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August 20, 2012

The Honourable Benard Valcourt
Minister, Aboriginal Affairs and Northern Development Canada
EXECUTIVE OFFICES
10 Wellington Street
Gatineau, Quebec
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Dear Minister Valcourt:

Re: Reasons for Decision and Report of Environmental Impact Review, Gahcho Kue Diamond Project

We are in receipt of the July 30, 2013 letter from the NPMO regarding consultation by the federal minister with our government. In this letter, we set out the basis for the failure of Report of Environmental Impact Review and Reasons for Decision (hereafter the "EIR Report") to substantively address our specific concerns.

We note that the Responsible Ministers request our comment on whether the potential adverse impacts resulting from the Project on rights have been identified and addressed in the EIR Report.

We have conducted a joint sufficiency review regarding the EIR Report. We include this as an Annex to this document.

In our joint technical review, we conclude that the EIR Report has failed to assign measures in almost every area considered significant to our nation and others. We also note that without fail, measures identified by the federal government in Closing Statements were also overlooked.

It is given this failure that we therefore conclude that the mitigation measures recommended by the Board are incomplete, and we recommend that the Minister refer numerous matters to the Board for further consideration.

We believe it will be vital to inform the NPMO and other federal departments of the views of Lutsel K'e and the other aboriginal parties who participated in the environmental review, and we will be contacting NPMO to determine how that coordinating body is prepared to facilitate consultation and accommodation of our concerns in greater depth.

Sincerely,

Chief Dora Enzoe
Lutsel K'e Dene First Nation

Technical Review Annex

Ni Hadi Yati

There was a uniform request that Ni Hadi Yati be made a measure. This request was made of the Board by all Aboriginal parties and key regulators, including AANDC, NRCan, Environment Canada, DFO. (See Closing statement of all parties, including DFO, AANDC, NRCan, and all Aboriginal nations 2012). While Ni Hadi Yati is a central theme to the EIR Report, the Board failed to make this governance a binding measure or even as a recognized commitment. The Aboriginal parties are extremely concerned that this governance arrangement for environmental monitoring and adaptive management is left to a future negotiation of a contractually binding agreement between the Aboriginal parties and the developer, and that the Board has not addressed any alternatives should those negotiations not prove successful. **We recommend that the Minister refer this matter to the Board for further consideration.**

Dykes & permafrost issues

We note that many core recommendations from the federal government have also been left as commitments. All of NRCan's recommendations are substantial, as they contend with the choices made for foundation materials for the dyke (NRCan Suggestion 1 in Closing Statement, Dec. 20, 2012); thermal analysis for to analyze the long-term thermal behaviour of permafrost foundations (NRCan Suggestion 2 in Closing Statement, Dec. 20, 2012), and monitoring plans for the dyke foundations (NRCan Suggestion 3). To refer to a previous Review Board approach (EA0809-004 Fortune Minerals in Closing Statement, Dec. 20, 2012), these type of fundamental engineering questions became the subject of measures. **We recommend that the Minister refer this matter to the Board for further consideration.**

Water quality

Non-binding commitments instead of regulatory measures are also proposed by the Board in respect to water quality, which is one of the most significant issues and concerns raised by the Aboriginal Parties. The Panel has merely referenced narrative statements in their report that the level of protection afforded to the aquatic receiving environment may be addressed at the water licensing stage. This runs contrary to previous environmental assessments (See Fortune Minerals EA EA0809-004), in which all proposals in respect of water quality made by AANDC became measures. The guidance provided by the Department, and echoed by Lutsel K'e and other Aboriginal governments (see Closing Statements, December 21, 2012) has been set aside by the Panel and left merely as a suggestion. The protection of Kennady Lake and of Lake N11, in particular of traditional uses of water in those areas, is vital to our traditional way of life. All of the closure recommendations (such as a requirement for reduced time for refilling of Kennady Lake), are also left as suggestions. The Board has not proposed any binding mechanisms in respect of water quality to ensure that the federal government, the Aboriginal parties and the peoples of the NWT do not once again assume a developer's liabilities. Traditional users should not have to face a questionable and uncertain future with respect to water quality and water use in the region. **The Minister should refer this matter to the Board for further consideration.**

The Panel accurately characterizes the strongly held and uniform views of the citizens of Lutsel K'e (the most proximate community) regarding water quality, but fails to recognise the significance of the impacts or the need for binding measures. Indeed, at the close of the EIR process, Lutsel K'e noted that there continues to be opposition to this proposed development due to concerns for water quality and for a central cultural and spiritual site. The Panel agreed with Lutsel K'e and other Aboriginal Parties "that if the Project does not operate as proposed and predictions and assumptions turn out to be inaccurate and are not managed properly, there could be adverse environmental impacts" (Report of EIR and Reasons for Decision, page 65). The Panel proposes a follow-up monitoring program for water, that it again fails to endorse as a measure. The magnitude of potential impacts should the development not proceed as expected (as has been the case with De Beer's other operating mine, Snap Lake) suggest that the absence of a mandatory follow-up monitoring program is insufficient to address the significance of potential impacts. **We therefore recommend the Minister refer this matter to the Board for further consideration.**

Kennady Lake

With respect to achieving the objective of re-establishing Kennady Lake, the Panel requested DFO to comment on whether this is achievable. "DFO believes that the overall objective is achievable however, these objectives need to be clearly defined and parameters for success need to be set including timeframes, and measurable characteristics to be achieved." (DFO Closing Statement, December 21, 2012). While the Panel's Suggestion # 3 requests methods to reduce the period of time required for recovery of the refilled Kennady Lake, there is no proposal that these methods be prescribed as measures, as requested by DFO. We believe this is a fundamental gap in the closure and post-closure regime for this project, and we recommend that **the Minister refer this matter back to the Board for further consideration.**

Further, the Aboriginal governments have noted that there will be significant environmental impact on Aboriginal subsistence fisheries from the fish-out of 80,000 fish from Kennady Lake, and associated concern that there may not be recovery of this lake (see for example, DKFN Closing Statement, December 21, 2012). "We have to consider 80,000 fish being removed from our food source. This impact will affect our future generations, so we believe the best and most advanced science practises should strongly be considered and more conservative numbers should be used to accommodate and compensate the DKFN, in these matters. Mitigating this through using the 80,000 fish figure numbers, handing out fish and providing the No Net Loss policy is a little short of reasonable." Other Aboriginal governments expressed similar concerns.

Inexplicably, the Board concludes that there will not be significant environmental impact from the loss of a subsistence fishery, and again fails to set clear closure goals (such as timing for refilling Kennady Lake) or clear narrative statements for the water license, leaving this vital mitigation issue without clear and specific guidance. **We recommend that the Minister refer the matter of loss of this subsistence fishery back to the Board for further consideration.**

Caribou

Our submissions to the Review Board focused heavily on caribou, as two of the three measures consider caribou, which remains an indispensable resource for the Aboriginal peoples of the region.

The report does a reasonably thorough job of summarizing the issues and concerns from the developer and party submissions regarding caribou. However, the summary of concerns regarding potential impacts of the winter access road on caribou habitat and movements is not accurately characterized, in that the Panel did not recognize the critical point made by Aboriginal intervenors and other experts that most of the data come from a period of declining and low caribou numbers, and that future movements and use of the area may differ.

Negative impacts on caribou which might affect herd recovery and contribute to on-going harvest restrictions were noted as paramount concerns for Aboriginal parties. Uncertainty and predicted duration of effects of the Gahcho Kué mine were key concerns given the current low numbers of Bathurst caribou. Numerous concerns relating to direct effects of the project on caribou were noted in the report. All Aboriginal parties noted that roads can act as partial barriers or filters to caribou movement, and expressed concerns about dust and other contaminants affecting habitat and food sources. Most significantly, the Aboriginal parties noted that the cumulative impacts of the development of this project in a region already saturated with development remains one of their most significant concerns, and voiced frustration about a lack of progress in implementing cumulative effects assessment and management measures despite numerous Reports of Environmental Assessment on previous projects proposing such measures. The Panel agreed that the incremental effects of the Project on caribou, including impacts from the the access road, are likely to be significant.

De Beers made several commitments regarding caribou, including the use of low profile roads and removal of snow berms on winter roads to reduce the barrier effect to wildlife (pg C-xiii – C-xiv). However, specific commitments are few, and others will presumably be detailed in the next iteration of the Wildlife and Wildlife Habitat Protection Plan (WWHPP) that, along with the Wildlife Effects Monitoring Program (WEMP), DeBeers proposes to "refine" prior to construction. Additional proponent commitments related to caribou largely refer to monitoring the zone of influence, commitments to additional discussions with GNWT on caribou and wolf monitoring, and collaboration with GNWT, communities and Aboriginal governments regarding the access road (C-xvii – C-xviii).

As summarized above, there are few commitments made by the proponent to address specific, outstanding concerns by the Panel or Aboriginal parties. Much of the onus is placed on future refinements to the WEMP and WWHPP, the content of which is unregulated, and that they will be addressed in an "*Adaptive Management Response Framework if caribou are present in suitable densities to allow for an informed assessment*" (e.g., De Beers response to TG technical report response recommendation 12, November 2012).

However, we note the following significant gaps in these proponent's proposals:

- There is no commitment to undertake research on the potential causal mechanism(s) behind the observed zone of influence of developments on caribou;
- There is no commitment to alter mitigations in order to minimize the zone of influence; and

- There is no commitment to monitor the winter access road as a barrier to caribou movement;

These points are **not addressed** in the current version of the WEMP (October 2012).

All of these gaps were noted in the recommendations put forward by the Panel, but are not proposed as measures. The Panel appears to believe that that developer will self-regulate and be a good corporate citizen, and required no further commitments to conduct monitoring or research as noted, which given the regulator and consistent spills at Snap Lake, seems misplaced. The Board has merely accepted a few limited and specific commitments by the proponent as evidence of their intention to address some of the points of concern, but the Aboriginal parties remain concerned (based on past experience in the region with previous developments) that in the absence of binding measures, there will be little or no attention to these significant issues.

The Ni Hadi Yati proposal may be able to address these impacts and concerns at a later date, but as there is not a measure requiring Ni Hadi Yati to be implemented, there is no guarantee that these impacts and concerns will be addressed. **We therefore recommend that the Minister require the Board to give further consideration to these matters.**

Monitoring, Follow-Up and Adaptive Management

The Report of Environmental Assessment also broadly outlines the developer's plans for monitoring, follow-up and adaptive management (Report of EIR, p. 102, Table 6). During the review, the Aboriginal parties emphasized the need to integrate monitoring, adaptive management and mitigation, and to manage uncertainties in the developer's impact predictions. Independent oversight to ensure effective development and implementation of wildlife monitoring and mitigation would potentially be provided by Ni Hadi Yati, but again, there is no binding requirement for Ni Hadi Yati to be in place.

A critical omission from the developer's plans for monitoring, follow-up and adaptive management are any proposals any monitoring of the access road as a partial barrier to caribou movement. Access is addressed, but only as it pertains to the amount and type of public use. This omission was recognized in the report (Report of EIR, p. 102, p. 105), but again, not proposed as a measure.

Many of the recommendations are sound and address Aboriginal party concerns, including researching causal mechanism for the zone of influence, altering mitigations to minimize the zone of influence, and monitoring the effects of the access road on caribou movement (Report of EIR, p. 102, p. 106), but again, are not proposed as measures.

The Panel did propose three Measures and three Suggestions (no Suggestions relate to wildlife).

Measure 1

The Measure "*Minimize impacts to caribou and the extent of the zone of influence around the mine site* ***to the extent*** *that is* ***technically feasible*** *[bold emphasis added]*" provides few specifics that are measureable and quantifiable. This leaves the lingering concern that with very little effort the developer can say that this Measure has been addressed. The Measure to include conditions for habitat protection in the Land Use Permit is a welcome addition.

Measure 2

The Measure "*Construct and operate the winter access road in a way that minimizes its adverse effects as a partial barrier to caribou movement and migration*" is again a fairly weak statement that is difficult to evaluate and measure.

Measure 3

This measure is largely directed at GNWT and AANDC to get cumulative effects framework, monitoring, mitigation and management solidly in place. De Beers is requested to report to GNWT and the public on how Gahcho Kué specific effects contribute to cumulative effects.

We note that in EA0809-004 (Fortune Minerals), the aboriginal parties were named as required parties to the cumulative effects framework. Indeed, this was the subject of the Consult to Modify process that was undertaken with all parties. The Panel's failure to require inclusion of the Aboriginal parties in cumulative effects framework development is surely an oversight that must be corrected.

We therefore recommend that the Minister require the Board to give further consideration to the critical aspects of caribou mitigation, monitoring, follow-up and adaptive management.

Impacts to other components of the biophysical environment

The Panel review of the developer submission respecting impacts to other components of the biological environment focused mainly on dust abatement, but the Panel failed to recognize another critical issue presented by YKDFN (Closing Statement, Dec. 21, 2012) respecting the uncontrolled and unenforceable release of Furans and Dioxins. Evidence was provided that showed Ekati and Diavik have operated out of compliance for years and the level of persistent organic pollutants (dioxins and furans) in the regional area is many times above background. These chemicals are very long lasting in the environment, and are known toxins of international concern. Inexplicably, this is not mentioned in the Panel analysis.

It is also notable that while the Panel relies significantly on the GNWT position, it appears to misunderstand the GNWT 's regulatory role. The Panel appears to believe that the GNWT is responsible for regulating Air Impacts within the NWT, which is a position that the GNWT itself rejects. This apparent gap in regulatory responsibility was not noted, nor was the compelling absence of any enforcement in this regard. Though the GNWT may have legislative authority, it does not and has not sought to exercise this authority, resulting in a significant regulatory gap that allows the uncontrolled release of carcinogenic chemicals into our environment. This gap is not recognized within the Panel analysis, and remains an outstanding concern of the Aboriginal parties.

The Panel's failure to assess the evidence from the Territorial Government respecting the lack of enforcement or the evidence of the YKDFN that existing mitigation at operating mines have failed to prevent significant environmental impacts is a significant omission. The Panel does not propose a measure, but instead proposes to rely on the developer's incomplete and unenforceable commitments and the non-existent enforcement regime. This is inadequate, and would not be acceptable in other parts of Canada.

We therefore recommend that the Minister require the Board to give the matter of air quality and toxins further consideration.

Cultural environment

The Panel recognized that Gahcho Kué site and surrounding area represent a region of cultural, social, spiritual and ecological importance to Aboriginal people and others, and cited evidence from Aboriginal intervenors of instances where the project would have significant impacts on the cultural environment, including:

- draining a lake is a significant impact, attempting to control water behind numerous dykes is a significant impact and any slight impact on the Lockhart River is a significant impact (PR#394 p. 122);
- people do not want any impact to the spiritually and culturally important site, Lady of the Falls, located on the Lockhart River (PR#394 p. 158);
- there are concerns with spills at the Snap Lake mine (PR#394 p. 160) (extracted from EIR Report);

However, the Panel made no specific recommendations and proposed no measures in respect of these issues, and only made passing commentary on the commitments by the developer to support traditional knowledge, community cultural gatherings, and the use of Aboriginal languages at the mine-site. The Panel then concluded that "there will not be significant adverse impacts to cultural values provided the commitments are followed."

With respect to those findings, it is the considered view of the Aboriginal parties that merely incorporating TK into the proponent's monitoring programs, encouraging language use and hosting community gatherings are altogether insufficient to address significant impacts on the cultural environment. The Panel's conclusions in this regard are absolutely inadequate and are frankly insulting to the elders and other Aboriginal experts who contributed time and energy to this process.

Other Review Board decisions (see Bayswater Uranium EA0708-005, UR Energy decision EA0607-003) have recognized that the connection between Aboriginal peoples and the land goes beyond the physical landscape and heritage resources, and have acknowledged while the footprints of proposed developments may be physically small, their likely cultural impacts are significant.

The impacts to the cultural environment require substantive measures, not platitudes from the Review Panel. We therefore strongly recommend the Minister refer this matter back to the Board for further consideration.

Social and economic values

The Panel finds that the project has a high likelihood of economic benefits and a relatively low likelihood of adverse effects on society or economy, but it reaches this conclusion on the basis of expectation, rather than evidence.

The Panel's notes in this regard that "the commitments described by the developer and referenced in this Report are comprehensive" (pg. 142) is incorrect. "Adequate" is one thing, "comprehensive" something else entirely.

In the view of the Aboriginal parties, there has not been adequate social and economic assessment conducted or implemented in mitigation and follow-up programs for a diamond mining project in the NWT to date. It is surprising and disappointing that the results of 15 years of diamond mining in terms of social and cultural change were not examined by the Panel in close detail. While the Panel suggests De Beers' own Snap Lake experience will prove beneficial, there is no evidence or discussion of Snap Lake as a case study in which either the balance of economic benefit and social impact are retrospectively assessed, nor, was the accuracy of predictions made during the Snap Lake EA considered. Snap Lake has consistently failed to meet the commitments in the SEA, in which the Panel has placed faith. Consideration of the previous operations on the basis of evidence rather than conjecture would have resulted in a more informed assessment by the Panel.

The Panel paid little attention to SEIA, and simply takes it as a given that the GNWT Socio-Economic Agreement and individual Aboriginal IBAs will address any impacts or gaps in their assessment of the socio-economic impacts of the project.

In other words, the Panel assumes that other processes (the GNWT SEMA and IBAs with Aboriginal parties) will be concluded and provide the necessary basis for mitigating impacts and providing economic and social benefit.

As it is currently not clear whether IBAs will actually be completed and implemented between the Aboriginal parties and the developer, there is no basis for the Panel's conclusions that the project's high likelihood of economic benefits and a relatively low likelihood of adverse effects on society or economy. Currently, only one agreement with the NSMA has been concluded, while other Aboriginal parties have been at the table for more than 3 years in an attempt to conclude a satisfactory IBA with this developer.

We therefore recommend that the Minister require the Board to give the matter of socio-economic impacts from the project further consideration.