

BHP Billiton Diamonds Inc.
Operator of the EKATI Diamond Mine



May 11, 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. BHP Billiton Diamonds Inc. Motion Regarding Board Jurisdiction Over Fish Habitat

BHP Billiton Diamonds Inc. ("BHP Billiton") is submitting the attached Notice of Motion and Submissions pursuant to Sections 21-26 of the Draft Rules of Procedure for *Mackenzie Valley Resource Management Act* Land and Water Boards. This Motion is for the purpose of resolving an issue that has substantive implications for BHP Billiton and the EKATI Diamond Mine. Specifically, the Motion addresses statements that have been put before the Wek'èezhii Land and Water Board (the Board) regarding its jurisdiction to require the creation of fish habitat in the closed pit lakes and Long Lake Containment Facility (LLCF) as part of the Interim Closure and Reclamation Plan (ICRP).

Reclamation of the pit lakes and Cell E of the LLCF has been discussed over the past two years through the Board's ICRP Working Group. Fish habitat creation is classified as an "outstanding issue" (per the Board staff advisory document) for the public hearing scheduled for May 25/26. The issue is classified as outstanding because some members of the ICRP Working Group have suggested that the Board should require BHP Billiton to reclaim the pit lakes and Cell E of the LLCF to fish habitat. BHP Billiton disagrees with this suggestion.

BHP Billiton is bringing this Motion forward at this time for two reasons. Firstly, clarity on this issue is fundamental to the next stages for development of the ICRP and, secondly, clarity on this issue is essential to development planning for the future of the EKATI Diamond Mine.

1. Clarity on this issue is fundamental to the next stages for development of the ICRP

In its May 6, 2009 intervention for the public hearing, the Independent Environmental Monitoring Agency presents its recommendation to the Board as follows (page 4):

In the Agency's view arrangements made by other agencies cannot fetter the discretion of the Board with regards to its jurisdiction over closure planning.

and

The Board ... thus has the authority and jurisdiction to direct changes to the ICRP, including where such changes may deal with fish or fish habitat.

These statements are fundamentally contrary to BHP Billiton's position regarding the Board's jurisdiction and to the manner in which BHP Billiton has, in good faith, operated the EKATI Diamond Mine for over 10 years.

BHP Billiton believes that it would be unproductive to continue with any further review or planning of reclamation work with this issue unresolved because the direction of further review or planning is dependent on its resolution.

2. *Clarity on this issue is essential to development planning for the future of the EKATI Diamond Mine*

The work that would be required to create fish habitat in pit lakes is substantive. By way of example, the new (2009) report provided by DFO as part of its May 6, 2009 intervention details the many activities and long-term obligations attendant on investigating the feasibility of, designing for, implementing, and subsequently monitoring fish habitat; work that has never been accounted for by BHP Billiton. This work was not included when the economic viability of the mine was first determined by BHP Billiton and is not included in BHP Billiton's business planning models for the existing or future open pits, such as Sable. This is because BHP Billiton's planning has relied on the regulatory approvals for the mine including the 1996 compensation agreement with DFO, which provided full and final compensation for the permanent loss of fish habitat for the life of the project.

It is essential to a valid business evaluation of the future of the EKATI Diamond mine that the fundamental reclamation measures are clear. The business need for certainty in regulatory requirements is an additional reason for bringing this motion forward at this time.

For the reasons described above, BHP Billiton requests that the Board consider the Motion and provide a decision prior to any further review, hearing or other work on the Final ICRP Working Draft (December 2008). BHP Billiton's preference and request in this respect is that the Board convene, as quickly as can reasonably be arranged, a hearing for the express and sole purpose of hearing arguments on the Motion prior to issuing a decision.

BHP Billiton's suggestion for a hearing on this Motion is for the purpose of providing the Board with the best information possible on which to base its decision. In this case, given the complex history of the successive ICRPs, the extensive historical references and overlapping regulatory regimes, BHP Billiton believes that oral presentations before the Board would best serve this purpose. A public hearing will also allow BHP Billiton the opportunity to directly address any questions or concerns the Board, or other parties, might have regarding our Motion and Submissions.

BHP Billiton is dedicated to working cooperatively with the Board, DFO, aboriginal peoples, and all of the other parties involved with the EKATI Diamond Mine. BHP Billiton is submitting this Motion in the belief that a clear resolution of the issue will be of benefit to all parties and will allow the EKATI Diamond Mine to continue to be a well-managed and positive presence in the NWT.

Please find attached our Notice of Motion and Submissions accompanied by evidence in support of this Motion and legal authorities referred to in the Submissions.

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 cursive script, appearing to read "R. Morland".

Richard Morland
Interim President and Chief Operating Officer
EKATI Diamond Mine

**WEK'ÈEZHÌI LAND AND WATER BOARD
INTERIM CLOSURE AND RECLAMATION PLAN
FOR BHP BILLITON DIAMONDS INC.'S EKATI MINE**

**MOTION:
BOARD JURISDICTION OVER FISH HABITAT**

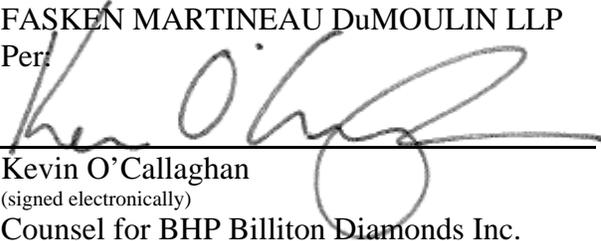
NOTICE OF MOTION

TAKE NOTICE THAT pursuant to Sections 21-26 of the Draft Rules of Procedure for Mackenzie Valley Resource Management Act Land and Water Boards, BHP Billiton Diamonds Inc. submits the following issue to the Wek'èezhìi Land and Water Board for determination:

Whether the Wek'èezhìi Land and Water Board, in the context of BHP Billiton Diamonds Inc.'s obligations relating to closure and reclamation of the EKATI Diamond Mine, has the jurisdiction to require that BHP Billiton Diamonds Inc. establish and maintain fish or fish habitat in the closed pit lakes or the Long Lake Containment Facility at the EKATI Diamond Mine.

Dated: May 12, 2009

FASKEN MARTINEAU DuMOULIN LLP
Per:



Kevin O'Callaghan
(signed electronically)
Counsel for BHP Billiton Diamonds Inc.

WEK'ÈEZHÌI LAND AND WATER BOARD
INTERIM CLOSURE AND RECLAMATION PLAN
FOR BHP BILLITON DIAMONDS INC.'S EKATI MINE

MOTION:
BOARD JURISDICTION OVER FISH HABITAT

SUBMISSIONS OF BHP BILLITON DIAMONDS INC.

INTRODUCTION

1. BHP Billiton Diamonds Inc. (“BHP Billiton”) is concerned that the Wek’èezhìi Land and Water Board (the “Board”) may require that the Interim Closure and Reclamation Plan (the “ICRP”) provide for the reclamation of closed pit lakes and the Long Lake Containment Facility (“LLCF”) (together the “Pit Lakes”) into fish habitat following mine closure.

2. A requirement that the Pit Lakes be reclaimed to include and support fish habitat is entirely inconsistent with the Department of Fisheries and Oceans’ (“DFO”) prior determination and agreements with BHP Billiton. DFO has addressed this matter directly and entered into agreements with BHP Billiton to provide for compensation for lost fish habitat. The essential premise of DFO’s determination was that fish habitat, as defined in the *Fisheries Act*, R.S.C. 1985, c. F-14¹, would be permanently destroyed during mine construction and operations and that BHP Billiton would compensate for that anticipated loss by methods other than reclamation of the Pit Lakes.

3. It is BHP Billiton’s position that the Board does not have the jurisdiction to require BHP Billiton to provide for the reclamation of Pit Lakes at the EKATI Diamond Mine (the “Mine”) into fish habitat following Mine closure.

ISSUE SUBMITTED FOR RULING

4. Whether the Board, in the context of BHP Billiton’s obligations relating to closure and reclamation of the Mine, has the jurisdiction to require that BHP Billiton establish

¹ A list of the Authorities and Documents referred to is attached as Schedule “D” to these Submissions.

and maintain fish or fish habitat in the closed pit lakes or the Long Lake Containment Facility at the Mine.

OVERVIEW OF BHP BILLITON'S POSITION

5. The environmental assessment reports for both the Main Site (which includes the Panda, Koala, Koala North, Misery and Fox kimberlite pipes) (the "Main Site") and the Sable, Pigeon and Beartooth Site (which includes kimberlite pipes bearing the same names) (the "SPB Site") made it clear that reclamation of fish habitat or compensation for loss of fish habitat in the Pit Lakes was to be determined by the DFO in conjunction with BHP Billiton. DFO and BHP Billiton ultimately came to an agreement, in the 1996 Fish Habitat Compensation Agreement, that BHP Billiton would provide compensation for the destruction of fish habitat in the Pit Lakes (a copy of the 1996 Compensation Agreement is attached as Schedule "A").

6. Pursuant to BHP Billiton's acceptance of, and compliance with, the 1996 Compensation Agreement, numerous Fisheries Authorizations from DFO followed, permitting the destruction of fish habitat as the Mine developed. The 1996 Compensation Agreement specifically provided that the compensation provided by BHP Billiton would be "for the life of the Project".

7. The *Fisheries Act*, R.S.C. 1985, c. F-14 confers on DFO the specific jurisdiction to deal with matters relating to fish and fish habitat. The Board does not have the statutory jurisdiction to override the specific jurisdiction of DFO by imposing conditions contrary to the 1996 Compensation Agreement.

8. Further, the 1996 Compensation Agreement is a binding contract between Canada and BHP Billiton. The Board, receiving its authority from Canada, does not have the jurisdiction to facilitate the breach of contractually binding commitments made by Canada in an agreement.

9. Indeed, a directive from the Board requiring the creation of fish habitat as part of BHP Billiton's reclamation obligation would undermine DFO's statutory mandate to obtain compensation for the loss of fish habitat through agreements such as the 1996 Compensation Agreement.

10. In the result, BHP Billiton submits that the Board has no jurisdiction to make the establishment of fish habitat a term of or a requirement for approval of the ICRP, the loss of such habitat having already been finally and fully addressed in the 1996 Compensation Agreement between Canada and BHP Billiton, and the Fisheries Authorizations from DFO that followed.

LEGISLATIVE REGIME

Fisheries Act, R.S.C. 1985, c. F-14

11. The *Fisheries Act* confers on DFO the authority to order the reclamation of fish habitat. This power is not conferred on or delegated to the Board.

12. A substantial part of the *Fisheries Act* addresses “Fish Habitat Protection and Pollution Prevention”. Within that part, s. 35 prohibits the harmful alteration, disruption or destruction of fish habitat or the deposit of deleterious substances into fish bearing waters in the absence of a permit to do so. Section 37 of the *Fisheries Act* supplements the power conferred under s. 35, authorizing the Minister to require plans and specifications from anyone who proposes to carry on work that results or is likely to result in the alteration, disruption or destruction of fish habitat. The Minister may also require modifications or restrictions to the proposed work.

13. Section 35(2) expressly confers on DFO the power to grant an authorization for the harmful alteration, disruption or destruction of fish habitat:

Harmful alteration, etc., of fish habitat

35. (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

Alteration, etc., authorized

(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

14. The *Fishery (General) Regulations* (SOR/93-53) set out the means and conditions described in s. 35(2) of the *Fisheries Act*. Part IX of the Regulations deals with “Authorization

to Alter Fish Habitat”. Section 58 provides that anyone proposing to alter, disrupt or destroy fish habitat must apply to the DFO for approval:

AUTHORIZATION TO ALTER FISH HABITAT

Authorization

58. (1) Any person who proposes to carry on any work or undertaking that is likely to result in the harmful alteration, disruption or destruction of fish habitat and who wishes to have the means or conditions of that work or undertaking authorized by the Minister under subsection 35(2) of the Act shall apply to the Minister in the form set out in Schedule VI.

(2) An authorization given under subsection 35(2) of the Act shall be in the form set out in Schedule VII.

15. The Schedule VI form acknowledges that the applicant is not released from obligations to obtain permission from other concerned regulatory agencies. The clarification that the s.35 authorization is limited to issues of fish and fish habitat, and is not a general authorization to proceed with a project, is uncontroversial:

The holder of this authorization is hereby authorized under the authority of section 35 (2) of the Fisheries Act, R.S.C., 1985, c. F-14, to carry out the work or undertaking described herein.

This authorization is valid only with respect to fish habitat and for no other purposes. It does not purport to release the applicant from any obligation to obtain permission from or to comply with the requirements of any other regulatory agencies.

In this case, BHP Billiton obtained all required permits at the material times.

16. No provision in the *Fisheries Act* or regulations extends to anyone other than the Minister of Fisheries and Oceans or his or her deputies the authority or jurisdiction to grant an authorization to alter, disrupt or destroy fish habitat. There is no suggestion that the Board has been delegated any authority under s.35 of the *Fisheries Act*.

Mackenzie Valley Resource Management Act, S.C. 1998, c. 25

17. The Board's jurisdiction is conferred and defined by its enabling legislation, the *Mackenzie Valley Resource Management Act* (the "MVRMA"). Under the MVRMA, the Board's objectives are described as follows:

Objectives — Wek'èezhìi Land and Water Board

58.1 The Wek'èezhìi Land and Water Board shall regulate the use of land and waters and the deposit of waste so as to provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of its management area.

...

Jurisdiction — land

59. (1) A board has jurisdiction in respect of all uses of land in its management area for which a permit is required under this Part and may, in accordance with the regulations, issue, amend, renew, suspend and cancel permits and authorizations for the use of land, and approve the assignment of permits.

Subsurface rights

(2) For greater certainty, the jurisdiction of a board under subsection (1) includes a use of land that is required for the exercise of subsurface rights.

Jurisdiction — water and waste

60. (1) A board has jurisdiction in respect of all uses of waters and deposits of waste in its management area for which a licence is required under the Northwest Territories Waters Act and may

(a) issue, amend, renew and cancel licences and approve the assignment of licences, in accordance with that Act, and

(b) exercise any other power of the Northwest Territories Water Board under that Act,

and, for those purposes, references in that Act to that Board shall be read as references to the board.

18. The MVRMA does not refer to fish or fish habitat. The MVRMA includes no provision suggesting it overrides the specific provisions of the *Fisheries Act*. Rather, the

MVRMA limits the jurisdiction of the Board by requiring that permits and licenses approved by the Board must be consistent with the conditions recommended by the Mackenzie Valley Environmental Impact Review Board (the “MVEIRB”) as accepted by the Minister. It is submitted this same deference applies to the results of previous environmental assessments under predecessor Acts, such as that undertaken at the Main Site. As explained below, the environmental assessment reports in this case and resulting approvals were based on the recognition that the Pit Lakes would not be restored to viable fish habitat at the time of Mine closure or following.

19. Section 26 of the *Mackenzie Valley Land Use Regulations*, SOR 98-429, mentions “the protection of wildlife habitat and fish habitat” in the context of land use permits. This incidental reference in the *Land Use Regulations* does not expand the Board’s original jurisdiction over water and waste so as to impose a condition requiring a remedial measure that contradicts the foundation of prior project approvals – especially where those approvals were conditional on negotiated agreements between DFO and BHP Billiton designed to compensate fully for the projected loss of fish habitat.

Northwest Territories Water Act, S.C. 1992, c. 39

20. The Board exercises the powers of the Northwest Territories Water Board as defined in the *Northwest Territories Water Act* (the “NWTWA”), subject to certain exceptions set out in s. 60 of the MVRMA. Section 15 of the NWTWA confers the authority to impose conditions in a water licence:

Conditions of licence

15. (1) Subject to this Act and the regulations, the Board may include in a licence any conditions that it considers appropriate, including, without limiting the generality of the foregoing,

(a) conditions relating to the manner of use of waters permitted to be used under the licence;

(b) conditions relating to the quantity, concentration and types of waste that may be deposited in any waters by the licensee;

(c) conditions under which any such waste may be so deposited;

(d) conditions relating to studies to be undertaken, works to be constructed, plans to be submitted, and monitoring programs to be undertaken; and

(e) conditions relating to any future closing or abandonment of the appurtenant undertaking.

Board to minimize adverse effects

(2) In fixing the conditions of a licence, the Board shall make all reasonable efforts to minimize any adverse effects of the issuance of the licence on

(a) licensees,

(b) domestic users,

(c) instream users,

(d) authorized users,

(e) authorized waste depositors,

(f) owners of property,

(g) occupiers of property, and

(h) holders of outfitting concessions, registered trapline holders, and holders of other rights of a similar nature

who are such licensees, users, depositors, owners, occupiers or holders, whether in or outside the water management area to which the application relates, at the time when the Board is considering the fixing of those conditions, who would be adversely affected by the use of waters or deposit of waste proposed by the applicant, and who have notified the Board in response to the notice of the application given pursuant to subsection 23(1) and within the time period stipulated in that notice for making representations to the Board.

21. It is submitted that the NWTWA, taken as a whole, reflects an understanding that the Board's authority over matters relating to fish and fish habitat is secondary to the powers granted to DFO under the *Fisheries Act*, not paramount.

22. The relevant facts must be considered with this legislative framework in mind.

RELEVANT FACTS

Overview

23. The project approval and permitting history of the Mine confirms that it was concluded that the Pit Lakes would not be restored to viable fish habitat. This was understood by all participants in the process for reasons outlined below. For that reason, DFO required compensation for lost fish habitat and BHP Billiton delivered that compensation. Attached as Schedule “B” to these Submissions is a chronology of the regulatory process relevant to the approval and permitting of the Main Site and the SPB Site.

Environmental Impact Statement submitted by BHP Billiton on May 23, 1995

24. Volume III, Section 9 of the Environmental Impact Statement, 1995 filed for the Main Site (“EIS”) deals with reclamation, decommissioning and the closure management plan for the site. The EIS contemplated the natural filling of the pits with water over a period of 6-212 years. Creation of fish habitat within the resulting Pit Lakes was not contemplated. Section 9.3.2.6 states:

Lake productivity would be limited due to small amount of littoral development possible in the lake on account of the steep pit slopes. However, pit slopes that extend above the high water level may provide the opportunity to create nesting habitat for raptors (Cairns 1980). The opportunities for habitat enhancement will be further explored as the mine develops.

25. Section 9.3.2.2 also confirms that the pits were not intended to become fish habitat but would, in fact, remain available as receptacles for water that would not meet effluent quality standards so as to allow discharge: “Water remaining in Cell E will be either allowed to discharge or be pumped to an abandoned pit, depending on the prevailing quality.”

Report of Environmental Assessment Panel on Main Site

26. The Report of the Environmental Assessment Panel on the Main Site was completed in June 1996 (the “Report”). In this Report the Panel found that the “environmental effects of the Project are largely predictable and mitigable”. The Panel recommended that the Government of Canada approve the project subject to several recommendations.

27. Section 3.1.4 of the Report dealt with closure and reclamation. The Report stated:

To respond to these concerns, BHP outlined its plans for effective reclamation and closure of the site. BHP's goals for reclamation would be to re-establish stable physical landforms, to re-establish the productive use of the land and to protect water resources. It proposed a progressive reclamation program that would be implemented as pits were mined out and cells of the Long Lake tailings impoundment filled. By following this approach, most of the disturbed sites would be reclaimed prior to decommissioning and closure.

28. Section 4.4 of the Report, dealing with fish and fish habitat, identified DFO's policy of "no net loss" of productive fish habitats and noted that discussions had commenced between BHP Billiton and DFO regarding a compensation agreement. The Report specifically stated that "re-creation of fish habitat" was "precluded" (underlining added):

Since opportunities for replacement of lake habitat could not be identified within the affected watershed, and because the time required to refill mined-out pits as well as their bathymetry precludes the re-creation of fish habitat, DFO and BHP agreed that financial compensation would be suitable in this case.

DFO indicated that the amount of compensation likely would be based on an estimate of the cost of "whole lake replacement." DFO proposed to use the cash compensation to establish a NWT Habitat Management Fund to finance habitat restoration and enhancement projects as close to the affected area as possible.

29. These statements confirm that the 1996 Compensation Agreement reached between DFO and BHP Billiton was intended to fully compensate for the permanent loss of fish habitat in the pits. While the Panel expressed concern about the method for calculating the value of lost habitat, it did not suggest that BHP Billiton should be required to create fish habitat in the pits.

30. In relation to fish the Panel recommended the following:

- (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 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.

31. In summary, the Panel's recommendations specifically acknowledged that the decision with respect to fish and fish habitat rested with DFO and that DFO and BHP Billiton needed to reach agreement to compensate for the projected permanent loss of fish habitat.

DFO 1996 Compensation Agreement

32. DFO and BHP Billiton negotiated and reached an agreement in 1996 regarding compensation for the permanent loss of fish and fish habitat from the development of the Mine. (the "1996 Compensation Agreement"). The 1996 Compensation Agreement, a contract between Her Majesty the Queen in Right of Canada and BHP Billiton, specifically recognized that the fish habitat in a number of lakes would be destroyed as those lakes became pits or part of the LLCF. Pursuant to S. 1(b) of the 1996 Compensation Agreement, BHP Billiton agreed that "in compensation for lake habitats set out in Clause B and that may be destroyed it shall provide DFO with the sum of \$1,500,000 which will be directed by DFO towards habitat restoration and enhancement projects off-site."

33. In s. 7 of the 1996 Compensation Agreement DFO specifically acknowledged that (underlining added):

...compensation agreed to be paid pursuant hereto shall be deemed to be good and valid compensation for alteration, disruption or destruction of fish habitat for the life of the Project, covering the current proposed mine development and, in the case where fish habitat is not altered, disrupted or destroyed in one or more of the identified lakes in the proposed mine development that another lake or other lakes on the BHP claim block of similar surface area and similar fish habitat may be substituted by BHP without additional compensation and without altering or amending this Agreement.

34. In the result, DFO expressly agreed that the future destruction of fish habitat had been appropriately compensated for, and that such compensation was sufficient for the “life of the Project”, where the “Project” was stated to have an anticipated duration “from mid-1995 to mid-2021 and possibly beyond”. These words were borrowed directly from the EIS definition of the Project where the stated duration expressly included “exploration, mine development and mine reclamation”².

35. BHP Billiton has fulfilled its obligations under the 1996 Compensation Agreement.

Fisheries Act Authorizations

36. Since execution of the 1996 Compensation Agreement, BHP Billiton has received five authorizations from DFO under s. 35(2) of the *Fisheries Act* each authorizing the harmful alteration, disruption or destruction of fish habitat. These authorizations contain terms and conditions that require monitoring, mitigation measures, data collection and the provision of “habitat unit gains” in streams by BHP Billiton. There is no requirement in any of these Fisheries Authorizations for the provision of “habitat unit gains” in the Pit Lakes.

37. Authorization SCA96021 (January 7, 1997), for example, provided for the alteration, disruption or destruction of fish habitat in Panda, Misery, Koala, Fox 1, Alexis and Leslie Lakes (among other water bodies). No fish habitat reclamation of pits was required under this Authorization as it was issued following and pursuant to the 1996 Compensation Agreement. Similarly, other authorizations require BHP Billiton to engage in “restoration and enhancement efforts” in relation to certain specified streams or ponds but there is no requirement that such effort be expended in the reclaimed Pit Lakes.

Environmental Assessment Report for Sable, Pigeon and Beartooth submitted by BHP Billiton

38. In April 2000 BHP Billiton submitted its Environmental Assessment Report (the “2000 EAR”) for the proposed development and mining of the Sable, Pigeon and Beartooth (“SBP”) pipes. Section 5.6.2.2- “Fisheries” of the EAR explicitly recognized DFO’s jurisdiction

² See Section 2.2 of the EIS entitled “Project Plan and Schedule”.

over “fisheries related matters” and proposed several options for reclaiming the SBP pits on closure (underlining added):

The Department of Fisheries and Oceans (DFO) as part of the Government of Canada is the regulatory body having jurisdiction over fisheries related matters.

...

During the development of the Sable, Pigeon and Beartooth Pits, six waterbodies will be affected. Three waterbodies, Sable Lake, Beartooth Lake and Big Reynolds Pond will either be dewatered or buried by a waste rock storage pile. Two Rock Lake will be used as a sedimentation pond. As these are fish-bearing waterbodies, current application of No Net Loss requires that compensation be achieved for these lakes. Little Reynolds Pond will receive mine water. However, because this pond does not support a fish community, No Net Loss will not apply. Pigeon Stream will be diverted around the Pigeon Pit. The diversion stream will replace the lost habitat.

BHP Diamonds Inc. has developed a number of habitat compensation strategies to replace habitat lost through the mine development (BHP, 1999c). Options for compensation include the re-construction of habitat in mined-out pits, the modification of unproductive lakes such that fish communities may be established, increasing the productivity of currently productive lakes, or monetary remuneration. Compensation will be provided that meets the approval of the DFO.

39. In respect of the option for “the re-construction of habitat in mined-out pits”, BHP Billiton proposed in Section 5.5.8- “Fisheries Replacement” (underlining added):

Reclamation measures will also be undertaken to further facilitate the establishment of essential habitat components and productive fish communities in each of the three lakes. Lake restoration will be conducted in accordance with the DFO policy of No Net Loss and the present BHP Interim Abandonment and Restoration Plan. Once pit operations cease, all three pits will be modified to create littoral and beach zones. Select areas of the pit lip will be sloped back at a shallow angle to form beach areas, with a drop-off to the first bench at approximately 5 m of water depth. Granitic waste rock will then be deposited into the pit to form steep slopes extending from a littoral zone down to the first bench. Within the constructed littoral zone, esker material or crushed granite will provide suitable material for lake trout and whitefish spawning. Boulders will be strategically placed to serve as reef structures and wave breaks for refuge areas. If necessary, fish stocks can be introduced into the lake once acceptable water quality conditions have been achieved.

40. In advancing the re-construction option, BHP Billiton proposed the construction of certain physical structures that could facilitate or be compatible with the establishment of “productive fish communities” in the pits in the future. BHP Billiton did not, however, propose or commit to ensure the establishment of “productive fish communities”. This is an important distinction to note as BHP Billiton never intended to assume responsibility for any future management or monitoring of those structures to determine if such “productive fish communities” did indeed develop or for implementing any further actions if they did not develop.

41. The 2000 EAR confirms that “reconstruction of habitat in mined-out pits” was only one option proffered by BHP Billiton to address loss of fish and fish habitat in the proposed SPB pits. Monetary remuneration or other forms of compensation (such as was accomplished through the 1996 Compensation Agreement) were also proposed for Board consideration.

MVEIRB Report on Environmental Assessment of Sable, Pigeon and Beartooth

42. At s.5.2.1.1.1.1 of the MVEIRB Report on the Environmental Assessment of SPB (“MVEIRB Report”) dated February 7, 2001, the Review Board noted that BHP Billiton was of the view in the 2000 EAR that one way to meet DFO’s “no net loss” policy would be through the creation of fish habitat in the refilled SPB pits on closure. The MVEIRB, however, determined that “the evidence provided was not conclusive” and noted in that regard at s. 5.2 that: “DFO claimed that BHP had not proven that the use of processed kimberlite would not result in water quality concerns and had also not adequately supported its proposition that the eventual lake would be “productive fish habitat” that would satisfy DFO’s “no net loss” objective.” Recognizing that the issue of fish and fish habitat compensation in the context of reclamation was properly within the jurisdiction of the DFO, the Review Board recommended in s. 5.2.1.1.2: “That BHP continues negotiating with DFO to satisfy the “no net loss” objective.”

43. In so doing, the MVEIRB recognized that the responsibility for directing the mitigation of fish habitat losses or choosing between the re-creation of fish habitat in the pits and the delivery of compensation for the permanent loss of such fish habitat lay with DFO.

Fisheries Act Authorizations – Sable Pigeon Beartooth

44. On January 17, 2003 DFO issued Fisheries Authorization SC99037 authorizing the harmful alteration, disruption or destruction of fish habitat in the SPB lakes. In accordance with the MVEIRB's directive, an agreement was negotiated between DFO and BHP Billiton regarding compensation for fish habitat loss due to the development of Sable Pigeon Beartooth. That agreement was reflected in section 5 of Authorization SC99037. Pursuant to that agreement BHP Billiton undertook to forego the dewatering of Leslie Lake and the development of the Leslie pipe (which activities had been approved by DFO as part of the 1996 Compensation Agreement and authorized under Fisheries Authorization SCA96021) in exchange and as compensation for the destruction of fish habitat attendant on the proposed dewatering, development and mining of the SPB water bodies and pipes.

45. In the result, DFO elected compensation in the form of retaining Leslie Lake in its natural state over the alternative option proposed by BHP Billiton in the 2000 EAR of creating fish habitat on closure of the SPB pits.

Main Site and SPB Water Licences and ICRPs

46. Part J section 2 of the current Main Site Water License (issued in August 2005) requires BHP Billiton to submit Terms of Reference for an ICRP in accordance with the NWT Water Board's "Guidelines for Abandonment and Reclamation Planning for Mines in the Northwest Territories" (the "Reclamation Guidelines"). The Reclamation Guidelines do not oblige licensees to create fish habitat in pits, but state that: "efforts should be made, where practical, to enhance the potential of the eventual water body to support a natural aquatic community." The guideline focuses not on creation of habitat, but on efforts to enhance the potential for a future aquatic community where practicable.³

47. Similarly, Part L, Item 1 of the SPB Water Licence (issued in August, 2002) requires an update to the ICRP in accordance with the Reclamation Guidelines. Among other

³ Northwest Territories Water Board, (September, 1990), "Guidelines for Abandonment and Restoration Planning for Mines in the Northwest Territories", section 2.3.

things, the SPB Water Licence requires BHP Billiton to submit terms of reference for studies to address the potential of converting the mined pits into Pit Lakes (Part I, Item 1).

48. In 2005, the Board asked BHP Billiton to develop new Terms of Reference for the ICRP. The Terms of Reference were submitted in June 2006 and did not include any reference to fish habitat. The Terms of Reference was submitted in approved form in September 2006.

49. Guided by the Terms of Reference, BHP Billiton drafted both the 2008 ICRP to reflect the 1996 Compensation Agreement and Fisheries Authorizations and to propose the installation of fish barriers to exclude fish from entering the Pit Lakes following closure (s. 5.2.5.2).

50. The 2008 ICRP submitted to the Board also proposes the construction of shallow zones by BHP Billiton to provide for the safety of wild life and humans that might access the reclaimed Pit Lakes from the shore and for the planting of certain shoreline vegetation to prevent erosion (s.5.2.5.1). In addition, BHP Billiton gratuitously undertook to work with DFO to ensure that the proposed shallow zones would accommodate future studies by DFO for the possible creation by DFO or others of fish habitat in the reclaimed pits if proven to be viable; but those discussions failed to reach a productive conclusion.

51. It has become apparent in Interventions submitted to the Board that IEMA and DFO as well as other participants in the ICRP Working Group wish the Board to direct BHP Billiton to include the creation of viable fish habitat in the Pit Lakes by BHP Billiton as a term of the ICRP.

Statements made in past ICRPs

52. In each successive ICRP (see attached Schedule “C” for a brief chronology of the ICRPs submitted) BHP Billiton has provided a progressive development of the details of the plan, while maintaining a consistent approach to reclamation of open pits. The primary focus has been on filling the open pits with water and providing for the physical safety of wildlife and people, and doing so in a manner that is consistent with, but not focused on, future use by fish, if

this is possible, based on the geochemical, limnological and biological characteristics of the pit lakes.

53. BHP Billiton understands from various documents, meetings and conversations that some parties may have misinterpreted previous documents provided by BHP Billiton, specifically previous ICRPs, as implying that BHP Billiton had committed to the construction of fish habitat for reclamation of pit lakes. This is not the case. This misunderstanding is reflected in the February 13, 2009 Advisory Document addressed to the Board by the Board Staff, where at page 7 under the heading “Reclamation of the Open Pits – Fish in the Pit Lakes and Cell E & Fish Barriers” the Board Staff states: “In the January 2007 version of the ICRP, BHPB had changed its mind on how to leave pit lakes following closure.”

54. The resolution of this misunderstanding lies in placing specific comments within the context of the entire ICRP. The foundation concept underlying all of BHP Billiton’s ICRPs is that full and final compensation for the loss of fish habitat at the EKATI operation was provided to DFO in 1996 (and the Fisheries Authorization that followed) for the life of the project. BHP Billiton submits that through a complete and careful reading of the ICRPs, it will become clear that BHP Billiton’s statements regarding open pit reclamation are consistent with the reclamation goals in the ICRPs and do not imply a commitment to create fish habitat in the Pit Lakes.

Requirement to restore fish habitat not feasible

55. A requirement this late in the Mine’s operation that pits be restored to self-sustaining fish habitat upon Mine closure would be onerous. DFO has consistently advised BHP Billiton that there is no scientific certainty regarding the restoration of fish habitat in pit lakes. DFO’s most recently delivered study, “Creating lakes from open pit mines: processes and considerations, with emphasis on northern environments”, Canadian Technical Report of Fisheries and Aquatic Sciences 2826 at viii states (underlining added):

Based on published case studies of pit lakes, large-scale bio-engineering projects have had mixed success. A common consensus is that manipulation of pit lake chemistry is difficult, expensive, and takes many years to achieve remediation goals. For this reason, it is prudent to take steps throughout mine operation to

reduce the likelihood of future water quality problems upon closure. Also, it makes sense to engineer the lake in such a way that it will achieve its maximal end-use potential, whether it be permanent and safe storage of mine waste, habitat for aquatic life, recreation, or water supply.

56. Equipment and resources will be removed from the area following Mine closure. It would be prohibitively expensive to ensure and demonstrate through long term monitoring that the Pit Lakes were supporting fish communities given the documented uncertainties surrounding the feasibility of successfully creating fish habitat in pit lakes. Further, BHP Billiton would be assuming long term liability for the success of the fish community and this would affect both the gross amount and the timeframe for return of reclamation liability.

57. The work that would be required to create fish habitat in Pit Lakes is substantive. By way of example, the new (2009) report provided by DFO, and referred to above, details the many activities and long-term obligations attendant on investigating the feasibility of, designing for, implementing, and subsequently monitoring fish habitat; work that has never been accounted for by BHP Billiton. This work was not included when the economic viability of the Mine was first determined by BHP Billiton and is not included in BHP Billiton's business planning models for the existing or future open pits, such as Sable. This is because BHP Billiton's planning has relied on the regulatory approvals for the Mine including the 1996 Compensation Agreement with DFO (and the Fisheries Authorization that followed), which provided full and final compensation for the permanent loss of fish habitat for the life of the project.

SUBMISSIONS

Overview

58. It is submitted that the Board does not have jurisdiction to require that the ICRP provide for the reclamation of Pit Lakes into fish habitat following Mine closure., nor the jurisdiction to direct that BHP Billiton create such habitat. BHP Billiton submits that the restoration of fish habitat falls under the purview of the *Fisheries Act* and was, in the case of BHP Billiton and the Mine, fully and finally dealt with by the 1996 Compensation Agreement and the Fisheries Authorizations that followed. BHP Billiton has fully compensated for the anticipated permanent loss of fish habit through to closure of the Mine. The Board does not have

the authority to impose additional, onerous terms requiring the restoration of that lost fish habitat.

Jurisdiction of Statutory Tribunals

59. The Supreme Court of Canada has confirmed on many occasions that statutory bodies must act within the legal limits accorded by their enabling legislation, the common law, and the Constitution. This principle was most recently enunciated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*per* Bastarache and LeBel JJ. for the majority at paras. 28-29):

By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution....

Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. ...

60. In short, a federally-created administrative body cannot overstep its legal authority and exercise a power not granted to it by Parliament. If it does so, its decision is *ultra vires* and will be set aside on judicial review.

61. It is well-settled that the words of an enactment must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislator: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. Therefore, in determining the jurisdiction of an administrative body, it is necessary to consider the ordinary and grammatical meaning of the legislation, the surrounding statutory context, and the legislative purposes underlying both the particular provisions in question and the statute as a whole. The courts' objective is to ensure that legislation is interpreted and applied in a way that best achieves Parliament's purposes. The legislation here in issue does not reveal an intention that the Board be empowered to make decisions contrary to those exercised by DFO under the *Fisheries Act*.

62. Another relevant principle of statutory interpretation is that general legislation should not be construed in a manner that overrides more specific legislative provisions: *Perron-Malenfant v. Malenfant (Trustee of)*, [1999] 3 S.C.R. 375, at para. 42. Where Parliament has addressed a particular subject, there is a presumption that the specific provision is not to be interfered with by application of more general legislation. In the present context, the jurisdiction of the Board should not be interpreted in a manner that interferes with the specific provisions of the *Fisheries Act*.

63. In addition, legislation should not be interpreted in a manner that prejudicially affects accrued rights: *Spooner Oils Ltd. V. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629, at p. 638. BHP Billiton made its decision to develop the Mine in the context of the agreement reached between the Canada and BHP Billiton in the 1996 Compensation Agreement. While the Board clearly has the jurisdiction to impose conditions, the governing legislation does not confer an express power to revisit the premises under which BHP Billiton has been operating since the 1996 Compensation Agreement. The foundation of the 1996 Compensation Agreement and the Fisheries Authorizations which followed was that BHP Billiton would pay compensation for the anticipated permanent loss of fish habitat in the pits. It would be unjust to now impose conditions that ignore the 1996 Compensation Agreement and the circumstances under which BHP Billiton decided to proceed with development of the Mine.

64. Applying these general principles, the Board has the general authority to impose conditions in a water licence. The governing legislation does not, however, grant the Board the authority to override or interfere with measures authorized by DFO under the specific provisions of the *Fisheries Act*. The *Fisheries Act* deals directly with fish and fish habitat and DFO has specific powers in order to ensure proper fisheries management throughout Canada. In accordance with its agreement with DFO, BHP Billiton has delivered fair compensation for the loss of fish habitat for the life of the Project. To now require creation of viable and self-sustaining fish habitat is directly at odds with the 1996 Compensation Agreement and the Fisheries Authorizations that followed.

65. The MVRMA also limits the jurisdiction of the Board in that permits and licenses approved by the Board must be consistent with the conditions recommended by the MVEIRB.

Here, the MVEIRB itself acknowledged the primacy of DFO's responsibility over fish habitat and recognized the need for DFO and BHP Billiton to achieve an appropriate resolution of the pit lake reclamation issue including, if appropriate, agreeing on an acceptable compensation model. Earlier reports, including environmental assessment reports for the Main Site similarly confirmed that DFO, in conjunction with BHP Billiton, would decide whether to proceed with reclamation of fish habitat or compensation for its destruction. Compensation was ultimately the model chosen by DFO, as reflected in the 1996 Compensation Agreement and the Fisheries Authorizations for both the Main Site and SPB Site which followed.

66. Nothing in the Board's authorizing legislation or in the relevant history of the Mine supports a conclusion that the Board may now impose a condition contrary or in addition to that compensation. The Minister of Fisheries and Oceans and his delegates at all material times had and continue to have primary jurisdiction in respect of fish and fish habitat. The Board does not have the statutory authority to impose conditions contrary to decisions made under the specific authority of the *Fisheries Act*.

ERROR TO RELY ON IRRELEVANT CONSIDERATIONS

67. In light of the Board's limited statutory authority, it is further submitted that any attempt by the Board to insist that BHP Billiton create fish habitat in the Pit Lakes would also amount to the improper exercise of a discretionary power. Although the Board may impose conditions it considers appropriate, even discretionary powers are limited. A statutory decision-maker cannot base a discretionary decision on irrelevant considerations, nor can it act in an arbitrary manner: *Comeau's Sea Foods Ltd. v. Canada*, [1997] 1 S.C.R. 12 at para 36. By requiring BHP Billiton to create viable fish habitat in the Pit Lakes, the Board would be failing to give effect to the 1996 Compensation Agreement and subsequent Fisheries Authorizations, and would be acting on irrelevant considerations and in an arbitrary manner amounting to an excess of the Board's statutory jurisdiction.

FAIRNESS

68. Administrative bodies should not make decisions that operate unfairly as such conduct is contrary to Parliament's legislative intent and the fundamental principles of natural justice. BHP Billiton has already provided full and fair compensation for the lost fish habitat in the Pit Lakes pursuant to the 1996 Compensation Agreement and Fisheries Authorizations that followed. BHP Billiton relied on the terms of those instruments when it elected to proceed with construction of the Mine. To now impose onerous, long-term and costly conditions inconsistent with those instruments would be contrary to notions of fundamental fairness and taint the honour of the Crown.

69. In effect, directing BHP Billiton to create fish habitat in the Pit Lakes would be asking it to compensate twice for the same activity. The legislation conferring the Board's authority should not be interpreted in a manner that would lead to such a result.

70. The imposition of such a condition by the Board for approval of the ICRP would unfairly impose unexpected work and financial obligations on BHP Billiton extending far into the future, where none had previously existed, leading to uncertainty in project capitalization and investment.

DFO'S POSITION CONTRARY TO ITS EARLIER AGREEMENT

71. DFO has now taken the position in its May 6, 2009 Intervention that BHP Billiton should be required to: complete Task 7 regarding the study of fish passage through the Pit Lakes; establish aquatic vegetation, one of the purposes of which is to provide habitat for fish, in the shallow zones the Company has volunteered to create in the Pit Lakes at the Mine; and facilitate fish passage into the Pit Lakes. In BHP Billiton's submission, these positions are entirely inconsistent with the 1996 Compensation Agreement and resulting Fisheries Authorizations. It would be both unjust and a breach of contract for DFO to resile from its previous commitments; an act which the Board should not facilitate.

72. As the Supreme Court of Canada explained, in *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 (*per* Major J. said for the Court, at para. 46):

In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to. In the absence of a clear express intent to abrogate rights and obligations — rights of the highest importance to the individual — those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens.

BOARD DOES NOT HAVE JURISDICTION TO BREACH CROWN CONTRACTS

73. The 1996 Compensation Agreement was a contract entered into between BHP Diamonds Inc. and Her Majesty the Queen in Right of Canada as represented by the Minister of Fisheries and Oceans. The Agreement explicitly addressed BHP Billiton's obligations with respect to fish habitat and the parties agreed the funds paid by BHP Billiton and other compensation provided by BHP Billiton would be "good and valid compensation for alteration, disruption or destruction of fish habitat for the life of the Project". The agreement is binding upon the parties and their successors and assigns.

74. The Board does not have the power to breach valid contracts entered into by another emanation of the federal Crown. While the Crown has the authority to legislatively avoid a contract, it cannot do so without explicit statutory language making clear the intention of extinguishing rights conferred by the contract: *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, *per* Major J. for the Court at para. 41. As the Supreme Court of Canada explained in *Wells* (at para. 46), "[i]n a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to".

75. In light of these principles, the legislation defining the Board's authority cannot be construed in a manner that would permit the Board to breach or invalidate the existing contract between the Crown and BHP Billiton. The Crown has not purported to breach the 1996 Compensation Agreement directly and, even if it chose to do so, explicit statutory language would be required. That language certainly does not exist in the Board's governing legislation. The Board does not have the jurisdiction to impose conditions that would abrogate the 1996 Compensation Agreement.

76. In their commentary on the Crown's ability to breach contracts, the editors of Hogg and Monahan, *Liability of the Crown*, 3rd ed. (Toronto: Carswell, 2000) state at 210-12:

An argument that has been advanced in favour of a public law of contract is that the Crown ought to be able to escape from its contractual obligations when public policy calls for non-compliance.⁵ Indeed, as will be explained later, there are seeds of this idea in some unsatisfactory common law decisions.⁶ The better view, in our opinion, is that the Crown should be bound by its contracts in the same way as a private person. The Crown is not obliged to enter into contracts; the imposition of contractual liability is the result of a voluntary and considered policy choice made by the Crown, as opposed to the imposition of liability on an ex post facto basis by the judiciary. We regard it as inappropriate for the Crown to be exempted from the consequences of a liability which it has voluntarily assumed.

In fact, a rule which permitted the Crown to exempt itself from contractual obligations through unilateral act would impede rather than assist the proper and efficient administration of public affairs. The effect of such a rule would be to place the Crown at a significant competitive disadvantage in relation to private enterprise, since the Crown would be prevented from effectively binding itself as to its future activity or performance. ...

In our view, these principles are not limited to the employment context but apply in any other case in which the Crown seeks to bind itself by contract. Since the original decision to enter into a contract is entirely voluntary, it is clearly a benefit rather than a hindrance to grant the Crown the legal capacity to effectively bind itself in the future. Otherwise we are denying to the public sector (and to society generally) a legal capacity which is enjoyed by the private sector and which would benefit society as a whole, since it would permit both the government and private parties to make binding commitments that could be relied on by both of them. Moreover, the fact that the Crown's contractual undertakings are binding reduces the cost of government operations, because a private contractor need not demand a higher price from the government to cover the risk of a unilateral government decision not to fulfil the obligation.

[Footnotes omitted]

77. The 1996 Compensation Agreement was the result of voluntary and considered policy choices made by DFO on behalf of the Crown. It would be inappropriate for the Crown to be effectively exempted from obligations voluntarily assumed and rights voluntarily conferred on BHP Billiton under the 1996 Compensation Agreement. This result would also undermine DFO's ability to enter into agreements in the future. The Board's governing legislation cannot be interpreted to permit such an outcome.

CONCLUSION

78. BHP Billiton submits that the Board does not have the legislative authority to require that BHP Billiton include a term in its ICRP that is inconsistent with the 1996 Compensation Agreement reached with DFO and its subsequent Fisheries Authorizations. It was settled by a contract with the Crown, entered into before construction of the Mine began, that fish habitat would be permanently lost and BHP Billiton delivered compensation for that loss through to and including closure of the Mine. The 1996 Compensation Agreement and Fisheries Authorizations that followed represented the exercise by DFO of its specific and paramount jurisdiction over fish and fish habitat granted under the *Fisheries Act*. The Board does not have jurisdiction to revisit DFO's decision.

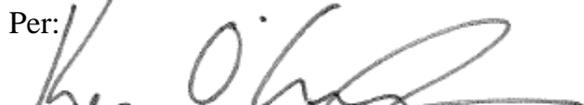
79. In any event, it would be unjust for the Board to impose at this late stage in the Mine's life new conditions on BHP Billiton that carry onerous, long-term performance and financial burdens which were wholly unaccounted for, the more so where those conditions contradict existing agreements and authorizations with the Crown upon which the Company and other joint ventures in the Mine fairly and reasonably relied.

80. BHP Billiton therefore respectfully requests that the Board clarify that BHP Billiton, in the context of its obligations relating to closure and reclamation of the Mine, or at all, will not be required to establish and maintain fish or fish habitat in the closed pit lakes or the LLCF at the Mine.

All of which is respectfully submitted.

Dated: May 12, 2009

FASKEN MARTINEAU DuMOULIN LLP
Per:



Kevin O'Callaghan
(signed electronically)
Counsel for BHP Billiton Diamonds Inc.

FISH HABITAT COMPENSATION AGREEMENT

THIS AGREEMENT made the 17th day of December, 1996.

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by the Minister of Fisheries and Oceans

(hereinafter referred to as "DFO")

OF THE FIRST PART

AND:

BHP DIAMONDS INC.

Incorporated under the laws of Canada and having its head office in Vancouver,
British Columbia

(hereinafter referred to as "BHP")

OF THE SECOND PART

WHEREAS:

- A. As part of the NWT Diamonds Project (the Project), BHP intends to conduct open pit and underground mining of kimberlite pipes located 300 kilometres NNE of Yellowknife, NWT (64° 40'N latitude; 110° 40' W longitude). Initially, a processing plant will receive 9000 tonnes per day (tpd), expanding to 18000 tpd of ore at maturity. Waste rock stripping will be up to 40 million tonnes per year. Duration of the project will be from mid-1995 to mid-2021 and possibly beyond. Tailings will be disposed of in Long Lake.
- B. An assessment of the potential impacts of the Project on fish and fish habitat can be found in BHP Diamonds Inc. Environmental Impact Statement, July 1995 and supporting documents. In particular, the Project will impact directly on 12 lakes within the claims block. Six lakes must be dewatered to gain access to and exploit the underlying kimberlite pipes, one is to be dewatered to access granular resources for construction, four will be filled by process plant tails and one will be covered by

a waste rock dump. In addition, a number of interconnecting and commonly ephemeral head water streams will be diverted. DFO has concluded that lake dewatering and stream diversion will result in the harmful alteration and destruction of fish habitat in the lakes and streams.

- C. Harmful alteration of stream habitat will be compensated for through fish habitat creation and enhancement within the diversion channel constructed to divert water from Panda Lake to Kodiak Lake, as described in the BHP report Panda Lake Diversion and Fish Habitat Enhancement Channel Design, June 1994. To provide for no net loss of the productive capacity of lake habitats affected by the Project, BHP is prepared to compensate for the habitat losses, as described in its report Hypothetical Lake Replacement/Habitat Enhancement at Paul Lake, 1996.
- D. This Agreement documents the obligations of BHP with respect to compensating for impacted fish habitat.
- E. The harmful alteration, disruption or destruction of fish habitat associated with the BHP NWT Diamonds Project, as described in B. above, would otherwise constitute a violation of subsection 35(1) of the *Fisheries Act* and is only permissible after S.35(2) authorization and with strict adherence to the conditions set out within this agreement. Failure to strictly adhere to these conditions may result in charges being laid under subsection 35(1) of the *Fisheries Act*.

NOW THEREFORE the parties hereto covenant and agree as follows:

1. Altered Habitat

- a) BHP covenants and agrees that in compensation for stream habitats, it shall carry out or cause to be carried out with due diligence and in a good and workmanlike manner and at its own cost and expense and to the satisfaction of DFO, a Stream Habitat Compensation Program consistent with the report Panda Lake Diversion and Fish Habitat Enhancement Channel Design, June 1994 referred to in C above, and more particularly, will create new habitat in the diversion channel shown in heavy outline on drawing number 455-C-0651-1.
- b) BHP covenants and agrees that in compensation for lake habitats set out in Clause B and that may be destroyed it shall provide DFO with the sum of \$1,500,000 which will be directed by DFO towards habitat restoration and enhancement projects off-site.

2. Habitat Compensation Program

Without restricting the generality of the foregoing, BHP covenants and agrees to perform the following:

- a) In respect of the Stream Habitat Compensation Program:
 - i) To provide for the approval of DFO, detailed fish habitat creation and enhancement plans for the Panda Lake diversion channel.
 - ii) To construct fish habitat creation and enhancement structures in the Panda Lake diversion channel as agreed to in the above mentioned plans.
 - iii) To maintain the Panda Lake diversion channel and fish habitat structures as required and to monitor the effectiveness of structures in providing fish habitat.
 - iv) To alter or add to fish habitat structures, as required by DFO, to obtain the objective of stream habitat compensation.
- b) Provide DFO with the sum of \$1,500,000 as compensation for impacted lake habitats.

3. Schedule of Works

- a) BHP covenants and agrees to the following schedule for the provision of the Stream Habitat Compensation Program:
 - i) Submission for DFO approval, of detailed fish habitat creation and enhancement plans by June 30, 1997.
 - ii) Submission for DFO approval, of detailed monitoring and maintenance plans for fish habitat creation and enhancement structures by June 30, 1997.
 - iii) Completion of construction of fish habitat creation and enhancement structures by August 1, 1998.
 - iv) Submission to DFO of "as constructed" drawings, certified by a professional engineer, of all fish habitat creation and enhancement structures within 60 days of completion of the construction.

- b) BHP covenants and agrees to provide DFO, by March 1, 1997, with an initial payment of \$1,000,000 as compensation for lake habitats that may be destroyed. Additional payments will be made according to the following schedule:
- i) April 1, 1997 - \$100,000
 - ii) April 1, 1998 - \$100,000
 - iii) April 1, 1999 - \$100,000
 - iv) April 1, 2000 - \$100,000
 - v) April 1, 2001 - \$100,000

4. Modifications

- a) In the event that the Stream Habitat Compensation Program is not completed within the time referred to above, a re-evaluation of the Stream Habitat Compensation Program may be undertaken by DFO and any reasonable modifications deemed by DFO to be necessary as a result of the failure to complete the Stream Habitat Compensation Program within the time set out in this Agreement, shall be carried out or caused to be carried out by BHP with due diligence and in a good and workmanlike manner, at its own expense and to the satisfaction of the parties.
- b) The parties may agree in writing to changes in the compensation payment schedule in the event of delays to scheduled activities that harmfully alter, disrupt or destroy fish habitat.

5. Monitoring Program

BHP shall set up a monitoring system satisfactory to DFO in order to assess the effectiveness of the Stream Habitat Compensation Program, and more particularly, every open water season for a period of 10 years will perform the following:

- a) assess the physical stability of the created habitat by using aerial photography and/or ground surveys;
- b) conduct biological evaluations to determine the success of fish habitat structures;
- c) provide DFO with a full written report, including all relevant documents, data and photographs by December 31 of that year.

6. Further Work

- a) BHP is responsible to ensure that the habitat created pursuant to the Stream Habitat Compensation Program is functioning properly for 10 years. If the monitoring program indicates to DFO that the created habitat is not functioning as designed, BHP will carry out or cause to be carried out at its own cost and expense, with due diligence and in a good and workmanlike manner and to the satisfaction of DFO, any reasonable modifications deemed by DFO to be necessary to enable the created habitat to function as designed.
- b) The resources provided by BHP as compensation for lake habitats that may be destroyed as a result of the Project will be used to establish a Fish Habitat Compensation Fund, which will support habitat restoration and enhancement projects proposed by an Advisory Committee established/selected by DFO. DFO will maintain responsibility for management of the Fund according to the following principles:
 - i) Resources may be used to cover all charges associated with habitat restoration and enhancement projects including, but not limited to, travel, supplies and contractors.
 - ii) Unused resources shall remain in the Fund upon termination of this Agreement.
 - iii) Any capital items or intellectual property purchased from the Fund shall remain the property of DFO.
 - iv) No employer-employee relationship will exist with contractors that may be hired from the Fund.

7. Changes to Project

It is understood and agreed by the parties that the compensation agreed to be paid pursuant hereto shall be deemed to be good and valid compensation for alteration, disruption or destruction of fish habitat for the life of the Project, covering the current proposed mine development and, in the case where fish habitat is not altered, disrupted or destroyed in one or more of the identified lakes in the proposed mine development that another lake or other lakes on the BHP claim block of similar surface area and similar fish habitat may be substituted by BHP without additional compensation and without altering or amending this Agreement.

It is further understood that any substitution may only be done after all applicable assessments and reviews are completed and if all approvals, including a Section 35(2) Authorization are obtained.

8. Responsibilities Under Other Legislation

Nothing contained herein shall in any manner relieve BHP of any of its other responsibilities for environmental protection, and it is BHP's responsibility to ensure that the requirements of other interested federal and/or territorial environmental departments and ministries are satisfied.

9. Default

In the event that BHP is, in the opinion of DFO, in default or breach of any of the terms of this Agreement, which default or breach has not been remedied by BHP to the satisfaction of DFO after 30 days written notice to remedy given by DFO to BHP, DFO may, but shall not be obliged to, take such steps as may, in its judgement, be necessary to remedy such default or breach and, without limiting any of DFO's remedies at law or in equity, all costs which DFO needed to incur in doing so, shall be charged to and paid by BHP and shall be deemed a debt due to DFO.

10. Compliance with Law

BHP shall comply with all applicable federal, territorial and municipal laws, by-laws, and orders which relate to the Compensation Program.

11. Indemnities

BHP hereby covenants and agrees at all times to indemnify and save harmless DFO from and against all claims and demands, loss, costs, actions, suits or other proceedings by whomsoever made, brought or prosecuted, whether arising by reason of personal injury or death or property damage or loss or otherwise occasioned by any breach of duty of BHP, its officers, servants, agents, contractors, employees or any other person for whom it is at law responsible, in any manner based upon, occasioned by, arising out of or attributable to this Agreement.

12. Notices

- (1) All notices and communications to DFO in connection with this Agreement shall be addressed to:

Manager
 Habitat Management Division
 Department of Fisheries and Oceans
 501 University Crescent
 Winnipeg, Manitoba R3T 2N6

- (2) All notices and communications to BHP in connection with this Agreement shall be addressed to:

Environmental Manager
 BHP Diamonds Inc.
 #1102, 4920-52nd Street
 Yellowknife, NT X1A 3T1

- (3) Any notices or other communications required or permitted to be given or made under this Agreement shall be in writing, and shall be well and sufficiently given or made if:

- a) delivered in person during normal business hours and left with the addressee or any other responsible employee at the relevant address set out herein, or
- b) telexed, telecopied or sent by other means of recorded electronic communication provided receipt thereof is confirmed by the recipient.

- (4) Any party to this Agreement may from time to time change its address for notice by giving notice to the other party in the manner provided herein.

13. Interpretation

Wherever the singular is used in this Agreement, it shall be construed as including the plural or feminine or masculine or body corporate wherever the context or parties hereto so require. All headings in this Agreement are for ease of reference only and do not form part of this Agreement, nor shall they be used to interpret this Agreement.

14. Enurement

This Agreement is binding upon and enures to the benefit of BHP, its executors, administrators, heirs, successors and assigns and DFO, its successors and assigns.

SCHEDULE "B"

Regulatory Process Chronology

Date	Event
May 23, 1995	Environmental Impact Statement submitted by BHP Billiton. This document summarized the anticipated effects of the Ekati project.
June 1996	Report of the Environmental Assessment Panel on Ekati Main Site completed. This Report summarized the environmental effects of the Ekati project and recommended the approval of the project, subject to various recommendations.
December 17, 1996	Fish Habitat Compensation Agreement entered into between BHP Billiton and DFO. This Agreement provided compensation to DFO for the destruction of fish habitat, including the destruction of fish habit in various pit lakes.
January 1997	Environmental Agreement entered into between BHP Diamonds Inc., Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development and the Government of the Northwest Territories. This agreement expires upon full and final reclamation of the Project.
January 1997	Main Site Water Licence (MV200312-0013) issued by the NWT Water Board. This licence permitted BHP Billiton to use water and deposit waste in connection with the Project.
January 7, 1997	Fisheries Act Authorization SCA96021 issued by DFO. This authorization permitted BHP Billiton to dewater or impact various lakes and divert numerous head water streams associated with the lakes. In particular, Panda, Misery, Koala, Fox 1, Alexis and Leslie lake were permitted to be dewatered.
November 20, 1998	BHP Billiton applies to the NWT Water Board for a Water Licence to cover the Sable, Pigeon and Beartooth project.
April 16, 2000	Environmental Assessment Report for Sable, Pigeon and Beartooth submitted by BHP Billiton to the MVEIRB. This report outlined the environmental impacts and mitigation measures of the Sable, Pigeon and Beartooth expansion project.

2001	Main Site Water Licence (MV200312-0013) amended to include the addition of the Fox development.
February 7, 2001	MVEIRB Report on Environmental Assessment of Sable, Pigeon and Beartooth issued. This report summarized the environmental impacts and mitigation measures of the Sable, Pigeon and Beartooth expansion project.
April, 2001	Fisheries Act Authorization SC00028 issued by DFO. This authorization provided for the harmful alteration disruption or destruction of King Pond and King-Cujo streams. BHP Billiton agreed to compensate for this HADD through “restoration and enhancement” to rehabilitate King Pond and King-Cujo streams.
December 24, 2001	Fisheries Act Authorization SC01168 issued by DFO. This authorization provided for the harmful alteration, disruption or destruction of Nero-Nema stream. BHP Billiton agreed to compensate for this HADD by providing habitat unit gains to offset the habitat unit losses in a ratio of at least 2:1.
April 4, 2002	Fisheries Act Authorization SC01111 issued by DFO. This authorization provided for the harmful alteration, disruption or destruction of Desperation-Carrie stream and Desperation Pond. BHP Billiton agreed to compensate for these HADDs through the implementation of compensation projects approved by DFO. Compensation projects were to provide habitat unit gains to offset the habitat unit losses in a ration of at least 2:1.
August 15, 2002	SPB Water Licence (MV2001L2-0008) issued by the Mackenzie Valley Land and Water Board. This licence authorized BHP Billiton to use water and deposit waste in connection with the Sable, Pigeon and Beartooth Project. This licence will expire in August 2009.
January 17, 2003	Fisheries Act Authorization SC99037 issued by DFO. This authorization permitted BHP Billiton to undertake the harmful alteration, disruption or destruction of Sable, Pigeon and Beartooth lakes. Included the exchange of compensation originally applied to Leslie Lake in Authorization SCA96021 because the dewatering of Leslie Lake would no longer be taking place. Required BHP Billiton to compensate with habitat units for the destruction of Pigeon Stream .

October 2004	Terms of Reference for Sable, Pigeon and Beartooth Pit Lakes Studies submitted by BHP Billiton to the Mackenzie Valley Land and Water Board pursuant to Part I of the SPB Water Licence. This document outlined the studies necessary to determine the feasibility of converting the Sable, Pigeon and Beartooth open pit mines into pit lakes at mine closure.
May 17, 2005	Terms of Reference for Sable, Pigeon and Beartooth Pit Lakes Studies approved by the Mackenzie Valley Land and Water Board.
August 19, 2005	Main Site Water Licence (MV200312-0013) renewed by the Mackenzie Valley Land and Water Board. This licence will expire on August 18, 2013.

SCHEDULE "C"

Chronology of ICRP Versions

Date	Event
October 1, 1997	1997 Initial Abandonment and Restoration Plan submitted by BHP Billiton. This was the first version of the ICRP submitted by BHP Billiton. The ICRP contains a detailed summary of reclamation activities, objectives and schedules. The Board requested revisions to this version of the ICRP.
February 19, 1998	1997 Initial Abandonment and Restoration Plan approved by the NWT Water Board.
February 2000	2000 Abandonment and Restoration Plan submitted by BHP Billiton to the NWT Water Board. This document updated the 1997 Abandonment and Restoration Plan to comply with the requirement of the Environmental Agreement for a Closure and Reclamation Plan.
June 2001	2000 Abandonment and Restoration Plan revised by BHP Billiton to include Falcon Road as part of the Sable, Pigeon and Beartooth Environmental Assessment.
May 13, 2002	2000 Abandonment and Restoration Plan approved by the Mackenzie Valley Land and Water Board.
July 30, 2003	2003 Interim Closure and Reclamation Plan submitted to the Mackenzie Valley Land and Water Board. This document updated the 2000 Closure Plan to include the Sable, Pigeon and Beartooth kimberlite pipes. This version of the ICRP was not approved by the Board on the basis that it did not contain sufficient detail should the mine close before the expected end of the Life of Mine.
April 9, 2004	2004 Interim Closure and Reclamation Plan submitted to the Mackenzie Valley Land and Water Board. Revisions to the ICRP were requested by the Board and this version of the ICRP was not approved.

December 2005	ICRP Terms of Reference Working Group established by the Board to review and comment on the Terms of Reference for the ICRP which were proposed by BHP Billiton. The Working Group included representatives from the communities, regulatory agencies, the Independent Environmental Monitoring Agency and BHP Billiton.
September 2006	Ekati Diamond Mine Terms of Reference for the ICRP submitted to the Board in June 2006. This document summarizes what the next version of the ICRP will contain. Submitted to the Board in approved form in September 2006.
January 2007	Draft ICRP submitted to the We’kèezhii Land and Water Board.
December 12, 2008	2008 ICRP submitted to the Board. This version of the ICRP updated the Draft Interim Closure and Reclamation Plan submitted in 2007.

SCHEDULE “D”
LIST OF AUTHORITIES AND DOCUMENTS

1. List of Documents referred to in Submissions:
 - (a) Environmental Impact Statement submitted by BHP Billiton on May 23, 1995
 - (i) Executive Summary
 - (ii) Volume I- Section 2
 - (iii) Volume III- Sections 8 and 9
 - (b) Environmental Assessment- Sable, Pigeon and Beartooth, April 2000
 - (i) Report- Sable, Pigeon, Beartooth- Kimberlite Pipes
 - (ii) Report (excerpt) - SPB Kimberlite Pipes Acknowledgements, Disclaimer, Table of Contents
 - (iii) Report (excerpt) - SPB Kimberlite Pipes Environmental Effects Assessment- Section 4
 - (iv) Report (excerpt) - SPB Kimberlite Pipes Environmental Management- Section 5
 - (c) 1996 Compensation Agreement
 - (i) Fish Habitat Compensation Main Site Dec 1996
 - (d) Report of Environmental Assessment Panel on EKATI Main Site, 1996
 - (i) NWT Diamonds Project- Report of the Environmental Assessment Panel
 - (e) *Fisheries Act* Authorizations
 - (i) Authorization for Works or Undertakings Affecting Fish Habitat- Authorization No. SCA96021
 - (ii) Authorization for Works or Undertakings Affecting Fish Habitat- Authorization No. SC00028
 - (iii) Authorization for Works or Undertakings Affecting Fish Habitat- Authorization No. SC01111
 - (iv) Authorization for Works or Undertakings Affecting Fish Habitat- Authorization No. SC99037
 - (v) Authorization for Works or Undertakings Affecting Fish Habitat- Authorization No. SC01168
 - (f) Mackenzie Valley Environmental Impact Review Board Report on Environmental Assessment of SPB
 - (i) Mackenzie Valley Environmental Impact Review Board- Report on SPB

- (g) SPB Water Licence
 - (i) 2002-2009 Type A Water Licence MV2001L2-0008
- (h) Main Site Water Licence
 - (i) Main Camp Water Licence
- (i) NWT Water Board's Guidelines for Abandonment and Reclamation Planning
 - (i) Abandonment and Restoration Planning for Mines
- (j) ICRP Versions
 - (i) 1997 ICRP
 - (A) ICRP - 1997 September 30
 - (ii) 2000 ICRP
 - (A) Interim A&R Plan 2000
 - (iii) 2003 ICRP
 - (A) Interim A&R Plan 2003
 - (iv) 2004 ICRP
 - (A) ICRP 2004
 - (B) ICRP - 2004 Excerpts
 - (v) 2008 ICRP
 - (A) ICRP Working Draft- December 2008
 - (B) ICRP Working Draft- December 2008 Excerpts

2. List of Legislation and Authorities referred to in Submissions:

- (a) *Fisheries Act*, R.S.C. 1985, c. F-14
- (b) *Fisheries (General) Regulations*, SOR 93-53
- (c) *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25
- (d) *Mackenzie Valley Land Use Regulations*, SOR 98-429
- (e) *Northwest Territories Water Act*, S.C. 1992, c. 39
- (f) *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190
- (g) *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 9, [2002] 2 S.C.R. 559
- (h) *Perron-Malenfant v. Malenfant (Trustee of)*, [1999] 3 S.C.R. 375
- (i) *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629
- (j) *Comeau's Sea Foods Ltd. v. Canada*, [1997] 1 S.C.R. 12
- (k) *Wells v. Newfoundland*, [1999] 3 S.C.R. 199
- (l) Hogg and Monahan, *Liability of the Crown*, 3rd Ed. (Toronto: Carswell 2000)