural integrity of the Lutsel K'e Denesoline way of life.

In this submission, LKDFN is advising the responsible Ministers and other responsible authorities of the potentially catastrophic effects that the proposed Jay Project's impacts on the

Bathurst Caribou Herd would have on LKDFN's Aboriginal and Treaty rights, and of LKDFN's views that the proposed Caribou mitigation measures are of uncertain or unproven effectiveness in reducing those impacts. The responsible Ministers and other responsible authorities are considering recommendations by the Review Board to approve the proposed Jay Project, but have also been advised by the Review Board that such an approval is likely to have a significant adverse impact on the Bathurst Caribou Herd.

There can be no debate that serious action should be taken to protect the Bathurst Caribou Herd. Nor is there any doubt about the fact that the Bathurst Caribou Herd are central to the survival and continuance of the Lutsel K'e Denesoline as a distinct Aboriginal people. Yet what is being proposed will result in harm to the Bathurst Caribou Herd, and the measures that are being proposed to mitigate such harm are of uncertain or unproven effectiveness. Such a circumstance invokes the need for the application of the precautionary principle, in which the burden of proof that the mitigation measures will be effective falls on the developer. Because the Review Board has determined that significant adverse impacts on the Bathurst Caribou Herd are either highly likely or certain if the project proceeds, it is essential that any mitigation measures are of equal certainty or effectiveness in fully mitigating the impacts of the proposed Jay Project on the Bathurst Caribou Herd. To do otherwise in the face of these findings would be a departure from the precautionary principle and other globally accepted principles of sustainable development (United Nations, 1982) and the requirements under s. 137(2) of the *Mackenzie Valley Resource Management Act* (S.C. 1998, c. 25) to consider the importance of the conservation of the lands, waters, and wildlife of the Mackenzie Valley on which the development might have an impact.

Given the findings of the Review Board regarding the significance of the impacts of the proposed Jay Project on the Bathurst Caribou Herd; the importance of the Bathurst Caribou Herd to Northerners and all Canadians; and the significance of such impacts on LKDFN's constitutionally-protected Aboriginal and Treaty rights to harvest the Bathurst Caribou Herd, decisions by the responsible Ministers and other responsible authorities in respect of the proposed Jay Project are decisions which would have a direct, causal impact on LKDFN's Aboriginal and Treaty rights, and accordingly, fully engage the honour of the Crown and the deepest and most profound aspects of the duty to consult, accommodate, and to justify any infringements (*Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 (CanLII);

West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2011 BCCA 247 (CanLII)).

Our ability to maintain our unique language, spirituality, and Denesoline ways of life is dependent upon our ability to continue to harvest Caribou. The same cannot be said about the need for the proposed Jay Project. While the proposed Jay Project would provide economic benefits, it is in no way central or vital to anyone's culture or way of life. Even the economic benefits of the proposed Jay Project will only flow for a short period of time, and many of those benefits will accrue to investors and others who have little or no connection to the North.

The importance of a thriving Bathurst Caribou Herd population to the LKDFN cannot be understated. The significance of the project-specific and cumulative adverse impacts on the Bathurst Caribou Herd are mirrored by equally significant impacts on LKDFN's constitutionally protected Aboriginal and Treaty rights, culture, and way of life.

Diamonds, it is said, are forever. This means that the wealth of those diamonds can be harvested in the future, once the Bathurst Caribou Herd has recovered and the effectiveness of the proposed mitigation measures are established. The same cannot be said about the Caribou, or the LKDFN Denesoline way of life, unless decisions and actions are made now to maintain them.

LKDFN believes that the only reasonable and justifiable course of action is for the responsible Ministers and other responsible authorities to make the approval of the Jay Project **conditional** upon:

- 1) the demonstrated recovery of the Bathurst Caribou Herd to sustainable harvest levels, and;
- 2) that evidence that the proposed mitigation measures are proven to be effective, based on implementation, testing, and monitoring at the company's existing Ekati Mine.

Deferring the realization of economic benefits from the proposed mine until there is a demonstrated recovery of the Bathurst Caribou Herd to sustainable harvest levels and proof of the effectiveness of the mitigation measures proposed by the Review Board at the existing Ekati operations is prudent, reasonable, and consistent with a precautionary approach and other key principles of sustainable development. It would also be a fair and balanced way to reconcile the

constitutionally-protected Aboriginal and Treaty rights of LKDFN with the interests of all Canadians.

LKDFN has provided additional comments and specific proposals on the Review Board's recommendations and proposed mitigation measures in this submission. We request that the responsible Ministers and other responsible authorities give these full consideration, and that LKDFN is engaged in further consultations on the terms of any approvals for the proposed Jay Project.

3.0 Measures

In the following section, the proposed mitigation measures are summarized, gaps in knowledge or practice are outlined, and alternative measures or actions are proposed for some measures as well as how the LKDFN can be involved in the design, implementation, and evaluation of the measures.

3.1 Impacts to water quality

Measure 4-1: Closure objectives

Measure 4-1 seeks to prevent significant cultural impacts after the closure of the proposed Jay Project from changes in water quality by requiring the Wek'eezhii Land and Water Board to set closure objectives and criteria for, but not limited to, the Jay pit, Misery pit, Lynx pit, and Jay waste rock storage area (MVEIRB, 2016, p. 231-2).

LKDFN proposes that water quality objectives and criteria should be established for water quality throughout the entire life of the proposed Jay Project. By setting achievable water quality objectives and criteria that aim to protect water quality throughout the life of the project, Dominion is greatly increasing their ability to achieve closure water quality objectives and criteria. In the absence of an Akaitcho Land and Water Board, LKDFN requests to be consulted by the Wek'eezhii Land and Water Board during the establishment of the closure water quality objectives and criteria, and to try and ensure they are as close to baseline conditions as possible.

Measure 4-2(a): Site water management plan

Measure 4-2(a) requires Dominion to create and submit a Site Water Management Plan to the Wek'eezhii Land and Water Board for approval, prior to the commencement of dike construction to avoid significant impacts to cultural use in the area of the proposed Jay Project. The Plan should include: (1) a list of contingencies to manage water during operations and assess the feasibility of each contingency measure, (2) a description of when contingencies will be implemented, (3) preferred contingencies, with rationales, for each, and (4) a description of how Dominion will monitor water quality and quantity (MVEIRB, 2016, p. 232).

LKDFN proposes that this measure should also include perceived impacts to water quality. This may include, but not limited to, colour or taste of the water. If water quality is perceived to be negatively altered, traditional users have said they will likely stop using the area. This effectively alienates traditional users from their traditional territory, and fails to avoid significant cultural impacts. LKDFN recommends that the responsible authorities and Dominion work with Aboriginal Parties to identify perceived impacts to water quality and implement strategies to eliminate these significant cultural impacts.

Measure 4-2(b): Pit lake water quality

This measure stipulates that Dominion will establish meromixis in the proposed Jay and existing Misery pits, and stabilize meromictic pit lakes for the long-term (MVEIRB, 2016, p. 232). The Review Board acknowledges that if this requirement cannot be met, then Dominion will develop and implement contingencies to ensure pit lake water quality is compatible with cultural uses of the area.

LKDFN proposes that the Site Water Management Plan outlined in measure 4-2(a) also explicitly require Dominion to develop a list of contingencies if meromixis cannot be established and/or maintained in the proposed Jay pit and the existing Misery pit. This measure should also

include specific timelines as to when contingencies will be identified and implemented as well as how long they will be monitored.

In addition, this measure does not address the issue of the formation of internal waves or “seiching,” particularly in the proposed Jay pit. Specific contingency measures must be in place to address this potential issue. In the event that meromictic pit lakes cannot be established, LKDFN also requests that we are consulted by the Wek’eezhii Land and Water Board when reviewing the list of contingencies.

Measure 4-3: Fine processed kimberlite

Measure 4-3 stipulates that Dominion will not deposit fine-processed kimberlite into the Panda and Koala pits unless the Wek’eezhii Land and Water Board approves the use of Panda and Koala pits for the containment of fine-processed kimberlite. The Wek’eezhii Land and Water Board is to base their decision on the protection of the downstream environment and results from the Beartooth fine-processed kimberlite trial. If fine-processed kimberlite cannot be stored in the Panda and Koala pits, then the fine-processed kimberlite should be deposited in an approved containment area (MVEIRB, 2016, p. 233).

LKDFN agrees with the Review Board’s recommendations to safely and properly dispose of fine-processed kimberlite in a secure containment area. LKDFN asks that the responsible authorities include LKDFN and other Aboriginal parties in the decision-making processes of where the fine-processed kimberlite will be disposed in order to avoid significant adverse environmental and socio-cultural impacts.

Measure 4-4: Dike stability and safety

Measure 4-4 requires Dominion to establish an independent dike review panel to evaluate, and if necessary, improve the design, construction, operation, and maintenance of the dikes. However, this measure does not require Dominion to adopt the recommendations of the independent dike review panel.

LKDFN proposes that Dominion be required to give careful consideration to the recommendations of the independent dike review panel and, if the recommendations of the panel

are not adopted by Dominion, a sound rationale, beyond economic reasons, should be publically provided. In addition to the GNWT, the Wek'eezhii Land and Water Board, and the Independent Environmental Monitoring Agency (IEMA) and other responsible authorities, LKDFN and other Aboriginal parties must be part of the review of the panel's recommendations and be informed of Dominion's rationales for adopting or not adopting the panel's recommendations.

3.2 Fish and fish habitat

Measure 5-1: Protection of the Narrows

This measure seeks to mitigate significant adverse ecological and cultural impacts resulting from unacceptable drops in the water levels at the Narrows. This will be achieved by Dominion through monitoring the Narrows before and during closure, and by appropriately managing activities at Lac du Sauvage during closure (MVEIRB, 2016, p. 234). In addition, an aquatic effects monitoring program will be developed and submitted to the Wek'eezhii Land and Water Board for approval.

LKDFN is concerned that Dominion may not be able to maintain the water level at the Narrows during the operation of the proposed Jay Project, which would likely negatively affect the movement of fish species between the two major bodies of water as well as make it difficult to maintain the natural flow of the watershed which will impact the water system, adversely affecting traditional uses and users of the area.

To address this concern, LKDFN proposes that Dominion and responsible authorities consult with the LKDFN and other Aboriginal parties to ensure water flow at the Narrow continues to allow the movement of fish species and traditional use to continue.

3.3 Impacts to Caribou

Despite Dominion's view that the proposed Jay Project will have no significant adverse impacts to the Bathurst Caribou Herd, the MVEIRB found that the proposed Jay Project is likely to cause

significant adverse project-specific and cumulative impacts to the Bathurst Caribou Herd. Section 6.1 of *The Report of Environmental Assessment and Reasons for Decision* summarizes the Review Board's primary reasons for coming to this conclusion, which are:

1. The Jay Project is proposed across an important caribou mitigation corridor at a time when the herd is in a precarious and "extremely worrisome" state
2. Existing cumulative impacts on the herd are already significant and additional stresses on the herd at this point matter
3. From a project-specific perspective, the Jay Project, in isolation, will create physical barriers to caribou movement and additional sensory disturbance (such as lights, smells noise and dust) along an important migration corridor
4. No plan exists to manage the Bathurst Caribou Herd or its range
5. Caribou harvest restrictions are in place, and any activities that inhibit the ability of the Bathurst Caribou Herd to recover, such as the cumulative effects of the Jay Project and other human activities on the Herd's range, affects the well-being, health and culture of Aboriginal communities. This is a cause of serious public concern (p. 81).

A more detailed summary of the MVEIRB findings on Caribou project-specific and cumulative impacts is outlined in section 6.4 of *The Report of Environmental Assessment and Reasons for Decision*. As previously stated, the LKDFN agrees with the Review Board's determination of the potential impacts on Caribou.

Below each mitigation measure will be evaluated based on LKDFN traditional knowledge and other knowledge systems to demonstrate either the uncertainty or insufficiency of the proposed mitigation measures to protect the Caribou. LKDFN strongly disagrees with the notion that by implementing the measures, the significant impacts the Herd will suffer are negated.

Measure 6-1: Road mitigation from caribou impacts

Measure 6-1 is meant to mitigate significant project-specific and cumulative adverse impacts to Caribou from the proposed Jay road through the use of traffic control measures; real-time Caribou satellite collar data to trigger Jay road management actions; and construction of Caribou

crossing features along at least 70% of the length of the proposed Jay road. In addition, a Caribou Road Mitigation Plan that outlines various Jay road management practices and research is proposed. (MVEIRB, 2016, p. 235).

LKDFN contends that this mitigation measure will not adequately mitigate impacts to the Caribou, particularly where the proposed Jay road intersects an important esker along the Caribou's migration route. During the public hearing held in Lutsel K'e, the esker was identified as an important area for Caribou. Stephanie Poole of the LKDFN said at the hearing that, "This esker that you want to destroy is the way that -- that they know how to travel. And destroying that esker just means another blow to -- to their ability to -- to live their lives" (PR, 646). In the public hearing in Yellowknife, Berna Catholique of the LKDFN stated that, "The Jay Project wants to make a road right on the Caribou migration route, and [Dominion] told us it will not affect the Caribou. But it will affect the Caribou because of the noise, dust, and air pollution" (PR, 644). These findings are supported by scientific studies that demonstrate the importance of eskers as Caribou habitat and migration corridors that span across the landscape and connect Caribou with their entire home range (Parlee et al., 2013; Thorpe et al., 2001; Traynor, 2001). It is not certain that impacts associated with the Jay road crossing the esker can be mitigated, and, therefore, any mitigation measures will be experimental and may not mitigate the disruption along the Caribou migration route. LKDFN fears that there are few, if any, "contingency" measures that could be implemented to encourage Caribou to cross the proposed Jay road.

LKDFN does not think that relying on real-time Caribou collar satellite information will be a sufficient indicator for detecting if Caribou are in the vicinity of the proposed Jay Project. Currently, only 50 or approximately 0.3% of the Bathurst Caribou Herd are collared (Personal communication, March 2016). The collar data provides the location of a very small percentage of the current Bathurst Caribou Herd population, and is, therefore, not an adequate detection device. It is likely that the majority of Caribou that enter the vicinity of the proposed Jay Project and the rest of the Ekati mine will not be detected by collar data, and will accordingly be affected by road traffic, noise, and dust.

Finally, the mitigation measure attempts to address road dust, which is noted as the single largest source of fugitive dust or particulate matter emissions from the proposed Jay Project (MVEIRB, 2016, p. 122). This issue is proposed to be addressed through the Caribou Road Mitigation Plan,

in combination with the Air Quality and Emissions Monitoring and Management Plan (AQEMMP). The Review Board states that the Caribou Road Mitigation Plan will include a “...dust management best practices document with adaptive management triggers for additional dust suppression and link to the AQEMMP” (MVEIRB, 2016, p. 128).

However, research has shown that water is not effective enough to significantly reduce fugitive dust from roads (Thomson & Visser, 2007) and it is uncertain whether or not chemical dust suppressants are an effective or safe dust suppressant to water (Myers-Smith et al., 2006; US EPA, 2008). In short, existing dust management approaches are not effective, and chemical dust suppressants are experimental and remain untested.

To address the uncertainty or ineffectiveness of this mitigation measure, LKDFN proposes the deployment of remote cameras and wildlife monitoring to detect the presence of Caribou before they are affected by the proposed Jay Project and the rest of the Ekati mine. The Review Board proposed this as advice, but not as a mitigation measure.

To mitigate the effects of dust on Caribou, LKDFN proposes that chemical dust suppressants are first tested and proven to be effective at the existing Ekati mine, on the Misery Road and other roads around site, before the Jay Project is developed.

TK should also be incorporated into the evaluation of the effects of chemical dust suppressants on the lichen and the Caribou, before chemical suppressants are approved for widespread use at the proposed Jay Project and the rest of the existing Ekati mine.

LKDFN remains concerned about the uncertainty and effectiveness of this mitigation measure, as it is unclear whether these impacts on the esker and Caribou migration from the Jay road can be mitigated.

LKDFN should be involved as a key participant in developing and deploying the proposed mitigation measures at the existing Ekati site, and should be fully involved in any determinations about their adequacy and effectiveness before they are considered for use at the proposed Jay Project.

Measure 6-2(a): Caribou offset and mitigation plan

Although not defined by the Review Board, LKDFN understands Caribou offsets to be measurable conservation outcomes resulting from actions designed to compensate for significant residual adverse Caribou impacts arising from the proposed Jay Project, and the rest of the Ekati mine site, after appropriate prevention and mitigation measures have been exhausted.

The Review Board states that the goal of the Caribou Offset and Mitigation Plan is, at a minimum, no net addition of impacts to the Bathurst Caribou Herd (p. 130). This is supposed to be achieved through enhanced road and dust mitigation strategies; a Dominion-funded zone of influence dust study; identifying and applying mitigation measures to the rest of the Ekati mine site; accelerated progressive reclamation of Long Lake Containment Facility; and incorporation of egress ramps on waste rock storage areas (MVEIRB, 2016, p. 131).

LKDFN fails to see how the proposed Caribou Offset and Mitigation Plan will result in no net addition of impact to the Bathurst Caribou Herd. The Caribou Offset and Mitigation Plan outlined by the Review Board in measure 6-2 is largely addressed by other mitigation measures and/or plans. This is referred to in the offset literature as additionality (ICMM IUCN, 2012). Additionality occurs when offset gains are the outcomes of the offset actions, not if they would have happened anyways (ICMM IUCN, 2012). In other words, in order to be offsets, the outcomes would not happen without the Caribou Offset and Mitigation Plan.

For example, measure 6-1 already requires enhanced road and dust adaptive management plans and/or actions to mitigate impacts to Caribou. While measure 6-2 does require additional research into dust mitigation strategies, it is unclear how this research will result in an offset. Research, in and of itself, does not mitigate impacts to the Bathurst Caribou Herd. In another example, the Review Board specifically states that the reclamation of the Long Lake Containment Facility should be substantially accelerated beyond the Interim Closure and Reclamation Plan, and that egress ramps should be incorporate waste rock storage. As stated by the Review Board, aspects of measure 6-2 are already included in the Interim Closure and Reclamation Plan, and could (and should) be effectively addressed through further refinement and review of the current Interim Reclamation and Closure Plan.

Furthermore, the Long Lake Containment Facility is equivalent to a relatively small portion of the proposed Jay Project, and an even smaller portion of the entire Ekati mine. From LKDFN's perspective, this is not an equivalent offset to mitigate the proposed Jay Project project-site, zone of influence, or cumulative impacts to Caribou.

What makes this measure more troubling is that in Yellowknife on day two of the Hearing, Dominion stated that, "no offset mitigation is likely to yield changes that can be confidently and powerfully measured as different from natural variation and energetic survival and productivity (PR, 644)." When questioned about the statement from Peter Unger, representing LKDFN, Golder Associates Dr. Jim Rettie elaborated:

"The effects of the project are anticipated to be a change in productivity of 0.3 percent, and a change in available habitat of 0.1 percent...When you have a population whose rate of productivity can change quite drastically, as well as its -- as well as the population abundance can change quite -- quite drastically, trying to detect something at a fraction of 1 percent and definitively be able to tie it to a cause and effect relationship with an offsetting activity is not practical. (PR, 644)."

The proponent's expert consultant believed that attempts at offsetting impacts to Caribou at the level of their disturbance is not practical, yet (in 6-2b below) the Review Board puts the onus on the GNWT to supervise measuring and quantifying the offsetting program.

LKDFN has two primary concerns with the Board's proposed approach:

- (1) LKDFN does not believe that the GNWT has the capacity to properly quantify the offsetting program; and
- (2) LKDFN does not believe the offsets suggested to date are actually offsets in the strictest sense, as we do not believe the impacts associated with altering Caribou migration routes, and reducing the reproductive capacity of the Bathurst Caribou are impacts that can be adequately offset.

LKDFN believes that in order for the Caribou Offset and Mitigation Plan to be capable of actually addressing residual impacts, it must be shown to have that capacity. From LKDFN's perspective, the experimental Caribou Offset and Mitigation Plan should be tested at the existing

Ekati mine to determine if the Caribou offset and mitigation measures are capable of reducing impacts from an operating mine on the Bathurst Caribou Herd before it is deployed on a new project that will create additional impacts on the already critically impacted Herd.

LKDFN believes that we can better understand the Caribou Offset and Mitigation Plan if they were tried and tested at the existing Ekati mine site, before being applied to proposed Jay Project. At this point, they are experimental, and it is both reasonable and precautionary to experiment at the existing Ekati mine, instead of approving the proposed Jay Project and causing further impacts to the Caribou.

We respectfully request specific consultation on the implementation of these measures at the existing Ekati site, and that LKDFN should be involved as a key participant in developing the Caribou Offset and Mitigation Plan at the existing Ekati site, and fully involved in any determinations about its adequacy and effectiveness. LKDFN expects to be fully consulted by the responsible Minister in relation to the Caribou Offset and Mitigation Plan.

Measure 6-2(b): Research to design and implement successful offsetting projects

Measure 6-2 (b) calls on the GNWT to research potential methods of evaluating and measuring the effectiveness of offsetting options described in the Caribou Offset and Mitigation Plan in measure 6-2(a). Though the LKDFN agrees with the need to research this option before testing it, given the significant risks to Caribou if the offsetting options do not result in additionality this experiment should be conducted at the existing Ekati site.

To our knowledge, this is the first attempt at a “Caribou Offset and Mitigation Plan” in the North. LKDFN is concerned, as stated by Dominion’s consultant Golder, that trying to detect the effectiveness of offsets is difficult, and though it doesn’t mean GNWT shouldn’t attempt it, proving the effectiveness of offsets poses significant challenges.

As an additional step, LKDFN recommends that GNWT should conduct a study on the scope and effectiveness of existing Caribou offset and mitigation plans, focusing on those that have been developed for other Caribou ranges in the Arctic and sub-Arctic, in order to first determine whether Caribou offset measures are an effective approach for reducing the mine impacts on the Bathurst Caribou Herd. Without undertaking this research, it is uncertain if the Caribou Offset

and Mitigation Plan will be at all effective at offsetting and mitigating impacts on Caribou, let alone resulting in no net impacts to caribou. At least with this knowledge all parties will be able to determine if offsets are a viable option, instead of pursuing what may be an expensive but ultimately impractical experiment.

As we have noted in our comments on measure 6-2(a), the GNWT should not approve a Caribou Offset and Mitigation Plan for the proposed Jay Project before understanding the suitability of a Caribou offset plan for the Bathurst Caribou Herd based on existing knowledge and experimental application to the existing Ekati site. Until this research is undertaken, LKDFN is not confident that the Caribou Offset and Mitigation Plan will result in no net additional impacts to the Bathurst Caribou Herd. As noted above, LKDFN must be a full participant in this process.

Measure 6-3: Air quality emissions monitoring and management plan

Measure 6-3 requires Dominion to finalize and implement the AQEMMP by the start of the proposed Jay Project. In the draft document referred to in this measure (PR, 424), Dominion states that they plan on implementing the AQEMMP “at the commencement of the project.” The measure goes on to outline the requirements of the AQEMMP; however, every single point outlined in the measure is already developed in Dominion’s draft AQEMMP. As such, this measure merely requires Dominion to implement the draft AQEMMP that they already intended to implement. Applying dust suppressant, managing vehicle speed, implementing a dustfall monitoring program, sampling lichen tissues, planning responses by trigger and action levels, allowing opportunity for public input, annual reporting of monitoring results, and submitting the plan for public review are all aspects of Dominion’s initial draft AQEMMP.

Regardless of the redundant nature of this mitigation measure, LKDFN believes that fugitive dust is an unfortunate inevitability of operating a mine in the Barrenlands, and no management plan is going to be able to effectively suppress most dust from the Ekati mine site. Undertaking a study on the effects of dust on lichen tissue may be valuable and important to aiding our understanding of the severity of the impacts on the main food source of the Caribou, but since lichen is very susceptible to the effects of dust, if the testing finds any sequestration of dust by the lichen, it will simply confirm that Caribou habitat is already significantly altered, resulting in significant impacts to Caribou and Caribou habitat.

The rest of the AQEMMP looks promising from LKDFN perspective, as each of the above mentioned components of the plan would improve the body of knowledge around the impacts of dust on the surrounding environment and Caribou habitat. Efforts like deploying other dust suppression methods may be more effective, but at this point they remain unproven, and we cannot know if they will result in no significant adverse impacts to Caribou until they are tested and proven.

There is an opportunity to better understand the impacts of and mitigations strategies to better control fugitive dust, and though the LKDFN agrees that this understanding will lead to better management of human impacts, we disagree that it should be tested at a new mine when existing mines offer opportunities for experimentation on the effectiveness of the proposed mitigation measures. Again, the alternative of applying the newly developed AQEMMP at the existing Ekati development would enhance the collective understanding of dust impacts and aid in the evaluation of the effectiveness of the AQEMMP as a Caribou protection measure. As it is a requirement of the AQEMMP to consult with the parties, LKDFN anticipates the opportunities to contribute to this plan as it develops.

Measure 6-4: Dustfall standards

Measure 6-4 requires the GNWT to develop “an interim dustfall objective” that Dominion will use “to inform its actions to reduce impacts to caribou and caribou habitat from dustfall.” MVEIRB states that the interim objective will “reduce dust-related sensory disturbances to caribou to the greatest extent practicable” (MVEIRB, 2016, p. 238).

LKDFN agrees with the Review Board that the GNWT should establish an interim dustfall objective for all types of dustfall that may impact Caribou and their habitat. However, the measure does not describe: (1) the process of setting an interim dustfall objective, (2) how it will be monitored and enforced, and (3) a date as to when the GNWT should establish a dustfall standard.

Typically, objectives are not legally binding, and LKDFN fears that if Dominion exceeds the interim dustfall objective, that the GNWT will have no recourse to enforce compliance with the objective. Without specific objectives or requirements for enforcement, it is difficult to see how

the measure could “mitigate impacts to habitat effectiveness from deposition of fine particulate dust on lichens and other caribou forage so that they are no longer significant.”

LKDFN requests that GNWT consult with its members over the creation of the objective, and incorporate LKDFN traditional knowledge into the process. Without knowing what the interim dustfall objective will be, LKDFN fears that the dustfall objective may not be adequate enough to mitigate significant adverse impacts to Caribou. LKDFN suggests that the interim dustfall objective, and ultimately standard, should be based on research undertaken at the existing Ekati mine site and other dustfall standards for similar industrial developments in Canada or elsewhere, and once an acceptable standard has been established then the proposed Jay Project should be approved and the dustfall standard should be applied to the project site and zone of influence, as well as other mines across the Northwest Territories.

LKDFN recommends that this interim dustfall objective, and ultimately the dustfall standard, should be based on the goal that Caribou should be able to consume the potentially impacted lichen without sustaining any negative health effects. The mitigation measure should have also established a timeline for GNWT to set dustfall standards for all industrial developments in the Northwest Territories. These standards should be stringent, measurable, and enforceable. Dustfall standards exist elsewhere (i.e. British Columbia, Newfoundland, Alberta, and Ontario) and should be referenced to bring the NWT up to speed in terms of habitat protection, though LKDFN expects more stringent standards to be applied, based on the susceptibility of lichen to dust impacts, and the value lichen holds for the Caribou populations. As per the other measures, LKDFN must be fully consulted and involved in the process of developing such standards

Measure 6-5: Traditional knowledge based caribou monitoring and mitigation

Measure 6-5 is comprised of two main components: (1) a collaborative research project incorporating traditional knowledge (TK) into the study of the causes of the zone of influence for Caribou, and (2) is the creation of a Dominion-funded TK Elders group that will advise on construction, operation, and monitoring the Jay Project road, esker crossing and waste rock management area egress ramps, as well as recommend a contingency plan for the esker crossing.

LKDFN contends that a research study on the causes of the zone of influence for Caribou will not be collaborative if its scope and contents are fully prescribed by the Review Board, and

designed and delivered by Dominion. If TK is going to be adequately incorporated TK into the collaborative research study then TK holders should be included in all phases of the research process, including design, data collection, data analysis, and reporting.

In addition, the scope of the TK Elders Group is too narrow. Currently, the TK Elders Group will address issues that Indigenous communities have frequently expressed concern about, such as a road crossing an esker. However, TK contains more than the expression of concerns about the environment and mine. TK should be incorporated into other facets of the mine's design, construction, operation, and closure; these efforts should be viewed as common practice, and not a mitigation measure. The collaborative research project should also be extended from the identification of causes to the zone of influence to monitoring, management responses, and impacts on Caribou health. Including TK holders in the collaborative research project from the design phase to dissemination will help ensure that the research project addresses Dominion and Indigenous parties concerns regarding the zone of influence or other research topics.

LKDFN is also concerned that the TK Elders Group is not be an independent group if they are funded and convened by Dominion. Similar to the independent dike review panel, the TK Elders Group should be able to operate with full autonomy from Dominion. A clear and comprehensive process should be established to ensure that the TK Elders Group's recommendations are given full consideration by Dominion, and that Dominion provides a rationale to the responsible Minister and to LKDFN and other participating Indigenous Parties as to why the company has or has not chosen to implement the TK Elders Group recommendations. Such a process would create the necessary independence, oversight and accountability for this measure.

Measure 6-6: Timely completion of caribou management plan

Measure 6-6 calls for the timely completion of a Bathurst Caribou Management Plan, with the Review Board noting that the lack of a management plan for the herd during a period of very low numbers and a declining population is both "unacceptable" and "alarming." The Review Board states that the GNWT's current effort at producing a plan is "not a timely response to an emergency situation," and calls for an interim recovery and management plan "to manage cumulative impacts of development and other human activities that are otherwise likely to combine with the cumulative effects of the Jay Project to worsen the situation." The measure

states that within a year of the Review Report's acceptance, GNWT will research causes behind the herd's population decline, complete and implement an interim management plan, as well as interim recovery strategy towards a sustainable Aboriginal harvest.

As with so many other measures in the REA, the Review Board looks to the existence of a future plan to accomplish much of the mitigatory work required to reduce the significance of the proposed Jay Project's significant adverse impacts on caribou in the present. In addition, management plans are not necessarily legally binding documents, unless enacted in accordance with legislation, and do not hold the force of laws, regulations, or other legal tools. They are voluntary, and there are no repercussions if they are not followed. There are provisions under the NWT *Wildlife Act* and the various land claim agreements to give legal authority to a management plan, but the Review Board did not make this a specific recommendation.

The dire situation facing the Bathurst Caribou Herd population has been recognized for years with little action. The GNWT and other parties have been working on a Bathurst Caribou Management Plan as well as a Bathurst Caribou Range Plan for close to two years now with an estimated completion date in 2019 (MVEIRB, 2016, p. 136).

During the hearings in September 2015, the GNWT said that that Bathurst Caribou Herd Range Plan is not expected to be completed for another three years. LKDFN is concerned that this is far too late, and we applaud the Review Board for inserting this measure that puts a time frame on the development of this plan; however, we still believe this plan, or at least the main point of limiting anthropogenic disturbances beyond Indigenous hunting, should be addressed as soon as possible and in legally binding ways.

LKDFN has repeatedly called for restrictions on industrial development in the Bathurst Caribou Herd's range. We believe the responsible Minister has the authority to take immediate action by making the approval of the proposed Jay Project contingent on the demonstrated recovery of the Bathurst Herd to sustainable harvesting levels. We also believe that any future Bathurst Caribou Management Plan should have legally-enforceable thresholds and measures to ensure that development activities are not permitted to continue in the event of a further decline.

Simply put, LKDFN believes that if Indigenous hunting is restricted within the Bathurst Herd range, industrial development should be similarly restricted. Harvesting restrictions infringe

upon constitutionally-protected Aboriginal and Treaty harvesting rights, so it is inconsistent with conservation and the constitutional priorities afforded to Aboriginal harvesting to permit industrial developments with known or likely significant impacts on the Caribou to occur while restrictions on Aboriginal harvesters are in place.

LKDFN proposes that a Bathurst Caribou Management Plan should be developed by 2017 and that it must address the full range of factors and disturbances impacting Caribou recovery, including, but not limited to mines and other industrial development, climate change, hunting, predation, insect harassment, and disease. In the interim, the GNWT should define a maximum threshold or level of disturbance in the Bathurst Caribou Herd's range. In LKDFN's view, the level of acceptable disturbance should be determined not only by the biological indicators of caribou recovery, but in relation to the sustainable Aboriginal harvest level. In present circumstances, the development threshold has already have been met or possibly exceeded as Aboriginal harvesting restrictions are currently in place. In such circumstances, new developments with significant impacts on the Caribou should not be permitted.

It will be necessary for LKDFN and other Indigenous communities to fully and equally participate in the creation and approval of the management plan(s) and in the establishment of acceptable levels of disturbance in the Bathurst Caribou Herd's home range.

3.4 Cultural aspects and traditional knowledge

In Section 7, the Review Board determines that “[the Jay Project] is likely to affect Aboriginal groups and cause significant adverse cumulative impacts to their well-being and traditional way of life.” The Board notes that among the adverse effects are continued loss of aboriginal language, continued loss of connection to the land, potential loss of traditional knowledge and memory about the region, and an adverse effect on valued cultural components resulting from the development of the Jay Project (p. 149). The Review Board has also acknowledged that any of these are significant effects occurring in communities “already dealing simultaneously with a collapse of the Bathurst caribou herd,” with which they are “inseparably linked.”

Addressing the intimate Caribou-culture interlinkage, the Board recognizes that mining has already adversely affected Aboriginal land use and exercise of rights in the Project Area even before the specific and cumulative effects of the Jay Project are added. However, it argues that

the Bathurst Herd will not decline further as a result of the Project, and Caribou will thus not be a pathway through which the Project affects Aboriginal people: “the suite of Dominion’s mitigations and commitments, combined with the measures identified in this REA, will serve to mitigate impacts from the Jay Project to this culturally important species.”

LKDFN has already noted that it believes that the measures for Caribou are unproven, and not yet capable of reducing the significance effects to caribou and Aboriginal communities to within acceptable levels.

Measure 7-1: Traditional knowledge management framework

Measures 7-1 and 7-2 are proposed to protect “the environment, traditionally used areas, and Aboriginal way of life,” a TK framework (7-1) and an on-the-land culture camp (7-2). The Review Board also suggests that TK protocols from the Aboriginal communities will help facilitate development of the TK Framework. LKDFN believes that these measures will fall drastically short of addressing, in a real way, any of the effects and impacts that the Board has recognized Aboriginal communities are experiencing.

The proposed focus of the framework is on mitigating the “cultural impacts” of the proposed Jay Project, which would restrict the utility of the framework to issues within the cultural sphere, ignoring the other areas where TK should be integrated into proposed Jay Project’s design, operations, monitoring, closure, and post-closure phases. In addition, this measure should be synthesized with Measure 6-5 (TK-based caribou monitoring and mitigation) to create a more robust, holistic approach to engaging communities through their TK in science and planning.

As stated above regarding the zone of influence for the Caribou research program, LKDFN observes that the TK Management Framework is not collaborative if its scope and contents are fully prescribed by the Review Board, and designed and delivered by Dominion. For the framework to achieve any measure of success as a TK venture, TK holders should be included in all phases of the research process, including design, data collection, data analysis, and reporting.

Funding should be provided to LKDFN and other Indigenous groups to develop a TK Protocol as suggested by the Review Board, which could function as a high-level framework for informed consent, data sharing, and Intellectual Property matters.

Measure 7-2: On-the-land cultural camp

Measure 7-2 speaks to the idea of having a culture camp at or near the proposed Jay Project site so that Indigenous groups can still use the site and maintain their cultural connections, stories, and activities in this area. Dominion is to support the culture camp and work with the affected communities to identify location, frequency and timing of the culture camp activities.

It should be noted that each First Nation will have different views about the structure and activities of a culture camp, and these perspectives will inform the location, frequency, and timing of the camp. LKDFN is unclear if a culture camp should not be attended by each First Nation simultaneously or if each group will have their own cultural camp, to engage in the cultural activities that are most important to each group.

Though we believe that a culture camp is a good approach to maintain a connection to the land in this area, there are farther reaching cultural impacts that are not mitigated simply by going to a location. The Review Board identified the connection to the land as integral to the Indigenous people of the North, and the need to be on the land is central to the livelihoods of the people. But for traditional communities that see themselves as a part of the land, to participate in reviews and hearings and raise grave concerns about the loss of language, the loss of connection, and the loss of caribou as cultural impacts, and have a mitigation measure be a culture camp, LKDFN's fear is that we are not addressing other deep and pressing concerns, such as the absence of Caribou in the traditional territory of the LKDFN.

When we talk about cultural impacts, we talk about this loss not just now, but for future generations to come. The Review Board and the other parties present at the hearing in Lutsel K'e witnessed something that few of the recent assessments that we have participated in have seen. Children of the community, provided with an overview of the proposed Jay Project, spoke on their own accord at the hearing, raising their concerns about the proposed Jay Project, and talked about *their* future children. Chyanna Catholique, an elementary school student said, "I strongly believe if you disturb the land or water it will never be the same anymore, and I am scared for my future and my grandchildren who are to come. (PR 646)." Valadee Lockhart, 12 years old, said that, "In the future, when I'm older and ready to have children, I want them to be able to eat our traditional food and drink the fresh water that I'm able to do today. (PR 646)." Ethan

Rombough, another youth in the community said, “And that I want my -- for myself to have caribou and -- and for my kids and grandkids to be able to experience that. (PR 646).”

Simply put, LKDFN does not believe a culture camp will sufficiently mitigate the significant adverse impacts of the proposed Jay Project on our way of life.

3.5 Maximizing benefits and minimizing impacts to communities

Measure 8-1: Minimize negative socio-economic impacts of the Project on communities

Measure 8-1 tasks the GNWT with identifying priority social issues at the individual, family, and community levels, assess the effectiveness of existing GNWT programs to address the issues, and implement program improvements where needed. The GNWT is required to submit an annual progress report to each affected community.

LKDFN believes that it is important to effectively address negative socio-economic impacts associated with the proposed Jay Project, LKDFN thinks it is equally, or more, important to maximize the positive socio-economic benefits of the proposed Jay Project. In addition to addresses the negative impacts resulting from the proposed Jay Project, the GNWT should also meet with the affected communities annually to discuss:

- (1) Priority social benefits at the individual, family and community levels;
- (2) The effectiveness of GNWT programs to enhance these social benefits; and
- (3) Enhance or implement new programs to maximize benefits resulting from the proposed Jay Project.

The effectiveness of GNWT programs should be evaluated based on feedback from people, families, or communities accessing these programs, and adequate funding should be set aside based on the current and future utilization of the programs.

Measure 8-2: Supporting increased employment opportunities for women

Measure 8-2 tries to mitigate significant adverse socio-economic impacts to women by requiring Dominion to work with the GNWT, the Status of Women Council in NWT, and the Native Women’s Association of the NWT to update Dominion’s strategy for the training, recruitment,

and employment of women in traditional and non-traditional occupations. Dominion is required to report on employment and retention of women and the effectiveness of their revised policy.

LKDFN applauds the Review Board's attempt at addressing this issue. LKDFN recommends including the retention of women in the update of their strategy or policies pertaining to the training, recruitment, and employment of women. LKDFN also recommends that Dominion work with the GNWT, the Status of Women Council in NWT, and the Native Women's Association of the NWT to investigate policies or strategies to enhance women's participation in management level positions. Although this may be implicitly implied by "non-traditional occupations," it should be made clear, with specific commitments to particular outcomes. This will also require Dominion to provide scholarship funding so that women can gain the credentials to qualify for non-traditional occupations.

LKDFN also recommends that on-site day care be provided for children under school age from infant to five years of age for mine employees.

3.6 Air quality

Measure 9-1: Incineration - stack testing and reporting

This measure requires Dominion to conduct incinerator stack testing at least every three years and submit results to the GNWT Department of Environment and Natural Resources and Environment Canada no more than 90 days after testing. If the test results fail the Canada Wide Standards for Dioxins and Furans then Dominion will develop an Adaptive Management Response Plan that will assess incinerator operations and identify methods to rectify the failure, consider increased monitoring, implement contingency methods, and submit the plan to GNWT.

LKDFN remains concerned about the lack of enforceable air quality standards in the NWT and that Dominion has already predicted that it will exceed the standards that it proposes to adhere to. Given this situation, LKDFN is surprised that the Review Board concluded that the proposed Jay Project emissions will not have a negative effect on the environment. LKDFN recommends that Independent Environmental Monitoring Agency's (IEMA's) suggestion that Dominion should be required to perform continuous inline stack emission testing for dioxin and furans. In short, LKDFN proposes that the Review Board's recommendation should be a measure.

Measure 9-2: Reporting on greenhouse gas (GHG) emission and management

Dominion will provide information on its GHG emissions management for all proposed Jay Project phases in the AQEMMP. The findings will be shared with affected communities during annual visits to impacted communities.

LKDFN supports the Review Board's measure to monitor and report on the proposed Jay Project's GHG emissions. However, LKDFN proposes that the wording of the measure to strengthened to include commitments to adopt technologies and management practices aimed at reducing GHG emissions. While it is important to conduct renewable energy studies, it is equally important to consider installing renewable energy, if the study demonstrates its feasibility. The measures should be strengthened by requiring Dominion to install renewable energy if the study proves its feasibility.

3.7 EA measures follow-up

Measure 13-1: Monitoring and Adaptive Management by Dominion

Measure 13-1 requires Dominion to implement environmental monitoring programs and assess their effectiveness, as well as the effectiveness of the mitigation measures in the Report of the EA and testing the accuracy of predictions in the EA. It requires the company to implement adaptive management processes that use the results of the monitoring programs to adjust their mitigation actions to minimize adverse impacts on the environment.

LKDFN appreciates the inclusion of this measure as it is an area that was seldom followed up on in previous EAs. Measures were made but there was no follow-up, no reporting on the measures, and no testing of EA predictions, which have turned out to be inaccurate on various occasions.

One gap that we wish to acknowledge is the setting of thresholds where impacts become significant if they are drastic deviations from the original predictions. Through the adaptive management process, if the proponent identifies an unexpected or unpredicted impact from their operation, they adjust their mitigation actions to decrease that impact. Though this is good practice, continuing to adaptively manage means that they are more and more impacts than predicted, and at some point, a conversation needs to be had about significance of those impacts.

We recommend that this measure include reporting to parties, including LKDFN, with provisions for accountability on the part of Dominion, and oversight by the parties, including LKDFN, concerning the significance of new impacts and effectiveness of any adaptive management strategies.

Measure 13-2: Engagement on Cultural Impacts

Measure 13-2 outlines the requirements of the company to engage with Indigenous communities, seek the communities' input on mitigation measures, and report to the communities annually on the effectiveness of Dominion's mitigation measures.

LKDFN believes this is an important measure to ensure is completed. We are pleased that the Review Board has included this measure as cultural impacts are serious and merit a discussion with the company.

Measure 13-3: Annual Reporting from Dominion

This measure requires annual reporting from Dominion as to the implementation of the measures set out in the Report of the EA. They are to describe the actions taken to address the measures, demonstrate how the actions fulfill the intent of the measure, include a summary of the monitoring programs and results that are related to the measure, and address the specific reporting requirements of the Report of the EA.

LKDFN agrees with the idea of the annual reporting requirements to ensure that there is follow-up on the measures. The measures are a necessary part of the project and important to ensuring no significant impacts are suffered.

Measure 13-4: Annual reporting from government and regulatory authorities

Measure 13-4 is focused on the annual reporting of government and regulatory authorities as to their responsibilities under the measures of the Report of the EA. Governments and regulatory authorities play a key role in aiding in the reduction of significant adverse impacts to the environment.

LKDFN is pleased to see that governments and regulatory authorities have reporting requirements. The only concern that we have is that there is no recourse to ensure that this

reporting happens. It is good that the Review Board's role in follow-up of the EA is evolving in this way, and hopefully the next step is having the authority to ensure this reporting is completed and not having to rely on these agencies to report on their own accord. This reporting information is pivotal in determining whether or not significant impacts will be suffered and the absence of this reporting is major concern for the parties' understanding of impacts caused by the Jay Project.

4.0 Conclusion

Although the Review Board has correctly assessed the evidence and found that significant, adverse impacts on the Bathurst Caribou Herd are likely to result from the construction and operation of the proposed Jay Project, the Board has not fully considered the consequences of the failure of unproven and untested mitigation measures to protect Caribou. The Caribou and the Lutsel K'e Denesoline are inseparably linked. The Lutsel K'e Denesoline way of life simply cannot continue to survive and thrive without the Caribou.

LKDFN has been speaking on behalf of the Caribou since the beginning of diamond mining in the NWT. We brought forward our concerns during BHP Billiton's first environmental assessment for the Ekati Diamond Mine (1996), Rio Tinto's environmental assessment for the Diavik Diamond Mine (1999), De Beers environmental assessment for the Snap Lake Diamond Mine (2003), De Beers environmental assessment for the Gahcho Kue Diamond Mine (2014), and environmental assessments for Avalon, and other developments in the NWT. We have dedicated substantial time and resources to examining the projected environmental, social, and economic impacts from these proposed industrial developments, and their potential impacts to the Caribou herds. All of the previous diamond mines have been approved by the responsible Ministers. We have been assured that the measures required for these projects would be sufficient to avoid or mitigate their impacts on the Caribou. As a consequence, the Bathurst Caribou range is the most "developed" Caribou range in the North. It is not unreasonable to assume that the pace and scale of development over the past 20 years has contributed to the decline of the Bathurst Caribou Herd population.

LKDFN firmly believes that immediate and decisive action needs to be taken to halt and reverse the decline of the Bathurst Caribou Herd. LKDFN does not agree that the Review Board's measures will reduce project-specific and cumulative impacts on the Caribou. The Caribou

measures are untested and of unknown effectiveness, while the impacts of the proposed Jay Project on caribou are likely to be significant and adverse. LKDFN does not have confidence in the measures to significantly mitigate impacts on Caribou, nor do we consider it reasonable or justifiable in the circumstances to proceed until the effectiveness of these measures can be established and the recovery of the Bathurst Caribou Herd is assured. The onus must be on the developer to establish that the mitigation measures will be effective. The risks to the survival of the Bathurst Caribou Herd and the associated impacts on the Aboriginal and Treaty Rights of the LKDFN are such that any approval of the Jay Project must be contingent upon:

- 1) the demonstrated recovery of the Bathurst Caribou Herd to sustainable harvest levels, and;
- 2) that evidence that the proposed mitigation measures are proven to be effective, based on implementation, testing, and monitoring at the company's existing Ekati Mine.

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