

March 2, 2022

Department of the Environment
Mining and Processing Division
351 Saint-Joseph Boulevard
Gatineau Quebec K1A 0H3

Sent via email

Dear Lorie Cummings,

**Re: *Canada Gazette*, Part I, Volume 156, Number 1, January 1, 2022,
Notice respecting the Agreement on the Equivalency of Laws Applicable to Certain Metal and
Diamond Mines Located in the Northwest Territories**

The Land and Water Boards (LWBs) of the Mackenzie Valley (Gwich'in, Sahtú, Wek'èezhii, and Mackenzie Valley Land and Water Boards) reviewed the *Canada Gazette*, Part 1 posting providing notice of an Agreement on the Equivalency of Laws Applicable to Certain Metal and Diamond Mines Located in the Northwest Territories (the Agreement).

The proposed Agreement seeks to create equivalency on the application of the federal *Fisheries Act*, RSC 1985, c F-14 and the *Waters Act*, SNWT 2014, c.18 to certain metal and diamond mines in the Northwest Territories.

The LWBs are co-management tribunals responsible for issuing licences for all effluent discharges from metal and diamond mining within their jurisdiction, using an evidence-based approach. In hearing evidence and establishing licences, the LWBs consider Contaminants of Potential Concern (COPC) for the specific project and set effluent quality criteria (EQCs) for each COPC for the project.

The LWBs have the following comments on the proposed Agreement.

REQUIRING PARAMETER LIMITS/EQC IN LICENCES

The proposed Agreement suggests that all licences issued by LWBs would be required to incorporate limits for all parameters under the Metal and Diamond Mining Effluent Regulations, SOR/2002-222 (MDMER) that are at least as stringent as the limits set out in the MDMER.

It is not clear that in preparing and negotiating the proposed Agreement that the parties gave thought to the unique co-management framework that exists in the NWT, the requirement for evidence-based decision making, and the requirements imposed on the LWBs as administrative tribunals. Co-management

is a fundamental part of environmental decision making in the NWT. This process requires that interested parties, including proponents, First Nations and local Indigenous and non-Indigenous residents have the opportunity to participate in hearings and provide evidence before the LWBs to inform the LWBs' decision making about a licence. Co-management and administrative law require that all LWB decisions reflect the evidence presented for the specific site and project before the LWB.

Requiring the LWBs to accept and apply all MDMER limits, even where the evidence indicates that one or more parameters are not present or of concern, removes the evidence-based nature of the hearing, and turns the LWB process into an exercise that simply copies the MDMER in its entirety into every licence. This is contrary to the applicable land claim agreements and to the co-management framework they establish.

The LWBs understand that they cannot set an EQC for a parameter at a higher concentration than permitted under the MDMER. However, under the LWBs' existing evidence-based approach, where there is no evidence that a parameter will be discharged from a project, the parameter is not included as an EQC. EQCs are reserved for those parameters that are determined, based on evidence, to be a COPC for the specific project before the LWB. From an evidence-based perspective, where a parameter is not relevant, because it is not a COPC or is not predicted to increase because of the specific project, the parameter should not be included in the licence.

This is also consistent with s. 27(5) of the *Waters Act*. Under this section, where the LWB includes a parameter in a licence, that parameter cannot be less stringent than the regulations under the *Fisheries Act*. There is no obligation on the LWBs to incorporate the entirety of the MDMER or other regulatory limits into every licence. Further, to do so would be contrary to the evidence-based approach required of the LWBs.

Inclusion of parameters that are not present or relevant also increases the length and complexity of the licence and may add additional regulatory burdens on proponents, LWBs, and the Government of the Northwest Territories ("GNWT").

AMENDMENTS TO LICENCES

The proposed Agreement suggests that the GNWT can require that existing LWB licences be amended. There is no authority under the *Waters Act* nor any other applicable legislation to allow the GNWT to directly amend a licence or compel the applicable LWB to amend the licence.

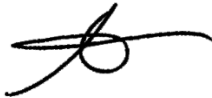
APPLICABLE LEGISLATION

The proposed Agreement includes references to both the *Waters Act* and the *NWT Waters Act*. The *Waters Act* replaced the *NWT Waters Act* in the Mackenzie Valley Region following devolution. The *Waters Act* is the applicable act for purposes of the proposed Agreement.

CONCLUSION

LWB staff would be pleased to discuss these comments further. Please feel free to contact Dr. Anneli Jokela at (867) 765-4588 should you require more information or to initiate a meeting.

Sincerely,



Leonard DeBastien
Executive Director
Gwich'in Land and Water Board



Shelagh Montgomery
Executive Director
Mackenzie Valley Land and Water Board



Paul Dixon
Executive Director
Sahtú Land and Water Board



Ryan Fequet
Executive Director
Wek'èezhìi Land and Water Board