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May 22, 2024

Dr. Kathy Racher
Executive Director
Mackenzie Valley Land and Water Board
4922 – 49th Street
Yellowknife NT X1A 2P6

Dear Dr. Racher:

RE: Cantung Mine – Care and Maintenance Water Licence Application (MV2023L2 - 0001) Information Request #3 - Łíídlıı Kúé First Nation Response Submission

Background

North American Tungsten Corporation Ltd. (NATCL) holds a type A Water Licence (MV2023L2-0006) for the Cantung Mine project, which is currently in a state of on-going care and maintenance.

NATCL has applied for a type B Water Licence (MV2023L2-0001) to continue the care and maintenance activities. Our understanding is this application would only cover care and maintenance activities and that if NATCL (or a successor) wished to recommence mining activities at the project site at some point in the future, they would need to apply for a type A water license in order to do so.

During the public review of NATCL's type B Water Licence Application, and in respective responses to Information Request #3, NATCL, Crown Indigenous Relations and Northern Affairs Canada (CIRNAC), and the Government of the Northwest Territories – Department of Environment and Climate Change (GNWT-ECC) provided different views on whether the

proposed activities required a type A or B licence, and differing views on whether the legislative framework generally permits downgrading from a type A to a type B licence.

Our understanding is that the Board intends to make a ruling on these matters in the context of the present license application, which could affect other parties throughout the Mackenzie Valley, including the Łíídlı̨ı̨ Kų́ę́ First Nation (LKFN).

The Mackenzie Valley Land and Water Board (the MVLWB) has requested comment from interested parties on Information Request #3 by May 14, 2024.

Information Request #3 – First Question

"Does a LWB have the jurisdiction to issue a type B licence that would replace a type A licence in situations when the activities associated with an appurtenant undertaking only exceed type B licencing criteria under the regulations, and will no longer exceed type A licensing criteria?"

On this first question related to jurisdiction, LKFN does not have particularly strong views on whether or not the legislative scheme prohibits changing from a type A to a type B licence during the life cycle of an applicable project. On this question, we offer the following:

1) Under section 72.15(1)(a) of the *Mackenzie Valley Resource Management Act* (MVRMA), the MVLWB has the explicit jurisdiction, where it would be in the public interest to do so, to require public hearings as part of type B licence applications (whether the application is for issuance, renewal, amendment, or cancellation of type B licences). As a matter of general principle, LKFN submits that in the context of mining and milling projects whose activities were, at one point in time, licenced as type A-level activities, regardless of whether a present application is for a type A or type B licence (and regardless of whether it is for a new licence, or a renewal/amendment/cancellation), it will very often be in the public interest to hold public hearings when the MVLWB is considering such licence applications, as such project sites will often be substantially contaminated, will often contain ongoing tailings storage, etc..
2) LKFN wishes to reinforce the critical principle that whether or not a licence in such circumstances is categorized as a type A or type B licence should have no bearing under any circumstances on the nature or extent of the conditions of the licence that speak to minimizing and avoiding adverse effects and impacts to Treaty and Aboriginal rights.
3) We wish to generally state that this Information Request #3 provides yet more compelling evidence of the need for legislative reform on this and related matters when it comes to the

lack of clarify in the MVRMA and the *Mackenzie Valley Federal Areas Water Regulations* (the Regulations).

Information Request #3 – Second Question

"Based on your response to question (a), does the MVLWB have the jurisdiction to issue a type B licence to NATCL in response to its Application?"

We have reviewed NATCL, CIRNAC and GNWT-ECC's response submissions to this question.

We note that both CIRNAC and GNWT-ECC are taking the position, for differing reasons, that the present licence is best categorized as a type A, basing their positions entirely on the activities NATCL is seeking to have licensed, and on the relevant licensing criteria set out in Schedule V of the Regulations.

We agree with and support the general consensus position among CIRNAC and GNWT-ECC that this matter is best addressed as a type A license application, however our rationale is focussed on three key reasons: the need for monitoring continuity, the requirement of Indigenous Guardians as part of the ongoing site monitoring within the water license, and the need for water discharge flexibility. LKFN strongly prefers that the environmental monitoring sites be maintained at all the current locations and frequencies for data continuity purposes to support decision-making for final closure. It is a standard expectation from LKFN for all water licenses to require local Indigenous Guardians be participants in ongoing environmental monitoring within our Traditional Lands. And in light of the highly unpredictable and widely varying volumes of precipitation (snow and rain) from year to year which is exacerbated by climate change, we see the operational flexibility provided by a Type A license as prudent from a site management and environmental protection perspective. If there ever happened to be excess water on site that risked causing the failure of the tailings facilities, we would not want water license imposed limitations to prevent the pumping of water that would avoid a more catastrophic failure of the tailings facilities or other key infrastructure on site..

We strongly recommend that a public hearing be held in the context of NATCL's application whether it proceeds as a type B application, or whether NATCL is required to re-submit a type A application. There is broad public interest – including among LKFN members – in the manner in which the ongoing activities at Cantung will be licenced. The ongoing potential for adverse environmental effects and impacts to LKFN rights and interests is substantial. Furthermore, there are historical (and ongoing) relationship issues between LKFN and the proponent, in particular related to fair, equitable and transparent contracting and procurement at the Cantung Mine site which make LKFN question the extent to which it can trust the licensee in this instance in the years to come. All things considered, it would be inappropriate and not in keeping with the honour of the Crown for the MVLWB to proceed with this application without a full public hearing.

Finally, and relevant to this question of MVLWB's jurisdiction to issue the licence in this matter, LKFN recommends that MVLWB include in the license clear conditions requiring NATCL to not only give preference, in the context of contracting opportunities whenever goods and services are required, to businesses owned by impacted Indigenous communities, but requiring NATCL to provide regular public reporting demonstrating that whenever bid packages for goods or services

go out, that such opportunities are made preferentially available, in advance, to the business arms of all impacted Indigenous communities. The Treaty and Aboriginal rights of LKFN have been and continue to be impacted by the Cantung mine. And while LKFN's primary concern is the protection of the environment, they also wish to have the benefit of preferential employment and contracting opportunities associated with the mine (such items being important and ongoing incidents of the Duty to Accommodate owed by the Crown to LKFN and others in relation to this licence application). In the view of LKFN, there is precedent with this mine and with NATCL of favouritism when it comes to how they treat the various impacted communities and their businesses. LKFN's recommendation in this paragraph is aimed at ensuring this does not continue to happen in the future.

Conclusion in Sum

- LKFN does not feel strongly that the legislative scheme here prohibits ever pivoting from a type A to a type B licence. That said:
    - LKFN recommends a public hearing as a critical component of the licencing process in this instance, whether NATCL's application ends up being characterized a type A or a type B.
    - LKFN wishes for it to be made abundantly clear that whether or not a licence is a type A or B has no bearing under any circumstances on the nature or extent of the conditions of the licence that speak to minimizing and avoiding adverse effects, and impacts to Treaty and Aboriginal rights, which should all be robustly tailored to context in each instance.
    - In the context of a project which was once a type A, and then becomes a type B, it will typically be in the public interest for licencing applications to trigger a public hearing in any event, given the nature of the genesis project, and the likelihood of ongoing, substantial liabilities and environmental risks.
- LKFN recommends a specific licence condition requiring NATCL to preferentially contract with businesses owned by impacted Indigenous communities, to treat all such businesses equitably, and to report publicly on a regular basis in relation to such equitable procurement practices.
- LKFN also recommends a specific license condition requiring the use of Indigenous Guardians as part of the ongoing monitoring at site.
- LKFN also believes that the number of monitoring sites on site should not be reduced during the care and maintenance period to maintain continuity of data gathering.