

January 23, 2004

TO Penny Anderson
NRCan

FROM: Dr. David Peerla
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RE: Victor Diamond Project, De Beers Canada Exploration Inc., FEAI Reference
Number 40658

Draft Guidelines for the Conduct of a Comprehensive Study and the preparation of a
Draft Comprehensive Study Report dated December 12, 2003

Find below my preliminary comments on the Draft Guidelines for the Conduct of a
Comprehensive Study and the preparation of a Draft Comprehensive Study Report
dated December 12, 2003.

Context

The Nishnawbe Aski Nation is a political body that represents 49 First Nations, many of
whom are signatories to Treaty No. 9. The Victor project is located within the boundaries
of Treaty No. 9 and will affect the entire Nishnawbe Aski Nation.

The multinational mining corporation De Beers proposes to construct Ontario's first
diamond mine in the intact ecosystem and traditional territory of First Nations who are
the most disadvantaged communities in the province. The environmental and social
sensitivity of the Victor project is at the highest level and this fact must be recognized in
the environmental assessment process.

The community located closest to the proposed mine, the Attawapiskat First Nation, is
currently fully engaged in an impact and benefit agreement (IBA) negotiation process
with De Beers and, in my view, has a limited capacity to both negotiate an IBA and
participate in the Environmental Assessment process at the same time.

The Responsible Agencies will need to be sensitive to coordinating the Environmental
Assessment process and the Impact and Benefit negotiations. There is a danger that the
economic benefits attached to the IBA will overshadow the community need and
capacity to respond to the environmental assessment process and this process issue
must be addressed.

Draft Guidelines Notification Process and Response Timelines.

On November 24, 2003, CEAA held a Project Planning and Environmental
Considerations Northern Ontario Information Session in Thunder Bay, Ontario. At that
session, acting in my role as the Mining Coordinator for the Nishnawbe Aski Nation, I
advised Agency officials of my interest in the Victor project and in particular the Draft
Guidelines for the Conduct of a Comprehensive Study and the Preparation of a Draft
Comprehensive Study Report. I requested that CEAA keep me informed of progress on
the Draft Guidelines. Despite my request I learned that the Draft Guidelines had been
released for public comment purely by accident many days after the Draft Guidelines

were publicly released. During the Christmas Holidays I heard a CBC radio report which referenced the Victor Project Environmental Assessment. Following the Christmas vacation I followed up with the Agency and officials of the provincial Ministry of Northern Development and Mines (MNDM) and ultimately learned that the Draft Guidelines had been issued on December 12, 2003. Upon contacting the Agency I was directed to an official at Natural Resources Canada and ultimately received a copy of the Draft Guidelines electronically.

There are three significant points that arise from these facts.

A) In my view, federal agencies have affirmative obligations to seek out First Nations and First Nations treaty organizations and tribal councils in a proposed project region and provide timely notification. In this instance the Agency failed to send a letter, notice, or copies of documents regarding the Draft Guidelines to a representative of an umbrella First Nation organization representing the treaty area of the project who had previously expressed an interest in receiving such documents. I request that this failure of process be remedied so that in future I receive timely notification of any and all Victor project environmental assessment documents.

B) The Draft Guidelines were released during the Christmas season. It is an institutional norm in First Nations organizations that offices are closed for a two-week period over Christmas. Accordingly, I request that the comment period be extended, at minimum, 10 working days and preferably until the Draft guidelines are available in Cree and distributed in the James Bay region.

C) The proposed project is being developed in the traditional territory of the Nishnawbe Aski Nation in one of the most remote regions of Canada. The project area is only accessible year round by air, and seasonally by winter road and barge. The proposed mine site is currently accessed by helicopter.

While the establishment and manner of operation of the public registry is subject to the exercise of discretion by the responsible authority, convenient public access to the registry must be ensured. Reasonable means, e.g. e-mail, faxes, placing a set of timely material filed in the registry with an agent in close proximity to the projects for access by the First Nations, must be provided. Given this context it is essential that all the Project documents be electronically available and some careful thought given to the location of satellite registries in Mushkego and more generally in the Nishnawbe Aski Nation.

As a matter of environmental justice it is appropriate, that the EA process translate crucial public documents, notices and hearings, into Cree for the limited English speaking populations in the region. The RAs must work to ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the First Nations, tribal councils and the Nishnawbe Aski Nation.

The following points respond to the numbered sections of the Draft Guidelines.

3.0 Participation Plan

The Nishnawbe Aski Nation is not explicitly mentioned as a First Nation participant in the participation plan. This is a serious deficiency.

The Nishnawbe Aski Nation Chiefs in Assembly have unanimously ratified a consultation policy that explicitly provides for notification of the Nishnawbe Aski Nation at the same time affected First Nations are notified. This has not occurred.

We need to draw a distinction between "participation" and consultation. Consultation in a First Nations context is much more than public participation. Public participation process, is an information gathering and sharing exercise, and consultation, is a government-to-government process that requires greater involvement and decision-making by all parties.

The unique legal status of First Nations creates an important requirement for governmental entities, and other stakeholders, to understand that the federal government must consult directly with First Nations when contemplating actions that may affect traditional lands, resources, members, and welfare. First Nation sovereignty is thwarted when federal government Agencies and departments attempt to treat First Nations in the same manner as any other interested members of the public, in a conventional public participation process. Rather, in recognition of their status as sovereign nations, the federal government should collaborate directly with First Nation governments in a consultative process, which leads to decision-making.

The optimal goal of First Nations consultation should be to achieve consensus between First Nations land federal officials on how to identify, consider, and address issues or concerns. These meetings should be supplemented with broader public meetings to keep all First Nations members informed.

Whatever the specific requirements, it must be stressed that federal agencies have affirmative obligations to seek out First Nations and provide meaningful opportunities for consultation. This generally means much more than sending letters, notices, and copies of documents to First Nations and requesting comment. Rather, there must be outreach and concerted efforts to provide for meaningful involvement in the decision-making processes

4.2 The CSR

The CSR needs to provide a mechanism for meaningful community involvement Beginning with the initial stages of the EA throughout the entire study. I wish to emphasize the fact that at this point in time we have no capacity to undertake independent technical review of the issues, and therefore First Nations and their organizations will have no substantive role in the authorship of the CSR and the determination of recommendations. This is a process issue that needs to be addressed.

5.2 Spatial and Temporal Boundaries

With respect to the boundaries used for cumulative effects assessment, we request that an ecological, scientific and cultural basis be given to the boundaries selected. The boundaries must come with an explanation and justification. For example, the project will likely have a significant economic and social effect on the staging area for mine development. These impacts may form part of the rationale for defining particular spatial and temporal boundaries.

It is well accepted that Traditional Knowledge can contribute to scoping the review by identifying the key species or important ecological features of the affected landscape, and historical or cultural features that may need to be considered. It is not obvious how traditional knowledge formed a part of the scoping exercise.

8.2 Surface and Ground Water and Sediment Quality

Since the proposed water treatment is one of most critical variables in the protection of the aquatic environment from the project, examination of proposed water treatment plant, as well as viable alternatives for water treatment, should be a priority goal for both De Beers and the government. An independent review of water treatment processes available to handle the array of substances that need to be removed should have been undertaken by government. Establishing the viability of the proposed treatment, given what is at risk, is an environmental assessment task, not a regulatory one.

We recommend a worst case scenario examination of the effects of chloride loadings in the proposed water management approach.

On a more general theme. The role of independent and specialized expertise is invaluable to a review such as this because the proposed project will demand an engineering sophistication that is not common to the Canadian experience. Independent expert review is critical not only because it makes the assessment more technically robust, but also because independent critical thinking can be seen to have been brought to bear on substantive issues in a consistent and thorough way.

7.0 Description of Existing Environment

We join our colleagues at the Mushkegowuk Council in asserting that First Nation governance needs to be recognized as part of the existing environment, including local First Nations, Regional (Mushkegowuk Council) and the NishnawbeAski Nation.

8.16 The Deep Sea Tankers, Lightering , Accidents and Mitigation

De Beers propose to transport 50ML of fuel every year during operations by deep sea tankers into James Bay, and onward lightering by barge to the Attawapiskat barge berth. I am advised by the Mushkegowuk Council that they would prefer De Beers to purchase electricity from Five Nations Energy Co. An issue for De Beers is the reliability and affordability of electric versus diesel power.

In this context, it is important that the Comprehensive Study goes beyond simply the costs of the alternatives and takes a "hard look" at the entire environmental life cycle of the power supply proposed for the project. Specifically, we are very concerned about De Beers oil spill prevention and response planning.

In our view, key elements of the assessment will include:

- The process of monitoring fully laden tankers as they pass through James Bay.
- The number of escort vessels to accompany each tanker while passing through the entire Bay.

- The capability of escorts to assist the tanker in the event of an emergency, such as a loss of power or loss of rudder control.
- The requirements for specially trained marine pilots while transiting the Bay.
- The Weather criteria for safe navigation.
- Contingency planning for oil spills in Bay
- A worst case scenario for a spill of 10 million gallons.
- An assessment of spill drill Frequency.
- An assessment of the ability of proposed skimming systems to remove oil from the water.
- An assessment of the place to put the oil-water mix in the event of spill.
- Size of containment boom necessary in the event of a spill
- Stockpile of Dispersants and systems to apply them from helicopters, airplanes, and boats.

There are no defined shipping lanes within Hudson Bay or James Bay.

Lightering is not unusual, especially in the Gulf Coast; more than a quarter of the 7.5 million barrels of petroleum imported each year to the United States is lightered. The procedure is less common, but not rare, in the Northeast.

Unfortunately, we have no experience with lightering in James Bay and some experts are of the opinion that lightering is the most dangerous operation for tankers to perform. It will be essential to have very strict rules for the lightering in an area that is demonstrably ecologically sensitive and where accidents would have disastrous consequences.

Further, we have concerns regarding the financial assurance De Beers would provide in the event of a spill.

Finally, it is reasonable to assess the effects of fuel consumption by the project on Canada's ability to meet its international obligations to reduce greenhouse emissions under the Kyoto Protocol to the U.N. Framework Convention on Climate Change.

8.17 Cumulative Environmental Effects.

Mining Exploration

We were encouraged to find that the Draft Guidelines require De Beers to evaluate the effects of exploration. In my view, there is a direct linkage between mining exploration and the Victor project. It is a given that "RAs should give particular attention to the selection of future projects where certain and reasonably foreseeable projects may have an effect on the same valued ecosystem components as the project under assessment,

where rapid development of the project area is anticipated, or where particular environmental sensitivities or risks are involved.” One of these activities is mining exploration.

The Victor Project has triggered an exploration boom in the region. Exploration is ongoing in an area of more than 10,000 square kilometers in the James Bay Lowlands. Mining exploration in the region has been so intensive that there is anecdotal trapper evidence to suggest that animal movements have been affected by exploration activity.

In the assessment of mining exploration there will have to be sensitive consideration of the traditional territories of individual Nishnawbe Aski First Nations in the region and the recognition that overlapping territories may exist.

8.11 Current Uses of Lands and Resources for Traditional Purposes by Aboriginal Persons

The current uses of lands and resources for traditional purposes have evolved out of a system of family hunting territories. We believe that it is essential that the EA take a more historical approach to examining the uses of lands and resources in the region and that the Draft Guidelines be amended to the more culturally sensitive phrase and analytically appropriate "Current and Historic uses"..

The Attawapiskat regional system of family hunting territories has been well studied in the past dating back to the work of the American anthropologist J.M Cooper. A comprehensive assessment of the current land use and occupancy in the region must include a consideration of the academic work (including maps of traditional territory) of Cooper, Honigmann, Preston, Bishop, Morantz and Cummings.

It may be important to recognize that the Attawapiskat First Nation were first aggregated for administrative purposes by the Department of Indian Affairs and formally detached from the Albany Band for Treaty payment in 1929.

The preferred methodology in the Nishnawbe Aski Nation for land use and occupancy mapping is Chief Kerry's Moose: A guidebook to land use and occupancy mapping, research Design and data collection.

The production of the CSR Report.

As the text in the drafts CSR report evolve from one version to the next, the wording will invariably change. Accordingly we request that, in the interests of transparency, when changes are made that an explanations be provided about why changes were made, or who authored them. We want extent of the proponent's involvement in the drafting process to be apparent to all participants.

Next Steps

I would like to propose a consultative process for First Nations, Tribal Councils and Nishnawbe Aski Nation involvement in the Environmental Assessment of the Victor project. The first step would be to agree on process. First Nations and their representative organizations face a common problem in lacking the capacity to effectively participate in and seek independent scientific and technical review of the complex elements of the project. I suggest CEAA facilitate discussions with all First Nations parties concerned to design a process to support the capacity of concerned First Nations to conduct an independent scientific and technical review of the project. It is in

the interest of all parties to support the First Nations capacity to undertake independent technical review of the issues, and thereby play a substantive role in the authorship of the CSR and the determination of recommendations.

Yours sincerely,

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