

JUN 04 2020

Chief Louis Balsillie and Band Council
Denínu Kúé First Nation
P.O. BOX 279
FORT RESOLUTION NT X0E 0M0

By Email

Dear Chief Balsillie:

Responsible Ministers' Decision to Adopt the Recommendation of the Mackenzie Valley Environmental Impact Review Board and Allow the Diavik Diamond Mines Inc.'s Kimberlite Deposition Proposal to Resume the Regulatory Process

The responsible ministers from the Government of the Northwest Territories (GNWT) and the Government of Canada (Canada) have recently concluded the decision phase for the environmental assessment of Diavik Diamond Mines Inc.'s (Diavik) proposal to store processed kimberlite in pits and underground (the Project). Their decision was to approve the Project subject to the implementation of six measures and the commitments from Diavik.

Previous communication with the Denínu Kúé First Nation

On February 19, 2019, the Mackenzie Valley Environmental Impact Review Board (Review Board) referred the Project to environmental assessment. The GNWT and Canada wrote to the Denínu Kúé First Nation (DKFN) on March 15, 2019 to advise you of potential government decisions relating to this Project. The letter also noted that both governments would be relying on the Review Board's process to assist in fulfilling Aboriginal consultation requirements in relation to the Project. Both governments also encouraged DKFN to participate in the Review Board's process.

Responsible ministers also wrote to DKFN after the Review Board released its recommendation. In concluding its environmental assessment process, the Review Board released its *Report of Environmental Assessment and Reasons for Decision* (REA) on January 6, 2020. The GNWT and Canada wrote to you at that time to continue dialogue regarding potential responsible ministers' decisions relating to the Review Board's findings in the REA. Responsible ministers also asked the DKFN if the REA addressed concerns as they relate to potential adverse Project impacts on your members' asserted Aboriginal and Treaty rights.

Consideration of concerns raised by Indigenous governments and organizations

In making their decision, responsible ministers considered comments made by Indigenous governments and organizations (IGOs).

This included what responsible ministers heard from the DKFN during the environmental assessment and after the REA was issued. Your letter of February 7, 2020 noted that DKFN has been supportive of the Diavik Diamond Mine; the letter also noted concern regarding residual and cumulative effects on ecosystems within the traditional territory of the DKFN from the Project. Specifically, DKFN identified remaining concerns about “water quality, fish and aquatic resources, the Bathurst caribou herd and future consultation and engagement.” How the responsible ministers considered your comments is outlined below:

Water quality

Your organization expressed two main concerns: lack of funding to support regulatory participation and lack of certainty in water quality predictions during the regulatory process. We will first address your concern regarding lack of participant funding during the regulatory process.

You stated that because the Wek'èezhì Land and Water Board process does not include participant funding, it is not “a fair and effective process.” The responsible ministers recognize the financial and capacity limitations of IGOs to participate in regulatory proceedings. As a means of alleviating some of this pressure, the GNWT provides annual financial support to IGOs who are eligible for the Interim Resource Management Assistance program. Financial assistance received by DKFN from this program, should DKFN's application be approved, can be used to assist DKFN in participating in the regulatory process. Certain measures from the REA also state and/or imply that Diavik will offer support to IGOs to satisfy aspects of measures.

The responsible ministers believe that this support and the updated engagement plan (Measure 5 requires Diavik to conduct additional and more effective engagement) should ensure that DKFN is able to meaningfully participate in the management of the Project.

Regarding DKFN's statement that “certainty in the water quality modelling predictions [should] be achieved during the water licence amendment process,” responsible ministers acknowledge that there is uncertainty with the modelling; however, issuing a water licence does not mean there is certainty with modelling. Responsible ministers understand that the Wek'èezhì Land and Water Board has a duty through the regulatory process to ensure there is an enforcement mechanism that can certify that processed kimberlite will not be deposited into pit lake(s) until the objectives under Measure 1 have been met. Responsible ministers also understand that this will likely be achieved through the issuance of an amended water licence with conditions. As there will be an enforcement mechanism to ensure processed kimberlite is not deposited into pit lake(s) until components of Measure 1 are satisfied (one of the requirements being certainty in the water quality modelling), the responsible ministers believe that this should ensure DKFN's concerns are addressed.

The measures in the REA state that no processed kimberlite can be deposited into pit(s) and underground mine workings until the modelling demonstrates that water quality will meet the objectives established by Measure 1.

This means that even though the water licence amendment could be approved prior to modelling certainty, the Project activities associated with deposition into pit(s) would not be allowed until the objectives in Measure 1 are satisfied. The responsible ministers believe the current measures address your concern because no processed kimberlite can be deposited until appropriate water quality objectives are met and updated modelling prior to the amended water licence issuance, as requested by DKFN, would not reduce uncertainty.

Fish and fish habitat

DKFN stated concern with the breaching of the dikes as it relates to fish and fish habitat. Specifically, you stated “there is the potential for localized significant effects from potential contaminant migration upwards in the water column, which could expose fish, plankton and benthic invertebrates in the immediate vicinity to potentially harmful levels.” DKFN also noted that additional offsetting measures for fish habitat could be required if Diavik keeps sections of the dikes in place, as opposed to breaching the dike and creating a pit lake that would be fish habitat. Your letter concluded that the potential localized effects to pit lake water quality and the potential additional offsetting measures “should be addressed within the Diavik Diamond Mine Aquatic Effects Monitoring Plan”. However, your letter also noted that the Review Board “did not include specific measures in the REA to ensure this happens” and DKFN “recommends an additional measure be added...to ensure a mechanism is in place to track the follow-up of this issue.”

Responsible ministers have considered your concern. Offsetting measures for fish and fish habitat are required as part of Diavik’s *Fisheries Act Authorization* and are a necessary part of Diavik’s closure plan. As well, the list of commitments Diavik made during the environmental assessment and captured as Appendix B to the REA become legally binding upon ministerial approval of the Review Board’s recommendation. Diavik’s commitment #26, to consider alternative fish habitat off-setting plans should pit lake reconnection no longer be considered acceptable, should address your concerns identified during the environmental assessment. As well, this commitment by Diavik was likely a reason the Review Board did not find there was a significant adverse impact to fish habitat that would require further mitigative measures (other than those related to water quality).

Bathurst caribou herd

Responsible ministers appreciate the concern about the Bathurst caribou herd and acknowledge that the survival of the herd is unknown. However, responsible ministers agree with the Review Board’s assessment “that the Project is not likely to make this problem worse” for Bathurst caribou.

The Review Board, in a suggestion, noted that “Diavik should conduct a feasibility study of moving extra-fine processed kimberlite off the containment facility” and would “fully consider [the] risk to wildlife (both real and perceived), and the Bathurst caribou herd.” This was suggested because one of the benefits to this activity “is improved long-term surface conditions of the [processed kimberlite] containment facility” and this could “reduc[e] the risk of caribou...getting stuck in the extra-fine [processed kimberlite].”

And “given the state of the caribou herd and the intimate relationship between caribou and culture, any and all actions that could help caribou should be examined.” As the responsible ministers always encourage any REA suggestions to be duly considered, Diavik is encouraged to meaningfully consider proceeding with this suggestion. Should Diavik proceed with the suggestion, responsible ministers do not agree with DKFN that this feasibility study should “be presented during the water licence amendment process.” Responsible ministers believe that a feasibility study should be considered through the larger closure planning process that is already established through the regulatory process.

Insufficient consultation and engagement

DKFN has stated that there has been insufficient engagement by Diavik with DKFN to date. In your letter, you stated that “some tangible results must be shown that will reduce the level of uncertainty and that demonstrate Diavik’s level of commitment to engagement before it is permitted to proceed with the Project.” The responsible ministers note that Measure 2 requires Diavik to support the involvement of communities represented by the Indigenous intervenors to develop and implement long-term monitoring of pit lakes. As well, Measure 5 specifically requires that Diavik conduct additional and more effective engagement with potentially affected Indigenous communities, including DKFN. In addition, Diavik also reiterated “its commitment to meaningful engagement” with potentially impacted IGOs in their February 27, 2020 letter to the GNWT. Responsible ministers therefore believe that Measures 5 and 2, in combination with Diavik’s commitments, ensure that Diavik will improve engagement with DKFN.

Certainty required prior to approval

In your letter you said that your closing argument to the Review Board held the position that the Project not be approved because of “the level of uncertainty in the assessment of effects” for the Project. You also said that the REA and the measures “identified within it, do not allow for a process that would address this level of uncertainty in a timely manner should the project be granted approval.” The letter also follows these statements with a “commitment to working with” the GNWT and Diavik “on the successful resolution of concerns and look forward to further engagement on this Project.” The responsible ministers understand this to mean that should the topics outlined in your letter be resolved, the DKFN would have no further concerns. Responsible ministers have carefully considered and explained how the concerns in your letter are or can be satisfied. Based on the analysis above, responsible ministers respectfully believe the duty to consult and accommodate the DKFN for the purposes of EA1819-01 has been fulfilled.

Next steps for Diavik’s Project

Responsible ministers emphasize that consultation and accommodation with respect to your asserted Aboriginal and Treaty rights do not end with the responsible ministers’ decision on the environmental assessment of the Project. The Project will now resume the regulatory process and any other post-environmental assessment processes.

These processes will include opportunities for IGOs to offer input on authorizations and management plans and help ensure that potential adverse impacts to Aboriginal and Treaty rights are accommodated, as necessary. The responsible ministers encourage the DKFN to participate in the Wek'èezhìi Land and Water Board's water licensing process and any other post-environmental assessment processes relating to this Project.

If you have any questions about the decision, please contact Melissa Pink Manager, Project Assessment Branch, at Melissa_Pink@gov.nt.ca or by telephone at 867-767-9180 ext. 24021.

Sincerely,



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Assistant Deputy Minister
Planning and Coordination
Lands



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