



Yellowknives Dene First Nation

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October 22nd, 2012

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RECEIVED

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**MACKENZIE VALLEY
REVIEW BOARD**

Dear Mr. Hubert:

Re: De Beers Gahcho Kue Technical Report

The Yellowknives Dene First Nation (YKDFN) would like provide the enclosed document as our technical report for the De Beers Environmental Impact Review (EIR0607-001).

The recommendations provided are based on the experience that our First Nation has had from the three diamond mines in our Traditional Territory. It is the Yellowknives Dene who have been exposed to the majority of impacts with few benefits. Indeed, Elders and Traditional Knowledge suggest that mining has had a major impact on caribou, a resource that our people depend on. Caribou populations have declined 90% since the start of diamond mining in our territory without any solid evidence that this population decline has stabilized or reversed. Prudence and caution is paramount – we cannot afford, and do not desire to see, the Chief Drygeese territory turned from one where hundreds of thousands of caribou roamed - and our people were able to live freely off the land - to a land where mining is dominant and we have to depend on industry to buy groceries from a store.

This isn't an unfounded fear. It is worth considering another example from our territory - the Beverly Herd has almost completely disappeared from the area where this project is proposed. What reaction has this elicited from the Crown? Little, if anything. How has this disappearance affected industry? Not at all, though in this case it is somewhat of a benefit as the company noted that there was less likelihood of encountering these animals, so impacts to them didn't have to be addressed and mitigations particular to this herd are not required.

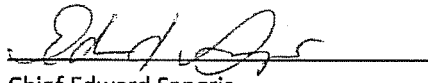
The onus is on the developer to convince the Board and the Parties that they will not have significant impacts to the environment. Unless we can be certain that this project will not impact caribou or limit the recovery of the caribou herds, this project cannot proceed. At present, YKDFN do not believe that the current project proposal shows the appropriate amount of prudence and adequately applies the precautionary approach – it is inadequate to the situation that our people currently face. To begin to

address this, we have included a number of recommendations that address this situation, yet even then, YKDFN are not sure that the current level of development predicted for the Caribou range is sustainable.

Adaptive Management a principle that the company has repeatedly mentioned through this process – and this line of thought needs to be extended to a situation where the proposed mitigations are not sufficient. As caribou populations have crashed, we have not seen any changes in the operational regime of the existing mines, they have not introduced any additional mitigations because the causal mechanisms attached to the decline are not well understood. Mining development in the Chief Drygeese territory is only appropriate if it does not compromise the ability of the environment to provide for the people.

YKDFN would like thank the Board for this opportunity and all of the participants for their hard work, honest involvement and strong presentations. If this project is approved, we hope that the strong positions and recommendations provided help to ensure that it will meet a very high bar for environmental stewardship and northern benefit to offset the impacts. Projects that meet this test are the ones that will build the North without compromising the future.

Sincerely,


Chief Edward Sangris
Yellowknives Dene First Nation (Dettah)

1.0 PLAIN LANGUAGE SUMMARY:

YKDFN members are concerned with the proposed level of development across the caribou range, including this development. YKDFN will not accept the Chief Drygeese Territory being turned from caribou habitat to a mining district. Until it can be demonstrated, to the satisfaction of YKDFN leadership, that this will not be the case significant concern will continue to exist. Flexible mitigations and measures are required until we can be certain that the caribou herd is recovering – these mitigations must extend to temporary shutdown of the mine if matters do not improve.

Though this proposal has done some things well, on others they have simply avoided the responsibility or refused to provide answers to concerns. This has hampered YKDFN's ability to provide effective recommendations to the Board. As we have with other Environmental Assessments, YKDFN have tried to provide recommendations that are based in experience – learning from the successes and failures of those projects, especially with regards to issues that are outside, or cannot be addressed through a statutory instrument. After 15 years, YKDFN have a very good idea of what works, what doesn't, and if it doesn't work, why. This experience is the primary source of the following comments.

- i) Caribou: YKDFN Traditional Knowledge strongly suggests that the existing mines have had an undeniable impact on the Bathurst Caribou herd and have contributed to the very significant decline in the herd numbers. YKDFN harvesters have been forced to make increasing levels of sacrifice while development has proceeded without any additional constraints placed on their operations. This proposal needs to focus more on the precautionary approach – focusing on mitigations that could be employed if the Caribou herd does not begin to recover.
- ii) Cumulative Effects: Indeed, the level of development has increased to the point where this is just one of a host of mines across the Bathurst Caribou Range:
 - a. Existing: Ekati, Diavik, Snap Lake, Jericho
 - b. Late EA: Avalon (2015), Fortune (2015), Gahcho Kue (2015)
 - c. Early EA: NWT Gold, Izok (2017), Back River (2018)
 - d. Starting EA in 2013: Hackett River, Courageous Lake

The company has indicated that cumulative effects are a governmental responsibility – to YKDFN this is not important. What is important is that someone, be it industry or government, is adequately evaluating and addressing cumulative impacts. YKDFN are not aware of any structure that mitigates this concern – including the CIMP program, which has had limited results to date and has not provided any recommendations to this process or developed best practices to minimize impacts. *It is not enough for this matter to fall into a 'not my job' approach.* It must be addressed through some transparent and enforceable mechanism.

We are not aware of any trans-boundary/range-wide projects that evaluate impacts to the range, consideration of thresholds of development or the development of best practices to minimize impacts. Effectively, range management is the same as it was when the Giant and Colomac disasters were allowed to occur.

- iii) Wildlife Monitoring: The Government's lack of action to create an enforceable mechanism to require wildlife and cumulative effects monitoring is a matter of significant public concern for the Yellowknives Dene First Nation. Though the company has made a commitment to develop a monitoring program, they have steadfastly refused to do this in a binding manner. The company promise is not sufficient for YKDFN – we have heard many promises from many companies, most of which have never come to be.
- iv) Air Quality: The Parties, Boards and regulators lack any legislative authority to enforce Air Quality measures. This gives a company complete freedom to emit any level of pollution up until they are releasing acutely toxic emissions. This is not acceptable and the Review Board must create a Measure that requires a collaboratively designed Air Quality Management Plan that includes regular post-commissioning stack testing. Part of this plan should be a local sediment sampling program to establish current levels of persistent pollutants.
- v) Closure: The lack of component-based closure objectives and criteria make it difficult to know what the company's true vision for the site is. It seems that the company does not believe that the land or water in its current state has intrinsic value – that their closure vision should be to restore the site to a state where nature can function again. The YKDFN want the closure vision to be not just healthy enough not to contaminate or kill fish and wildlife, but for this area to be equal in value to flora and fauna of the surrounding landscape.

2.0 INTRODUCTION:

The Yellowknives Dene First Nation (YKDFN) provides this Technical Report to the Review Board for their consideration in developing a Report of Environmental Assessment for the Gahcho Kue mine proposal (EIR0607-001).

2.1 Organization

Members of the Yellowknife Dene First Nation are descendants of people whose very existence depended on utilization of the rich resources of the lands and waters north of Great Slave Lake, known as the Chief Drygeese Territory. While today the Yellowknives Dene primarily reside in the communities of Dettah, Ndilo and Yellowknife, thousands of years of life on the land has created traditional ties that remain strong. The Yellowknives Dene have practiced their traditional rights for generations, and they remain in active use to this day – they do not exist just on paper. The treaty right to hunt, fish, trap and gather remain active, an integral part of the tradition and existence of the Yellowknives Dene.

The YKDFN's Lands and Environment Department strives to document, understand and ultimately protect that long standing relationship to the Chief Drygeese Territory. Our office seeks to ensure that any development is acceptable and sustainable, that development on the land don't compromise the ability of future generations to support themselves as their ancestors did.

2.2 List of Issues or Topics

In this report, YKDFN provide specific comments related to environmental and socio-economic impacts as a result of the activities proposed as part of the Gahcho Kue Mine proposal. In all instances, YKDFN has provided recommendations that are required to mitigate the potential for significant impacts or significant concerns. These recommendations are not focussed just with the establishment of the disturbance and consequential impacts, but also the ongoing concern that would exist with the operations if the project is approved. Without the recommended mitigation efforts, it is the YKDFN's position that there is either the likelihood or the risk of impacts that will be of high significance.

- 3.1 Addressing Regulatory Gaps and Community Limitations
- 3.2 Environmental Agreement with Binding Wildlife Monitoring Measures
- 3.3 Cumulative Impacts
- 3.4 Caribou: Impacts
- 3.5 Caribou: Monitoring the Project's Winter Access Road
- 3.6 Caribou: Determination of Zone of Influence and managing mining operations
- 3.7 Grizzly Bear and Wolverine: study design
- 3.8 Incinerator Management Plan – Persistent Organic Pollutants
- 3.9 Lack of Closure Plan
- 3.10 Ongoing incorporation of Traditional Knowledge
- 3.11 Socio-Economic Concerns

3.0 SPECIFIC IMPACTS:

3.1 Addressing Regulatory Gaps and Community Limitations

Impact: The well known and acknowledged gaps in the regulatory system allow uncontrolled impacts to occur without recourse. Because of the critical importance of themes within this issue, it is a significant public concern and may lead to significant impacts.

Developer's Conclusion: De Beers believes that "the NWT regulatory regime is holistic in its requirements to address ecosystem integrity" and there is no need for any type of extra-regulatory instrument to enshrine certain commitments and requirements. All community concerns should be directed through the MVRMA authorities. For those areas that YKDFN suggest fall within a regulatory void, the developer continues to insist that these matters can be regulated by the Land and Water Boards. This position is made despite clear and incontrovertible positions to the contrary from these very Land and Water Boards.

YKDFN Conclusion: YKDFN cannot understand the developer's assertion that the Boards can regulate this area when the Boards themselves insist that it is outside their jurisdiction. In the past, AANDC has echoed this position, indicated that had been unable to enforce wildlife related Terms and Conditions that the Boards introduced into permits during the early 2000's. Thus, for issues like Wildlife and Air Quality there is a clear and undeniable gap in the ability of the regulatory regime's ability to address community concerns associated with particular topics, and it must be achieved through other means.

Beyond the initial limitations of the statutory and regulatory framework, there are real world limitations to the ability of YKDFN to meaningfully participate in ongoing regulatory processes. The very high level of development in the Chief Drygeese Territory and the limited resources available mean that the single staff member available is unable to address all of the needs arising from the review. The Environmental Impact Statement for this project was in excess of 14000 pages, and this is just one project. For meaningful participation, an economy of scale, shared resources and outside expertise is required in order to provide adequate oversight.

These needs can be best met through an independent oversight model, which is a fundamental requirement if this project is to proceed without causing ongoing significant concern and environmental impact.

Rationale to support conclusion:

- There are regulatory gaps, on issue of the highest significance, that are being ignored. Reliance on the 'regulatory system' will mean these issues will not be addressed or mitigations not enforced.
- Wildlife:
 - AANDC has abandoned any role it once had relating to wildlife: On January 29th, 2010, Minister Chuck Strahl said that INAC is not responsible for wildlife: "The Northwest Territories manages

wildlife. Our responsibility with INAC, is basically on land and water issues, not on management of wildlife, per say"

- GNWT has consistently refused to exercise leadership in terms of oversight on Wildlife Monitoring. They have insisted that this is a board responsibility, despite the clearest possible statements from the Land and Water Boards that this is outside their jurisdiction.
- Given the importance that wildlife have under Treaty responsibility and the needs of the people, the lack of meaningful oversight or authority on this issue is a *significant concern that is not currently mitigated in any way through the current instruments of the regulatory system.*

Air Quality

- There is no regulator for air quality. The company is free to release airborne contaminants in whatever manner they wish. Current oversight boards have reviewed the existing operations, the management plans and made public comments – the only option available to parties. However, industry has been free to ignore these concerns. After almost 15 years, Ekati is only just installing a new incinerator that will meet federal guidelines. Snap Lake has the best record with regards to Air Quality – precisely because this matter is addressed in their environmental agreement.

Traditional Knowledge:

- There is no mechanism to require traditional knowledge to be incorporated into the operational approach of the existing mines. There is no governmental approach to preserving or collecting traditional knowledge. The GNWT policy is that this is the responsibility of parties to collect and provide though there are no resources, support or expertise provided to help facilitate this. The existing oversight boards have tried to work with the mines to provide meaningful opportunities to collect and utilize TK in their monitoring and operational approach.
- We must be clear – Caribou is and will always be the first concern of the Dene. Impacts to this most important resource cannot be addressed at this time by any regulator or any government other than through hunting restrictions. This means that if this mine contributes to further decline of the herd, they don't need to alter their operations – First Nations will pay the price for their actions. Already YKDFN harvest is limited to a scant 150 caribou, part of an agreement with the GNWT. The potential for further reduction is unacceptable.

To help resolve this failure an extra-regulatory approach is needed. The Review Board, AANDC, and the GNWT don't have the authority once the mine is in place yet a contract between the parties that outlines clear roles and responsibilities for wildlife management and monitoring as it relates to this mine will help insure that wildlife-related commitments are enforceable. This board can require that agreement to be negotiated.

- YKDFN have had generally good experiences with existing mines and their oversight bodies. Industry has benefited by their presence as well, receiving awards based on their performance

over the years. YKDFN believe that this behaviour was propelled and encouraged by the oversight bodies. YKDFN rely on the expertise and knowledge of the existing oversight boards to help understand the scope and nature of issues. Strong oversight boards breed trust and faith – we know that IEMA closely scrutinizes BHP's operations and can rely on them.

- As we saw at the recent Snap Lake water license hearing, industry has no limitations on staff, consultants and resources – De Beers used legal counsel as one of their primary speakers, a horde of technical experts and consultants, and a number of employees present. If this board does not mandate an oversight body, we can expect a great deal more paper – the EIS in this file was in excess of 14000 pages, far exceeding the capability of FN review and much larger than other documents of similar natures. There is no reason to suspect that the size of subsequent filings will be similar to what we've seen in the past – even if it was it would easily overwhelm community's ability to meaningfully respond. This erodes trust and social license required for a mine of this size operating in the range of a significantly depleted caribou herd. An oversight body provides a valuable resource that can be trusted by the YKDFN to insure appropriate and continuously improved environmental monitoring and management.
- The current regulatory system relies on an adversarial approach – each party makes a submission to the Board. YKDFN are well aware of the vast amount of information generated by each existing mine – reviewing this information is not humanly possible with existing resources. In the next five to ten years, we are looking at 10 mines across the Bathurst Herd range with 6 in the Chief Drygeese Territory, with no prospect of additional resources from the Crown – the failure to introduce meaningful oversight is to effectively overwhelm the YKDFN such that they are not able to participate in the regulatory processes. The independent review provided by the oversight bodies is essential to streamlined review – requiring every First Nation try and review the whole of the paper record hardly seems efficient when all parties can utilize the output from an oversight body.
- Oversight bodies bring economy of scale for the communities – saving everyone money and improving the level of review and subsequent quality of environmental stewardship. Using this expertise to identify issues of importance – to triage the mountains of data into actionable information, is critical to meaningful YKDFN participation in the regulatory structures. Alternatively, the Crown needs to provide adequate resources for each community to review the data, hire appropriate outside expertise, and facilitate meaningful participation in the regulatory processes – which hardly seems efficient.
- Lessons learned from existing oversight boards provide the road forward on how to improve them. They do not provide a rationale to dispense with them entirely – and the community voice is clear in this regard. YKDFN asked the proponent why a body such as SLEMA for Gahcho Kue should be jettisoned – seeking an explanation as to why it should be replaced with some other structure that does not provide independent oversight. The answer provided failed to address the question and YKDFN are still unaware of what the rationale is (YKDFN IR 2-2). YKDFN

believe that independent oversight makes for strong environmental stewardship and sustainable vision – we understand other communities feel the same way. The only Party that wants to jettison the idea of oversight is the proponent, but they won't say why.

- The AMAC proposal from the company is not arms length (the company retains complete control over its activities and resources) and has no 'teeth' to encourage action – the results are provided to the company with no requirement for response. The committee will not act as an intervener in any of the regulatory processes. It fails to meet the basic needs of the YKDFN in a number of ways.

Recommendation:

- 1) The Board must make a Measure that requires the proponent and parties to collaboratively conclude an extra-regulatory agreement that brings into being an arms-length oversight body. This body will be based on the best practices developed in the territory and the principles found in the research undertaken by YKDFN and Alternatives North (and currently found on the registry). The mandate of this body will be: To review the environmental monitoring and management proposals, activities and reports from the proponent and the regulators, making recommendations or submissions to whomever they believe necessary.

YKDFN are open to working with the Parties and the Proponent and to this end, are participating in a First Nation-led workshop aimed at developing a draft proposal for the Proponent to consider. This will likely be submitted to the registry prior to the hearing.

3.2 Environmental Agreement with Binding Wildlife Monitoring Measures

Impact: A lack of a binding measure requiring Wildlife Monitoring means that the proponent is free to abstain from addressing this concern, creating the potential for unforeseen environmental impacts and significant community concern.

Developer's Conclusion: Requirement for the WEMP can be included as a term/condition in the Land Use Permit.

YKDFN Conclusion: Wildlife monitoring is one of the most significant concerns to First Nations. It is not acceptable for this project to proceed with only a weak and potentially empty 'commitment' from the company – this is empty as De Beers would be free to walk away from that commitment at any point.

When both the Board that issues the Land Use Permit and the Inspectors who enforce the permit have stated that wildlife related matters, including wildlife monitoring, are outside their enabling statutory framework, it seems inconceivable that the proponent would continue to adopt this position.

YKDFN assume that the Board respects the position of the inspectors and MVLWB, meaning that the need for wildlife monitoring must be addressed through some other method. AANDC has already

abandoned any role with regard to wildlife and GNWT's position in the Fortune EA suggests that they do not intend to provide any leadership on this matter, despite the clear benefits.

As with the oversight, the end result is that First Nations are required to directly conclude an extra-regulatory enforceable agreement with the company, with part of that focus being an enforceable WEMP through an enforceable contract.

Rational to support conclusion:

- Fish and Wildlife are the foundation of YKDFN culture and society. Issues surrounding these matters, including the health and abundance, are of the highest level of concern.
- The company's overarching responsibility is not to the people of the NWT, it is to its shareholders. Positive community views and social license are not required. In difficult economic times the company can be expected to cut back on optional expenses that amount to social responsibility rather than environmental necessity. This is not hypothetical – during the economic slowdown of 2008, industry sought to move away from their environmental commitments for complete environmental monitoring, but because the existing operations had binding environmental agreements they were unable to do so.

- The Land and Water Board has provided a clear and unambiguous position that should have disabused the proponent of this approach:

"The MVLWB Terms and Conditions Working Group (WG4) is of the view that Land Use Permit conditions must be in accordance with the regulations (MVLUR). Conditions related to wildlife are thus limited to a focus on wildlife habitat.

WEMPs are focussed on monitoring of wildlife, rather than wildlife habitat, therefore, it is the view of MVLWB WG4 that conditions related to WEMPs are outside of the jurisdiction and authority of the LWBs as defined by the MVLUR."

- The proponent indicted that the Chair of the Wildlife Terms and Conditions Working Group did not have sufficient authority to make them alter their perspective. Further clarity was provided by the Executive Director of the Mackenzie Valley Land and Water Board:

"Brett's email represents the views of the working groups established by the Boards. The working groups have been mandated by the Boards to develop clarity and consistency in a number of areas of Board operations.

Brett's view is entirely consistent with the Board's view. We cannot be inconsistent with any legislation, including regulations, under which we operate."

- This position is consistent with a position presented to the Akaitcho Consultation Working Group by Darnell McCurdy in 2008 – the former INAC district manager. At the time, First Nations were surprised to learn that many of the concerns that they had brought to the board had not

truly been addressed and when the Board's had previously issued terms and conditions for wildlife related matters, they could not be enforced. For years, the regulatory system had provided false comfort and never informed the YKDFN that no one was able to protect the wildlife that was critical to their lifestyle.

- The Operations perspective is consistent with AANDC's broader approach to wildlife – they will manage the land and GNWT manages wildlife issues. On January 29th, 2010, Minister Chuck Strahl stated:

"The Northwest Territories manages wildlife. Our responsibility with INAC, is basically on land and water issues, not on management of wildlife, per say"
- CJCD, "Work It Out Yourself", February 3rd, 2010

- In the Fortune Environmental Assessment, GNWT staff initially provided evidence that agreed with YKDFN's position:

p273, in response to a question from Board Counsel, ENR states that *"such a program [the Wildlife Effects Monitoring Program] wouldn't be enforceable, I guess, by law. We - we have to rely on commitments and the good nature of the company to do that."*

YKDFN hopes that we can rely on the commitments of the company, but we do not believe hope represents a sound environmental stewardship policy. It makes more sense to have a plan B in case that reliance is misplaced. In this case, that Plan B is a Measure from the Board requiring this to be done.

- Subsequently, the GNWT has walked away from the position presented to the Review Board and they too are suggesting that the requirement for wildlife monitoring is a function of the Land and Water Board (See GNWT October 2nd response to Undertaking #3 on the Fortune Registry). Obviously this is wrong and the government knew it was wrong. More troubling is the GNWT closing comments:

"Should a process take place for developing a WEMP, the GNWT is also willing to work cooperatively in this process" [underline added]

The Government department seemingly charged with the responsibility of providing leadership on Wildlife Management is not just stepping away from suggesting that this plan is a requirement to avoid concern and environmental impacts, but is now openly suggesting that this approach is optional.

Recommendation:

- 2) The Board must make a measure that requires an enforceable Wildlife Effects Monitoring Plan. This plan must be collaboratively designed (and to a large degree, already has been), with a reporting requirement similar to that of the Aquatic Effects Monitoring Program, and an agreed upon general review and approval system. Lastly, it must have an easy, efficient, and cost effective dispute resolution system if the parties strongly disagree on matters in terms of design quality or implementation.

- 3) YKDFN believe that this (and recommendation #1) can best be addressed through the development of a contractual environmental agreement between the company and the First Nation which provides clarity in terms of roles and responsibilities; reporting, review, updating and approval mechanisms; appropriate resources to facilitate participation; and as a last resort, a simple, efficient and effective dispute resolution system. The particulars of a WEMP or an oversight approach would be jointly agreed upon plans within this agreement – but the framework that they would fit in would be a broader environmental agreement.

3.3 Cumulative Impacts

Impact: This project is only one of many across the landscape, all of which are having impacts on the environment, especially to the Caribou that the YKDFN depend on.

Developer's Conclusion: Cumulative Effects are not likely to result in impacts and having demonstrated this, any monitoring of cumulative effects monitoring is a government responsibility.

YKDFN Conclusion: YKDFN believe that: a) the cumulative effects analysis understates the level of development and overstates the point at which Impacts become significant and b) the proponent's position that continued evaluation of cumulative effects is outside of their responsibility is not a reasonable position given government inaction to date. YKDFN assert that the companies who create impacts on the land, including cumulative impacts, bear the responsibility to address them. If industry can collaborate with government so much the better, but if government fails in providing assistance, the responsibility remains and industry must find a solution.

Rational to support conclusion:

- As noted in the Terms of References "*Concern over possible cumulative effects arose frequently during the environmental assessment and the fact that the proposed development would be the fifth diamond mine in the general area was cited numerous times as a rationale behind an issue or its priority*" (pg 47). Nowhere in the ToR does it suggest that future cumulative effects assessment and monitoring should be relegated to government.
- If Gahcho Kué goes ahead, De Beers will have two operating diamond mines within a relatively small area (along with Snap Lake). This fact underlines the importance of cumulative effects monitoring and assessment that De Beers should be conducting.
- Not all of the developments that are announced or are currently in Environmental Assessment proceedings –are included as mine developments in the Cumulative Effects analysis.
- The Zone of Influence that the proponent applied utilized disturbance co-efficients or a 'decay curve'. This is not consistent with the results of research undertaken at the existing mine sites. This results in a significant overestimation of the quality of habitat around the mine site (See YKDFN IR#1-3) and an overestimate of caribou abundance of approximately three times beyond the overall 75% reduction across the entire ZOI.
- Caribou react differently to stimulus at different parts of their life cycle – the developments on

the calving grounds will likely have a much larger impact than those in the winter range. Several of the developments are taking place in or adjacent to the Bathurst herd's calving grounds. This has not been addressed and indeed, YKDFN believe that the level of Nunavut development is underplayed.

- The effects of roads as barriers to movement are not well understood. Research from BHP show that caribou are reluctant to cross roads (55% of crossing attempts were deflected)– and with a road for Fortune, a road for Izok, a road for Gahcho Kue, and a road for Hackett River & Back River – there are a lot of new roads planned for the barrens. Impacts to movement are not known.
- There is no cumulative effects analysis underway or any mechanism to force developments to implement mitigations if cumulative effects are shown to be an issue. The CIMP program is limited and haphazard – there is no systematic approach to evaluate cumulative effects on the barrens. YKDFN are not aware of what, if any, work has been done focusing on the impacts of development on Caribou or have any intention to do so. GNWT's cumulative effects plan, as presented in their Fortune closing comments seems to be content with hoping some type of "active collaboration between governments, developers, Aboriginal groups and other interested parties" will take place. They have done nothing to ensure or try to require that this will take place or to require this to occur. Hoping for a good outcome, when there are options to pursue more secure outcomes, is to invite uncertainty, risk and further impacts.
 - The example provided – the grizzly bear hair snagging program – has only just begun, with the first samples (Ekati/Diavik) collected this year. Snap Lake/Gahcho Kue have not yet commenced their program. Secondly, it is not clear what party is responsible once the hair has been collected - the last update that YKDFN had on this program suggested that some companies intended to complete the DNA work, with others content to collect the hairs and provide the samples to the GNWT. Once in possession of the DNA, it seems that the range level analysis is a GNWT responsibility, but if so, we are not aware of how this is to be done or if a commitment had been made to do this work. In any event, the current status is after 3 years of discussion between industry and GNWT – and the split of responsibilities is unclear.
 - Though this project represents a step forward for Grizzly Bear knowledge on the Barrens, the uncertainty surrounding project implementation, the lack of results and the choice of species hardly means that we can put our faith in this approach. The membership of YKDFN cannot afford another 15 year interval before cumulative effects analysis focusing on Impacts to caribou is developed.

Recommendation:

- 4) The Board must issue a measure that requires the creation of an ongoing trans-boundary cumulative effects monitoring program across the range of the Bathurst Caribou herd.
 - a. To grant maximum flexibility, YKDFN suggest that this measure be issued in such a way that the concern has been considered to be mitigated/achieved when all parties agree

that there are appropriate mechanisms in place to address this concern. This would allow the GNWT vision of an industry-government-FN collaboration with an enforceable backdrop. Once the Parties agree, further determinations can be made under the MVRMA.

- 5) The Board should issue a measure that creates an adaptive management approach for range management that this monitoring ties into – monitoring is empty unless it feeds into management decisions and at this point there is no mechanism or impetus for any type of management beyond the project specific level. Recognizing the complexities, YKDFN recommend that this be in place within 5 years of the report of environmental assessment decision.

3.4 Caribou: Impacts

Impact: Caribou are being negatively impacted both cumulatively (above) and by the activities/infrastructure of this mine.

Developer's Conclusion: Effects to caribou are not expected to be significant.

YKDFN Conclusion: The project underestimates the impacts to caribou because they do not understand the impacts of the current population crisis.

Rational to support conclusion:

- YKDFN don't have the resources to evaluate the data analysis that the project completed, but we can understand how they categorized the results and say with certainty that it does not conform to how YKDFN would evaluate the impacts. The project evaluated the impacts to caribou as though a population in the order of 32000 animals was not an issue.
- The project's impact analysis was undertaken as though the current caribou situation was acceptable rather than a crisis that has seen emergency measures put into place. These actions limited the exercise of constitutionally protected Treaty Rights, the amount of country food for the community, and limitations to cultural events.
- The project conclusion that they will have relatively minor impacts to caribou is only acceptable if the herd is recovering and the limitations to harvesting has been lifted. Further suppression of this ability will continue the ongoing hardship. If the project reduces the ability to harvest even a single season, this amounts to a significant impact.
- The proponents categorization of impacts must be evaluated in this light – during periods of scarcity, even small impacts may have significant consequences. For instance, the worst case scenario envisioned by the project is a 0.7% reduction of the population – simply put in economic terms, the replacement cost of the meat provided through harvesting is in the millions of dollars (Using the BQMB report and GNWT harvesting data). This says nothing of the impacts

to cultural practices and benefits to establishing and maintaining healthy communities.

Recommendation:

- 6) The Board should issue a measure that requires the proponent to collaboratively re-evaluate the impacts of this project 5 years after the Report of Environmental Assessment, with a particular focus on the relationship between developments and the recovery of the caribou herd. This evaluation should propose further mitigations to limit impacts, up to and including mothballing the mine until herd populations are healthy enough to support YKDFN harvesting or communities directly acknowledge that they are willing to accept the risk.

3.5 Caribou: Monitoring the Project's Winter Access Road

Impact: The winter road may at times in the future act as a semi-permeable barrier (filter) to caribou movements. Lack of proposed monitoring will not detect any barrier effect of the road, allowing impacts to occur without mitigation.

Developer's Conclusion:

- That the Winter Access Road will be monitored only to determine the amount and type of public use. Section 4.4 of the Wildlife Monitoring Plan (WMP; October 2012 version, pg 4-4) states that *"Although caribou have not been present in the area in high numbers during the time of year when the Project Winter Access Road is operating, the primary concern of communities and government is the potential for increased harvesting of caribou."*
- Table 5-2 of the WMP (pg 5-7) does not list change in movement as a monitoring theme.

YKDFN Conclusion:

- Although changes in harvest patterns may occur as a result of the Winter Access Road, the potential exists for the Winter Access Road to affect caribou movements at local (winter movement) and regional (migration) scales.

Rational to support conclusion:

- The Diamond Mine Wildlife Monitoring Workshop (Marshall 2009) identified *"roads acting as barriers"* as one of the six main potential impacts, and community scoping sessions often identified concerns about changes in migration routes (MVEIRB Report of Environmental Assessment and Reasons for Decision 2006).
- The Gaucho Kue winter access road will see up to 2,000 trucks per year during construction, decreasing to about 1,200 per year during operation (pg 7-101). Over a 12 week winter road period, this equate to approximately 25 trucks per day (pg 7-101). With warming temperatures and decreasing length of ice road season, the intensity of truck traffic will need to be increased. Analysis was not conducted on the impact of a shortened winter trucking season on the filter or semi-permeable barrier effect of the road under these conditions.

- The Proponent has stated that *"the effect of winter roads on caribou movement and behaviour has not been quantitatively analyzed"* (response to IR YKDFN 1.13).
- While the assessment and IR responses acknowledge that the presence of winter roads may represent a barrier to animals, and lead to fragmentation of the population within the RSA, the proponent does little to evaluate this potential – it suggests that the winter road will likely be a "leaky barrier" (evidence from the North seems to confirm this) and that the fact of the winter road being limited to an 8 to 12 week period each year represents some mitigation. This would be true if it weren't for the fact that the 8 to 12 weeks that the road is in operation is the period which caribou are likely to be in the area, thus the effects on movement are in place. The assessment does not go on to meaningfully evaluate or assess these impacts, only suggesting that they are low to minimal in magnitude.
- The Developer does not appear to have a plan in place to test whether assumptions about impacts to caribou movement as a result of the road are true.

Recommendation:

- 7) As part of the WEMP, YKDFN ask that De Beers be required to develop a comprehensive mitigation and monitoring plan that examines whether the Winter Access Road acts as a barrier or filter to caribou movement. As this monitoring aspect of the WEMP is deployed, the project should concurrently develop further management and mitigation options to be considered if the monitoring discovers that unforeseen impacts are occurring as a result of the road construction and operations.

3.6 Caribou: Determination of Zone of Influence and managing mining operations

Impact: Determination of the Zone of Influence (ZOI) and subsequent identification of the causal mechanisms behind the ZOI can lead to mitigation and reduced impacts to caribou.

Developer's conclusion:

- *"Studies on the ZOI around the Project are not likely to provide information helpful to adaptively manage mining operations. However, monitoring caribou distribution around the Project would likely contribute information for future environmental assessments and for the on-going assessment and management of cumulative effects by government under different development scenarios. In other words, estimating a ZOI for the Project provides habitat information at the population level if government develops the necessary modelling tools to use the information."* (WMP; pg 5-10)

YKDFN conclusion:

- YKDFN disagrees that determination and monitoring of the ZOI can be of no use to managing mining operations or mitigating potential impacts to caribou.

Rational to support conclusion:

- YKDFN suggests that one of the more important potential impacts to caribou from this mining development include impacts to caribou distribution around mine infrastructure and changes in movement and migration patterns. The attitude that monitoring for ZOI will produce no tangible benefits to mitigating impacts of development on caribou is short-sighted.
- In addressing a potential ZOI around mine infrastructure, the process De Beers should follow is:
 - Determine whether a ZOI exists, and the extent (distance) of impacts to caribou distribution around mine infrastructure;
 - Examine potential causal mechanisms for the ZOI;
 - Mitigate to reduce the influence of the causal mechanism.
- If aerial transect surveys (ideally fixed-wing) are not acceptable for whatever reasons, then De Beers needs to suggest alternative methods that actually address the question.

Recommendation:

- 8) As part of the WEMP, YKDFN ask that De Beers be required to evaluate the ZOI by means of testing their impact predictions, and develop studies that can examine potential causal mechanisms for the ZOI, which can lead to further mitigation of Impacts of the project on caribou.

3.7 Grizzly Bear and Wolverine: study design

Impact: The study designs, specifically the proposed distribution of hair-snagging cells, in the latest WMP (October 2012) may not result in adequate coverage to address the objectives of the programs as related to the mine site.

Developer's Conclusion:

- As shown in Fig. 5-3, the southern grizzly bear sampling grid provides 2 rows of sampling south of the Gahcho Kue mine site.
- As shown in Fig. 5-4, as a result of "*No posts would be erected within 5 km of the Project site to avoid attracting wolverine to site*" (pg 5-18), there is an approximately 12-14 km wide space centred around the mine site where no wolverine posts will be placed (missing 2 rows and 4 columns of posts).

YKDFN Conclusion:

- The coverage of grizzly bear sampling cells south of the Gahcho Kue mine site is inadequate.
- The wolverine grid pattern should include cells within 12-14 km of the mine site.

Rational to support conclusion:

- The current grid design provides only limited coverage south of the mine site, such that the furthest tripod would be placed only 18 km south of the mine. There is no indication that grizzly density at and below tree line in this area should be lower than on the open tundra. Extension of

the grid south by a minimum of 1 row would provide better coverage of the Project Regional Study Area.

- Placement of wolverine posts to fill in the central area immediately surrounding the mine site will provide better coverage of wolverine distribution, and greater ease of determining density – if unsampled, the central area will result in additional closure issues for modelling population abundance and distribution. It is highly unlikely that these posts attract wolverines from great distances beyond where they would go. As long as a post is not placed directly inside mine infrastructure, there will be no addition threat to human safety.

Recommendation:

- 9) As part of the WEMP, YKDFN suggests that De Beers sample the area south of the proposed grizzly bear grid to provide better coverage of areas potentially affected by mine-related activities. Similarly, YKDFN suggests that De Beers conduct full wolverine sampling within the 12-14 km area centred on the mine site.

3.8 Incinerator Management Plan – Persistent Organic Pollutants

Impact: A lack of an effective Incinerator Management Plan could allow the company to release significant amounts of pollution to the environment, including persistent organic pollutants, without a regulatory response.

Developer's conclusion: Despite clear language in the Terms of Reference and community concerns, the company refuses to meaningfully address this as a potential issue.

YKDFN conclusion: The regulatory loophole, inadequate monitoring, and the lack of local baseline data will not only create a situation which allows the proponent to emit almost any amount of pollution, but also will permit poor operations that cannot be regulated. Given the unclear and unenforceable commitment to monitoring, none of the Parties will have sufficient Information to determine if the company is complying with the CCME guidelines. Even if there was a meaningful monitoring program, the effects to the local environment would not be detectable as the company has not collected adequate sediment data to allow analysis – we don't have a starting point to evaluate the impact of the mine.

Rational to support conclusion:

- **Statutory Framework:** There are no regulatory mechanisms for emissions in the NWT. YKDFN do not believe that an air quality plan can be enforced through current regulations.
- **Monitoring -** A quick review of the incinerator management plan (submitted two business days before the deadline for this report) has revealed that the company intends to conduct intermittent stack testing – without providing any indication as to what this Interval may be. In the Fortune file, Golder indicated that only a commissioning test was required. This is

insufficient and wholly inadequate. If parties do not have information on how the incinerator is performing during operations, guidelines could be exceeded over many years (as has happened at other mines).

- Baseline - YKDFN are not aware of the collection of baseline data for persistent organic pollutants in the local environment.
- Thus, there is no way to require the company to conform to the guidelines, there is no sampling to ensure that they are, and in the event that they are exceeding the guidelines, there's no way to establish the level of impact that they've had on the local environment, especially to the water, fish and sediments. This is a top to bottom failure meaning that remedying one of these matters does nothing to address the systematic failure.
- As we have seen with all other industrial developments, once permitted, there is little that any party can do to require change, regardless of how poorly the incinerator is run. Snap Lake has the best incinerator/emissions record, precisely because planning and approval for management plans were written into the environmental agreement.

Recommendation:

10) As part of the Environmental Agreement, YKDFN recommend that the Board make a measure that requires:

- a) Conformance to the CCME guidelines
- b) Implement a monitoring regime that includes testing to confirm that the company is meeting the guidelines. This monitoring regime should include regular testing as directed by Environment Canada.
- c) Develop a local baseline for persistent pollutants

This will allow the parties to have a regulatory mechanism to utilize to ensure good corporate behaviour with regards to this issue. Without this measure, the company is free to pollute in any manner they wish.

3.9 Closure Plan

Impact: The lack of closure planning greatly increases the difficulty in understanding the long term impacts. It also greatly increases the risk of the plan not meeting community expectations – the vague statements during the EA are the only guidance as to what the site will provide in a generation.

Developer's conclusion: The conceptual closure plan presented in section 3.12 is sufficient – “Because the MVEIRB issued a statement that the EIS achieved conformity” (Round one IR response to YKDFN).

YKDFN conclusion: The proponent misunderstands the intent and purpose of the conformity check. The purpose of the conformity check is limited:

"[The conformity check] determines whether the developer has responded to every item required by the Terms of Reference with enough information to address the impacts on the environment, but does not investigate the quality of the responses in detail" – MVERIB EIA Guidelines, section 3.12

As to the quality of the 'conceptual closure plan', there is a significant gap between what the language used – only broad statements – mean to YKDFN and the company. This needs to be improved during the Environmental Assessment. Once this project moves into permitting, we only have the language used here to provide guidance and clarity is required to ensure that the parties have universal understanding of what the closure objectives are.

Rational to support conclusion:

- Closure is a Key Line of Inquiry and the lack of a modern, component based approach with agreed upon objectives is a serious limitation.
- *"The environmental assessment revealed considerable concern over the long term effects of this development... The EIS must include a conceptual closure and reclamation plan and an analysis of the viability of this plan"*

YKDFN do not believe that anyone can look at the 'conceptual closure plan' and believe that it represents a viable approach, especially when compared with best practices (see the most recent editions of BHP and Diavik). The critical issue is the precision attached to the intentions – for instance, YKDFN and De Beers likely have much different expectations with regards to 'decommissioning the roads'.

- Closure and Reclamation is part of the Scope of the Development. By not addressing this in a meaningful way, the project is introducing potentially significant risks.
- During a site visit to the project, De Beers' consultants discussed the closure vision for water quality. They indicated that they would be satisfied if a functioning aquatic ecosystem were to be established - so simply not being toxic seems to be the goal – there is no value placed on the pristine nature of the water or any indication that the project will attempt to return the site to a state that represents its current condition. Massive changes in contaminant concentrations can occur, but as long as the project can demonstrate that it isn't toxic to some types of fish, that will be acceptable.
- YKDFN would likely have very different goals and objectives, as natural water and land have intrinsic value. Simply put, the company approach to not contaminating fauna and flora is not a high enough bar. The end site must be reflective of what it is now – while we know that it will never be the same, this land is some of the cleanest and purest left in the Chief Drygeese territory – the headwaters of an important watershed – a 'good enough' approach to closure is not acceptable.
- The project has not developed a meaningful closure vision in collaboration with the community. YKDFN are going to be using this land once the project is finished, it is the Dene voice which should receive the most credence. Inclusion of TK in this plan is set out in the ToR section 3.2.5. Section 4.1.4 also states "a summary of the use of public consultation, consultation with first

nations, and traditional knowledge in determining standards and methods for reclamation;" YKDFN are not aware of this process being undertaken.

Recommendation:

- 11) YKDFN are only requesting that the Board require the spirit of their Terms of Reference be met by issuing a measure that requires the development of a preliminary closure plan that meets these terms. This issue isn't an afterthought or peripheral matter; it is one of the KLOI and should have been fully addressed.

The development of this closure plan should be done in collaboration with communities and according to best practices developed with industry, to be completed within one year of the Report of Environmental Assessment. If the plan cannot be successfully completed with consensus, then this would represent a significant risk and the Board should be required to intervene.

3.10 Ongoing incorporation of Traditional Knowledge

Impact: Industry has failed to incorporate traditional knowledge into their monitoring programs, leading to incomplete monitoring and discordant results from western science and community knowledge.

Developer's conclusion: The project has made an unclear and unenforceable commitment that traditional knowledge can be incorporated into operational aspects of the project.

YKDFN conclusion: The commitment is a start, but it is unclear and absent language that prevents the company from walking away or failing to implement a response to this commitment.

Rational to support conclusion:

- Current industrial operations have generally failed to incorporate traditional knowledge into their projects – including the proponent's operation at Snap Lake. While we have started to see some positive changes in the approach, but the level of dedication is uncertain.
- This commitment is wholly unenforceable absent a measure.

Recommendation:

- 12) To ensure that this does not become an idle commitment, YKDFN ask the board to issue a measure that requires the project to develop a framework to gather and incorporate this knowledge in collaboration with the knowledge holders. The test of success for this measure will be met when consensus exists between the parties that a good faith effort has been made to address the intent.

3.11 Socio-Economic Concerns

Impact: YKDFN are concerned that the economic benefits from this mine would be much greater if the project were to commence just a few years from now. Both Ekati and Diavik are approached their final stages of operation and this site could provide an important employment opportunity for YKDFN members whose employment would come to an end with those closures. At present, the projected northern employment for this site is very low.

Developer's conclusion: There is little benefit to delaying the mine – Non-northern hiring does not represent a negative impact.

YKDFN conclusion: YKDFN believe that benefits derived from the Chief Drygeese Territory should benefit Yellowknives Dene members. The logic of having this mine be brought into operation concurrent to the other operations provides little employment opportunity to the membership. As such, the vast majority of the positions will be staffed by residents from outside the north – De Beers would prefer to fly its employees in from Alberta than wait a few years so that YKDFN members could benefit.

Rational to support conclusion:

- The company predicts very low hiring rates for northern and aboriginal people. This is primarily because most of the eligible workforce is already employed at one of the existing operations.
- Diavik and Ekati will close in 2021 and 22, putting hundreds of Dene and Northerners out of work.
- If YKDFN members were able to move from one of the existing sites to a new Gahcho Kue mine, this would meet the test of maximizing employment opportunities.

Recommendation:

- 13) YKDFN ask the board to require the commissioning of an independent economic analysis that evaluates a series of likely scenarios to determine what options would provide maximum benefits for the residents of the Mackenzie Valley. If this analysis is in agreement with De Beers perspective, then permitting could begin, however if it is in conflict, then additional mitigations must be considered.

4.0 SUMMARY OF RECOMMENDATIONS:

- 1) The Board must make a Measure that requires the proponent and parties to collaboratively conclude an extra-regulatory agreement that brings into being an arms-length oversight body. This body will be based on the best practices developed in the territory and the principles found in the research undertaken by YKDFN and Alternatives North (and currently found on the registry). The mandate of this body will be: To review the environmental monitoring and management proposals, activities and reports from the proponent and the regulators, making recommendations or submissions to whomever they believe necessary.

YKDFN are open to working with the Parties and the Proponent and to this end, are participating in a First Nation-led workshop aimed at developing a draft proposal for the Proponent to consider. This will likely be submitted to the registry prior to the hearing.

- 2) The Board must make a measure that requires an enforceable Wildlife Effects Monitoring Plan. This plan must be collaboratively designed (and to a large degree, already has been), with a reporting requirement similar to that of the Aquatic Effects Monitoring Program, and an agreed upon general review and approval system. Lastly, it must have an easy, efficient, and cost effective dispute resolution system if the parties strongly disagree on matters in terms of design quality or implementation.
- 3) YKDFN believe that this (and recommendation #1) can be best addressed through the development of a contractual environmental agreement between the company and the First Nation which provides clarity in terms of roles and responsibilities; reporting, review, updating and approval mechanisms; appropriate resources to facilitate participation; and as a last resort, a simple, efficient and effective dispute resolution system. The particulars of a WEMP or an oversight approach would be jointly agreed upon plans within this agreement – but the framework that they would fit in would be a broader environmental agreement.
- 4) The Board must issue a measure that requires the creation of an ongoing trans-boundary cumulative effects monitoring program across the range of the Bathurst Caribou herd.
 - a. To grant maximum flexibility, YKDFN suggest that this measure be issued in such a way that the concern has been considered to be mitigated/achieved when all parties agree that there are appropriate mechanisms in place to address this concern. This would allow the GNWT vision of an industry-government-FN collaboration with an enforceable backdrop. Once the Parties agree, further determinations can be made under the MVRMA.
- 5) The Board should issue a measure that creates an adaptive management approach for range management that this monitoring ties into – monitoring is empty unless it feeds into

management decisions and at this point there is no mechanism or impetus for any type of management beyond the project specific level. Recognizing the complexities, YKDFN recommend that this to be in place within 5 years of the report of environmental assessment decision.

- 6) The Board should issue a measure that requires the proponent to collaboratively re-evaluate the impacts of this project 5 years after the Report of Environmental Assessment, with a particular focus on the relationship between developments and the recovery of the caribou herd. This evaluation should propose further mitigations to limit impacts, up to and including mothballing the mine until herd populations are healthy enough to support YKDFN harvesting or communities directly acknowledge that they are willing to accept the risk.
- 7) As part of the WEMP, YKDFN ask that De Beers be required to develop a comprehensive mitigation and monitoring plan that examines whether the Winter Access Road acts as a barrier or filter to caribou movement. As this monitoring aspect of the WEMP is deployed, the project should concurrently develop further management and mitigation options to be considered if the monitoring discovers that unforeseen impacts are occurring as a result of the road construction and operations
- 8) As part of the WEMP, YKDFN ask that De Beers be required to evaluate the ZOI by means of testing their impact predictions, and develop studies that can examine potential causal mechanisms for the ZOI, which can lead to further mitigation of impacts of the project on caribou.
- 9) As part of the WEMP, YKDFN suggests that De Beers sample the area south of the proposed grizzly bear grid to provide better coverage of areas potentially affected by mine-related activities. Similarly, YKDFN suggests that De Beers conduct full wolverine sampling within the 12-14 km area centred on the mine site.
- 10) As part of the Environmental Agreement, YKDFN recommend that the Board make a measure that requires:
 - a) Conformance to the CCME guidelines
 - b) Implement a monitoring regime that includes testing to confirm that the company is meeting the guidelines. This monitoring regime should include regular testing as directed by Environment Canada.
 - c) Develop a local baseline for persistent pollutants

This will allow the parties to have a regulatory mechanism to utilize to ensure good corporate behaviour with regards to this issue. Without this measure, the company is free to pollute in any manner they wish.

- 11) YKDFN are only requesting that the Board require the spirit of their Terms of Reference be met by issuing a measure that requires the development of a preliminary closure plan that meets these terms. This issue isn't an afterthought or peripheral matter; it is one of the KLOI and should have been fully addressed.

The development of this closure plan should be done in collaboration with communities and according to best practices developed with industry, to be completed within one year of the Report of Environmental Assessment. If the plan cannot be successfully completed with consensus, then this would represent a significant risk and the Board should be required to intervene.

- 12) To ensure that this does not become an idle commitment, YKDFN ask the board to issue a measure that requires the project to develop a framework to gather and incorporate this knowledge in collaboration with the knowledge holders. The test of success for this measure will be met when consensus exists between the parties that a good faith effort has been made to address the intent.
- 13) YKDFN ask the board to require the commissioning of an Independent economic analysis that evaluates a series of likely scenarios to determine what options would provide maximum benefits for the residents of the Mackenzie Valley. If this analysis is in agreement with De Beers perspective, then permitting could begin, however if it is in conflict, then additional mitigations must be considered.

5.0 Attachments:

Attachment A – Land and Water Board Clarification for Wildlife Conditions in Land Use Permits (WLWB Chair of Wildlife Terms and Conditions Working Group)

From: Brett Wheler [brett@wlwb.ca]
Sent: August 28, 2012 9:24 PM
To: Todd Slack
Cc: 'Marc Casas'
Subject: RE: Wildlife and Land Use Permits

Hi Todd,

The MVLWB Terms and Conditions Working Group (WG4) is of the view that Land Use Permit conditions must be in accordance with the regulations (MVLUR). Conditions related to wildlife are thus limited to a focus on wildlife habitat.

WEMPs are focussed on monitoring of wildlife, rather than wildlife habitat, therefore, it is the view of MVLWB WG4 that conditions related to WEMPs are outside of the jurisdiction and authority of the LWBs as defined by the MVLUR.

The Proposed Wildlife Act for the NWT (consultation draft, Feb 2012) includes provisions for Wildlife Management and Monitoring Plans, which will be for approval by the Minister of ENR. MVLWB WG4 supports this proposal.

From: Todd Slack [mailto:tslack@ykdene.com]
Sent: August-27-12 8:20 AM
To: Brett Wheler
Cc: 'Marc Casas'
Subject: RE: Wildlife and Land Use Permits

Hi Brett. I appreciate the timeline trouble – I'm certainly suffering that myself.

However, if we could get an official answer by next Tuesday (the 4th), it would sure help inform the Gahcho Kue WEMP discussions – we're at an impasse on what is required to implement/enforce a WEMP. Technically, it would probably help on the Fortune file too, but that's less of a concern *at the moment*.

From: Brett Wheler [mailto:brett@wlwb.ca]
Sent: August-26-12 9:48 PM
To: Todd Slack

Cc: 'Marc Casas'

Subject: RE: Wildlife and Land Use Permits

Hi Todd, just reading this today after being away for 3 weeks. I'll be at fortune hearings this week, but I'll chat/think about your question a bit and get back to you.

You are correct that the Terms and Conditions Working Group is of the view that lup conditions must be consistent with MVLUR. This is also consistent with the legal advice we have received.

From: Todd Slack [<mailto:tslack@ykdene.com>]

Sent: August-15-12 12:52 PM

To: Brett Wheler

Cc: Chisholm, Veronica; Marc Casas

Subject: Wildlife and Land Use Permits

In recent discussions with De Beers, they informed me that they believe that the future WEMP will be submitted as part of the Land Use Permit and that they feel the LWB has the ability to review and enforce this. It is our understanding that there is nothing within the mandate or purview of the LWB that provide this ability in terms and conditions – much less the inspectors being empowered to enforce terms and conditions that are outside the LUR. Thus, the only statutory consideration that a wildlife effect monitoring plan will receive is at the MVEIRB stage.

I'm sending this to you as head of the wildlife working group for further clarification and confirmation. However, if you feel that this question is better directed to the MVLWB RO, I've CC'd Marc (just let me know if you're handing it off, so I understand where the answer will be coming from). If the LWB have the ability to enforce a 'WEMP' then that removes one of the significant issues before the Review Board.

Attachment B – Further LWB Clarification for Wildlife Conditions (MVLWB Executive Director)

From: Zabey Nevitt [zabey@mvlwb.com]

Sent: October 12, 2012 11:35 AM

To: Todd Slack

Cc: 'Marc Casas'; Brett Wheler; Stephen.Lines@debeerscanada.com

Subject: Re: Wildlife and Land Use Permits

Todd, thank you for your email.

Brett's email represents the views of the working groups established by the Boards. The working groups have been mandated by the Boards to develop clarity and consistency in a number of areas of Board operations.

Brett's view is entirely consistent with the Board's view. We cannot be inconsistent with any legislation, including regulations, under which we operate.

We note that WEMP (both monitoring and management plans) are a difficult area to define clear jurisdictional authority over, as drawing the line between wildlife/wildlife habitat can be tricky. However, through the work of the Board's working group and our discussions with ENR we will provide clarity on this issue and the extent to which our permit conditions can go.

I have attached for your information the Board's recent comments on the NWT proposed Wildlife legislation.

Attachment C – Email Correspondence to GNWT Asking for Clarity on their Position

From: Todd Slack
Sent: October 3, 2012 2:03 PM
To: Chuck Hubert
Cc: Gavin More; Kerri Garner; Rick Schryer; Stephen Ellis
Subject: GNWT undertaking response inconsistency

Hi Chuck. I've tried to be especially thorough here, sorry for the length.

Issue 1: Undertaking used to revise the evidence submitted to the Board – untested and unquestioned

I've just reviewed the GNWT response to their undertaking in the NICO project (#3, August 31st Transcript – actually in reference to matters of August 30th). And frankly, it's introduced a new/different position that we were not able to ask questions about during the hearing. In the simplest terms, it does not answer the question that Mr. Donihee asked on the 30th, for which an undertaking was eventually taken, to submit the recommendations made in during the ENR presentation but were not part of the powerpoint. This is not what was contained in the response to undertaking #3. To help the conversation, I've parsed the recommendations from the transcript (p260):

- "that we would like to see a recommendation to minimize the project-related impacts on wildlife species. And the Proponent shall commit to file with the wild -- a Wildlife Protection and Management Plan to the Renewable Resources Board, regulatory agencies, and/or Aboriginal governments responsible for the management of wildlife and wildlife habitat within the North Slave region.

This plan should address general wildlife protection and specific protection of wildlife species, incorporating both Western science and traditional knowledge. We request that this be done in a timely fashion."

- "The other one that we've been -- that we would like to see either as a Proponent commitment or Board recommendation to the Proponent, that the proponent, to support the continuation of the existing harvest management plans that are ongoing with the Aboriginal communities."

The undertaking response provided is not consistent with the evidence provided to the Board at the hearing. During their presentation, ENR asked the Board to make Recommendations, which are not the same as a commitment from the company. The former must be done to avoid significant concern or environmental impacts, the latter is an unenforceable promise from the proponent. The undertaking response not only suggests that a WEMP or continued support for harvest management are not essential to avoid significant concern and impacts, but goes on to suggest that this is not even a matter for the MVEIRB to consider – rather that it should be an issue for the LWB. Effectively, ENR is now not making any recommendations addressing wildlife to the Board.

If this were part of the hearing, YKDFN would most certainly have had further questions on this topic, especially in regards to the enforceability of the GNWT suggested approach. A commitment from the company is not enforceable, which is perhaps why GNWT wants the LWB to enshrine it as a condition in their LUP. However, this approach provides no more comfort than a commitment – wildlife related terms and conditions in a LUP are not enforceable. Had the proponent had made this statement on the record during the session, exposed to party analysis, we would have sought clarification on the credibility of the statement.

In point and fact have already shown this – on the 30th, Mr. Shafic Khouri stated that the Land Use Permit for Snap Lake showed that LUPs can be used as regulatory instruments for wildlife matters (p274). On p310 YKDFN responded – that we had already asked this very question of the LWB and confirmed that wildlife issues are not a matter for terms and conditions – only wildlife habitat is. As WEMPs are monitoring of wildlife rather than wildlife habitat, they are outside the authority of the MVLUR. During the hearing I stated that we had had this exchange with the Water Board and I'd be happy to put that on the record – had ENR provided a position such as they did in their response, I most certainly would have.

- *I have attached that email exchange and ask it to be filed to the registry.*

Issue 2: Clarification of new evidence/position.

I was tempted to ask for this to be part of the hearing next week – but I wouldn't want to take away from the people of Behchoko with a procedural issue, regardless of how important it may be. What I would like to ask for is that this response is opened to appropriate consideration and questioning from the parties.

I would like to ask for clarification from GNWT for the record:

- on p273, in response to a question from Board Counsel, ENR states that "such a program [the Wildlife Effects Monitoring Program] wouldn't be enforceable, I guess, by law. We - we have to rely on commitments and the good nature of the company to do that."
- However, in October 2nd [letter] filed to the registry, Mr. More states that the wildlife is within the mandate of the Land and Water Boards.

These positions are contradictory and YKDFN ask for a clear statement on what GNWT believes and what rationale or examples they have to support that position.

The GNWT goes on:

- iii) GNWT further states that section 26(1)(h) of the Mackenzie Valley Land Use Regulations is the appropriate tool for binding enactment of Fortune's WEMP commitment.
- iv) GNWT is parsing this section of the MVLUR, resulting in a change of the meaning: the full text is: "(h) protection of wildlife habitat and fish habitat;". This section does not 'consider the protection of wildlife' - it considers the protection of their habitat - a very important distinction that has been made readily clear to GNWT over the years. It is not appropriate to simply parse legislation as they have here.

I ask Mr. More to provide explanation and legal justification on this interpretation, especially in light of the LWB statements. Ideally, this will include examples of not just wildlife related terms and conditions, but actual examples of these being enforced absent an Environmental Agreement.

To provide further clarification to this Board to aide their decision process, earlier today I wrote to AANDC's Operations District Manager for the South Mackenzie, asking for their interpretation. As we have stated in the past, YKDFN was informed by Darnell McCurdy (former director) during a meeting of the INAC-Akaiitcho Consultation Working Group that these types of terms and conditions were not enforced. Earlier today YKDFN sought written confirmation of this for the Board [there is the possibility that this will be a moot question].

- *I would like the opportunity to file the AANDC response to the Board even if the registry has been closed for other issues.*

Chuck, I understand that this may not be best handled through email, but I'm looking for a solution and guidance here - what is the road forward? It doesn't seem that you should have the opportunity to refine answers after the hearing without the matter being tested - else parties will continuously seek this outcome. The undertaking response is inconsistent with the request and the evidence that GNWT provided during their questioning. I appreciate that it's late in the process and if necessary this could become the focus of closing comments - but it doesn't seem right to be able to submit a new position that contradicts the evidence presented during the hearing after the fact - when it can't be opened to questioning.

I've cc'd some of the parties to ensure transparency...what is important to me is that we can establish the responsibility (or lack thereof) for once and for all. It does no good for regulators and boards to play hot potato with an issue this important as this and it would only be worse if the result was that false comfort is provided. For this issue, it is not acceptable for there not to be appropriate enforceability or transparency.

If anyone has any questions or if you think I have something wrong, just call. As I said, the important thing is firmly establishing what the reality surrounding enforcement and responsibility is.