

**BHP Billiton Diamonds Inc.**  
**Operator of the EKATI Diamond Mine**



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September 14, 2007

**Attention: Mr. Bruce Hanna, Habitat Biologist,  
Fish Habitat Management, Western Arctic Area**

Dear Sirs:

Re: BHP Billiton Interim Closure and Reclamation Plan

We write further to your letters to the Wek'eezhii Land and Water Board dated May 19 and July 27, 2007 and further to our recent discussions concerning your suggestion that BHP Billiton Diamond Inc (BHP Billiton), within the context of its Interim Closure and Reclamation Plan (ICRP), should commit to the creation of littoral zone areas, beach areas, and/or aquatic systems that support fish habitat in the end pit lakes where "feasible and practical", and to reclaim to fish habitat, or at least to conduct experiments and investigations in relation to the same.

We have considered this issue carefully since our last meeting on this topic July 4, 2007. We appreciate DFO's desire to create such habitat and we understand that DFO's position is that doing so is critical to meeting BHP Billiton's reclamation goal of returning the EKATI Minesite "to viable, and wherever practicable, self-sustaining ecosystems that are compatible with a healthy environment, human activities, and the surrounding environment". With respect, however, we do not agree that doing so would be feasible or practical in the circumstances, or that it is consistent with our reclamation goal. Accordingly, we cannot agree to include any such commitments in the ICRP. The following provides the basis for our position.

During the Environmental Assessment and Review Process ("EARP") for the EKATI Diamond Mine, the issue of destruction of and compensation for fish habitat was canvassed thoroughly before the Environmental Assessment Review Panel ("EARP") with the full involvement of DIAND, DFO, affected aboriginal groups and all other interested parties. In June 1996, EARP, in its Report to the federal Ministers for the Environment and DIAND concluded the following, and made the following recommendations in section 4.4 of the Report:

"The Panel concludes that the primary impacts of the Project on fish would be the loss of existing populations and habitat in 12 lakes and associated streams....such effects would be localized and would not have an overall effect on fish populations in Lac de Gras or

the Coppermine River. Effects on stream habitat would be offset by the creation of habitat enhancement features in the diversion channel between Kodiak and Panda Lakes...

...The Panel recommends that:

- a) cash compensation for the loss of fish habitat should be considered by DFO only when there are no viable options to avoid the loss of habitat or to re-create the lost habitat;
- b) DFO develop a fair, realistic and transparent approach to the calculation of compensation for loss of fish habitat;
- c) DFO settle compensation [sic] with BHP as quickly as feasible, reflecting the principles described in b) above;
- d) if it is decided to proceed with the proposed Habitat Management Fund, an effective public consultation program including Aboriginal peoples be undertaken by DFO as soon as possible to identify projects that would be most appropriate; and
- e) the results of projects paid for by this fund be carefully monitored to ensure that the objective of habitat enhancement is achieved.”

In December, 1996, following the issuance by the Minister of an approval for the EKATI Diamond Mine, DFO determined the appropriate cash compensation to be paid by BHP Billiton in relation to the destruction of fish habitat in the pit lakes for the EKATI main site. DFO entered into a Compensation Agreement with BHP Billiton dated December 17, 1996 covering the 12 pits comprising the EKATI Mine and the streams connecting them (the “Compensation Agreement”). By the Compensation Agreement, DFO and BHP Billiton established BHP Billiton’s particular obligations and requirements respecting fish habitat. In particular, the Compensation Agreement requires the company to construct the Panda Diversion Channel to compensate for the destruction of fish habitat in streams as well as the payment by BHP Billiton to DFO of \$1.5 million dollars to be applied to a Habitat Management Fund as compensation for the destruction of fish habitat in the lakes.

On January 7, 1997, DFO issued a section 35 Fisheries Act Authorization (the “FAA”) to BHP Billiton permitting the destruction of fish habitat in the lakes to be mined as open pits by dewatering of those lakes on the condition that BHP Billiton comply with the terms of the Compensation Agreement.

During the Environmental Assessment of the Sable, Pigeon and Beartooth project, BHP Billiton proposed mitigations and compensation for the loss of fish habitat to DFO. BHP Billiton had originally proposed fish habitat creation in Sable, Pigeon and Beartooth as outlined in the Environmental Assessment for Sable, Pigeon and Beartooth, 2000. DFO remained unsatisfied with the proposal throughout the assessment and as a result, the Mackenzie Valley Environmental Impact Review Board (MVEIRB) recommended that BHP Billiton continue negotiating with DFO to satisfy the “no net loss” objective. BHP Billiton committed to continuing these negotiations in a letter to the Minister of INAC dated March 2, 2001. The

Minister formally acknowledged this commitment in his response to the MVEIRB's Report of Environmental Assessment on the Sable, Pigeon, Beartooth project (letter dated April 12, 2001). In the end the Environmental Assessment Report plans for creation of fish habitat in these pit lakes was replaced by a financial compensation for fish and fish habitat loss through Fisheries Act authorization, January 17, 2003.

BHP Billiton is compliant with the above noted Fisheries Act authorizations, and the above noted Compensation Agreement. The Compensation Agreements do not contemplate that the company must create fish habitat in any pit lakes; rather, they contemplate that habitat there will be forever lost, and compensates for that loss. Approximately one half of the funds paid by BHP Billiton into the Habitat Management Fund, in compensation for that loss have now been applied to the creation of new fish habitat.

The Compensation Agreement and FAA were executed and issued respectively following a comprehensive consultation program with all affected parties. These instruments provided BHP Billiton then, and they continue to provide BHP Billiton, as well as all other interested and affected parties (including all regulatory agencies) with certainty as to the company's regulatory obligations and liabilities with respect to fish habitat, including in relation to its reclamation obligations for the mine. BHP Billiton has relied on the Compensation Agreement and on the terms of the FAA in carrying out its operations at the EKATI Diamond Mine and in developing its mine plan, including in its closure and reclamation planning.

The Compensation Agreement and the FAA represent a regulatory decision on the part of DFO that was issued with prior and comprehensive input from all interested and affected parties and which:

- accords with DFO's no net loss policy;
- ensures the full reclamation and viability of the ecosystem in the area of the Claims Block and in the larger area of the Lac de Gras watershed;
- meets the interests of all interested and affected parties; and
- provides for the extent of BHP Billiton's obligations and liabilities going forward in perpetuity with respect to fish habitat in relation to the EKATI Diamond Mine.

This is as true today as it was at the time this regulatory decision was made.

By asking BHP Billiton to commit to the creation, or even the investigation of the creation of littoral zones that support fish habitat in end pit lakes, DFO is seeking to alter the terms of the Compensation Agreement and the FAA. In addition DFO is effectively, requiring the company to create fish habitat that is additional to that which DFO has already determined as adequate compensation. The creation of littoral zones and fish habitat in the end pit lakes would therefore result in a net gain of fish habitat on the closure of the EKATI Diamond Mine and would most certainly bring with it additional and uncertain obligations and liabilities for the company.

BHP Billiton's statement of its reclamation goal as set out in the ICRP is derived from and is consistent with DIAND's Mine Site Reclamation Policy for the Northwest Territories, 2002 which provides that:

"The required standard of reclamation should be based on the 1994 Whitehorse Mining Initiative definition: "returning mine sites and affected areas to viable and, wherever practicable, self-sustaining ecosystems that are compatible with a healthy environment and with human activities."

For the reasons set out above and others, a requirement to create fish habitat in end pit lakes that is imposed in a way that differs from the Compensation Agreement and the FAA settled after a broad consultative regulatory process is not practical. Nor is it a necessary measure to ensure that the reclamation goal is achieved. It would extend BHP Billiton's responsibilities beyond returning the EKATI Diamond Mine to a viable self-sustaining ecosystem, and instead require an enhanced ecosystem, with more fish habitat than existed originally.

DIAND's Mine Site Reclamation Policy states that "DIAND also recognizes that many of the provisions incorporated within this Policy are governmental "principles" that provide general guidance and direction. They work in harmony with the existing regulatory framework and the regulators charged with their application. It is not the intent of this Policy to supplant or diminish these existing regulatory authorities or the organizations that have been created to carry them out." Requiring BHP Billiton to make the commitments DFO now seeks, whether in the context of the ICRP or otherwise, would undermine existing regulatory processes (both the environmental assessment process and the permitting process that flows from it), on which the company and all interested parties have relied and continue to rely for regulatory, environmental and socio-economic certainty. It would also be contrary to the principles of openness, transparency, fairness and justice that are inherent in such processes.

We remain available should you wish to discuss this further, and if you have any comments or questions on this letter, please contact Helen Butler (867) 669-6104.

Sincerely,



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

cc: Wek'eezhii Land and Water Board, Attention Zabey Nevitt.