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(BHPB & Diavik)

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## REASONS FOR DECISION

**Reference/File Number:** Water Licence MV2001L2-0008 & MV2003L2-0013 (Type "A")

**Licensee:** BHP Billiton Diamonds Inc.

### Wek'èezhìi Land and Water Board (WLWB)

## REASONS FOR DECISION

Issued pursuant to Section 26  
of the *Northwest Territories Waters Act*, R.S.C. 1992, c.39

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## **BACKGROUND AND REGULATORY HISTORY**

On April 2<sup>nd</sup>, 2008, the WLWB received BHP Billiton's renewal applications for their Sable, Pigeon and Beartooth Water License (MV2001L2-0008) and Land Use Permits (MV2001X-0071, MV2001X-0072 and MV2001F-0032). Board Staff deemed the land use permit applications complete and informed parties that the Board had decided that, pursuant to section 22(2)(b) of the *Mackenzie Valley Land Use Regulations*, that further studies and/or a hearing were required.

After notifying reviewers that the Board had deemed BHPB's Water Licence Renewal application complete on April 9<sup>th</sup>, the Board received a letter on April 17<sup>th</sup> from the Department of Fisheries and Oceans (DFO), Indian and Northern Affairs Canada (INAC) and Environment Canada (EC) collectively recommending the amalgamation of BHPB's two Type A Water Licences; MV2003L2-0013 (the "Main Licence") and MV2001L2-0008 (the "SPB Licence"), for reasons of administrative efficiency. The Board also received two additional letters on April 23<sup>rd</sup> from the Independent Environmental Monitoring Agency (IEMA) and GWNT-Environment and Natural Resources (ENR) expressing a similar interest in pursuing the option of amalgamation.

The Board then provided an opportunity for other interested parties to provide comment on the possibility of amalgamation of these licences by allowing a further two-week period for comments. BHPB was then given a chance to respond to reviewer's comments by May 16<sup>th</sup>, 2008. During this review and consideration of the

amalgamation, the Board also ruled, on May 23<sup>rd</sup>, 2008, that BHP Billiton's renewal applications for the Sable, Pigeon and Beartooth developments were exempt from preliminary screening. Board direction was provided on how parties should move forward with the review of the various BHPB applications and consideration of the potential amalgamation of the Licences.

Although several parties had recommended amalgamation of BHPB's two Type A Water Licences, the initial correspondence received by the Board was not very clear as to the advantages of doing so. Therefore, a request for more detailed comments on the potential amalgamation was distributed to reviewers for response by June 30<sup>th</sup> (the "Clarification Process"). In response to this request for additional clarification from reviewers, BHPB submitted a letter dated June 6, 2008, expressing their concerns about the Board's approach. The Licensee was concerned that the Board might be considering substantive changes to the Main Licence.

Comments were received from IEMA (June 18, 2008) and a joint letter submission was received outlining a collaboration from DFO, INAC and Environment Canada (June 30, 2008) giving reasons why they recommended the amalgamation of the two Licences.

BHPB provided a further response which commented on the Clarification Process on June 14, 2008. BHPB stated, its view that the Board did not have the authority to proceed with any amalgamation which might affect the scope of either of the licences.

## **DISCUSSION**

The idea of amalgamating BHPB's Water Licences is not new. It has been raised in the original Sable, Pigeon and Beartooth licensing process, during the hearing in 2002 and again during the renewal of the Main Licence in 2005. In 2005, there were various ideas brought up as to how to accomplish an amalgamation, including limiting the term of the Main Licence to 2009 so that it would coincide with the renewal of the SPB Licence. The Mackenzie Valley Land and Water Board decided, at that time, that a three year term for the Main Licence was not fair or reasonable. INAC then recommended adding a condition to the Main Licence which would require the SPB Licence, when it expires in 2009, to be merged with the Main Licence. In response, the MVLWB stated that it was "of the opinion that it cannot impose a condition binding on another water licence through this [Main] licence" and the possibility of amalgamating the licences on that basis was therefore dropped at that time.

### **Reviewer and Company Comments Regarding the Amalgamation**

Reviewers provided comments to the Board in 2008 that suggested that the amalgamation of the two Licences held by BHP Billiton Diamonds Inc. to operate the Ekati Diamond Mine would:

*"Provide clarity, consistency and certainty for all those involved."*<sup>1</sup>

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<sup>1</sup> INAC, DFO, EC Letter to the WLWB dated April 16, 2008.

It was suggested that one Licence would be more appropriate for the undertaking and produce administrative efficiencies, less complexity in the regulation, monitoring and reporting of the project. It was further suggested by reviewers that the public and regulators would find a single water licence:

*“...simpler to understand and follow.”<sup>2</sup>*

In the IEMA correspondence dated June 18, 2008 it was further suggested that there would be a possibility to move beyond simply amalgamating the Licences to harmonizing the Licences. The IEMA proposed that studies carried out specific to one Licence could be applied equally across the entire mining operation. The IEMA provided an example of the chloride discharge criterion work that has been carried out under the SPB Licence suggesting that harmonizing the licences would avoid:

*“a separate process and study for a chloride discharge criterion for the other parts of the mining operation at Panda, Koala, Fox and Misery...”<sup>3</sup>*

The IEMA proposed that:

*“Special studies, risk assessments, and related work should apply to the whole mining operation and this can be accomplished more readily through amalgamation than through the changes proposed by the company as part of the MV2001L2-0008 renewal.”<sup>4</sup>*

BHP Billiton, in their correspondence to the Board, expressed real concerns with the carrying out of an amalgamation of their two Type A Water Licences. BHP Billiton set out three main reasons why the amalgamation process should not be considered by the Board:

1. The Main Licence has more than five (5) years remaining in its term and BHPB has designed and implemented operations management plans based on the Main Licence as it presently stands and is conducting operations to meet the criteria under that Licence.
2. BHPB believes that the administrative and reporting efficiencies that the federal departments seek have been addressed within the application for renewal of the SPB Licence.
3. BHPB believes that proceeding with an amalgamation is not within the jurisdiction of the Board because the *Northwest Territories Waters Act* (NWTWA) only grants the Board authority to “*amend, for a specified term or otherwise, any condition of a licence*”. BHPB believes that amalgamating the two Licences would be equivalent to changing the scope (i.e., description of undertaking) of one or both Licences and they argue that the Board does not have the authority to do this.

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<sup>2</sup> INAC, DFO, EC Letter to the WLWB dated June 30, 2008.

<sup>3</sup> IEMA Letter to the WLWB dated June 18, 2008

<sup>4</sup> *Ibid.*

All the arguments put forward by reviewers and the company were considered during the Board's deliberations.

## **Board Decision**

As an overall policy the Board has aimed towards improving the consistency and clarity with which operators and reviewers in Wek'èezhii and the North can develop and manage resources.

The Board is working towards this goal through various initiatives. At a policy level, the Board is working with other Land and Water Boards from throughout the Mackenzie Valley to develop consistent procedures, policies and approaches to licencing. At a project specific level, the Board is trying to ensure consistent licencing practices, including wherever possible consistent and practical licensing conditions, that are still appropriate to each individual project. The Board has also been working to develop consistent guidelines for plans and studies that may be required through regulatory instruments by different operators.

The Board reviewed the amalgamation proposal within the context of this policy goal and the legislative framework within which the Board must operate. Working towards efficiency and clarity must always be balanced against the need for environmental protection and the operational certainties required by licensees. Finally, changes made to achieve efficiency and clarity must always fit with the jurisdictional framework laid out for the Board.

The arguments put forward by reviewers, and summarized above, as well as the operational experience gained by Board members and staff led the Board to the conclusion that an amalgamated Licence would provide for a less complex, clearer and more consistent approach to licencing, ongoing regulation and monitoring of the Ekati Diamond Mine. The process would also support the Board in its overall goal of creating a more consistent approach to regulating projects with the management area.

The WLWB have decided that it is in the public interest to amalgamate BHP Billiton's two Type A Water Licences. The Board has therefore passed a motion in accordance with section 18(1)(b)(iii) of the NWTWA to amend Water Licence MV2003L2-0013 to include terms and conditions relating to the Sable, Pigeon and Beartooth development.

The Board considered the benefits of amalgamation to the work loads of regulatory staff, government and reviewing agencies and determined that amalgamation will reduce the amount of work and resources for the Board and others to oversee the administrative and technical aspects of two Licences for one project. This includes the work of inspectors currently tasked with administering and carrying out inspections to monitor compliance with two separate Licences for one project.

The company would benefit from a single Licence as amalgamation would eliminate the potential for differences in interpretation between Licences. Regulatory efficiencies

would be achieved through single framework for monitoring and reporting and special studies would be contained within one Licence.

The Board also considered the work required by the company, reviewers and the Board in developing, reviewing and processing renewal applications. Since original licensing (N7L2-1616) the company has had to apply for a new Licence for the Sable, Pigeon and Beartooth development and two renewals (the Main Licence and the SPB Licence). By requiring only one Licence from the company for the entire development there will be a reduction in the workload and cost for the Licensee and all parties by reducing the number of Licence renewals.

The Board understands that there could be fairness and other concerns raised if the amalgamation were to result in changes to the Main Licence that affect BHPB's current planning and on-site operations. Any substantial adjustment to their Main Licence could affect ongoing operations and might have negative consequences to the company. The Main Licence was renewed and modified three years ago, so to re-visit the substantive content of that Licence could be unfair and redundant, unless a substantial environmental threat or significant public concern existed in relation to operations under the Main Licence. There is no evidence on the record at this time which indicates that such problems exist.

The position of INAC, EC and DFO supported this approach:

*"...,we are not proposing to change any of the existing requirements or parameters from either licence. Licence amalgamation is only sought in order to eliminate the procedural redundancy of the two licences."*<sup>5</sup>

The Board has therefore decided that a process should be undertaken to review the existing terms and conditions of the SPB Licence, and then prepare a draft Licence for review that would insert those new terms and conditions into the Main Licence. The Board sees no reason to make changes to the existing terms and conditions of the Main Licence, except where it would be administratively necessary or where inserting an equivalent condition from the SPB Licence would create repetition.

The Board also sees no reason for extending additional requirements from the Sable, Pigeon and Beartooth licence across to the Main Licence. For example, in the case of the chloride criterion, a study was carried out as a condition within the SPB Licence. During the renewal of the Main Licence, which occurred after the issuance of the SPB Licence, no similar clause was inserted for the development of a chloride criterion for the main site. The Board agrees that it would be unfair to the company to, at this time, apply a requirement that a SPB Licence specific requirement be extended beyond the scope of that undertaking.

Similarly, the Board does not think it appropriate to reopen the effluent quality criteria for the Main Licence during this review and amalgamation process.

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<sup>5</sup> INAC/DFO/EC Letter to the Board dated June 30, 2008

In response to BHP Billiton's argument that the Board does not have the jurisdictional authority to carry out an amalgamation process; the process the Board will undertake will ensure that the scope of the two Licences continues to reflect the undertakings as described in applications from the company. However the licencing will be provided for in one regulatory instrument rather than two.

## **CONCLUSION**

The Board supports and will proceed with a process to amalgamate BHP Billiton's two Licences relating to the development of the Main Ekati Site (currently licence MV2003L2-0013) and the Sable, Pigeon and Beartooth development (currently licence MV2001L2-0008). The Board has initiated this process by passing a motion, as provided for by section 18(1)(b)(iii) of the NWTWA, to amend the Main Licence to include conditions relating to the Sable, Pigeon and Beartooth development.

The process will be restricted such that there will be no changes to the scopes described in the Main Licence or the SPB Licence. The scope sections of the two licences will be set out in two separate parts of the amalgamated Licence. In addition, the substance of the terms and conditions of the Main Licence will not be changed in order to preserve the results of the last renewal of that instrument. The only changes considered will be those which are necessary to harmonize language, timelines and actions necessary to accommodate the amalgamation of the two Licences.

Signed on behalf of the WLWB:

October 3, 2008

Date



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Violet Camsell-Blondin, Chair