



INDEPENDENT ENVIRONMENTAL MONITORING AGENCY

P.O. Box 1192, Yellowknife, NT X1A 2N8 ■ Phone (867) 669-9141 ■ Fax (867) 669-9145
Website: www.monitoringagency.net ■ Email: monitor1@yk.com

February 15, 2011

Letter to Society Members

Re: Update on BHPB's Closure Plan for Ekati Mine

We are writing to update you on the current status of BHPB's *Closure and Reclamation Plan* and the outcome of the public hearing held on the plan in Behchoko last September.

On December 10, 2010, following the public hearing, the Wek'eezhii Land and Water Board (WLWB) gave conditional approval to a new version of the company's closure plan for reclaiming and closing the Ekati diamond mine.

A revised closure plan for Ekati was a long time coming. The last approved plan was the 2000 version, and it is long out of date with current conditions at the mine. An overhaul to the plan was needed and, despite attempts to get approval for a revised plan over the past ten years, this was only achieved by the Board's December 2010 decision. The fact that the latest approval is 'conditional' means that BHPB now has to fulfill certain requirements specified by the Board before the plan can be considered approved. When this is done, there is a requirement for the company to provide another update three years from when this plan is accepted.

The most significant and noteworthy of these required conditions has to do with the Board's decision that BHPB must plan for the re-establishment of fish use of the flooded pits at the end of mining - something the company had been opposing for the past three years or so. IEMA, and all the other parties involved in the closure planning process, argued that it was better to get this requirement into the closure plan. As a result, we are very pleased that the Board has made this decision, and has done so comprehensively in its *Reasons for Decision* (which you can download from <http://www.monitoringagency.net/LinkClick.aspx?fileticket=4O9svBIGpsw%3d&tabid=36&mid=447>)

It is an important, precedent-making decision, for a number of reasons.

First, it reflects the Board's strong intention to make sure that when operating mines are shut down at the end of their productive life, environmentally sound goals for mine reclamation will be pursued. This means that mine sites will not simply be left in conditions that don't adversely affect the environment, but will be restored to levels where they can become functioning, productive parts of the local ecosystem once again - where plants, wildlife, fish and people will regain some beneficial use of the reclaimed areas. These are the goals stated by BHP Billiton in the closure plan and we are pleased to see them as part of the approved plan.



Second, the decision confirms the overarching importance of land claim agreements (in this case the *Tlicho Agreement*) in providing the authority and guidance for the co-management regulatory bodies established under them to make decisions that protect the interests of the people who live there. The Board recognized that the starting point for determining the proper closure objectives had to be consistent with the traditional and cultural values expressed in the *Tlicho Agreement*, which requires the WLWB to take into account the importance of conservation to the Tlicho First Nation well-being and way of life when it exercises its powers.

Importantly, the Board noted that ‘conservation’ was defined in the *Tlicho Agreement* as “the maintenance of the integrity of ecosystems by measures such as the protection and reclamation of wildlife habitat, and, where necessary, restoration of wildlife habitat.”

Third, although the matter was not determined by a court, any uncertainty about whether the Board had the authority to compel mining operators to provide for specific closure conditions to be in place at the end of a mine’s productive life has been significantly reduced through this process.

Finally, the existence of the 1996 *Fish Habitat Compensation Agreement* between BHPB and DFO dealing with the lakes destroyed by the development was found not to significantly constrain the Board’s authority to compel the company to reclaim the pit lakes for fish and fish habitat. The *Compensation Agreement* dealt with the lakes lost to mining, but has little relevance in setting reclamation objectives for potential fish-bearing waters at the end of mine life.

As a result of the Board’s directive, BHPB must now plan for reclaiming the pit lakes in such a way that they will be useable by fish. At the time when the quality of water flowing out of the flooded pits is not harmful to aquatic life (as most parties expect to be the case), the company will have to ensure that fish can move freely upstream into the pits so that they have an opportunity to re-establish themselves over time in these areas. In addition, the sides of the pits are to be re-sloped so that shallow underwater areas can provide for plant growth and the development of fish habitat over time.

As the Board found, the 2000 closure plan, along with other company documents, had indicated that it was BHPB’s intention to provide for fish habitat in the flooded pits at end of mine life. This was the situation going into the closure plan review process that began in 2007. Not long into this process it became apparent that BHPB had decided that it would install permanent barriers to fish trying to enter the pit lakes once they were connected to the outflow streams. This position was seen as inconsistent with the stated closure goal of attempting to restore the mine site to viable, self-sustaining ecosystems where practicable, and was therefore opposed by all the other parties involved in the closure planning process, including the Agency.

With this disagreement evident, the closure plan moved towards a public hearing in the spring of 2009. Prior to the hearing, however, BHPB filed a motion with the Board challenging the Board’s jurisdiction to specify measures for restoration of fish and fish habitat in the pit lakes. The Board put the closure plan review hearing on hold, and set another hearing to consider BHPB’s jurisdictional challenge. That hearing, held in July

2009, resulted in the Board's finding that it did have the authority to require the company to create fish habitat as a part of the closure program.

BHPB disagreed with the Board's finding and had it judicially reviewed by the Supreme Court of the Northwest Territories in August of 2010. The court found that, since the WLWB had not yet made a decision on the substantive issue of fish habitat in the pit lakes, the company's action before the court was premature and it turned the matter back to the impending public review process.

At that point, the WLWB moved ahead with the public hearing on the closure plan in September 2010 at Behchoko. There, all the intervening parties, including IEMA, maintained their original position that BHPB ought to restore fish use in the pit lakes at mine closure, and that the Board had jurisdiction to compel the company to do this. BHPB also maintained its opposition to all this, and presented three arguments in attempting to convince the Board that it could not, and should not, force the company to provide for fish use and habitat in the flooded pits:

1. the 1996 *Fish Habitat Compensation Agreement* it had with DFO took precedence over the Board's jurisdiction;
2. requiring reclamation of fish habitat would be unfair and unreasonable; and,
3. there was no evidence to show that restoring fish habitat in the pit lakes would be successful.

In considering BHPB's arguments in its *Reasons for Decision*, the Board spelled out in some detail why it did not accept each of these arguments and, in the end, directed the company to get on with the job of providing for fish use and fish habitat in the pit lakes reclamation.

The Board also resolved several other issues that had arisen during the closure planning process and were still a source of disagreement between BHPB and the other intervenors by the time of the public hearing.

One of these issues dealt with the lack of detail of the reclamation research plans. There are some 26 of these plans that form part of the overall closure plan. Each deals with some aspect of mine closure for which uncertainty exists, and for which additional research or study is necessary before the closure plan can be finalised. The Agency and other parties were not convinced that some of these plans adequately described the research needed to address the uncertainty, or that sufficient time has been allowed for the research to be completed so that it could reliably form part of the final closure plan.

The Board determined that the best way of solving the 'lack of detail' issue was to require BHPB to produce annual reports on progress made that year for each of the reclamation plans. In addition, there were two research plans dealing with the reclamation of kimberlite tailings in Long Lake which had received specific comments of concern from the IEMA and INAC. The Board also directed BHPB to revise these.

Another unresolved issue was the reclamation standard that would be applied to those areas that had been contaminated by spilled hydrocarbons during the mine operation. BHPB was arguing for the 'industrial standard', while the IEMA was arguing for the 'agricultural

standard’—a higher standard that would allow for use of the remediated site by wildlife to safely consume vegetation growing there. The Board directed BHPB to incorporate the agricultural standard in its closure plan.

A final unresolved issue dealt with wildlife—specifically, whether closure objectives should be set for each mine component (e.g., waste rock dumps) as the Agency recommended, or whether BHPB’s single objective to cover the entire mine site was adequate. The Board directed BHPB to develop component-specific objectives and criteria for wildlife protection.

Despite the process being a long and taxing one, all parties, including BHPB, should take great satisfaction that the closure plan for Ekati is developing into a robust and comprehensive document. The IEMA is tremendously encouraged by the Board’s decisions on these matters, and by its apparent willingness and ability to take on these tough issues and work its way through the complexities in a rigorous way. In the end, the WLWB produced a solid, transparent and accountable product that provides for very high standard of mine reclamation and ensures protection of the lands and waters of Wek’eezhii for the benefit of the people who live here.

BHPB, too, should take significant comfort from the result, and from the knowledge that not only is its closure plan vastly improved, but that it has gained a much greater level of community acceptability through this process. We believe that the plan is evolving into a ‘state of the art’ closure plan, and that it will enable reclamation at the Ekati mine to be a model for mine closure in Canada.

We would be pleased to respond to any questions or concerns that any of our society members might have in regard to the closure plan and the issues it raises. Do let us know if we can be of any further assistance on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Ross". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Bill Ross
Chairperson