

December 15, 2021

Serge Beaudoin
Assistant Deputy Minister
Northern Affairs Canada
15 Eddy Street
Gatineau, QC K1A 0H4

Dear Mr. Beaudoin,

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

On October 18, 2021, the Mackenzie Valley Environmental Impact Review Board (Review Board) decided not to exercise its discretion under subsection 126(3) of the *Mackenzie Valley Resource Management Act* (MVRMA) and order an environmental assessment (EA) of Arctic Canadian Diamond Company's (Arctic) proposed Point Lake Project.¹ The Review Board's reasons set out the full rationale for this decision.

In making this decision, however, the Review Board identified outstanding legal and procedural issues that in its opinion require further clarification. Additionally, the Review Board when making its subsection 126(3) decision identified challenges in considering already significant cumulative effects within the project area. This letter sets out the following issues and concerns:

1. The relationship between the [Jay Project EA](#) and the Point Lake Project and what process is required to change or remove measures from the Jay Project EA;
2. Timely Implementation of MVRMA Development Certificate Provisions; and
3. Need for Regional Strategic Assessment for the Slave Geological Province– Already Significant Cumulative Effects to Caribou, Cultural and Socio-economic conditions.

The MVEIRB is requesting that Crown-Indigenous Relations and Northern Affairs Canada help to address these matters as soon as possible.

Background - *The Point Lake Project and its relationship with the Jay Project Environmental Assessment*

In May of 2021, Arctic applied to the WLWB to amend its Type A water licence and applied for two new land use permits for the proposed Point Lake Project.² This project is located between

¹ [Reasons for Decision – MVEIRB s.s126\(3\) Determination – Point Lake Project](#)

² [Point Lake Project Description](#)

the location of the unbuilt, but approved, Jay Pit and the already constructed Jay access road, at the southern end of the Ekati Mine site.

The Point Lake Project is in an area identified by parties to the Jay EA and the Review Board in its Jay Project Report of EA as an important corridor for barren-ground caribou, notably Bathurst Caribou migration. During the preliminary screening review and other public engagements conducted by Arctic, parties identified their concerns about the potential for significant cumulative effects from the Point Lake Project in combination with the Jay Project, assuming both projects would be developed.

As part of its response to concerns brought up by Indigenous Government Organizations (IGOs) and other reviewers in response to its Point Lake applications, Arctic decided not to proceed with the Jay Project. That project had been assessed and approved subject to EA1314-01. Arctic has also requested that water licence and permit conditions required to implement Jay Project Measures be removed from these regulatory instruments. The Jay Project EA resulted in 22 measures (Jay Project Measures) that, by law, must be implemented by the appropriate regulatory authority or by the relevant government department or agency, to the extent of their authorities.³

In its Preliminary Screening Decision, the Wek'èzhì Land and Water Board (WLWB) stated that it was uncertain what impact the cancellation of the Jay Project by Arctic would have on the implementation of the Jay Measures approved by the Minister and responsible ministers at the completion of the Jay Project Environmental Assessment (EA).⁴ The Review Board agrees with WLWB's observation that "there is no provision in the *MVRMA* to vacate or remove these [Jay Project] Measures."

Uncertainty on how to amend or remove measures from Jay Project Environmental Assessment

In this regard, the *MVRMA* contains no amendment process currently in force relating to situations in which approved measures resulting from an EA must be changed or removed. 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

³ *MVRMA* subsection 130(5) and section 62.

⁴ See page 8, WLWB Ekati-Point Lake Project-Preliminary Screening Determination and Reasons for Decision August 24, 2021.

(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.⁵ 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.⁶

In the Review Board's opinion similar legal and procedural questions remain outstanding in relation to the WLWB's Arctic screening decision and Arctic's plans. We suggest that this issue should be addressed before any amendment to remove conditions from any regulatory permit or licence required to implement measures from the Jay Environmental Assessment is approved.

The Review Board is not aware of any new legal rationale or authority that would excuse the WLWB and the GNWT from meeting their section 62 obligations or requirements from acting in conformity with the s. 130 MVRMA decision of the Minister on the Jay Project.

In making its ss.126(3) decision the Review Board relied on the implementation of a number of measures from the Jay Project to mitigate significant impacts of the Point Lake Project. The WLWB in its preliminary screening decision and parties in their submissions to the WLWB during the water licence amendment process have also relied on the full or partial implementation of Jay measures to mitigate significant impacts from the Point Lake Project, particularly measures related to the already constructed Jay Road and caribou. The Review Board, the WLWB, and other parties will greatly benefit by understanding what mitigations may still be relied on from the Jay Project to mitigate the impacts of the Point Lake Project and what process is required to vary, remove, or cancel any measures from the Jay project that may no longer be relevant now that Arctic has decided not to proceed with any further construction of the Jay Project.

The Review Board is asking Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) whether the views of AANDC (as expressed in the letters of November 5, 2013 and December 16, 2013) still apply. The Review Board also requests the opinion of CIRNAC on what procedure would be required to amend or remove recommended measures as adopted by decision of the federal Minister and responsible ministers, as well as any procedure to cancel such a decision. **Please respond to this request as soon as possible and prior to any decision to approve the amendment to Arctic Canadian Diamond Company's Water Licence W2012L2-0001.**

Development Certificates

The Review Board also strongly endorses the WLWB observation in its reasons for decision on its Arctic screening that amendments to the MVRMA, not yet in force, related to the requirement for development certificates, could have been a very helpful tool to evaluate and

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

⁶ [Report of Environmental Assessment for the De Beers Snap Lake Water Licence Amendment – EA1314-02.](#)

make changes to, or omit measures of, a previously assessed development, such as with the Jay Project.

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.⁷ The Review Board has detailed its readiness to implement the provisions of the MVRMA to require development certificates in a reference bulletin.⁸

These new provisions allow for the issuance, administration, enforcement, and amendment of development certificates. The Review Board will issue a development certificate after the Ministers, and any other MVRMA decision makers, adopt the Review Board's recommendations on a development.⁹ The development certificate will set out the final, approved measures that a developer must comply with as it builds, operates, and closes its development.

The ability to amend development certificates will allow the flexibility to review and adjust EA measures during the life of a project. This means that a proposal to use new technology or change mitigation strategies, as well as if there is a significant change to the circumstances related to the development, could undergo a development certificate amendment process rather than a new EA. For example, the [Snap Lake water licence amendment EA](#) process might not have been required if the development had a development certificate and an examination process had been available to the Board. In all cases, the Review Board will use the most appropriate assessment tools and process steps for the scope and scale of the development and the issues to be assessed.

The Review Board is of the strong opinion that the coming in to force of these provisions is long overdue, as they were originally intended to come in to force by April 2016. The Review Board is requesting an update on when the coming in to force of the provisions for development certificates can be expected.

Already Significant Caribou, Socio-economic and Cultural Cumulative Effects and the need for a Regional Strategic Environmental Assessment

In addition to the procedural issues addressed above, the Review Board in its Reasons for Decision, outlines several concerns of Indigenous Parties and others around the catastrophic

⁷ 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.

⁸ [Reference Bulletin on Development Certificates](#), Feb. 2017

⁹ Per s.128 of the MVRMA

decline of the Bathurst caribou herd since the time of the original approval of the Ekati Mine and continuing decline since the approval of the Jay Project. This concern is shared by the Review Board.

The Review Board, in making its ss. 126(3) determination, considered that the Point Lake Project might cause significant adverse impacts or public concern based on:

- the potential for the Point Lake Project to contribute to existing *cumulative* impacts on barren-ground caribou, socio-economics, and Indigenous culture. These pre-existing cumulative impacts are already significant in the Point Lake area.¹⁰

Along with the concerns also expressed in the Reasons for Decision that new diamond projects might contribute to the pre-existing significant socio-economic and cultural cumulative impacts that communities are experiencing from diamond mining. The Review Board found that the Point Lake Project might add to these existing significant cumulative effects. Indigenous cultural use of the Lac de Gras area has also been affected. This is a significant cumulative impact that might be worsened with additional projects, as a culturally important landscape in incrementally disturbed. These social-economic and cultural impacts were identified by the Review Board in the Jay Project EA and Diavik EA.¹¹

The Review Board when making its ss.126(3) determination had the benefit of relying on the measures of the Jay Project along with commitments of the developer and GNWT to mitigate these likely significant cumulative effects. However, the Board in the last several EAs has determined that new projects are contributing to already significant cumulative effects on the Bathurst Caribou range and that the Review Board is finding it increasingly difficult to assess or mitigate potentially significant cumulative effects during project assessments, particularly to the Bathurst Caribou herd and the communities that depend on it for maintaining their culture, traditional rights to harvest, and food security.

The Review Board supports the Tłı̨ch̨ Governments request to Minister Vandal in their letter of June 7, 2021 for the Minister to initiate a “regional study” or regional strategic environmental assessment of the Slave Geological Province as provided for through Part 5.2 of the MVRMA. Cumulative impacts require a more holistic, regional, collaborative, and comprehensive approach to better inform future decisions that cannot be achieved through project assessment.

Conclusion

Although the Review Board has decided not to exercise its discretion under subsection 126(3) of the MVRMA for the Point Lake Project, it was challenged in many ways in making this

¹⁰ See pages 72 and 73 of the (2021) [Diavik EA](#) and pages 113, 156-158 and 169 of the [Jay Report of EA](#) for details on these pre-existing significant cumulative effects.

¹¹ See pages 153-161 and pages 166-170 in the [Jay Report of EA](#).

determination. Answering the procedural questions above will assist the Review Board, WLWB and the GNWT in better understanding how to proceed with the amendment process of the regulatory authorizations, management plans and potential Part 5 proceedings that may be required for the Point Lake Project. Please feel free to contact Executive Director Mark Cliffe-Phillips at mcliffephillips@reviewboard.ca or at 867-766-7055 to discuss these matters further.

Respectfully,

A handwritten signature in black ink, appearing to read 'Joanne Deneron'.

Joanne Deneron
Chair
Mackenzie Valley Review Board

Copied to:

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

Jamie Koe – Deputy Minister, GNWT-Lands

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

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