

BHP Billiton Diamonds Inc.
Operator of the EKATI Diamond Mine

BHP Billiton Diamonds Inc.
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March 10, 2009

Wek'èezhii Land and Water Board
P.O. Box 2130
Yellowknife, NT
X1A 2P6
Attention: Ms. Violet Camsell-Blondin, Chair

Dear Ms. Camsell-Blondin:

Re. Request for Procedural Clarification Regarding WLWB Staff Request for Additional Information from Indian and Northern Affairs Canada (INAC) at the March 4/5, 2009 Public Hearing for the Sable, Pigeon and Beartooth Water Licence Renewal

I write to reiterate and substantiate the objection made by BHP Billiton Diamonds Inc. (BHP Billiton) to the information requested from INAC by Wek'èezhii Land and Water Board (the Board) staff during the March 4/5, 2009 Public Hearing (the Hearing). BHP Billiton continues to be of the view that any reliance by the Board on the information supplied pursuant to Undertaking #2 would be contrary the Board's obligations regarding procedural fairness.

Undertaking #2 (documented on page 51 of the March 5, 2009 transcript, erroneously numbered Undertaking #3) was as follows:

- 6 UNDERTAKING NO. 3 [sic]: Barry Zajdlik from INAC to
- 7 provide information as to
- 8 what increases in nitrate
- 9 have resulted in demonstrable
- 10 acts in the receiving
- 11 environment with respect to
- 12 phytoplankton biomass.

This undertaking was volunteered by Mr. Zajdlik in response to a question from Mr. Hutchinson on behalf of the Board staff (pages 49-50 of the March 5 transcript):

21 MR. NEIL HUTCHINSON: Thank you. Neil

22 Hutchinson from the Board.

23 Yesterday, we heard Environment Canada's

24 opinion that they knew of cases where nitrogen additions

25 on their own had stimulated productivity in the lake.

1 Are -- are you aware, INAC, or is -- that

2 anyone has submitted such evidence in front of the Board

3 that might help the Board decide what an appropriate EQC

4 might be for nitrate should -- should nutrient enrichment

5 be a problem?

...

9 MR. BARRY ZAJDLIK: Barry Zajdlik.

10 I think that's something that INAC could

11 take on as an endeavour to try to help the Board look at

12 what nitrate concentrations -- or increases in nitrate

13 have resulted in demonstrable acts in the receiving

14 environment with respect to phytoplankton biomass.

It is clear from Mr. Zajdlik's answer that, in fact, INAC had put no evidence before the Board to substantiate the request for an EQC on nitrate. Therefore, the undertaking is speculative in nature and for the purpose of assisting the Board with establishing a new EQC for nitrate even though no evidence supporting such an EQC was presented prior to or at the Hearing.

In your opening remarks at the Hearing Madam Chair, you reminded all parties that the Board was a quasi-judicial body that operates under the rules of procedural fairness. BHP Billiton fully supports this statement and questions how the Board staff's request and the information from INAC will be managed within the bounds of procedural fairness.

In its closing remarks to the Hearing, BHP Billiton identified this as an issue of concern (page 127 of the March 5, 2009 transcript):

[Laura Tyler]

15 In addition, BHP Billiton objects that

16 additional nitrate evidence has been requested by Board

17 staff post public hearing which will not be available to

18 be discussed at a public hearing and may ultimately

19 extend the renewal process.

BHP Billiton believes that the information requested by Board staff in Undertaking #2 will constitute new evidence and that it should not be relied upon by the Board during its deliberations unless that information has first been provided to BHP Billiton and all other parties for comment and the Board then fairly considers those comments. Future assessment by all parties of the information provided by INAC could substantially delay the renewal process.

BHP Billiton is concerned that some may be of the view that Undertaking #2 is simply a matter of clarification similar in nature to BHP Billiton's Undertaking #1. It is BHP Billiton's view that the two undertakings are fundamentally different in nature.

Undertaking #1 was a request from Board staff to BHP Billiton (see page 131 of the March 4, 2009 transcript) to provide additional technical information in support of its proposed changes to three of the existing EQC. BHP Billiton stated at the Hearing that it believed it had provided all information necessary to support the proposed changes, which changes were accepted by the Independent Environmental Monitoring Agency, Environment Canada and the Department of Fisheries and Oceans. Board staff, however, requested further explanatory information (page 125 of the March 4, 2009 transcript):

[Dr. Kathleen Racher]

3 Myself, I have tried to go through the –

4 all the information that was provided in the January

5 submission and other submissions to try to recreate those

6 numbers myself but I can't.

Undertaking #1 is a request for clarification of evidence that BHP Billiton had put before the Board many weeks earlier.

As regards nitrate, BHP Billiton in its response to Interventions explained in detail why no such EQC was required; a position repeated at the Hearing. No evidence was put before the Board by INAC in support of a new EQC for nitrate based on nutrient enrichment.

The current renewal process was begun by BHP Billiton in August, 2007. Several workshops, written interventions and formal detailed responses from BHP Billiton followed. INAC has had ample time to prepare evidence on the nitrate issue prior to the Hearing. We believe that it would be unfair to BHP Billiton and to all the other parties to the Hearing for the Board to delay the issuance of the renewal water licence and reopen proceedings at this late stage in the process without a sound reason in the form of conflicting evidence for doing so.

We hope that you find the preceding information to be helpful. Please contact Eric Denholm, Superintendent - Traditional Knowledge and Permitting, at 669-6116 if you have any questions.

Sincerely,

BHP Billiton Diamonds Inc.

A handwritten signature in blue ink, appearing to be 'L. Tyler', written over the company name.

for Laura Tyler
Manager – Environment, Community, Communications and Planning
EKATI Diamond Mine