

MEDIATION REPORT

Participants:

BHP Billiton Diamonds Inc. (“BHPB”);

Government of the Northwest Territories (“GNWT”), represented by the Minister of Environment and Natural Resources;

Government of Canada (“Canada”), represented by the Minister of Indian Affairs and Northern Development;

and

Independent Environmental Monitoring Agency (“IEMA”);

History and Procedural Matters

This mediation occurred as a result of operational differences among the above-listed four participants in the following four areas:

- IEMA¹ mandate
- workplan
- budget process, and
- core budget

Two basic issues have in my judgment led to the request for dispute resolution. First, the IEMA has had difficulties with BHPB because, in IEMA’s view, BHPB has attempted to interfere with the IEMA’s independence; BHPB’s view, in response, was that seeking explanation for large budget increases had nothing to do with independence. Second, there was an issue concerning government engagement in the resolution of budget dispute matters in the Environmental Agreement.

1 **Independent Environmental Monitoring Agency.** Canada, the Government of Northwest Territories (NWT) and BHP Billiton Diamonds Inc. have established an Independent Environmental Monitoring Agency (IEMA). The IEMA serves as a public watchdog for the regulatory process, and collects and reviews reports on environmental data, environmental effects, monitoring programs and the integration of traditional knowledge and experience into environmental plans.

The history of the dispute spans at least back to 2003, and although various attempts to hold meetings were made, it was not until late 2005 that BHPB exchanged letters² with Canada and the GNWT, formally leading, by agreement, to the mediation meetings.

The authority for the Dispute Resolution option, of which mediation is one alternative, comes from Article XIV of the Environmental Agreement³ between Canada, GNWT, and BHP Diamonds. Article XIV, in relevant part, states:

XIV. Dispute Resolution

Except as expressly provided otherwise in this Agreement, Canada, the GNWT and BHP hereby agree that all matters of dispute arising out of this Agreement shall be resolved as follows:

1. “Canada, the GNWT and BHP shall act in good faith and promptly engage in discussions to resolve any dispute;
2. In the event that any one of Canada, the GNWT or BHP determine that the dispute cannot be resolved through discussions, Canada and the GNWT shall appoint, in Consultation with BHP, a mediator to assist in further discussions to resolve the dispute;
and
3. In the event that any one of Canada, the GNWT or BHP determine that the dispute cannot be resolved satisfactorily with the assistance of a mediator, the dispute shall be referred to an Arbitration Committee and the arbitration process shall be open to the public. ...”

A key difference between mediation and arbitration, as seen from the above section of the Environmental Agreement, is that mediation is a non-binding⁴ process whereby a neutral helps parties reach settlement through discussions based on parties’ interests.

2 BHPB wrote to the two governments in October 18, 2005, and the governments responded subsequently to that request in a fashion that led to the Mediation.

3 The aim of the Environmental Agreement is:

- To respect and protect land, water and wildlife and the land-based economy essential to the way of life and wellbeing of the Aboriginal peoples.
- To facilitate the use of holistic and ecosystem-based approaches for the monitoring, management and regulation of the project.
- To provide advice to BHP Billiton to assist BHP Billiton in managing the project consistent with these purposes.
- To maximise the effectiveness and coordination of environmental monitoring and regulation of the project.
- To facilitate effective participation of the Aboriginal peoples and the general public in the achievement of the above purposes.

4 Non-binding means parties may or may not agree to the mediation option. If a settlement is reached, it is binding between the parties but it is an agreement created by the parties and not imposed by someone else.

Arbitration, on the other hand, is a form of decision-making and involves adjudication of parties' interests and positions, following a formal hearing.

Before beginning any mediation, it is my practice to meet with the participants and discuss issues to be included in an "Agreement to Mediate." On November 24, 2005, we met as a group, discussed several issues⁵, and ultimately the parties agreed with certain ground rules and other matters such that we could then proceed with the mediation. The Mediation Conference concluded successfully on January 16th and 17th in Yellowknife. Before the final Mediation Conference, I met as a mediator several times with the participants, individually, between November 24, 2005 and January 16, 2006.⁶

Finally, the nature of the mediation was open-minded and collaborative and this willingness to work together increased in my opinion, over time. From the beginning, all participants hoped to reach agreement and expected that my Report, in the end, would become public. All participants wanted to achieve the best result in the substantive areas⁷ that would respect the Environmental Agreement; the participants wanted to eliminate issues of disagreement and build a better future in the context of working relationships formed under the Environmental Agreement.

Resolution Agreement

As stated above, I met with the participants at the Mediation Conference in Yellowknife on January 16 and 17th 2006. In summary, I can report that:

- all parties were present,
- meaningful mediation did take place, and
- as a result of mediation, all matters discussed in this Report, are settled.

The Resolution Agreement, attached to this Report, includes several issues, all of which again are settled. As a mediator, I will comment on those issues in the way that I believe they were established by the Resolution Agreement, but before doing so, I need to briefly clarify some important definitions.

The reader will note that this Report, and the Resolution Agreement, makes a distinction between "Participants" and "Parties". "Participants" refers to the four signatories to the Resolution Agreement including the intervenor IEMA, whereas "Parties" refer to the three signatories to the Environmental Agreement (BHP, GNWT, and Canada).

5 Issues included: Overview of the mediation process, review of ground rules, preliminary identification of issues, scheduling of in-take interviews and meetings including venues and timing.

6 For example, I met with GNWT on December 13, 2005, BHPB on December 14, 2005, DIAND on December 15th & 16th 2005, and IEMA on December 20, 2005. Additionally, I met with BHPB and IEMA individually on January 9th and 15th respectively.

7 Again, the key areas are: IEMA Mandate, Workplace, Budget Process, and Core Budget.

Resolution Agreement Issue #1: Core Budget

While this may seem to be self-explanatory, I think it is important to make several points. First, I wish to set out an example to see the way in which clauses 1.2 and 1.3 create an increase to the Core Budget. To illustrate, the CPI is calculated against the budget in 2006-07 as follows:

Illustration of Annual Increase in the Core Budget Calculation of Core Budget for 2006-07

Calculation of preceding year (2005) change in Statistics Canada Consumer Price Index for Canada (CPI)⁸:

CPI for 2004	124.6
CPI for 2005	127.3
Change to CPI in 2005	2.7%

Calculation of Core Budget for 2006-07:

Deemed Core Budget for 2005-06	\$560,000
CPI increase (2.7% of \$560,000)	15,120
Core Budget for 2006-07:	\$575,120 ⁹

This means that while the \$40,000 separate fund will not increase (as a portion of the successive Core Budget), it will be included in the CPI calculation on an annual basis.

Second, Clause 1.5 was necessary to finalize the historical funding obligations of BHPB, which were paid in the past year in a good faith, on a without prejudice basis, pending the completion of this mediation process pursuant to Article XIV of the Environmental Agreement.

Resolution Agreement Issue #2: Additional Funding Processes

This issue was necessary to provide a mechanism and process for IEMA to seek additional funding for not only research and monitoring activities¹⁰ but also for those

⁸ Source: <http://www40.statcan.ca/l01/cst01/econ150a.htm?sdi=consumer%20price%20index> on January 21, 2006.

⁹ \$40,000 of the \$575,120 must be held in a separate fund with such funds used solely for IEMA's participation as an intervenor in regulatory and other legal proceedings respecting environmental matters pursuant to paragraph IV.2(d) of the Environmental Agreement.

cases where regulatory or other legal proceedings were complicated and/or complex and thus lengthy; that IEMA may need funds greater than \$40,000/year.¹¹

Resolution Agreement Issue #3: Surplus

Simply stated, any surplus funds will be returned to BHPB at the end of that fiscal year (March 31st).

Resolution Agreement Issue #4: Mandate, Work Place, and Budget Process

Clause 4.1 of the Resolution Agreement establishes two meetings per year, in January and May, and commits the signatories to attend those meetings. The agenda of the two meetings are different and this is self-evident from comparing the language of 4.1(a) and 4.1(b). Regarding 4.1(b), the participants agreed to collaborate more closely on their respective and mutual obligations, particularly with respect to communities. They agreed to meet annually in May to discuss these obligations in a comprehensive manner (s.4.1 (b)). Following that meeting, IEMA agreed to incorporate, as it sees fit, the results of these discussions in its annual report.

In addition, the IEMA undertook to discuss with its full board and at the 2006 AGM the feasibility of tabling a draft annual report 10 days prior to subsequent May meetings. This would enable BHPB, GNWT and Canada to provide their comments and observations prior to the meetings and contribute to full and frank discussions, the results of which IEMA would, at its discretion, incorporate in its final annual report.

In general, the intent of the Resolution Agreement is to improve and strengthen the implementation of the Environmental Agreement. The January and May meeting requirements in Clause 4 of the Resolution Agreement will help provide the formal mechanisms to better implement and understand the primacy of the Environmental Agreement, and to build and maintain good working relationships. These meetings are also not intended to replace the Annual General Meeting of the IEMA as a registered society. All Participants understood that the IEMA will continue to abide by all of its responsibilities to all of its society members as set out in the Environmental Agreement and by-laws as a registered society in the NWT.

Resolution Agreement Issue #5: Term

On April 1, 2007, the participants can review and amend any clause of the Resolution Agreement, with two conditions or exceptions. First, the changes, if any, need to be

10 See Resolution Agreement, Clause 2.1-2.3 and Environmental Agreement, Article IV.6(e).

11 See Resolution Agreement, Clause 2.4.

agreed upon by all four. The second condition is that clause 2, the Core Budget, cannot be reviewed until production at the mine ceases.

Resolution Agreement Issue #6: Interpretation

Both Clauses 6.1 and 6.2 speak to the Environmental Agreement and that document is paramount to the Resolution Agreement; the former controls the latter. To illustrate, the mediation Resolution Agreement is a direct result of the ADR mechanism invoked under these circumstances by the Parties as per the Environmental Agreement.

The Resolution Agreement itself is binding on all four participants, but even so, the Resolution Agreement, like the Agency established by the Environmental Agreement, is subject at all times to the Environmental Agreement. To further illustrate, *if* a Regional (Monitoring) Agency contemplated by the Environmental Agreement was created at some point in the future, then that provision of the Environmental Agreement (Article 4.7 as amended)¹² would establish the platform for the annual funding.

Dated this 25th day of January 2006

“Original signed by”

William A. Tilleman, J.S.D., Q.C.
Mediator

Attachment: Resolution Agreement

12 The Environmental Agreement, dated January 6, 1997 and amended April 14, 2003, included the option that the parties can “. . . consider the timing and advisability of the replacement of the Monitoring Agency created under this Article IV and the Advisory Board created pursuant to the Diavik Environmental Agreement, with a Regional Agency with a similar mandate, provided that if BHPB, as a result of the creation of such Regional Agency . . .”

RESOLUTION AGREEMENT

In the matter of the mediation of the IEMA mandate, work plan, budget process, and Core Budget for 2005-2007:

Among the Participants:

BHP Billiton Diamonds Inc. ("BHPB");

and

Government of the Northwest Territories ("GNWT"), represented by the Minister of Environment and Natural Resources;

and

Government of Canada ("Canada"), represented by the Minister of Indian Affairs and Northern Development;

and

Independent Environmental Monitoring Agency ("IEMA");

(hereinafter referred to as the "Participants")

Preamble:

Whereas a mediation pursuant to the Article XIV of Environmental Agreement has occurred; and

Whereas the Participants have met and discussed the issues with each other and the mediator, the result of which is this resolution of the Participants' issues and concerns; therefore

The Participants agree to the following terms of resolution:

1.0 Core Budget

- 1.1 The Core Budget is fixed at \$560,000 per year (April 1 to March 31). This includes \$40,000 annually to be held by IEMA in a separate fund with such funds used solely for IEMA's participation as an intervenor in regulatory and other legal proceedings respecting environmental matters pursuant to Article IV.2(d) of the Environmental Agreement. For clarity, the total amount of \$560,000 includes all amounts previously identified as "Contributed Services".
- 1.2 The Core Budget will increase annually by a percentage change that is equal to the previous year's percentage change in the Consumer Price Index for



Canada as published by Statistics Canada. The amount to be held in the separate fund will not increase annually; however, IEMA may request additional funding to participate as an intervenor as set out in Clause 2.4 below.

- 1.3 For purposes of calculating the percentage increase based on the Consumer Price Index, the Core Budget of \$560,000 is deemed to have been established as of April 1, 2005. For clarity, the percentage change in the Consumer Price Index for the year 2005 will be applied to the Core Budget for the 2006-07 Core Budget.
- 1.4 The Core Budget will be paid by BHPB to IEMA in equal semi-annual instalments, payable in advance.
- 1.5 The amount paid by BHPB to IEMA for the year 2005-06 fulfils BHPB's funding obligation to IEMA for the 2005-06 financial year.

2.0 Additional Funding Process

- 2.1 Consistent with Article IV.6(e) of the Environmental Agreement, IEMA may request additional funding for research and monitoring activities based on a proposal(s) submitted to BHPB. IEMA's proposal(s) must:
 - (a) be made at least 30 days prior to the funds being required;
 - (b) include the rationale for the funding documented against the IEMA mandate as set out in Article IV.2 of the Environmental Agreement; and
 - (c) not in total exceed 10% of that current year's Core Budget.
- 2.2 BHPB will, in a timely fashion, not exceeding 30 days, review and respond to a proposal from IEMA for additional funding for research and monitoring activities. In accordance with the Environmental Agreement, if funding is denied, BHPB will provide to IEMA, Canada and GNWT, written reasons for denying the additional funding.
- 2.3 Upon receipt of BHPB's written reasons for denying additional funding to IEMA, IEMA may request that BHPB, Canada and GNWT consider the proposal for additional funding. BHPB, Canada and GNWT will decide, by majority vote, and in a timely fashion, not exceeding 30 days, for or against the additional funding to IEMA.
- 2.4 In the event that an amount greater than \$40,000 is required in a given year in order for IEMA to participate as an intervenor in regulatory and other legal proceedings respecting environmental matters pursuant to Article IV.2(d) of the Environmental Agreement, IEMA may submit a proposal to BHPB for additional funding and receive a decision according to the procedure identified in Clauses 2.1 to 2.3.

3.0 Surplus

Handwritten initials and signatures in the bottom right corner of the page. The initials appear to be 'WAR' and 'SP' stacked vertically, with a signature below them that includes the letters 'BE'.

3.1 Any funds not expended by IEMA in a budget period will be returned to BHPB.

4.0 Mandate, Work Plan and Budget Process

4.1 For the purposes of consistent planning and integrated implementation of the Environmental Agreement, the Participants agree to each appoint a senior officer equivalent to the signatories to this agreement. They shall meet semi-annually at the following times, for the following purposes:

(a) In the month of January, to provide the Participants with an opportunity to discuss methods of achieving IEMA's mandate in the current and upcoming year. The meeting shall include:

- a discussion of IEMA's current and proposed work plans and budgets;
- a presentation by BHPB on its Environmental Management programs and operational projections for the coming year;
- a presentation by IEMA on its findings, recommendations, reports and overview of the monitoring program costs; and
- a reconciliation of the drawdown on the separate fund.

(b) In the month of May, to discuss the communications responsibilities that the Participants have under the Environmental Agreement. The meeting shall include:

- a presentation by each of BHPB and IEMA on the status of their responsibilities;
- Participants' plans to meet with communities;
- Opportunities to coordinate Participants' engagement with communities; and
- review and discussion of the preliminary content in the IEMA Annual Report.

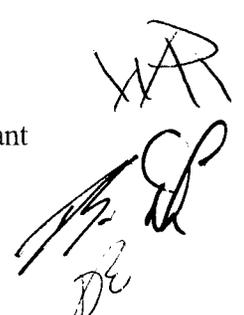
5.0 Term of the Resolution Agreement

5.1 Clause 1 of this Resolution Agreement applies until production at the mine ceases, at which time Clause 1 will be reviewed by the Participants and amended as necessary.

5.2 Prior to April 1, 2007, the Participants will review the remainder of this Resolution Agreement, and if necessary, will make changes, any of which are subject to the mutual agreement of all of the Participants.

6.0 Interpretation

6.1 This Resolution Agreement fulfils the obligations of the Participants pursuant to Article XIV of the Environmental Agreement for this mediation.



6.2 This Resolution Agreement is not intended to amend any of the terms of the Environmental Agreement.

Dated at Yellowknife, NWT, on January 17, 2006:



BHP Billiton Diamonds Inc. represented by:
David Scott, Manager, Environment and Technical Services



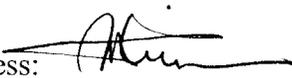
Government of the Northwest Territories, Minister of Environment and Natural Resources, represented by:
Doris Eggers, Director, Policy, Legislation and Communications



Government of Canada, Minister of Indian Affairs and Northern Development, represented by:
David Livingstone, Director, Renewable Resources and Environment



Independent Environmental Monitoring Agency, intervenor, represented by:
Bill Ross, Chair

Witness: 

Bill Tilleman
Mediator